12–30–96
Vol. 61 No. 251
Pages 68541–68986

federal register

Monday
December 30, 1996

Briefings on how to use the Federal Register
For information on briefings in Washington, DC, see announcement on the inside cover of this issue

Now Available Online

Code of Federal Regulations

via

GPO Access

(Selected Volumes)

Free, easy, online access to selected *Code of Federal Regulations (CFR)* volumes is now available via *GPO Access*, a service of the United States Government Printing Office (GPO). *CFR* titles will be added to *GPO Access* incrementally throughout calendar years 1996 and 1997 until a complete set is available. GPO is taking steps so that the online and printed versions of the *CFR* will be released concurrently.

The *CFR* and *Federal Register* on *GPO Access,* are the official online editions authorized by the Administrative Committee of the Federal Register.

New titles and/or volumes will be added to this online service as they become available.

http://www.access.gpo.gov/nara/cfr

For additional information on ***GPO Access*** products, services and access methods, see page II or contact the *GPO Access* User Support Team via:

★ Phone: toll-free: 1-888-293-6498
★ Email: gpoaccess@gpo.gov

FEDERAL REGISTER Published daily, Monday through Friday, (not published on Saturdays, Sundays, or on official holidays), by the Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408, under the Federal Register Act (49 Stat. 500, as amended; 44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). Distribution is made only by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

The Federal Register provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders and Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress and other Federal agency documents of public interest. Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless earlier filing is requested by the issuing agency.

The seal of the National Archives and Records Administration authenticates this issue of the Federal Register as the official serial publication established under the Federal Register Act. 44 U.S.C. 1507 provides that the contents of the Federal Register shall be judicially noticed.

The Federal Register is published in paper, 24x microfiche and as an online database through *GPO Access*, a service of the U.S. Government Printing Office. The online edition of the Federal Register on *GPO Access* is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions. The online database is updated by 6 a.m. each day the Federal Register is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents home page address is http://www.access.gpo.gov/su__docs/, by using local WAIS client software, or by telnet to swais.access.gpo.gov, then login as guest, (no password required). Dial-in users should use communications software and modem to call (202) 512–1661; type swais, then login as guest (no password required). For general information about *GPO Access*, contact the *GPO Access* User Support Team by sending Internet e-mail to gpoaccess@gpo.gov; by faxing to (202) 512–1262; or by calling toll free 1–888–293–6498 or (202) 512–1530 between 7 a.m. and 5 p.m. Eastern time, Monday–Friday, except for Federal holidays.

The annual subscription price for the Federal Register paper edition is $494, or $544 for a combined Federal Register, Federal Register Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the Federal Register including the Federal Register Index and LSA is $433. Six month subscriptions are available for one-half the annual rate. The charge for individual copies in paper form is $8.00 for each issue, or $8.00 for each group of pages as actually bound; or $1.50 for each issue in microfiche form. All prices include regular domestic postage and handling. International customers please add 25% for foreign handling. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA or MasterCard. Mail to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954.

There are no restrictions on the republication of material appearing in the Federal Register.

How To Cite This Publication: Use the volume number and the page number. Example: 60 FR 12345.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	202–512–1800
Assistance with public subscriptions	512–1806
General online information	202–512–1530 1–888–293–6498
Single copies/back copies:	
Paper or fiche	512–1800
Assistance with public single copies	512–1803
FEDERAL AGENCIES	
Subscriptions:	
Paper or fiche	523–5243
Assistance with Federal agency subscriptions	523–5243

For other telephone numbers, see the Reader Aids section at the end of this issue.

NOW AVAILABLE ONLINE

The January 1997 Office of the Federal Register Document Drafting Handbook

Free, easy, online access to the newly revised January 1997 Office of the Federal Register Document Drafting Handbook (DDH) is now available at:

http://www.nara.gov/nara/fedreg/ddh/ddhout.html

This handbook helps Federal agencies to prepare documents for publication in the Federal Register.

For additional information on access, contact the Office of the Federal Register's Technical Support Staff.

Phone: 202–523–3447

E-mail: info@fedreg.nara.gov

FEDERAL REGISTER WORKSHOP

THE FEDERAL REGISTER: WHAT IT IS AND HOW TO USE IT

FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Registers system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Cod of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessar4y to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC

WHEN: January 28, 1997 at 9:00 am

WHERE: Office of the Federal Register
Conference Room
800 North Capitol Street, NW
Washington, DC
(3 blocks north of Union Station Metro)

RESERVATIONS: 202–523–4538

Printed on recycled paper containing 100% post consumer waste

Contents

Federal Register

Vol. 61, No. 251

Monday, December 30, 1996

Separate Parts In This Issue

Reader Aids

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

Electronic Bulletin Board

Free Electronic Bulletin Board service for Public Law numbers, Federal Register finding aids, and a list of documents on public inspection is available on 202–275–1538 or 275–0920.

CFR PARTS AFFECTED IN THIS ISSUE

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

Rules and Regulations

Federal Register

Vol. 61, No. 251

Monday, December 30, 1996

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

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

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Parts 2 and 371

[Docket No. 96–058–1]

Humane Treatment of Slaughter Horses; Delegation of Authority

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This document delegates the authority given to the Secretary of Agriculture under the Federal Agriculture Improvement and Reform Act of 1996 to regulate the care provided to horses being transported to slaughter. Authority is delegated from the Secretary of Agriculture to the Assistant Secretary for Marketing and Regulatory Programs; from the Assistant Secretary for Marketing and Regulatory Programs to the Administrator of the Animal and Plant Health Inspection Service; and from the Administrator of the Animal and Plant Health Inspection Service to the Deputy Administrator for Veterinary Services.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Dr. Tim Cordes, Senior Staff Veterinarian, National Animal Health Programs, VS, APHIS, 4700 River Road Unit 43, Riverdale, MD 20737–1231, (301) 734–3279.

SUPPLEMENTARY INFORMATION: Sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note) authorizes the Secretary of Agriculture to issue guidelines for the regulation of the commercial transportation of equines for slaughter by persons regularly engaged in that activity within the United States. In carrying out this responsibility, the Secretary of Agriculture is authorized to regulate the food, water, and rest provided to such equines in transit and to require the segregation of stallions from other equines during transit. Further, the Secretary may review other related issues he considers appropriate. Additionally, the Secretary may (1) require any person to maintain such records and reports, (2) conduct such investigations and inspections, and (3) establish and enforce such appropriate and effective civil penalties, as the Secretary deems necessary.

This rule delegates that authority from the Secretary of Agriculture to the Assistant Secretary for Marketing and Regulatory Programs; from the Assistant Secretary for Marketing and Regulatory Programs to the Administrator of the Animal and Plant Health Inspection Service; and from the Administrator of the Animal and Plant Health Inspection Service to the Deputy Administrator for Veterinary Services.

This rule relates to internal agency management. Therefore, this rule is exempt from the provisions of Executive Orders 12866 and 12988. Moreover, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required for this rule, and it may be made effective less than 30 days after publication in the Federal Register. In addition, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121. Finally, this action is not a rule as defined by 5 U.S.C. 601 *et seq.*, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

List of Subjects

7 CFR Part 2

Authority delegations (Government agencies).

7 CFR Part 371

Organization and functions (Government agencies).

Accordingly, 7 CFR parts 2 and 371 are amended as follows:

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

1. The authority citation for part 2 continues to read as follows:

Authority: Sec. 212(a), Pub. L. 103–354, 108 Stat. 3210, 7 U.S.C. 6912(a)(1); 5 U.S.C. 301; Reorganization Plan No. 2 of 1953, 3 CFR, 1949–1953 Comp., p. 1024.

Subpart C—Delegations of Authority to the Deputy Secretary, the Under Secretaries and Assistant Secretaries

2. Section 2.22 is amended by adding a new paragraph (a)(2)(xlv) to read as follows:

§ 2.22 Assistant Secretary for Marketing and Regulatory Programs.

(a) * * *

(2) * * *

(xlv) Sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note).

* * * * *

Subpart N—Delegations of Authority by the Assistant Secretary for Marketing and Regulatory Programs

3. Section 2.80 is amended by adding a new paragraph (a)(50) to read as follows:

§ 2.80 Administrator, Animal and Plant Health Inspection Service.

(a) * * *

(50) Sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note).

* * * * *

PART 371—ORGANIZATION, FUNCTIONS, AND DELEGATIONS OF AUTHORITY

4. The authority citation for part 371 continues to read as follows:

Authority: 5 U.S.C. 301.

5. Section 371.2 is amended by adding a new paragraph (d)(2)(xix) to read as follows:

§ 371.2 The Office of the Administrator.

* * * * *

(d) * * *

(2) * * *

(xix) Sections 901–905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note).

* * * * *

For Part 2, Subpart C:

Dated: December 23, 1996.

Dan Glickman,

Secretary of Agriculture.

For Part 2, Subpart N:

Dated: December 9, 1996.

Michael V. Dunn,

Assistant Secretary for Marketing and Regulatory Programs.

For Part 371:

Dated: November 29, 1996.

Terry L. Medley,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 96–33128 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–34–P

Federal Crop Insurance Corporation

7 CFR Part 433

Dry Bean Crop Insurance Regulations

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Interim rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) hereby amends the Dry Bean Crop Insurance Regulations (7 CFR part 433), effective for the 1997 crop year only, to extend the contract change date to February 15, 1997.

The intended effect of this rule is to extend the contract change date, which is the date by which all contract changes must be on file in the service office, in order to provide sufficient time for FCIC to publish a final rule amending the policy for insuring dry beans.

DATES: This interim rule is effective December 30, 1996. Written comments, data, and opinions on this interim rule must be submitted not later than February 28, 1997 to be sure of consideration.

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

FOR FURTHER INFORMATION CONTACT: Arden Routh, Program Analyst, Research and Development Division, Product Development Branch, Federal Crop Insurance Corporation, United States Department of Agriculture, 9435 Holmes Road, Kansas City, MO 64131, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION: This action has been reviewed under the USDA procedures established by Departmental Regulation 1521–1. This action constitutes a review as to the need, currency, clarity, and effectiveness of the Dry Bean Crop Insurance Regulations affected by this rule under those procedures.

Executive Order No. 12866

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

Paperwork Reduction Act of 1995

The title of this information collection is ‘‘Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Dry Bean Crop Insurance Regulations.’’ The information to be collected includes a crop insurance application and an acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies. Potential respondents to this information collection are producers of fresh market tomatoes that are eligible for Federal crop insurance.

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

All information is reported annually. The reporting burden of this collection of information is estimated to average 16.9 minutes per response for each of the 3.6 responses from approximately 1,755,015 respondents. The total annual burden on the public for this information collection is 2,669,932 hours.

FCIC is requesting comments for the following: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms or information gathering technology.

Comments regarding paperwork reduction should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

FCIC is soliciting comments on this rule for 60 days following publication in the Federal Register. This rule will be scheduled for review so that any amendment made necessary by public comments may be published as soon as possible.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order No. 12612

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

Regulatory Flexibility Act

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

Federal Assistance Program

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

Executive Order No. 12372

This program is not subject to the provisions of Executive Order No. 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order No. 12778

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

Environmental Evaluation

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

National Performance Review

This regulatory action is not being taken as part of the National Performance Review Initiative to eliminate unnecessary or duplicative regulations and improve those that remain in force.

Background

FCIC herewith amends the Dry Bean Crop Insurance Regulations (7 CFR part 433) to extend the contract change date to February 15, 1997. This action is taken in order to provide sufficient time for FCIC to receive and respond to comments on the proposed rule and to publish a final rule for insuring dry beans.

The contract change date, included in the crop insurance policy, is the date by which all contract changes must be on file in the service office.

FCIC has under consideration a proposal to add to the Common Crop Insurance Policy (7 CFR part 457) a new section, 7 CFR 457.150, Dry Bean Crop Provisions. It is felt that there is not sufficient time for FCIC to solicit and respond to public comment and publish a final rule addressing the complete proposed rule before the December 31, 1996, contract change date.

Therefore, Kenneth D. Ackerman, Manager, FCIC has determined that the extension of the contract change date is necessary to provide sufficient time for FCIC to complete the comment process and publish a final rule amending the dry bean crop insurance policy for the 1997 crop year.

It is further determined that such extension will not be detrimental to any program recipient, and that publication of the extended contract change date as a proposed rule for notice and comment is impracticable, unnecessary, and contrary to the public interest. Therefore, good cause is shown for making this rule effective upon publication.

Lists of Subjects in 7 CFR Part 433

Crop insurance, Dry beans.

Interim Rule

Accordingly, for the reasons set forth in the preamble, the Federal Crop Insurance Corporation hereby amends 7 CFR part 433, in the following instance:

PART 433—DRY BEAN CROP INSURANCE REGULATIONS

1. The authority citation for 7 CFR part 433 is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

2. Section 433.7 is amended by revising subsection 16 of the policy to read as follows:

§ 433.7 The application and policy.

* * * * *

16. Contract changes.

We may change any terms and provisions of the contract from year to year. If your price election at which indemnities are computed is no longer offered, the actuarial table will provide the price election which you are deemed to have elected. All contract changes will be available at your service office by December 31 preceding the cancellation date (February 15, 1997, for the 1997 crop year only). Acceptance of any change will be conclusively presumed in the absence of any notice from you to cancel the contract.

* * * * *

Signed in Washington, D.C., on December 23, 1996.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 96–33065 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–FA–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 51

RIN 3150–AD63

Environmental Review for Renewal of Nuclear Power Plant Operating Licenses; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Correction.

SUMMARY: This document corrects a final rule appearing in the Federal Register on December 18, 1996 (61 FR 66537), that amends regulations on the environmental review of applications to renew the operating licenses of nuclear power plants. This action is necessary to remove an unnecessary amendatory instruction and to correct an erroneous amendatory instruction.

EFFECTIVE DATE: January 17, 1997.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, telephone (301) 415–7163.

SUPPLEMENTARY INFORMATION:

§ 51.103 [Corrected]

On page 66545, amendatory instruction 5 is removed.

On page 66546, amendatory instruction 8 is revised to read as follows:

''8. In § 51.103, paragraphs (a)(3) and (a)(5) are revised to read as follows:''

Dated at Rockville, Maryland, this 23rd day of December, 1996.

For the Nuclear Regulatory Commission.

Michael T. Lesar,

Federal Register Liaison Officer.

[FR Doc. 96–33148 Filed 12–27–96; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 9 and 19

[Docket No. 96–30]

RIN 1557–AB12

Fiduciary Activities of National Banks; Rules of Practice and Procedure

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is revising its rules that govern the fiduciary activities of national banks. The OCC also is relocating provisions concerning disciplinary sanctions imposed by clearing agencies to its rules of practice and procedure. This final rule is another component of the OCC's Regulation Review Program, which is intended to update and streamline OCC regulations and to reduce unnecessary regulatory costs and other burdens.

EFFECTIVE DATE: January 29, 1997.

FOR FURTHER INFORMATION CONTACT: Andrew T. Gutierrez, Attorney, Legislative and Regulatory Activities Division, (202) 874–5090; Donald N. Lamson, Assistant Director, Securities and Corporate Practices Division, (202) 874–5210; Lisa Lintecum, Director, Fiduciary Activities, (202) 874–5419; Dean Miller, Senior Advisor, Fiduciary Activities, (202) 874–4852; Aida M. Plaza, Director for Compliance, Multinational Banking, (202) 874–4610, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION:

Background

The OCC is revising 12 CFR part 9, which governs the fiduciary activities of national banks, based on its authority under 12 U.S.C. 92a. This action is a component of its Regulation Review Program. One goal of the Regulation Review Program is to review all of the OCC's rules with a view toward eliminating provisions that do not contribute significantly to maintaining the safety and soundness of national banks or to accomplishing the OCC's other statutory responsibilities, including oversight of national banks' fiduciary activities. Another goal of the Program is to improve the clarity of the OCC's regulations.

This final rule is the OCC's first comprehensive revision of part 9 since 1963.[1] Much about national banks' fiduciary business has changed since that time, including the nature and scope of the fiduciary services that banks offer and the structures and operational methods that banks use to deliver those services. The OCC's primary goal in revising part 9 is to accommodate those changes by removing unnecessary regulatory burden and facilitating the continued development of national banks' fiduciary business consistent with safe and sound banking practices and national banks' fiduciary obligations.

On December 21, 1995, the OCC published a notice of proposed rulemaking to revise part 9 (60 FR 66163) (proposal). The proposal reflected three principal themes. First, bank organizational structures—particularly with respect to the geographic structure of banking organizations—have changed significantly since Congress created the basic framework for national banks' fiduciary operations. The OCC proposed to adjust part 9 to make the requirements of the rule more workable for both large, multistate fiduciary banking organizations and small banks that conduct fiduciary activities primarily on a local basis. Second, national banks' fiduciary activities are subject to state law in many respects, though the OCC often can establish uniform Federal standards. In the proposal, the OCC attempted to strike an appropriate balance between Federal and state law. Third, over the years, the OCC has applied part 9 to a wide variety of investment advisory activities and related services, not all of which involve the bank's exercise of investment discretion. In some cases, national banks engaged in these activities operate under different standards than other financial services providers that conduct the same type of business.

Moreover, the proposal reflected an effort to update, clarify, and streamline part 9, to incorporate significant interpretive positions, and to eliminate unnecessary regulatory burden wherever possible to promote more efficient operation and supervision of national banks' fiduciary activities. The proposal added headings for ease of reference, but, for the most part, retained the numbering system used in the former regulation.

The OCC received 57 comments regarding the proposal, including letters from banks, bank trade groups, state bank supervisors, law firms, consultants, auditors, and a member of Congress. With the exception of certain aspects of the rule that concerned state bank supervisors, the commenters generally supported the proposal. However, the commenters recommended numerous modifications to the proposal. The OCC carefully considered these recommendations and incorporates many of them into this final rule.

Section-by-Section Discussion

Authority, Purpose, and Scope (§ 9.1)

The proposal added a new provision explicitly setting forth the statutory authority for, and the purpose and scope of, part 9. One commenter recommended that the OCC clarify that part 9 applies to national banks and their operating subsidiaries, but not to other subsidiaries or affiliates. The OCC notes that 12 CFR 5.34(d)(3), as recently revised at 61 FR 60342 (November 27, 1996), already clarifies that the OCC's regulations, including part 9, apply to national banks' operating subsidiaries unless otherwise provided by statute or regulation. Moreover, the OCC recognizes that its regulations generally do not apply to other subsidiaries or affiliates of national banks, and believes that it is unnecessary to enumerate those or other entities excluded from the coverage of its regulations. However, the OCC is amending this section to clarify that part 9 applies to Federal branches of foreign banks, which, unlike Federal agencies, may receive fiduciary powers.

Definitions (§ 9.2)

The proposal modified or removed some of the former regulation's definitions, and added new definitions. Moreover, the proposal relocated the definitions from former § 9.1 to proposed § 9.2. For the most part, the OCC is adopting the definitions contained in the proposal. The following discussion highlights the definitions that the OCC has modified significantly.

Applicable law (§ 9.2(b)). The former regulation used the term ''local law,'' as defined at § 9.1(g), to refer to the laws of the state or other jurisdiction governing a fiduciary relationship. The proposal replaced the term ''local law'' with ''applicable law'' in order to streamline some of the operative provisions of the regulation and to clarify that the law that governs a national bank's fiduciary relationships may include Federal law,[2] state law governing a national bank's fiduciary relationships (that is, fiduciary duties and responsibilities), the terms of the instrument governing a fiduciary relationship, and any court order pertaining to the relationship.

Some commenters supported the proposed language without reservation. Others requested that the OCC clarify what type of law takes precedence. Some believed that Federal law should override state law, while others believed that state law should override Federal law.

The OCC recognizes that the proposed definition does not provide a priority among the various bodies of authority. Thus, the definition does not resolve situations in which the terms of a trust instrument, for example, conflicts with

[1] National banks have been authorized to exercise fiduciary powers since 1913. In 1962, the oversight responsibility for national banks' fiduciary activities was transferred from the Board of Governors of the Federal Reserve System to the OCC. *See* 12 U.S.C. 92a. Following the transfer of oversight responsibility, the OCC promulgated part 9 on October 3, 1962 (27 FR 9764), and revised it soon thereafter on April 5, 1963 (28 FR 3309).

[2] The Federal law relevant to a national bank's fiduciary activities includes, for example, provisions of the Federal banking laws (12 U.S.C. 1 *et seq.*), the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 *et seq.*) (ERISA), the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) (Advisers Act), the Trust Indenture Act of 1939 (15 U.S.C. 77aaa *et seq.*) (Trust Indenture Act), the Internal Revenue Code of 1986 (26 U.S.C. 1 *et seq.*) (Internal Revenue Code), and the rules issued pursuant to those acts.

a state statute or a Federal regulation. Conflicts of law issues in the fiduciary area are highly fact specific and, thus, cannot be resolved by reference to a general rule of priority. The OCC does not intend the term ''applicable law'' to resolve conflicts of law; rather, the OCC merely intends to identify concisely the various bodies of authority that may govern national banks' fiduciary activities.

Some commenters were concerned that the OCC intended this term to effectuate a wholesale Federal preemption of conflicting state law, or otherwise to change the *status quo* regarding conflicts of laws. This is not the case. To clarify the OCC's intention, the OCC is modifying the definition's reference to Federal law to read ''any applicable Federal law'' governing a national bank's fiduciary relationships. This allows the OCC to use the concise ''applicable law'' term, but the definition does not presume that Federal law necessarily will apply in any particular context. Rather, Federal law is merely one of many sources of law that may govern a fiduciary relationship.

Additionally, a few commenters noted that the proposed definition of ''applicable law'' did not mention foreign law, and asked the OCC to clarify the extent to which foreign law governs a national bank's fiduciary activities in foreign branches. Recognizing that the law of other jurisdictions, including foreign countries, may apply to a national bank's fiduciary activities, the OCC is modifying the definition to include the law of the state *or other jurisdiction* governing a national bank's fiduciary relationships. However, as with other conflicts of law, the extent to which foreign law applies to a national bank's fiduciary activities in foreign branches is a complex issue and depends on the specific factual situation. Thus, the OCC is not addressing that issue in the regulation.

Fiduciary capacity (§ 9.2(e)). In the proposal, the OCC attempted to establish a clearer and more objective boundary for the coverage of part 9. The proposal retained the statutory list of fiduciary capacities, but, unlike the former rule, it limited the definition of other fiduciary activities to: (1) any other capacity involving investment discretion on behalf of another; and (2) any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a. Thus, the proposal defined fiduciary capacity to exclude relationships (other than those listed in the statute) in which the bank does not have investment discretion. Under this approach, an investment advisory activity for which the bank does not have investment discretion generally is not a fiduciary activity subject to part 9.

The proposal also solicited comment on an alternative approach under which part 9 would apply to investment advisory and other activities if, when the same or similar activity is conducted by a competing state bank or corporation, the state regulates the activity as a fiduciary activity.

A majority of commenters who addressed this issue supported the proposed definition, which utilizes investment discretion as a test, and opposed the alternative approach on the grounds that it would lead to inconsistent treatment of accounts in a bank with multistate operations, and increase risk by creating undue complexity in fiduciary compliance. A few commenters voiced concerns with the proposed definition, and recommended that the OCC define ''fiduciary capacity'' to include any capacity that is fiduciary under state law.

The OCC believes that ''fiduciary capacity'' should be defined in a manner that fosters consistent application of part 9 throughout the national banking system. Thus, the OCC is not defining ''fiduciary capacity'' exclusively with reference to state law. Rather, the final rule retains the proposal's approach and defines ''fiduciary capacity'' by using investment discretion as a test for determining whether part 9 applies to certain activities.

With respect to non-discretionary investment advisory activities, commenters differed widely as to whether and the extent to which the OCC should treat those activities as fiduciary. After carefully considering the comment letters, the OCC has concluded that when a customer pays a national bank a fee in return for providing investment advice (whether or not the customer follows that advice), the customer has a reasonable expectation of receiving advice that is free of conflicts of interest. Additionally, other Federal statutes provide heightened fiduciary-type protection to customers of certain investment advisers who receive a fee.[3] By contrast, when a national bank does not receive a fee for investment advice (*e.g.*, directed custodian accounts), it has no contractual or other obligation to provide investment advice. Therefore, the bank should not incur fiduciary liability for any incidental advice it offers.[4] Thus, the OCC is adding ''investment adviser, if the bank receives a fee for its investment advice'' to the list of fiduciary capacities. The OCC believes that this distinction between paid and unpaid investment advisers reflects the reasonable expectations of national bank customers.

Fiduciary records (proposed § 9.2(g)). The proposal defined ''fiduciary records'' and used that term in the record retention and separation requirement of § 9.8. The final rule, however, does not use the term. Thus, the definition is eliminated in the final rule.

Fiduciary powers (§ 9.2(g)). The proposal provided that ''fiduciary powers'' means the authority the OCC permits a national bank to exercise pursuant to 12 U.S.C. 92a. Moreover, in the proposal's preamble, the OCC discussed and invited comment on the legal framework set forth in the OCC's Interpretive Letter No. 695 (December 8, 1995), in which the OCC analyzed the authority of a national bank to exercise fiduciary powers on an interstate basis under 12 U.S.C. 92a. Some commenters questioned the analysis contained in this letter. However, as stated in the letter, the effect of 12 U.S.C. 92a is that in any specific state, the extent of fiduciary powers is the same for out-of-state national banks as for in-state national banks, and that extent depends upon what powers the state grants to the fiduciaries in the state with which national banks compete. The OCC has considered the comments, but continues to believe that the legal analysis contained in Interpretive Letter No. 695 reflects a correct interpretation of the basic fiduciary powers of national banks under 12 U.S.C. 92a. The definition of fiduciary powers summarizes this basic principle. The OCC notes that neither Interpretive Letter No. 695 nor the definition of national banks' fiduciary powers in § 9.2(g) addresses the applicability of particular state laws to national banks' exercise of their fiduciary powers.[5]

[3] For example, under ERISA, a person is a fiduciary with respect to a plan, to the extent he renders investment advice for a fee or other compensation. 29 U.S.C. 1002(21)(A). As another example, the Advisers Act generally applies to any person who, for compensation, engages in the business of advising others (although banks are exempt). 15 U.S.C. 80b–2(a)(11).

[4] The OCC does not treat non-discretionary custodial activities as fiduciary, and the final rule continues that approach. Those activities are authorized under 12 U.S.C. 24 (Seventh).

[5] To the extent they arise, the OCC intends to handle specific questions about the applicability of particular state laws on a case-by-case basis, which in many cases will involve preemption opinions developed with the aid of a public notice and comment process.

Investment discretion (§ 9.2(i)). As mentioned previously, the proposal defined the term ''fiduciary capacity'' to include any capacity where the bank possesses investment discretion on behalf of another, and the final rule retains this approach. The proposed term ''investment discretion'' includes any account for which a national bank has the authority to determine what securities or other assets to purchase or sell on behalf of the account.

Some commenters recommended that the OCC clarify that a bank has investment discretion with respect to an account whether or not the bank exercises that discretion. Others recommended that the OCC clarify whether a bank has investment discretion with respect to an account in which the customer or another fiduciary also has investment discretion. In response to these commenters, the OCC is modifying the proposed definition to clarify that the term does not depend on whether or not the bank exercises its authority over investments, or whether or not its authority over investments is sole or shared. Moreover, the OCC is clarifying that a bank is deemed to have investment discretion even when it delegates its authority over investments, as well as when another fiduciary delegates its authority over investments to the bank.

Several commenters asked whether the OCC considers a national bank to have investment discretion when it administers asset allocation accounts or sweep accounts. Asset allocation programs differ widely in the extent of the administering bank's discretion. In some asset allocation programs, the bank has discretion to invest initially the customer's assets among several mutual funds, and to reallocate the assets as it deems appropriate based on the customer's investment profile and the prevailing market conditions. In these programs, and in any other program in which the bank may purchase or sell an investment without the customer's approval, the OCC considers the bank to have investment discretion. In sweep programs, on the other hand, a bank typically has no investment discretion. Rather, the bank is automatically sweeping excess cash into investments pre-selected by the customer (*e.g.*, money market funds).

Approval Requirements (§ 9.3)

Consistent with § 9.2 of the former regulation, the proposal directed an applicant for fiduciary powers (whether the applicant is a national bank seeking approval to exercise fiduciary powers, or a person seeking approval to organize a special-purpose national bank limited to fiduciary powers) to appropriate provisions in 12 CFR part 5, which contains rules, policies, and procedures for corporate activities. This is designed as a useful reader aid. The OCC received no specific comments on this section and adopts this section as proposed.

Administration of Fiduciary Powers (§ 9.4)

Consistent with § 9.7 of the former rule, the proposal permitted a national bank's board of directors to assign functions related to the exercise of fiduciary powers to bank directors, officers, employees, and committees thereof. The proposal also retained the requirement that all fiduciary officers and employees must be bonded adequately. Moreover, the proposal permitted a national bank to use personnel and facilities of the bank to perform services related to the exercise of its fiduciary powers, and permitted any department of the bank to use fiduciary officers and employees and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law. Additionally, the proposal added a new provision to the section clarifying that a national bank may enter into an agency agreement with another entity to purchase or sell services related to the exercise of fiduciary powers.

Some commenters recommended that the OCC allow a national bank to use personnel and facilities of its affiliates (and not just other departments of the bank) to perform services related to its fiduciary activities, and allow affiliates to use fiduciary officers and employees and facilities to perform services unrelated to the bank's fiduciary activities, to the extent not prohibited by applicable law. The OCC believes that utilizing affiliates in this manner enhances efficiency and is consistent with safety and soundness. Moreover, this recommendation reflects the realities of modern bank organizational structures. Thus, the OCC is modifying the provision accordingly.

Policies and Procedures (§ 9.5)

The proposal required a national bank to establish written policies and procedures to ensure that its fiduciary practices comply with applicable law, and also provided a list of particular fiduciary practices that a bank's policies and procedures should cover. Several items on the list were derived from requirements in the former regulation, including brokerage placement practices (former § 9.5); methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security (former § 9.7(d)); selection and retention of legal counsel readily available to advise the bank and its fiduciary officers and employees on fiduciary matters (former § 9.7(c)); and investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution (former § 9.10(a)).

Other items on the proposed list were not based on requirements in the former regulation, including methods for preventing self-dealing and conflicts of interest, allocation to fiduciary accounts of any financial incentives the bank may receive for investing fiduciary funds in a particular investment, and disclosure to beneficiaries and other interested parties of fees and expenses charged to fiduciary accounts.

Many commenters were concerned that specific items on the list, particularly the items addressing the allocation of financial incentives and disclosures to interested parties, could be construed overbroadly (*e.g.*, to prohibit otherwise permissible fee arrangements, or to require disclosures to creditors of settlors of revocable trusts). Some commenters suggested that the OCC not provide a list of required policies and procedures, but rather provide guidance through less formal means.

The OCC is retaining the proposal's general requirement that a national bank adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. The OCC is not attempting to assemble an exhaustive list of required policies and procedures. However, the OCC believes that the regulation should provide examples of areas that a bank's policies and procedures should address. Thus, the OCC is adopting an abbreviated list of areas that a bank's policies and procedures should address. The list includes brokerage placement practices, the prevention of misuse of material inside information, the prevention of self-dealing and conflicts of interest, the selection and retention of legal counsel, and the investment of funds (including funds awaiting investment or distribution).

Review of Assets of Fiduciary Accounts (§ 9.6)

The proposal, like the former rule, required national banks to perform reviews with respect to fiduciary accounts at least once during each calendar year, and within 15 months of the last review. Moreover, the proposal required two distinct types of annual written reviews: individual account reviews and reviews of assets by issuer. To contrast the two types of review, a review of assets by issuer determines what investments (e.g., common stock of Corporation X) are appropriate investments for the bank's fiduciary accounts in general. In some banks, the review of assets by issuer results in a list of permissible fiduciary investments for the bank's fiduciary accounts, and the person or committee in charge of investing for a particular fiduciary account chooses investments from this list. Under an individual account review, on the other hand, the person or committee in charge of a particular account's investments determines whether the current investments are appropriate, individually and collectively, given the objectives of the account.

Several commenters indicated that the requirement for an annual review of assets by issuer is burdensome, redundant, and may conflict with the modern portfolio theory embraced by the prudent investor rule.[6] The OCC agrees with these commenters and, thus, is eliminating the requirement for an annual review of assets by issuer.

Some commenters recommended that the OCC make the requirement for a ''written'' review more flexible by allowing other forms of evidence of a review (e.g., an automated screening process that screens out routine and non-complex assets and accounts), in order to allow bank personnel to conduct their reviews more efficiently. In response to this recommendation, the OCC is eliminating the requirement that the review be ''written.'' However, if a bank adopts a review system in which reviews are not documented individually, the bank must be able to demonstrate that its review system is designed to perform all required reviews.

One commenter recommended that the OCC eliminate the requirement to perform a review within 15 months after the last review, and instead rely on the requirement to perform a review at least once during each calendar year. The OCC has determined that the 15-month requirement is somewhat rigid, raises timing issues (*e.g.*, whether to measure the period from the start date to start date or end date to start date), and does not contribute significantly to safety and soundness. Consequently, the OCC is eliminating it in favor of a requirement that a national bank perform a review at least once during each calendar year.

Recordkeeping (§ 9.8)

Section 9.8(a) of the proposal required a national bank to document the establishment and termination of fiduciary accounts and to maintain adequate records for all fiduciary accounts. Section 9.8(b) of the proposal required a national bank to retain all ''fiduciary records'' for a specified period. Section 9.2(g) of the proposal defined ''fiduciary records'' to include *all* written or otherwise recorded information that a national bank creates or receives relating to a fiduciary account or the fiduciary activities of the bank.

Some commenters asserted that the proposed definition of ''fiduciary records'' is overly broad, and recommended that the OCC limit the record retention requirement of § 9.8(b) to the records described in § 9.8(a). The OCC agrees that the proposed definition of fiduciary records is overly broad and has limited the record retention requirement accordingly.

Audit of Fiduciary Activities (§ 9.9)

The proposal required a national bank to perform, through its fiduciary audit committee, suitable audits of its fiduciary activities annually and to report the results of the audit, including all actions taken as a result of the audit, in the minutes of the board of directors. The proposal also clarified that if a bank adopts a continuous audit system in lieu of performing annual audits, the bank may perform discrete audits of each fiduciary activity, on an activity-by-activity basis, at intervals appropriate for that activity. For example, a bank may determine that it is appropriate to audit certain low-risk fiduciary activities every 18 months. Moreover, the proposal permitted a national bank to use an affiliate's audit committee as the bank's fiduciary audit committee.

Most commenters strongly supported allowing a continuous audit system and allowing an affiliate's audit committee to serve as a bank's fiduciary audit committee. The OCC is adopting these elements. A few commenters recommended that the OCC clarify whether a bank may use external auditors in performing the required audits. In response, the OCC is adding parentheticals to clarify that a bank may use internal or external auditors. A few commenters expressed concern that the requirement to note in the board's minutes ''all'' actions taken as a result of the audit could be interpreted to require a board to note excessive detail. To alleviate this concern, the OCC is modifying the provision to require the board to note ''significant actions'' instead of ''all actions.''

One commenter also noted that the proposal required a suitable audit of ''all'' fiduciary activities (or, for continuous audits, a discrete audit of ''each'' fiduciary activity), and pointed out that certain fiduciary activities at certain banks may be *de minimis* (*e.g.*, a bank may have only one small account under a particular fiduciary activity, as an incidental service for a particular customer). They asserted that these *de minimis* fiduciary activities may not merit a full-scope audit. To provide a measure of flexibility with respect to *de minimis* activities, the OCC is modifying the regulation to require a suitable audit of ''all significant'' fiduciary activities (or, for continuous audits, a discrete audit of ''each significant'' fiduciary activity). The OCC intends for this standard to exclude only *de minimis* fiduciary activities conducted by a bank.

Moreover, as with annual reviews under § 9.6, the OCC is eliminating the requirement that a national bank that performs audits annually (rather than using a continuous audit system) perform an audit not later than 15 months after the last audit. The 15-month requirement is somewhat rigid, raises timing issues, and does not contribute significantly to safety and soundness. The OCC is retaining the requirement that a national bank perform an audit at least once during each calendar year.

The proposal required that a national bank's fiduciary audit committee must not include directors who are members of a fiduciary committee of the bank. Several commenters noted that some banks would experience difficulties in complying with this restriction due to their fiduciary committee structure. To provide those banks with a reasonable degree of flexibility, the OCC is modifying this restriction to require that a national bank's fiduciary audit committee must consist of a majority of members who are not also members of any committee to which the board of directors has delegated power to manage and control the fiduciary activities of the bank. The OCC believes that this modification will not impair the safety and soundness of those banks.

[6] Modern portfolio theory, which underlies modern asset management practices, focuses on the reduction of specific risk through portfolio diversification. This theory, along with corresponding practice, demonstrated that ''arbitrary restrictions on trust investments are unwarranted and often counterproductive.'' Rest. 3rd, Trusts (Prudent Investor Rule), Introduction (1992), at 4. The prudent investor rule states that the standard of prudent investment ''is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suited to the trust.'' Rest. 3rd, Trusts (Prudent Investor Rule), sec. 227(a) (1992).

Fiduciary Funds Awaiting Investment or Distribution (§ 9.10)

The proposal retained the former regulation's general prohibition against allowing fiduciary funds to remain uninvested and undistributed any longer than reasonable for proper account management. One commenter pointed out that directing the treatment of fiduciary funds is appropriate only if the bank has investment discretion with respect to those funds. The OCC agrees that the duty to invest funds applies only to accounts for which a bank has investment discretion. However, the duty to distribute uninvested funds within a reasonable time may apply even in the absence of investment discretion. Thus, the OCC is limiting this prohibition to fiduciary accounts for which a bank has investment discretion or discretion over distributions.

The proposal eliminated the requirement that a bank obtain the ''maximum'' rate of return for fiduciary funds awaiting investment or distribution. One commenter asserted that the OCC should have some policy with respect to the rate of return for fiduciary funds awaiting investment or distribution. The OCC agrees, and is adopting a requirement that a bank obtain for such funds a rate of return consistent with applicable law. Thus, in states that require their corporate fiduciaries to obtain a market rate of return for fiduciary funds awaiting investment or distribution, a national bank must do the same. In other states, national banks are placed on a level playing field with competing corporate fiduciaries.

The proposal permitted a national bank to set aside, as collateral for self-deposits of fiduciary funds awaiting investment or distribution, any assets (including surety bonds) that qualify under state law as appropriate security. Several commenters recommended that the OCC allow a bank to collateralize self-deposits with surety bonds without regard to state law. Other commenters recommended that the OCC allow a bank to collateralize self-deposits with surety bonds only if state law permits that practice. The OCC has determined that it is consistent with national banks' fiduciary powers for banks to use surety bonds as collateral for self-deposits unless prohibited by applicable law. This standard grants national banks the ability to collateralize self-deposits with surety bonds, yet preserves for each state the ability to prohibit this practice for all fiduciaries operating in the state.

The proposal also permitted a national bank to deposit fiduciary funds awaiting investment or distribution with an affiliate and to secure a deposit of idle fiduciary funds by or with an affiliate ''if consistent with applicable law''. Several commenters recommended that the OCC modify the applicable law standard, though the commenters suggested various alternatives ranging from ''without regard to state law'' to ''only if permitted by applicable law''. After considering the various standards, the OCC is adopting ''unless prohibited by applicable law'' as the standard. This standard allows national banks to secure deposits of idle fiduciary funds by or with an affiliate, yet permits a state to preclude this practice for all fiduciaries operating in the state, if the state so chooses.

Investment of Fiduciary Funds (§ 9.11)

The proposal directed a national bank to invest fiduciary funds in a manner consistent with applicable law. One commenter pointed out that directing a bank how to invest fiduciary funds is appropriate only if the bank has investment discretion. This commenter's point is generally true. However, situations may arise in which a bank trustee without investment discretion receives a direction from a party with investment discretion to make an investment that violates applicable law (*e.g.*, ERISA or the trust instrument). The bank, in these situations, should comply with applicable law notwithstanding its lack of investment discretion. Thus, the OCC is adopting the provision generally as proposed.

Self-Dealing and Conflicts of Interest (§ 9.12)

The proposal clarified that a bank may not lend to any of its directors, officers, or employees any funds it holds as trustee, except with respect to bank's own employee benefit plans in accordance with section 408(b)(1) of ERISA, which specifically authorizes loans to participants and beneficiaries of such plans under certain circumstances. One commenter noted that section 408(b)(1) covers plans that the bank administers for other employers, as well as the bank's own plans. The OCC agrees, and is extending the proposed exception to plans that the bank administers for other employers. Moreover, the OCC is broadening the regulation's reference to ERISA by citing to section 408 rather than section 408(b)(1), because section 408 contains several exemptions from ERISA's prohibited transaction provisions, and not just the exemption found in 408(b)(1).

The proposal authorized a national bank to make a loan between any of its fiduciary accounts if the transaction is authorized by the instrument creating the account from which the loan is made and is not prohibited by applicable law. One commenter recommended that the OCC change this standard to ''if the transaction is fair to both accounts and is not prohibited by applicable law,'' in order to be consistent with the standard for loans to fiduciary accounts and for sales between fiduciary accounts. The OCC agrees that there is no compelling reason to have different standards for these transactions and, thus, is modifying the standard accordingly.

Finally, one commenter pointed out that these self-dealing and conflicts of interest provisions are appropriate only if the bank has investment discretion. The OCC agrees, and is limiting this provision to fiduciary accounts for which a bank has investment discretion.

Custody of Fiduciary Assets (§ 9.13)

The proposal allowed a national bank to maintain fiduciary assets off-premises if the bank maintains adequate safeguards and controls. However, some off-premise locations may not be appropriate for the safekeeping of fiduciary assets, depending on applicable law. Consequently, the OCC is modifying the provision to allow a bank to maintain fiduciary investments off-premises only if consistent with applicable law.

Deposit of Securities With State Authorities (§ 9.14)

The proposal allowed a national bank with fiduciary assets in more than one state to meet its deposit requirement in each state based on the amount of trust assets administered from offices located in that state. The OCC intended this provision to avoid duplicative securities deposits for the same trust asset.

Some commenters requested that the OCC clarify that the deposit requirement for a multistate bank depends on the amount of trust assets that the bank administers ''primarily'' or ''principally'' from offices in that state. These commenters were concerned that the proposed language still could be interpreted in a manner that results in duplicative securities deposits for the same trust asset. To ensure that the requirement is not interpreted in a manner that results in duplicative securities deposits, the OCC is clarifying that the required deposit for each state is based on the amount of trust assets that the bank administers ''primarily'' from offices located in that state.

Fiduciary Compensation (§ 9.15)

The proposal retained the substance of former § 9.15, which addressed fiduciary compensation. The proposal authorized a national bank to charge a reasonable fee for its fiduciary services if the amount is not set or governed by applicable law. Moreover, the proposal prohibited an officer or an employee of a national bank from retaining any compensation for acting as a co-fiduciary with the bank in the administration of a fiduciary account, except with the specific approval of its board of directors.

One commenter requested that the OCC provide guidance on what constitutes a reasonable fee, and that the OCC allow a bank to rely on their regularly published fee schedules to satisfy the reasonableness test. However, because reasonableness of fiduciary compensation depends heavily upon the facts of each situation, the OCC does not believe that it is possible to establish specific rules on what is and what is not reasonable. Thus, the OCC is adopting this section as proposed. The OCC points out, however, that the amount of fiduciary compensation is typically set or governed by applicable law (*e.g.*, by the terms of the governing instrument, state fee schedules, a probate court, etc.), in which case the general reasonableness standard does not apply.

Receivership or Voluntary Liquidation of Bank (§ 9.16)

The proposal directed a receiver or liquidating agent for a national bank to close promptly all fiduciary accounts to the extent practicable (in accordance with OCC instructions and the orders of the court having jurisdiction) and to transfer all remaining fiduciary accounts to substitute fiduciaries. Some commenters recommended that the OCC modify this provision to reflect that a national bank's receiver or liquidating agent generally transfers fiduciary accounts to substitute fiduciaries, noting that the FDIC's usual practice is to sell a failed bank's fiduciary business. The OCC agrees that a national bank should have the option to transfer fiduciary accounts to substitute fiduciaries, regardless of whether it can practicably close those accounts. Thus, the OCC is modifying the provision accordingly.

Additionally, the OCC is clarifying that this provision does not apply to the receiver of insured national banks, which, under 12 U.S.C. 191, is the Federal Deposit Insurance Corporation.

Surrender or Revocation of Fiduciary Powers (§ 9.17)

The proposal retained the substance of former § 9.17, which addresses surrender and revocation of fiduciary powers. The proposal set forth the standards and procedures that apply when a national bank seeks to surrender its fiduciary powers. The proposal also described the standards that apply when the OCC seeks to revoke a bank's fiduciary powers. This section provides useful guidance to banks surrendering or revoking their fiduciary powers. The OCC did not receive any comments that warranted changes to this section and, thus, the OCC is adopting it as proposed.

Collective Investment Funds (§ 9.18)

The proposal retained the general structure of § 9.18. Paragraph (a) authorized national banks to invest fiduciary assets in two types of collective investment funds (called (a)(1) funds and (a)(2) funds, in reference to the paragraphs of § 9.18 that authorize them). Paragraph (b) set forth the requirements applicable to funds authorized under paragraph (a). Paragraph (c) described other types of collective investments available to national bank fiduciaries. The OCC is adopting much of proposed § 9.18, but with several significant modifications.

In General (§ 9.18(a))

The proposal removed a provision from former § 9.18(b)(3) that specifically provided that a bank may look at a collective investment fund's portfolio in the aggregate in determining whether it may invest fiduciary assets in the collective investment fund. This treatment is consistent with the prudent investor rule.[7] One commenter noted that not all states have adopted the prudent investor rule, and recommended that the OCC retain the provision. The OCC agrees, and is retaining the provision as a footnote to § 9.18(a).

Written Plan (§ 9.18(b)(1))

The former regulation required the full board of directors of a national bank to approve a new collective investment fund plan. The proposal provided additional management flexibility by allowing a committee of the board of directors to perform this function. Some commenters recommended that the OCC modify this requirement further by allowing a committee authorized by the board to approve a new plan. Because this modification provides banks with some flexibility in approving new plans and presents no supervisory concerns, the OCC is adopting it as recommended.

[7] *See* Rest. 3rd, Trusts (Prudent Investor Rule), sec. 227(a) (1992).

Frequency of Valuation (§ 9.18(b)(4)(i))

The proposal allowed a bank to value an illiquid collective investment fund (*i.e.*, one invested primarily in real estate or other assets that are not readily marketable) at least annually rather than at least quarterly, in an effort to be consistent with the one-year prior notice allowance for withdrawals from illiquid collective investment funds found at former § 9.18(b)(4). Because the prior notice allowance is limited to (a)(2) funds, it is appropriate to limit the valuation exception to (a)(2) funds. The OCC is modifying the proposed valuation exception to include this limitation.

Short-term Investment Funds (§ 9.18(b)(4)(ii)(B))

The proposal retained the former regulation's restrictions on short-term investment funds. Several commenters noted, however, that these restrictions are more stringent than the Securities and Exchange Commission's Rule 2a–7 (17 CFR 270.2a–7), which governs money market funds. The commenters recommended that the OCC revise the restrictions to make them more consistent with Rule 2a–7. The OCC agrees that its restrictions regarding short-term investment funds should be more consistent with Rule 2a–7. Consequently, the OCC is removing (1) the requirement that a bank invest at least 80 percent of the fund's assets in instruments payable on demand or that have a maturity date not exceeding 91 days from the date of purchase, and (2) the requirement that at least 20 percent of the fund's assets must be cash, demand obligations, or assets that will mature on the fund's next business day. In their place, the OCC is adding a requirement that a bank maintain a dollar-weighted average portfolio maturity of 90 days or less, consistent with Rule 2a–7.

Method of Distributions (§ 9.18(b)(5)(iv))

The proposal revised substantially the former regulation's standard for distributions to an account withdrawing from a collective investment fund. Former § 9.18(b)(6) required a bank to make distributions in cash, ratably in kind (*i.e.*, a proportional share in each of the assets held by the collective investment fund), or a combination of the two. The proposal allowed a bank to make any distributions consistent with applicable law. The proposal reflected an effort to provide banks with sufficient flexibility to address complex distribution problems that may arise (particularly with respect to collective investment funds that invest primarily in illiquid assets), while maintaining the basic protections of state fiduciary law. In the proposal's preamble, the OCC invited comment on whether to adopt this applicable law approach in lieu of the former regulation's distribution options.

Many commenters supported replacing the former regulation's distribution options with the proposed approach. Several commenters supported the proposed approach, but only as a supplement to the former regulation's distribution options. Some commenters noted that relying wholly on applicable law, as proposed, could be unworkable for a bank whose collective investment fund includes accounts from different states.

The OCC has determined to retain the former regulation's distribution options (*i.e.*, cash, ratably in kind, or a combination of the two) and to add, as a fourth option, ''any other manner consistent with applicable law in the state in which the bank maintains the fund.'' The OCC believes that this approach provides ample flexibility while maintaining the basic protections of state fiduciary law. Moreover, it resolves the proposal's potential problems regarding a fund with accounts from different states by clarifying that the only state whose law applies to the fourth distribution option is the state in which the bank maintains the fund (though other forms of ''applicable law,'' such as Federal law, may apply).

Audits and Financial Reports (§ 9.18(b)(6))

Consistent with OCC precedent, the proposal clarified that a national bank must disclose in a collective investment fund's annual financial report the fees and expenses charged to the fund. One commenter recommended that the OCC further clarify that the regulation does not require *per se* that a national bank disclose fees and expenses on a line-item basis, or as a specific dollar amount (as opposed to a percentage of assets). The OCC affirms that the regulation does not require *per se* a particular form of disclosure. However, if state law (or other applicable law) governing the collective investment fund requires a particular form of disclosure, then national banks must comply with that requirement.[8] To clarify this issue, the OCC is modifying the provision to clarify that disclosures of fees and expenses are required in a manner consistent with applicable law in the state in which the bank maintains the fund.

Advertising Restriction (§ 9.18(b)(7))

The proposal retained and clarified the former regulation's restriction on advertising (a)(1) funds. In particular, the proposal prohibited a bank from advertising a common trust fund except in connection with the advertisement of the general fiduciary services of the bank.

Many commenters recommended that the OCC eliminate or at least relax the restriction on advertising past performance. Other commenters, apparently in support of the restriction, warned that if a bank markets its common trust fund to the general public, then that fund will be subject to registration and regulation under the securities laws.

The views of commenters opposed to the advertising restriction may have some merit. The OCC has carefully considered their views but has decided that, on balance, it is not appropriate to remove the advertising restriction. Therefore, the OCC is adopting the provision as proposed.

Self-Dealing and Conflicts of Interest (§ 9.18(b)(8))

The proposal retained the substance of former § 9.18(b)(8), which addressed self-dealing and conflicts of interest specific to collective investment funds. The OCC noted in the preamble that a national bank administering a collective investment fund must comply with not only these provisions, but also the general self-dealing and conflicts of interest provisions found in § 9.12. One commenter recommended that the OCC clarify this position in the regulatory text. The OCC agrees, and is amending the provision accordingly.

Elimination of Mortgage Reserve Account Provision

The proposal retained the substance of former § 9.18(b)(11), which allowed a bank administering a collective investment fund to establish a mortgage reserve account for overdue interest payments on mortgages in the fund. Suspecting that this provision was outdated, the OCC invited comment on the extent to which banks use mortgage reserve accounts. The only commenter on this provision recommended that the OCC eliminate it, stating that national banks no longer maintain mortgage reserve accounts because they are unnecessary and may not be appropriate under generally accepted accounting principles. Accordingly, the OCC is eliminating this provision.

Management Fees (§ 9.18(b)(9))

The proposal retained the quantitative management fee limitation, found at former § 9.18(b)(12), but invited comment on whether the OCC should defer to state law instead of retaining the fee limitation. Under this limitation, a bank administering a collective investment fund may charge a fund management fee only if the total fees charged to a participating account (including the fund management fee) does not exceed the total fees that the bank would have charged had it not invested assets of the fiduciary account in the fund.

Many commenters supported eliminating the management fee limitation altogether in favor of a ''reasonableness'' standard or a state law based approach, arguing that these alternatives would reflect modern fiduciary law standards in this area. However, some commenters supported retaining the limitation. Other commenters were concerned that a state law approach could be unworkable for a collective investment fund with participants from different states whose fee standards differ.

The OCC recognizes the desirability of providing updated operating standards for national bank fiduciary activities, but is concerned that a general ''reasonableness'' standard, or even a state law standard, alone, may not provide sufficient protections for banks' fiduciary customers. Accordingly, the final rule provides that a national bank may charge a fund management fee only if: (1) the fee is reasonable; (2) the fee is permitted under applicable law (and complies with fee disclosure requirements, if any) in the state in which the bank maintains the fund; *and* (3) the amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participating fiduciary accounts that would not have been provided to the accounts were they not invested in the fund.

This modification safeguards the interests of customers in several ways. First, a fund management fee is subject to an overall reasonableness standard. Second, in order to charge a fund management fee, applicable law must allow the type of fee charged. Third, the bank must justify the amount of a fund management fee based on particular services that provide a tangible benefit to participating fiduciary accounts that would not have been provided to the accounts were they not invested in the fund. Fourth, a bank that charges a fee under this approach also must comply with applicable fee disclosure

8 *See* Trust Interpretive Letter #242 (January 1990).

requirements. Finally, a separate provision in the final rule requires a bank to disclose a management fee, along with other fees and expenses charged to the fund, in the annual financial report in a manner consistent with applicable law in the state in which the bank maintains the fund.[9]

Additionally, this modification eliminates the possibility that multiple conflicting states' laws could apply to the same fund, and thus is responsive to commenters' concerns about administering a collective investment fund with participants from different states.

Expenses (§ 9.18(b)(10))

The proposal retained the requirement that the bank absorb establishment and reorganization expenses, but eliminated other provisions that specifically permitted or prohibited a bank to charge certain expenses to the fund. Rather than mandating the treatment of specific expenses (other than establishment and reorganization expenses), the proposal deferred to state law, in effect, by allowing a bank to charge reasonable expenses incurred in administering the fund to the extent not prohibited by applicable law.

Many commenters supported this approach. However, some commenters were concerned that a state law approach to permissible expenses could be unworkable for funds with participants from different states.

The OCC continues to believe that, when expenses of a fund are reasonable and permissible under state law, and are fully disclosed in appropriate documentation,[10] a bank should be allowed to charge them directly to the fund. Thus, the final rule retains the proposal's approach of allowing a bank to charge any reasonable expenses (except expenses incurred in establishing or reorganizing a collective investment fund) not prohibited by applicable law, and clarifies that the applicable law in the state in which the bank maintains the fund—including Federal law where appropriate, and excluding the law of states other than the state in which the bank maintains the fund—determines whether particular expenses are prohibited. This standard addresses commenters' concerns about funds with participants from different states.

[9] *See* § 9.18(b)(6)(ii).

[10] *See* § 9.18(b)(1)(iii) (disclosure of anticipated fees and expenses in the written plan) and § 9.18(b)(6)(ii) (disclosure of fees and expenses in the annual financial report).

Prohibition Against Certificates (§ 9.18(b)(11))

The proposal prohibited a national bank from issuing certificates of interest in a collective investment fund. One commenter recommended that the OCC provide an exception allowing a bank to issue a certificate of participation in a segregated investment to a customer withdrawing from a fund, consistent with OCC fiduciary precedents. The OCC agrees. The exception for segregated investments should not raise any of the securities-related concerns underlying the prohibition against certificates. Consequently, the OCC is adopting the exception.

Elimination of Participation, Investment, and Liquidity Requirements

The proposal eliminated the 10 percent participation limitation, the 10 percent investment limitation, and the liquidity requirement applicable to common trust funds under former § 9.18(b)(9). The OCC received many comment letters on this issue. All who commented supported the proposal. These restrictions have at times interfered with optimal management of common trust funds. Moreover, the OCC believes that the protections found in state fiduciary law adequately address the concerns underlying these restrictions. Consequently, the OCC is eliminating the participation, investment, and liquidity requirements.

Other Collective Investments (§ 9.18(c))

In addition to (a)(1) and (a)(2) funds, the proposal authorized other means by which a national bank may invest fiduciary assets collectively: (1) bank fiduciary funds, (2) single loans or obligations, (3) mini-funds (i.e., funds established for the collective investment of cash balances), (4) trust funds of corporations and closely-related settlors, and (5) special exemption funds. These other collective investments are not subject to the requirements of § 9.18(b).

While the OCC did not receive any comments on the provision authorizing bank fiduciary funds, the OCC believes that banks no longer maintain this type of fund. Thus, the OCC is eliminating the provision.

With respect to single loans or obligations, the proposal eliminated the restriction that a bank invest in a variable-amount note on a short-term basis only. Those who commented on this change supported it. The change will bring that provision in conformity with § 9.18(b)(4)(ii)(B), which allows a bank to invest fiduciary assets collectively in short-term investment fund composed of short-term vehicles, including variable-amount notes, but places no limitation on renewals of those investments. For this reason, the OCC is adopting the provision as proposed.

With respect to mini-funds, the proposal eliminated the requirement that no participating account's interest in the fund may exceed $10,000. Moreover, the proposal increased the total amount of assets permitted in a mini-fund to $1,000,000. Those who commented on these changes supported them. These changes remove outdated limitations on mini-funds. Consequently, the OCC is adopting the provision as proposed.

One commenter recommended that the OCC add a provision that permits a bank to use any collective investment authorized by applicable law (*e.g.*, pre-need funeral statutes). The OCC agrees that a bank should be permitted to use any collective investment authorized by applicable law, and is adding a provision to this effect.

With respect to special exemption funds, the proposal provided an expedited procedure for their review. While most commenters supported the expedited review procedure, a few commenters strongly opposed it. Those who opposed it objected that the provision does not require notice and comment, does not distinguish between routine and novel applications, and, because approval is automatic if the OCC does not act in 30 days, could lead to inadvertent approvals of common trust funds that are exempt from the regulation's management fee and common trust fund advertising provisions. After carefully considering these concerns, the OCC has decided that it may not be appropriate to adopt the proposed expedited review procedure. Thus, the OCC is modifying the provision to eliminate the expedited review procedure.

Finally, one commenter recommended that the OCC extend the right to seek special exemptions from the OCC to state banks and other corporate fiduciaries that must comply with the OCC's collective investment fund regulation in order to receive favorable tax treatment under the Internal Revenue Code (26 U.S.C. 584). The OCC agrees that those corporate fiduciaries should have the same opportunity to establish special exemption funds as national banks. Consequently, the OCC is modifying the proposal to reflect this recommendation.

Transfer Agents (§ 9.20)

The proposal incorporated by means of cross-reference the Securities and Exchange Commission (SEC) rules prescribing procedures for registration of transfer agents for which the SEC is the appropriate regulatory agency (17 CFR 240.17Ac2–1). The proposal also clarified that a national bank transfer agent must comply with rules adopted by the SEC pursuant to section 17A of the Securities Exchange Act (15 U.S.C. 78q–1), which sets forth operational and reporting requirements that apply to all transfer agents (17 CFR 240.17Ac2–2, and 240.17Ad–1 through 16).

Several commenters noted that the SEC's rules regarding transfer agents do not apply to activities in foreign countries. The OCC acknowledges that the SEC's rules regarding transfer agents apply only to domestic activities. Consequently, the OCC is clarifying this point in the regulatory text.

Waiver of Regulatory Requirements

In the preamble to the proposal, the OCC invited comment on whether the OCC should add a reservation of authority to part 9 for the purpose of setting forth standards and procedures under which a national bank may obtain a waiver from a specific provision. All but one of those who commented on this issue supported the addition of waiver standards and procedures. Upon reconsideration, the OCC has concluded that it is preferable to continue its current practice of considering any request to modify the application of any provision in part 9, and granting a request if the OCC deems it consistent with the bank's fiduciary duties and with safe and sound banking practices. The OCC expects that the additional flexibility it has incorporated into many of part 9's provisions will reduce the need for waivers and modifications. Moreover, the requests that banks are likely to file will vary significantly in subject matter and complexity, reducing the usefulness of generalized standards. Therefore, the OCC has decided not to include a specific waiver provision in part 9.

Acting as Indenture Trustee and Creditor (§ 9.100)

In the proposal's preamble, the OCC indicated that it was inclined to modify its restrictions on allowing an indenture trustee to act as creditor to the same debt securities issuance. In particular, the OCC suggested allowing a national bank to act both as creditor and indenture trustee until 90 days after default, consistent with the Trust Indenture Act, with the added condition that the bank maintains adequate controls to manage any potential conflicts of interest. Additionally, the OCC indicated that it would apply this policy consistently to all debt securities issuances, including issuances exempt from the Trust Indenture Act. The OCC invited comment on how banks are managing these conflicts, and on the need to address this issue in part 9.

Commenters supported a revision of the OCC's position, and indicated that bank policies and procedures effectively manage potential conflicts of interest. However, most who commented recommended that the OCC not add specific requirements to the regulation on this issue, though most of these commenters also supported less formal guidance.

Based on its experience in this area, the OCC believes that banks generally have established adequate controls to manage those conflicts. Moreover, the OCC believes that it is important to clarify to all national banks the revised position on this issue. Consequently, the OCC is adding a short interpretive ruling to part 9 explaining that a national bank may act as creditor and indenture trustee to any debt securities issuance (whether or not covered by the Trust Indenture Act) until 90 days after default with the added condition that the bank maintains adequate controls to manage the potential conflicts of interest.

Disciplinary Sanctions Imposed by Clearing Agencies (§ 19.135)

The proposal eliminated much of the detail of former §§ 9.21 and 9.22, which concern applications by national banks for stays or reviews of disciplinary sanctions imposed by registered clearing agencies. Instead, the proposal cross-referenced the SEC's rules in this area, which are virtually identical to former §§ 9.21 and 9.22. The proposal also relocated the provision to 12 CFR part 19, the OCC's rules of practice and procedure, where readers are more likely to find it.

The OCC received no comments on this provision and, thus, is adopting it as proposed.

Investment Adviser to an Investment Company

Part 9 has never contained conditions applicable to national bank operating subsidiaries engaged in investment advisory activities. Instead, appropriate conditions for particular operating subsidiary activities have been dealt with by the OCC as part of the application process. However, one of the issues related to the treatment of investment advisory activities under part 9 that was raised in the proposal was whether to impose certain conditions in all situations where a national bank or its operating subsidiary acts as investment adviser to an investment company, and, if so, whether to include them in part 9.

Most who commented on this issue expressed concerns that the conditions could impose unnecessary restrictions on certain activities. After carefully considering the comments, the OCC has decided to continue its current approach of dealing with conditions imposed on national bank operating subsidiaries as part of the corporate application process. Recent amendments to 12 CFR part 5 (61 FR 60342, November 27, 1996) also provide a specific new mechanism for conditions and policies to be developed that will be applicable to operating subsidiaries engaged in particular types of activities. One of these types of activities is serving as an investment adviser to an investment company (see § 5.34(e)(3)(ii)(D)). Accordingly, the OCC has concluded that it is not appropriate to deal with conditions imposed on operating subsidiaries engaged in such activities as an aspect of part 9.

Derivation Table for 12 CFR Part 9

This table directs readers to the provisions of the former 12 CFR part 9 on which the revised 12 CFR part 9 and the amended 12 CFR part 19 are based.

Revised provision	Former provision	Comments
§ 9.1		Added.
§ 9.2(a)		Added.
(b)	§ 9.1(g)	Significantly modified.
(c)	§ 9.1(l)	Modified.
(d)	§ 9.1(a)	Modified.
(e)	§ 9.1(b) and (h)	Significantly modified.
(f)	§ 9.1(j)	Modified.
(g)	§ 9.1(c)	Significantly modified.
(h)	§ 9.1(e)	Modified.

Revised provision	Former provision	Comments
(i)		Added.
§ 9.3	§ 9.2	Modified.
§ 9.4	§ 9.7(a)(1), (b), and (d)	Significantly modified.
§ 9.5	§§ 9.5, 9.7(c), 9.7(d), and 9.10(a)	Significantly modified.
§ 9.6	§ 9.7(a)(2)	Significantly modified.
§ 9.8	§§ 9.7(a)(2) and 9.8	Modified.
§ 9.9	§ 9.9	Significantly modified.
§ 9.10	§ 9.10	Significantly modified.
§ 9.11	§ 9.11	Significantly modified.
§ 9.12	§ 9.12	Modified.
§ 9.13	§ 9.13	Modified.
§ 9.14	§ 9.14	Significantly modified.
§ 9.15	§ 9.15	Modified.
§ 9.16	§ 9.16	Modified.
§ 9.17	§ 9.17	Modified.
§ 9.18(a)	§ 9.18(a), (b)(2), and (b)(3)	Modified.
(b)(1)	(b)(1)	Significantly modified.
(b)(2)	(b)(12)	Significantly modified.
(b)(3)	(b)(3)	Modified.
(b)(4)	(b)(1), (4), and (15)	Significantly modified.
(b)(5)	(b)(4), (6), and (7)	Significantly modified.
(b)(6)	(b)(5)(i)-(iv)	Significantly modified.
(b)(7)	(b)(5)(iv) and (v)	Significantly modified.
(b)(8)	(b)(8)	Modified.
(b)(9)	(b)(12)	Significantly modified.
(b)(10)	(b)(5)(i) and (iv), (b)(10) and (b)(12)	Significantly modified.
(b)(11)	(b)(13)	Modified.
(b)(12)	(b)(14)	Modified.
(c)(1)	(c)(2)	Modified.
(c)(2)	(c)(3)	Significantly modified.
(c)(3)	(c)(4)	Modified.
(c)(4)		Added.
(c)(5)	(c)(5)	Significantly modified.
§ 9.20	§ 9.20	Modified.
§ 9.100		Added.
§ 19.135	§§ 9.21 and 9.22	Modified.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, the OCC certifies that this final rule will not have a significant economic impact on a substantial number of small entities in accord with the spirit and purposes of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Accordingly, a regulatory flexibility analysis is not required. The final rule's requirements, for the most part, are not new to the regulation. The final rule eases requirements and reduces burden for all national banks that exercise fiduciary powers, regardless of size.

Executive Order 12866

The Office of Management and Budget has concurred with the OCC's determination that this final rule is not a significant regulatory action under Executive Order 12866.

Paperwork Reduction Act of 1995

The OCC invites comment on:

(1) Whether the information collection contained in this final rule is necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(2) The accuracy of the OCC's estimate of the burden of the information collection;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected;

(4) 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; and

(5) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The OCC asked similar questions in the proposed rule, but received no comments.

Respondents/recordkeepers are not required to respond to this collection of information unless it displays a currently valid OMB control number.

The collection of information requirements contained in this final rule have been approved by the Office of Management and Budget under Control No. 1557–0140 in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information requirements should be sent to the Office of Management and Budget, Paperwork Reduction Project (1557–0140), Washington, DC 20503, with copies to the Legislative and Regulatory Activities Division (1557–0140), Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

The collection of information requirements in this final rule are found in 12 CFR 9.8, 9.9, 9.17, and 9.18. The OCC requires this information for the proper supervision of national banks'' fiduciary activities. The likely respondents/recordkeepers are national banks.

Estimated average annual burden hours per respondent/recordkeeper: 15 hours.

Estimated number of respondents and/or recordkeepers: 1,000.

Estimated total annual reporting and recordkeeping burden: 15,010 hours.

Start-up costs to respondents: None.

Unfunded Mandates Reform Act of 1995

The OCC has determined that this final rule will not result in expenditures by state, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, a budgetary impact statement is not required under section 202 of the Unfunded Mandates Reform Act of 1995. The final rule's requirements, for the most part, are not new to the regulation. The final rule eases requirements and reduces burden for all national banks that exercise fiduciary powers, regardless of size.

List of Subjects

12 CFR Part 9

Estates, Investments, National banks, Reporting and recordkeeping requirements, Trusts and trustees.

12 CFR Part 19

Administrative practice and procedure, Crime, Investigations, National banks, Penalties, Securities.

Authority and Issuance

For the reasons set out in the preamble, chapter I of title 12 of the Code of Federal Regulations is amended as follows:

1. Part 9 is revised to read as follows:

PART 9—FIDUCIARY ACTIVITIES OF NATIONAL BANKS

Regulations

Authority: 12 U.S.C. 24 (Seventh), 92a, and 93a; 15 U.S.C. 78q, 78q–1, and 78w.

Regulations

§ 9.1 Authority, purpose, and scope.

(a) *Authority.* The Office of the Comptroller of the Currency (OCC) issues this part pursuant to its authority under 12 U.S.C. 24 (Seventh), 92a, and 93a, and 15 U.S.C. 78q, 78q–1, and 78w.

(b) *Purpose.* The purpose of this part is to set forth the standards that apply to the fiduciary activities of national banks.

(c) *Scope.* This part applies to all national banks that act in a fiduciary capacity, as defined in § 9.2(e). This part also applies to all Federal branches of foreign banks to the same extent as it applies to national banks.

§ 9.2 Definitions.

For the purposes of this part, the following definitions apply:

(a) *Affiliate* has the same meaning as in 12 U.S.C. 221a(b).

(b) *Applicable law* means the law of a state or other jurisdiction governing a national bank's fiduciary relationships, any applicable Federal law governing those relationships, the terms of the instrument governing a fiduciary relationship, or any court order pertaining to the relationship.

(c) *Custodian under a uniform gifts to minors act* means a fiduciary relationship established pursuant to a state law substantially similar to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act as published by the American Law Institute.

(d) *Fiduciary account* means an account administered by a national bank acting in a fiduciary capacity.

(e) *Fiduciary capacity* means: trustee, executor, administrator, registrar of stocks and bonds, transfer agent, guardian, assignee, receiver, or custodian under a uniform gifts to minors act; investment adviser, if the bank receives a fee for its investment advice; any capacity in which the bank possesses investment discretion on behalf of another; or any other similar capacity that the OCC authorizes pursuant to 12 U.S.C. 92a.

(f) *Fiduciary officers and employees* means all officers and employees of a national bank to whom the board of directors or its designee has assigned functions involving the exercise of the bank's fiduciary powers.

(g) *Fiduciary powers* means the authority the OCC permits a national bank to exercise pursuant to 12 U.S.C. 92a. The extent of fiduciary powers is the same for out-of-state national banks as for in-state national banks, and that extent depends upon what powers the state grants to the fiduciaries in the state with which national banks compete.

(h) *Guardian* means the guardian or conservator, by whatever name used by state law, of the estate of a minor, an incompetent person, an absent person, or a person over whose estate a court has taken jurisdiction, other than under bankruptcy or insolvency laws.

(i) *Investment discretion* means, with respect to an account, the sole or shared authority (whether or not that authority is exercised) to determine what securities or other assets to purchase or sell on behalf of the account. A bank that delegates its authority over investments and a bank that receives delegated authority over investments are both deemed to have investment discretion.

§ 9.3 Approval requirements.

(a) A national bank may not exercise fiduciary powers unless it obtains prior approval from the OCC to the extent required under 12 CFR 5.26.

(b) A person seeking approval to organize a special-purpose national bank limited to fiduciary powers shall file an application with the OCC pursuant to 12 CFR 5.20.

§ 9.4 Administration of fiduciary powers.

(a) *Responsibilities of the board of directors.* A national bank's fiduciary activities shall be managed by or under the direction of its board of directors. In discharging its responsibilities, the board may assign any function related to the exercise of fiduciary powers to any director, officer, employee, or committee thereof.

(b) *Use of other personnel.* The national bank may use any qualified personnel and facilities of the bank or its affiliates to perform services related to the exercise of its fiduciary powers, and any department of the bank or its affiliates may use fiduciary officers, employees, and facilities to perform services unrelated to the exercise of fiduciary powers, to the extent not prohibited by applicable law.

(c) *Agency agreements.* Pursuant to a written agreement, a national bank exercising fiduciary powers may perform services related to the exercise of fiduciary powers for another bank or other entity, and may purchase services related to the exercise of fiduciary powers from another bank or other entity.

(d) *Bond requirement.* A national bank shall ensure that all fiduciary officers and employees are adequately bonded.

§ 9.5 Policies and procedures.

A national bank exercising fiduciary powers shall adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the bank's:

(a) Brokerage placement practices;

(b) Methods for ensuring that fiduciary officers and employees do not use material inside information in connection with any decision or recommendation to purchase or sell any security;

(c) Methods for preventing self-dealing and conflicts of interest;

(d) Selection and retention of legal counsel who is readily available to advise the bank and its fiduciary officers and employees on fiduciary matters; and

(e) Investment of funds held as fiduciary, including short-term investments and the treatment of fiduciary funds awaiting investment or distribution.

§ 9.6 Review of fiduciary accounts.

(a) *Pre-acceptance review.* Before accepting a fiduciary account, a national bank shall review the prospective account to determine whether it can properly administer the account.

(b) *Initial post-acceptance review.* Upon the acceptance of a fiduciary account for which a national bank has investment discretion, the bank shall conduct a prompt review of all assets of the account to evaluate whether they are appropriate for the account.

(c) *Annual review.* At least once during every calendar year, a bank shall conduct a review of all assets of each fiduciary account for which the bank has investment discretion to evaluate whether they are appropriate, individually and collectively, for the account.

§ 9.8 Recordkeeping.

(a) *Documentation of accounts.* A national bank shall adequately document the establishment and termination of each fiduciary account and shall maintain adequate records for all fiduciary accounts.

(b) *Retention of records.* A national bank shall retain records described in paragraph (a) of this section for a period of three years from the later of the termination of the account or the termination of any litigation relating to the account.

(c) *Separation of records.* A national bank shall ensure that records described in paragraph (a) of this section are separate and distinct from other records of the bank.

§ 9.9 Audit of fiduciary activities.

(a) *Annual audit.* At least once during each calendar year, a national bank shall arrange for a suitable audit (by internal or external auditors) of all significant fiduciary activities, under the direction of its fiduciary audit committee, unless the bank adopts a continuous audit system in accordance with paragraph (b) of this section. The bank shall note the results of the audit (including significant actions taken as a result of the audit) in the minutes of the board of directors.

(b) *Continuous audit.* In lieu of performing annual audits under paragraph (a) of this section, a national bank may adopt a continuous audit system under which the bank arranges for a discrete audit (by internal or external auditors) of each significant fiduciary activity (*i.e.*, on an activity-by-activity basis), under the direction of its fiduciary audit committee, at an interval commensurate with the nature and risk of that activity. Thus, certain fiduciary activities may receive audits at intervals greater or less than one year, as appropriate. A bank that adopts a continuous audit system shall note the results of all discrete audits performed since the last audit report (including significant actions taken as a result of the audits) in the minutes of the board of directors at least once during each calendar year .

(c) *Fiduciary audit committee.* A national bank's fiduciary audit committee must consist of a committee of the bank's directors or an audit committee of an affiliate of the bank. However, in either case, the committee:

(1) Must not include any officers of the bank or an affiliate who participate significantly in the administration of the bank's fiduciary activities; and

(2) Must consist of a majority of members who are not also members of any committee to which the board of directors has delegated power to manage and control the fiduciary activities of the bank.

§ 9.10 Fiduciary funds awaiting investment or distribution.

(a) *In general.* With respect to a fiduciary account for which a national bank has investment discretion or discretion over distributions, the bank may not allow funds awaiting investment or distribution to remain uninvested and undistributed any longer than is reasonable for the proper management of the account and consistent with applicable law. With respect to a fiduciary account for which a national bank has investment discretion, the bank shall obtain for funds awaiting investment or distribution a rate of return that is consistent with applicable law.

(b) *Self-deposits*—(1) *In general.* A national bank may deposit funds of a fiduciary account that are awaiting investment or distribution in the commercial, savings, or another department of the bank, unless prohibited by applicable law. To the extent that the funds are not insured by the Federal Deposit Insurance Corporation, the bank shall set aside collateral as security, under the control of appropriate fiduciary officers and employees, in accordance with paragraph (b)(2) of this section. The market value of the collateral set aside must at all times equal or exceed the amount of the uninsured fiduciary funds.

(2) *Acceptable collateral.* A national bank may satisfy the collateral requirement of paragraph (b)(1) of this section with any of the following:

(i) Direct obligations of the United States, or other obligations fully guaranteed by the United States as to principal and interest;

(ii) Securities that qualify as eligible for investment by national banks pursuant to 12 CFR part 1;

(iii) Readily marketable securities of the classes in which state banks, trust companies, or other corporations exercising fiduciary powers are permitted to invest fiduciary funds under applicable state law;

(iv) Surety bonds, to the extent they provide adequate security, unless prohibited by applicable law; and

(v) Any other assets that qualify under applicable state law as appropriate security for deposits of fiduciary funds.

(c) *Affiliate deposits.* A national bank, acting in its fiduciary capacity, may deposit funds of a fiduciary account that are awaiting investment or distribution with an affiliated insured depository institution, unless prohibited by applicable law. A national bank may set aside collateral as security for a deposit by or with an affiliate of fiduciary funds awaiting investment or distribution, unless prohibited by applicable law.

§ 9.11 Investment of fiduciary funds.

A national bank shall invest funds of a fiduciary account in a manner consistent with applicable law.

§ 9.12 Self-dealing and conflicts of interest.

(a) *Investments for fiduciary accounts*—(1) *In general.* Unless authorized by applicable law, a national bank may not invest funds of a fiduciary account for which a national bank has investment discretion in the stock or obligations of, or in assets acquired from: the bank or any of its directors, officers, or employees; affiliates of the bank or any of their directors, officers, or employees; or individuals or organizations with whom there exists an interest that might affect the exercise of the best judgment of the bank.

(2) *Additional securities investments.* If retention of stock or obligations of the bank or its affiliates in a fiduciary account is consistent with applicable law, the bank may:

(i) Exercise rights to purchase additional stock (or securities convertible into additional stock) when offered pro rata to stockholders; and

(ii) Purchase fractional shares to complement fractional shares acquired through the exercise of rights or the receipt of a stock dividend resulting in fractional share holdings.

(b) *Loans, sales, or other transfers from fiduciary accounts*—(1) *In general.* A national bank may not lend, sell, or otherwise transfer assets of a fiduciary account for which a national bank has investment discretion to the bank or any of its directors, officers, or employees, or to affiliates of the bank or any of their directors, officers, or employees, or to individuals or organizations with whom there exists an interest that might affect the exercise of the best judgment of the bank, unless:

(i) The transaction is authorized by applicable law;

(ii) Legal counsel advises the bank in writing that the bank has incurred, in its fiduciary capacity, a contingent or potential liability, in which case the bank, upon the sale or transfer of assets, shall reimburse the fiduciary account in cash at the greater of book or market value of the assets;

(iii) As provided in § 9.18(b)(8)(iii) for defaulted investments; or

(iv) Required in writing by the OCC.

(2) *Loans of funds held as trustee.* Notwithstanding paragraph (b)(1) of this section, a national bank may not lend to any of its directors, officers, or employees any funds held in trust, except with respect to employee benefit plans in accordance with the exemptions found in section 408 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108).

(c) *Loans to fiduciary accounts.* A national bank may make a loan to a fiduciary account and may hold a security interest in assets of the account if the transaction is fair to the account and is not prohibited by applicable law.

(d) *Sales between fiduciary accounts.* A national bank may sell assets between any of its fiduciary accounts if the transaction is fair to both accounts and is not prohibited by applicable law.

(e) *Loans between fiduciary accounts.* A national bank may make a loan between any of its fiduciary accounts if the transaction is fair to both accounts and is not prohibited by applicable law.

§ 9.13 Custody of fiduciary assets.

(a) *Control of fiduciary assets.* A national bank shall place assets of fiduciary accounts in the joint custody or control of not fewer than two of the fiduciary officers or employees designated for that purpose by the board of directors. A national bank may maintain the investments of a fiduciary account off-premises, if consistent with applicable law and if the bank maintains adequate safeguards and controls.

(b) *Separation of fiduciary assets.* A national bank shall keep the assets of fiduciary accounts separate from the assets of the bank. A national bank shall keep the assets of each fiduciary account separate from all other accounts or shall identify the investments as the property of a particular account, except as provided in § 9.18.

§ 9.14 Deposit of securities with state authorities.

(a) *In general.* If state law requires corporations acting in a fiduciary capacity to deposit securities with state authorities for the protection of private or court trusts, then before a national bank acts as a private or court-appointed trustee in that state, it shall make a similar deposit with state authorities. If the state authorities refuse to accept the deposit, the bank shall deposit the securities with the Federal Reserve Bank of the district in which the national bank is located, to be held for the protection of private or court trusts to the same extent as if the securities had been deposited with state authorities.

(b) *Assets held in more than one state.* If a national bank administers trust assets in more than one state, the bank may compute the amount of deposit required for each state on the basis of trust assets that the bank administers primarily from offices located in that state.

§ 9.15 Fiduciary compensation.

(a) *Compensation of bank.* If the amount of a national bank's compensation for acting in a fiduciary capacity is not set or governed by applicable law, the bank may charge a reasonable fee for its services.

(b) *Compensation of co-fiduciary officers and employees.* A national bank may not permit any officer or employee to retain any compensation for acting as a co-fiduciary with the bank in the administration of a fiduciary account, except with the specific approval of the bank's board of directors.

§ 9.16 Receivership or voluntary liquidation of bank.

If the OCC appoints a receiver for an uninsured national bank, or if a national bank places itself in voluntary liquidation, the receiver or liquidating agent shall promptly close or transfer to a substitute fiduciary all fiduciary accounts, in accordance with OCC instructions and the orders of the court having jurisdiction.

§ 9.17 Surrender or revocation of fiduciary powers.

(a) *Surrender.* In accordance with 12 U.S.C. 92a(j), a national bank seeking to surrender its fiduciary powers shall file with the OCC a certified copy of the resolution of its board of directors evidencing that intent. If, after appropriate investigation, the OCC is satisfied that the bank has been discharged from all fiduciary duties, the OCC will provide written notice that the bank is no longer authorized to exercise fiduciary powers.

(b) *Revocation.* If the OCC determines that a national bank has unlawfully or unsoundly exercised, or has failed for a period of five consecutive years to exercise its fiduciary powers, the Comptroller may, in accordance with the provisions of 12 U.S.C. 92a(k), revoke the bank's fiduciary powers.

§ 9.18 Collective investment funds.

(a) *In general.* Where consistent with applicable law, a national bank may invest assets that it holds as fiduciary in the following collective investment funds: [1]

(1) A fund maintained by the bank, or by one or more affiliated banks,[2] exclusively for the collective investment and reinvestment of money contributed to the fund by the bank, or by one or more affiliated banks, in its capacity as trustee, executor, administrator, guardian, or custodian under a uniform gifts to minors act.

(2) A fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts that are exempt from Federal income tax.

(i) A national bank may invest assets of retirement, pension, profit sharing, stock bonus, or other trusts exempt from Federal income tax and that the bank holds in its capacity as trustee in a collective investment fund established under paragraph (a)(1) or (a)(2) of this section.

(ii) A national bank may invest assets of retirement, pension, profit sharing, stock bonus, or other employee benefit trusts exempt from Federal income tax and that the bank holds in any capacity (including agent), in a collective investment fund established under this

[1] In determining whether investing fiduciary assets in a collective investment fund is proper, the bank may consider the fund as a whole and, for example, shall not be prohibited from making that investment because any particular asset is nonincome producing.

[2] A fund established pursuant to this paragraph (a)(1) that includes money contributed by entities that are affiliates under 12 U.S.C. 221a(b), but are not members of the same affiliated group, as defined at 26 U.S.C. 1504, may fail to qualify for tax-exempt status under the Internal Revenue Code. *See* 26 U.S.C. 584.

paragraph (a)(2) if the fund itself qualifies for exemption from Federal income tax.

(b) *Requirements.* A national bank administering a collective investment fund authorized under paragraph (a) of this section shall comply with the following requirements:

(1) *Written plan.* The bank shall establish and maintain each collective investment fund in accordance with a written plan (Plan) approved by a resolution of the bank's board of directors or by a committee authorized by the board. The bank shall make a copy of the Plan available for public inspection at its main office during all banking hours, and shall provide a copy of the Plan to any person who requests it. The Plan must contain appropriate provisions, not inconsistent with this part, regarding the manner in which the bank will operate the fund, including provisions relating to:

(i) Investment powers and policies with respect to the fund;

(ii) Allocation of income, profits, and losses;

(iii) Fees and expenses that will be charged to the fund and to participating accounts;

(iv) Terms and conditions governing the admission and withdrawal of participating accounts;

(v) Audits of participating accounts;

(vi) Basis and method of valuing assets in the fund;

(vii) Expected frequency for income distribution to participating accounts;

(viii) Minimum frequency for valuation of fund assets;

(ix) Amount of time following a valuation date during which the valuation must be made;

(x) Bases upon which the bank may terminate the fund; and

(xi) Any other matters necessary to define clearly the rights of participating accounts.

(2) *Fund management.* A bank administering a collective investment fund shall have exclusive management thereof, except as a prudent person might delegate responsibilities to others.[3]

(3) *Proportionate interests.* Each participating account in a collective investment fund must have a proportionate interest in all the fund's assets.

[3] If a fund, the assets of which consist solely of Individual Retirement Accounts, Keogh Accounts, or other employee benefit accounts that are exempt from taxation, is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the fund will not be deemed in violation of this paragraph (b)(2) as a result of its compliance with section 10(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–10(c)).

(4) *Valuation*—(i) *Frequency of valuation.* A bank administering a collective investment fund shall determine the value of the fund's assets at least once every three months. However, in the case of a fund described in paragraph (a)(2) of this section that is invested primarily in real estate or other assets that are not readily marketable, the bank shall determine the value of the fund's assets at least once each year.

(ii) *Method of valuation*—(A) *In general.* Except as provided in paragraph (b)(4)(ii)(B) of this section, a bank shall value each fund asset at market value as of the date set for valuation, unless the bank cannot readily ascertain market value, in which case the bank shall use a fair value determined in good faith.

(B) *Short-term investment funds.* A bank may value a fund's assets on a cost, rather than market value, basis for purposes of admissions and withdrawals, if the Plan requires the bank to:

(*1*) Maintain a dollar-weighted average portfolio maturity of 90 days or less;

(*2*) Accrue on a straight-line basis the difference between the cost and anticipated principal receipt on maturity; and

(*3*) Hold the fund's assets until maturity under usual circumstances.

(5) *Admission and withdrawal of accounts*—(i) *In general.* A bank administering a collective investment fund shall admit an account to or withdraw an account from the fund only on the basis of the valuation described in paragraph (b)(4) of this section.

(ii) *Prior request or notice.* A bank administering a collective investment fund may admit an account to or withdraw an account from a collective investment fund only if the bank has approved a request for or a notice of intention of taking that action on or before the valuation date on which the admission or withdrawal is based. No requests or notices may be canceled or countermanded after the valuation date.

(iii) *Prior notice period for withdrawals from funds with assets not readily marketable.* A bank administering a collective investment fund described in paragraph (a)(2) of this section that is invested primarily in real estate or other assets that are not readily marketable, may require a prior notice period, not to exceed one year, for withdrawals.

(iv) *Method of distributions.* A bank administering a collective investment fund shall make distributions to accounts withdrawing from the fund in cash, ratably in kind, a combination of cash and ratably in kind, or in any other manner consistent with applicable law in the state in which the bank maintains the fund.

(v) *Segregation of investments.* If an investment is withdrawn in kind from a collective investment fund for the benefit of all participants in the fund at the time of the withdrawal but the investment is not distributed ratably in kind, the bank shall segregate and administer it for the benefit ratably of all participants in the collective investment fund at the time of withdrawal.

(6) *Audits and financial reports*—(i) *Annual audit.* At least once during each 12-month period, a bank administering a collective investment fund shall arrange for an audit of the collective investment fund by auditors responsible only to the board of directors of the bank.[4]

(ii) *Financial report.* At least once during each 12-month period, a bank administering a collective investment fund shall prepare a financial report of the fund based on the audit required by paragraph (b)(6)(i) of this section. The report must disclose the fund's fees and expenses in a manner consistent with applicable law in the state in which the bank maintains the fund. This report must contain a list of investments in the fund showing the cost and current market value of each investment, and a statement covering the period after the previous report showing the following (organized by type of investment):

(A) A summary of purchases (with costs);

(B) A summary of sales (with profit or loss and any other investment changes);

(C) Income and disbursements; and

(D) An appropriate notation of any investments in default.

(iii) *Limitation on representations.* A bank may include in the financial report a description of the fund's value on previous dates, as well as its income and disbursements during previous accounting periods. A bank may not publish in the financial report any predictions or representations as to future performance. In addition, with respect to funds described in paragraph (a)(1) of this section, a bank may not publish the performance of individual funds other than those administered by the bank or its affiliates.

(iv) *Availability of the report.* A bank administering a collective investment

[4] If a fund, the assets of which consist solely of Individual Retirement Accounts, Keogh Accounts, or other employee benefit accounts that are exempt from taxation, is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), the fund will not be deemed in violation of this paragraph (b)(6)(i) as a result of its compliance with section 10(c) of the Investment Company Act of 1940 (15 U.S.C. 80a–10(c)), if the bank has access to the audit reports of the fund.

fund shall provide a copy of the financial report, or shall provide notice that a copy of the report is available upon request without charge, to each person who ordinarily would receive a regular periodic accounting with respect to each participating account. The bank may provide a copy of the financial report to prospective customers. In addition, the bank shall provide a copy of the report upon request to any person for a reasonable charge.

(7) *Advertising restriction.* A bank may not advertise or publicize any fund authorized under paragraph (a)(1) of this section, except in connection with the advertisement of the general fiduciary services of the bank.

(8) *Self-dealing and conflicts of interest.* A national bank administering a collective investment fund must comply with the following (in addition to § 9.12):

(i) *Bank interests.* A bank administering a collective investment fund may not have an interest in that fund other than in its fiduciary capacity. If, because of a creditor relationship or otherwise, the bank acquires an interest in a participating account, the participating account must be withdrawn on the next withdrawal date. However, a bank may invest assets that it holds as fiduciary for its own employees in a collective investment fund.

(ii) *Loans to participating accounts.* A bank administering a collective investment fund may not make any loan on the security of a participant's interest in the fund. An unsecured advance to a fiduciary account participating in the fund until the time of the next valuation date does not constitute the acquisition of an interest in a participating account by the bank.

(iii) *Purchase of defaulted investments.* A bank administering a collective investment fund may purchase for its own account any defaulted investment held by the fund (in lieu of segregating the investment in accordance with paragraph (b)(5)(v) of this section) if, in the judgment of the bank, the cost of segregating the investment is excessive in light of the market value of the investment. If a bank elects to purchase a defaulted investment, it shall do so at the greater of market value or the sum of cost and accrued unpaid interest.

(9) *Management fees.* A bank administering a collective investment fund may charge a reasonable fund management fee only if:

(i) The fee is permitted under applicable law (and complies with fee disclosure requirements, if any) in the state in which the bank maintains the fund; and

(ii) The amount of the fee does not exceed an amount commensurate with the value of legitimate services of tangible benefit to the participating fiduciary accounts that would not have been provided to the accounts were they not invested in the fund.

(10) *Expenses.* A bank administering a collective investment fund may charge reasonable expenses incurred in operating the collective investment fund, to the extent not prohibited by applicable law in the state in which the bank maintains the fund. However, a bank shall absorb the expenses of establishing or reorganizing a collective investment fund.

(11) *Prohibition against certificates.* A bank administering a collective investment fund may not issue any certificate or other document representing a direct or indirect interest in the fund, except to provide a withdrawing account with an interest in a segregated investment.

(12) *Good faith mistakes.* The OCC will not deem a bank's mistake made in good faith and in the exercise of due care in connection with the administration of a collective investment fund to be a violation of this part if, promptly after the discovery of the mistake, the bank takes whatever action is practicable under the circumstances to remedy the mistake.

(c) *Other collective investments.* In addition to the collective investment funds authorized under paragraph (a) of this section, a national bank may collectively invest assets that it holds as fiduciary, to the extent not prohibited by applicable law, as follows:

(1) *Single loans or obligations.* In the following loans or obligations, if the bank's only interest in the loans or obligations is its capacity as fiduciary:

(i) A single real estate loan, a direct obligation of the United States, or an obligation fully guaranteed by the United States, or a single fixed amount security, obligation, or other property, either real, personal, or mixed, of a single issuer; or

(ii) A variable amount note of a borrower of prime credit, if the bank uses the note solely for investment of funds held in its fiduciary accounts.

(2) *Mini-funds.* In a fund maintained by the bank for the collective investment of cash balances received or held by a bank in its capacity as trustee, executor, administrator, guardian, or custodian under a uniform gifts to minors act, that the bank considers too small to be invested separately to advantage. The total assets in the fund must not exceed $1,000,000 and the number of participating accounts must not exceed 100.

(3) *Trust funds of corporations and closely-related settlors.* In any investment specifically authorized by the instrument creating the fiduciary account or a court order, in the case of trusts created by a corporation, including its affiliates and subsidiaries, or by several individual settlors who are closely related.

(4) *Other authorized funds.* In any collective investment authorized by applicable law, such as investments pursuant to a state pre-need funeral statute.

(5) *Special exemption funds.* In any other manner described by the bank in a written plan approved by the OCC.[5] In order to obtain a special exemption, a bank shall submit to the OCC a written plan that sets forth:

(i) The reason that the proposed fund requires a special exemption;

(ii) The provisions of the proposed fund that are inconsistent with paragraphs (a) and (b) of this section;

(iii) The provisions of paragraph (b) of this section for which the bank seeks an exemption; and

(iv) The manner in which the proposed fund addresses the rights and interests of participating accounts.

§ 9.20 Transfer agents.

(a) The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1) prescribing procedures for registration of transfer agents for which the SEC is the appropriate regulatory agency (17 CFR 240.17Ac2–1) apply to the domestic activities of national bank transfer agents. References to the ''Commission'' are deemed to refer to the ''OCC.''

(b) The rules adopted by the SEC pursuant to section 17A of the Securities Exchange Act of 1934 prescribing operational and reporting requirements for transfer agents (17 CFR 240.17Ac2–2, and 240.17Ad–1 through 240.17Ad–16) apply to the domestic activities of national bank transfer agents.

Interpretations

§ 9.100 Acting as indenture trustee and creditor.

With respect to a debt securities issuance, a national bank may act both as indenture trustee and as creditor

[5] Any institution that must comply with this section in order to receive favorable tax treatment under 26 U.S.C. 584 (namely, any corporate fiduciary) may seek OCC approval of special exemption funds in accordance with this paragraph (c)(5).

until 90 days after default, if the bank maintains adequate controls to manage the potential conflicts of interest.

PART 19—RULES OF PRACTICE AND PROCEDURE

2. The authority citation for part 19 is revised to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1817, 1818, 1820, 1831o, 1972, 3102, 3108(a), 3909 and 4717; 15 U.S.C. 78(h) and (i), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, and 78w; 28 U.S.C. 2461 note; 31 U.S.C. 330 and 5321; and 42 U.S.C. 4012a.

3. A new § 19.135 is added to subpart E of part 19 to read as follows:

§ 19.135 Applications for stay or review of disciplinary actions imposed by registered clearing agencies.

(a) *Stays.* The rules adopted by the Securities and Exchange Commission (SEC) pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for stays of disciplinary sanctions or summary suspensions imposed by registered clearing agencies (17 CFR 240.19d–2) apply to applications by national banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

(b) *Reviews.* The regulations adopted by the SEC pursuant to section 19 of the Securities Exchange Act of 1934 (15 U.S.C. 78s) regarding applications by persons for whom the SEC is the appropriate regulatory agency for reviews of final disciplinary sanctions, denials of participation, or prohibitions or limitations of access to services imposed by registered clearing agencies (17 CFR 240.19d–3(a)–(f)) apply to applications by national banks. References to the ''Commission'' are deemed to refer to the ''OCC.''

Dated: December 23, 1996.

Eugene A. Ludwig,

Comptroller of the Currency.

[FR Doc. 96–32943 Filed 12–27–96; 8:45 am]

BILLING CODE 4810–33–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 367

RIN 3064–AB76

Suspension and Exclusion of Contractors and Termination of Contracts

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Board of Directors of the Federal Deposit Insurance Corporation (FDIC or Corporation) is adopting a final rule concerning suspension and exclusion of FDIC contractors and termination of contracts. The final rule is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act (FDI Act), and the rule-making authority of the FDIC found at section 9 of the Act. Additional provisions implementing these statutory directives appear in the FDIC's regulation as published in the Federal Register on June 6, 1996 governing contractor conflicts of interest and the requirements that FDIC contractors meet minimum standards of competence, experience, fitness and integrity. This final rule is a companion to the conflict of interest regulation in that it sets forth procedures for the suspension and/or exclusion of contractors that have violated the conflicts of interest regulations (and hence, fail to meet minimum standards of fitness and integrity), or have otherwise acted in a manner warranting such action. In addition to FDIC contractors, this final rule also applies to subcontractors, key employees, management officials and affiliated business entities of FDIC contractors (all such terms are defined herein), and is designed to inform such contractors regarding their rights to notice and an opportunity to be heard on FDIC suspension and exclusion actions. The final rule is identical to an interim final rule adopted by the FDIC and published as an interim final rule on July 5, 1996 (61 FR 35115) except for one minor clarifying change.

EFFECTIVE DATE: This final rule is effective December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Peter A. Ziebert, Counsel, Legal Division, (202) 736–0742; or Richard M. Handy, Assistant Executive Secretary (Ethics), Office of the Executive Secretary, (202) 898–7271.

SUPPLEMENTARY INFORMATION:

I. Background

The final rule that is being adopted herein, to be codified at 12 CFR part 367, sets forth standards and procedures governing suspension and exclusion of FDIC contractors, which includes subcontractors, management officials, key employees and affiliated business entities of such contractors, for violations of 12 CFR part 366, the FDIC's contractor conflict of interest regulation. This final rule also provides for the termination of awarded contracts of FDIC contractors. For the most part, this rule is modeled after the suspension and exclusion regulation used by the Resolution Trust Corporation (RTC) until RTC sunset on December 31, 1995, which had been codified at 12 CFR part 1618. This rule also bears similarity to the suspension and debarment procedures utilized by other federal entities, which have been developed after extensive public comment and have withstood considerable judicial scrutiny. However, as discussed below, the rule departs in certain respects from the procedures used by other federal entities because the FDIC is not subject to the Federal Acquisition Regulation (FAR). The rule also revises the former RTC regulation in several ways as the FDIC now promulgates its own suspension and exclusion regulation.

Generally, this rule provides for more expedited and less formal procedures than are used by other federal agencies, while at the same time satisfying due process requirements regarding notice and an opportunity to be heard. These expedited procedures are necessary due to the urgent need to protect the FDIC and the public interest against further dissipation of assets now under FDIC control and previously under RTC control.

As noted above, FDIC has a statutory mandate to be vigilant in enforcing the highest ethical standards for its contractors. Accordingly, it is imperative that contractor suspension and exclusion proceedings be processed as expeditiously as possible consistent with due process requirements that affected contractors be afforded notice and an opportunity to be heard on such enforcement actions.

II. Summary of Comments

The FDIC did not receive any public comments to the interim final rule published on July 5, 1996.

III. The Final Rule

The FDIC has decided to adopt the interim final rule, without change, as a final regulation, except for one minor clarification. The interim final rule inadvertently failed to state that causes for exclusion are to be shown by an evidentiary standard of a ''preponderance of the evidence''. That term was defined at § 367.2(q) of the interim final rule, and appears at that section in the final rule. The clarification will thus make clear that the causes for exclusion set forth at § 367.6 are to be established by a preponderance of the evidence. This clarification will contrast with language, set forth in the interim final rule and included in this final rule, concerning the evidentiary standard to be used in suspension actions, i.e., suspensions may be imposed upon a showing of ''adequate evidence'' of one of the enumerated causes for suspension (See § 367.8).

IV. Regulatory Flexibility Analysis

The Board of Directors has concluded that the final rule will not impose a significant economic hardship on small institutions. Therefore, the Board of Directors hereby certifies pursuant to section 605 of the Regulatory Flexibility Act (5 U.S.C. 605) that the final rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Therefore, the provisions of that Act relating to an initial and final regulatory flexibility analysis do not apply.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is inapplicable to the final rule as it does not establish any new recordkeeping or collection of information requirement or amend any such existing requirement.

List of Subjects in 12 CFR Part 367

Administrative practice and procedure, Conflict of interests, Government contracts.

For the reasons set out in the preamble, the interim final rule adding 12 CFR part 367 which was published at 61 FR 35115 on July 5, 1996, is adopted as a final rule and revised to read as follows:

PART 367—SUSPENSION AND EXCLUSION OF CONTRACTOR AND TERMINATION OF CONTRACTS

Sec.

Authority: 12 U.S.C. 1822(f) (4) and (5).

§ 367.1 Authority, purpose, scope and application.

(a) *Authority.* This part is adopted pursuant to section 12(f) (4) and (5) of the Federal Deposit Insurance Act, 12 U.S.C. 1822(f) (4) and (5), and the rule-making authority of the Federal Deposit Insurance Corporation (FDIC) found at 12 U.S.C. 1819. Other regulations implementing these statutory directives appear at 12 CFR part 366.

(b) *Purpose.* This part is designed to inform contractors and subcontractors (including their affiliated business entities, key employees and management officials) regarding their rights to notice and an opportunity to be heard on FDIC actions involving suspension and exclusion from contracting and rescission of existing contracts. This part is in addition to, and not in lieu of, any other statute or regulation that may apply to such contractual activities.

(c) *Scope.* This part applies to:

(1) Contractors, other than attorneys or law firms providing legal services, submitting offers to provide services or entering into contracts to provide services to the FDIC acting in any capacity; and

(2) Subcontractors entering into contracts to perform services under a proposed or existing contract with the FDIC.

(d) *Application.* (1) This part will apply to entities that become contractors, as defined in § 367.2(f), on or after December 30, 1996. In addition, this part will apply to contractors as defined in § 367.2(f) that are performing contracts on December 30, 1996.

(2) This part will also apply to actions initiated on or after December 30, 1996 regardless of the date of the cause giving rise to the actions.

(3) Contracts entered into by the former Resolution Trust Corporation (RTC) that were transferred to the FDIC will be treated in the same manner as FDIC contracts under this part.

(4) RTC actions taken under the RTC regulations on or before December 31, 1995, will be honored as if taken by the FDIC. A contractor subject to an RTC exclusion or suspension will be precluded thereby from participation in the FDIC's contracting program unless that exclusion or suspension is modified or terminated under the provisions of this part.

§ 367.2 Definitions.

(a) *Adequate evidence* means information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliated business entity* means a company that is under the control of the contractor, is in control of the contractor, or is under common control with the contractor.

(c) *Civil judgment* means a judgment of a civil offense or liability by any court of competent jurisdiction in the United States.

(d) *Company* means any corporation, firm, partnership, society, joint venture, business trust, association, consortium or similar organization.

(e) *Conflict of interest* means a situation in which:

(1) A contractor; any management officials or affiliated business entities of a contractor; or any employees, agents, or subcontractors of a contractor who will perform services under a proposed or existing contract with the FDIC:

(i) Has one or more personal, business, or financial interests or relationships which would cause a reasonable individual with knowledge of the relevant facts to question the integrity or impartiality of those who are or will be acting under a proposed or existing FDIC contract;

(ii) Is an adverse party to the FDIC, RTC, the former Federal Savings and Loan Insurance Corporation (FSLIC), or their successors in a lawsuit; or

(iii) Has ever been suspended, excluded, or debarred from contracting with a federal entity or has ever had a contract with the FDIC, RTC, FSLIC or their successors rescinded or terminated prior to the contract's completion and which rescission or termination involved issues of conflicts of interest or ethical responsibilities; or

(2) Any other facts exist which the FDIC, in its sole discretion, determines may, through performance of a proposed or existing FDIC contract, provide a contractor with an unfair competitive advantage which favors the interests of the contractor or any person with whom the contractor has or is likely to have a personal or business relationship.

(f) *Contractor* means a person or company which has submitted an offer to perform services for the FDIC or has a contractual arrangement with the FDIC to perform services. For purposes of this part, contractor also includes:

(1) A contractor's affiliated business entities, key employees, and management officials of the contractor;

(2) Any subcontractor performing services for the FDIC and the management officials and key employees of such subcontractors; and

(3) Any entity or organization seeking to perform services for the FDIC as a minority or woman-owned business (MWOB).

(g) *Contract(s)* means agreement(s) between FDIC and a contractor, including, but not limited to, agreements identified as ''Task Orders'', for a contractor to provide services to FDIC. Contracts also mean contracts between a contractor and its subcontractor.

(h) *Control* means the power to vote, directly or indirectly, 25 percent or more of any class of the voting stock of a company; the ability to direct in any manner the election of a majority of a company's directors or trustees; or the ability to exercise a controlling influence over the company's management and policies. For purposes of this definition, a general partner of a limited partnership is presumed to be in control of that partnership.

(i) *Conviction* means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea, and includes pleas of nolo contendere.

(j) *FDIC* means the Federal Deposit Insurance Corporation acting in its receivership and corporate capacities, and FDIC officials or committees acting under delegated authority.

(k) *Indictment* shall include an information or other filing by a competent authority charging a criminal offense.

(l) *Key employee* means an individual who participates personally and substantially in the negotiation of, performance of, and/or monitoring for compliance under a contract with the FDIC. Such participation is made through, but is not limited to, decision, approval, disapproval, recommendation, or the rendering of advice under the contract.

(m) *Management official* means any shareholder, employee or partner who controls a company and any individual who directs the day-to-day operations of a company. With respect to a partnership, all partners are deemed to be management officials unless the partnership is governed by a management or executive committee with responsibility for the day-to-day operations. In partnerships with such committees, management official means only those partners who are a member of such a committee.

(n) *Material fact* means one that is necessary to determine the outcome of an issue or case and without which the case could not be supported.

(o) *Offer* means a proposal or other written or oral offer to provide services to FDIC.

(p) *Pattern or practice of defalcation regarding obligations* means two or more instances in which a loan or advance from an insured depository institution:

(1) Is in default for ninety (90) or more days as to payment of principal, interest, or a combination thereof, and there remains a legal obligation to pay an amount in excess of $50,000; or

(2) Where there has been a failure to comply with the terms of a loan or advance to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000 to the insured depository institution.

(q) *Preponderance of the evidence* means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(r) *Subcontractor* means an entity or organization that enters into a contract with an FDIC contractor or another subcontractor to perform services under a proposed or existing contract with the FDIC.

(s) *Substantial loss to federal deposit insurance funds* means:

(1) A loan or advance from an insured depository institution, which is currently owed to the FDIC, RTC, FSLIC or their successors, or the Bank Insurance Fund (BIF), the Savings Association Insurance Fund (SAIF), the FSLIC Reserve Fund (FRF), or funds that were maintained by the RTC for the benefit of insured depositors, that is or has ever been delinquent for ninety (90) or more days as to payment of principal, interest, or a combination thereof and on which there remains a legal obligation to pay an amount in excess of $50,000;

(2) An obligation to pay an outstanding, unsatisfied, final judgment in excess of $50,000 in favor of the FDIC, RTC, FSLIC, or their successors, or the BIF, the SAIF, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors; or

(3) A loan or advance from an insured depository institution which is currently owed to the FDIC, RTC, FSLIC or their successors, or the BIF, the SAIF, the FRF or the funds that were maintained by the RTC for the benefit of insured depositors, where there has been a failure to comply with the terms to such an extent that the collateral securing the loan or advance was foreclosed upon, resulting in a loss in excess of $50,000.

§ 367.3 Appropriate officials.

(a) The *Ethics Counselor* is the Executive Secretary of the FDIC. The Ethics Counselor shall act as the official responsible for rendering suspension and exclusion decisions under this part. In addition to taking suspension and/or exclusion action under this part, the Ethics Counselor has authority to terminate exclusion and suspension proceedings. As used in this part, ''Ethics Counselor'' includes any official designated by the Ethics Counselor to act on the Ethics Counselor's behalf.

(b) The *Corporation Ethics Committee* is the Committee appointed by the Chairman of the FDIC, or Chairman's designee, which provides review of any suspension or exclusion decision rendered by the Ethics Counselor that is appealed by a contractor who has been suspended and/or excluded from FDIC contracting.

(c) Information concerning the possible existence of any cause for suspension or exclusion shall be reported to the Office of the Executive Secretary (Ethics Section). This part does not modify the responsibility to report allegations of fraud, waste and abuse, including but not limited to criminal violations, to the Office of Inspector General.

§ 367.4 [Reserved]

§ 367.5 Exclusions.

(a) The Ethics Counselor may exclude a contractor from the FDIC contracting program for any of the causes set forth in § 367.6, using procedures established in this part.

(b) Exclusion is a serious action to be imposed when there exists a preponderance of the evidence that a contractor has violated one or more of the causes set forth in § 367.6. Contractors excluded from FDIC contracting programs are prohibited from entering into any new contracts with FDIC for the duration of the period of exclusion as determined pursuant to this part. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Excluded contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors. *Provided however,* that these limitations do not become effective upon the notification of the contractor that there is a possible cause to exclude under § 367.13. Rather, they become effective only upon the Ethics Counselor's decision to exclude the contractor pursuant to § 367.16. *Provided further,* that the causes for exclusion set forth in § 367.6(a)(1) through (4) reflect statutorily established mandatory bars to contracting with the FDIC.

(c) Except when one or more of the statutorily established mandatory bars to contracting are shown to exist, the existence of a cause for exclusion does not necessarily require that the contractor be excluded; the seriousness of the contractor's acts or omissions and any mitigating or aggravating circumstances shall be considered in making any exclusion decision.

§ 367.6 Causes for exclusion.

The FDIC may exclude a contractor, in accordance with the procedures set forth in this part, upon a finding that:

(a) The contractor has been convicted of any felony;

(b) The contractor has been removed from, or prohibited from participating in the affairs of, any insured depository institution pursuant to any final enforcement action by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System, or the FDIC or their successors;

(c) The contractor has demonstrated a pattern or practice of defalcation;

(d) The contractor has caused a substantial loss to Federal deposit insurance funds;

(e) The contractor has failed to disclose, pursuant to 12 CFR 366.6, a material fact to the FDIC;

(f) The contractor has failed to disclosed any material adverse change in the representations and certifications provided to FDIC under 12 CFR 366.6;

(g) The contractor has miscertified its status as a minority and/or woman owned business (MWOB);

(h) The contractor has a conflict of interest that was not waived by the Ethics Counselor or designee;

(i) The contractor has been subject to a final enforcement action by any federal financial institution regulatory agency, or has stipulated to such action;

(j) The contractor is debarred from participating in other federal programs;

(k) The contractor has been convicted of, or subject to a civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction, or conspiracy to do the same;

(2) Violation of federal or state antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging, or conspiracy to do the same;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, obstructing of justice, or conspiracy to do the same;

(4) Commission of any other offense indicating a breach of trust, dishonesty or lack of integrity, or conspiracy to do the same;

(l) The contractor's performance under previous contract(s) with FDIC or RTC has resulted in:

(1) The FDIC or RTC declaring such contract(s) to be in default; or

(2) The termination of such contract(s) for poor performance; or

(3) A violation of the terms of a contract that would have resulted in a default or termination of the contract for poor performance if that violation had been discovered during the course of the contract; or

(m) The contractor has engaged in any conduct:

(1) Indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects its ability to meet standards of present responsibility required of an FDIC contractor; or

(2) So serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimum ethical standards required by 12 CFR part 366.

§ 367.7 Suspensions.

(a) The Ethics Counselor may suspend a contractor for any of the causes in § 367.8 using the procedures established in this section.

(b) Suspension is an action to be imposed when there exists adequate evidence of one or more of the causes set out in § 367.8. This includes, but is not limited to, situations where immediate action is necessary to protect the integrity of the FDIC contracting program and/or the security of FDIC assets during the pendency of legal or investigative proceedings initiated by FDIC, any federal agency or any law enforcement authority.

(c) The duration of any suspension action shall be for a temporary period pending the completion of an investigation and such other legal proceedings as may ensue.

(d) A suspension shall become effective immediately upon issuance of the notice specified in § 367.13(b).

(e) Contractors suspended from FDIC contracting programs are prohibited from entering into any new contracts with the FDIC for the duration of the period of suspension. The FDIC shall not solicit offers from, award contracts to, extend or modify existing contracts, award task orders under existing contracts, or consent to subcontracts with such contractors. Suspended contractors are also prohibited from conducting business with FDIC as agents or representatives of other contractors.

§ 367.8 Causes for suspension.

(a) Suspension may be imposed under the procedures set forth in this section upon adequate evidence:

(1) Of suspension by another federal agency;

(2) That a cause for exclusion under § 367.6 may exist;

(3) Of the commission of any other offense indicating a breach of trust, dishonesty, or lack of integrity that seriously and directly affects the minimum ethical standards required of an FDIC contractor; or

(4) Of any other cause so serious or compelling in nature that it adversely affects the ability of a contractor to meet the minimal ethical standards required by 12 CFR part 366.

(b) Indictment for any offense described in § 367.6 is adequate evidence to suspend a contractor.

(c) In assessing the adequacy of the evidence, FDIC will consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated and what inferences can reasonably be drawn as a result.

§ 367.9 Imputation of causes.

(a) Where there is cause to suspend and/or exclude any affiliated business entity of the contractor, that conduct may be imputed to the contractor if the conduct occurred in connection with the affiliated business entity's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(b) Where there is cause to suspend and/or exclude any contractor, that conduct may be imputed to any affiliated business entity, key employee, or management official of a contractor who participated in, knew of or had reason to know of the contractor's conduct.

(c) Where there is cause to suspend and/or exclude a key employee or management official of a contractor, that cause may be imputed to the contractor if the conduct occurred in connection with the key employee or management official's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(d) Where there is cause to suspend and/or exclude one contractor participating in a joint venture or similar arrangement, that cause may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(e) Where there is cause to suspend and/or exclude a subcontractor, that cause may be imputed to the contractor for which the subcontractor performed services, if the conduct occurred for or on behalf of the contractor and with the contractor's knowledge, approval, or acquiescence. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§ 367.10–367.11 [Reserved]

§ 367.12 Procedures.

(a) FDIC shall process suspension and exclusion actions as informally as practicable, consistent with its policy of providing contractors with adequate information on the grounds that give rise to the proposed action and affording contractors with a reasonable opportunity to respond.

(b) For purposes of determining filing dates for the pleadings required by this part, including responses, notices of appeal, appeals and requests for reconsideration, the provisions relating to the construction of time limits in 12 CFR 308.12 will control.

§ 367.13 Notices.

(a) *Exclusions.* Before excluding a contractor, the FDIC shall send it a written notice of possible cause to exclude. Such notice shall include:

(1) Notification that exclusion for a specified period of time is being considered based on the specified cause(s) in § 367.6 to be relied upon;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicates that there is cause to believe a cause for exclusion exists, described in sufficient detail to put the contractor on notice of the conduct or transaction(s) upon which an exclusion proceeding is based;

(3) Notification that the contractor is not prohibited from contracting with the FDIC unless and until it is either suspended from FDIC contracting or the FDIC Ethics Counselor issues a decision excluding the contractor, *provided however,* in any case where the possible cause for exclusion would also be an impediment to the contractor's eligibility pursuant to 12 CFR part 366, the contractor's eligibility for any contract will be determined under that part; and

(4) Notification of the regulatory provisions governing the exclusion proceeding and the potential effect of a final exclusion decision.

(b) *Suspensions.* Before suspending a contractor, the FDIC shall send it notice, including:

(1) Notice that a suspension is being imposed based on specified causes in § 367.8;

(2) Identification of the event(s), circumstance(s), or condition(s) that indicate that there is adequate evidence to believe a cause for suspension exists, described in sufficient detail to put the contractor on notice of the basis for the suspension, recognizing that the conduct of ongoing investigations and legal proceedings, including criminal proceedings, place limitations on the evidence that can be released;

(3) Notification that the suspension prohibits the contractor from contracting with the FDIC for a temporary period, pending the completion of an investigation or other legal proceedings; and

(4) Notification of the regulatory provisions governing the suspension proceeding.

(c) *Service of notices.* Notices will be sent to the contractor by first class mail, postage prepaid. For purposes of compliance with this section, notice shall be considered to have been received by the contractor if the notice is properly mailed to the last known address of such contractor. Whenever practical, a copy of the notice will also be transmitted to the contractor by facsimile. In the event the notice is not sent by facsimile, a copy will be sent by an overnight delivery service such as Express Mail or a commercial equivalent.

§ 367.14 Responses.

(a) The contractor will have 15 days from the date of the notice within which to respond.

(b) The response shall be in writing and may include: information and argument in opposition to the proposed exclusion and/or suspension, including any additional specific information pertaining to the possible causes for exclusion; and information and argument in mitigation of the proposed period of exclusion.

(c) The response may request a meeting with an FDIC official identified in the notice to permit the contractor to discuss issues of fact or law relating to the suspension and/or proposed exclusion or to otherwise resolve the pending matters.

(1) Any such meetings between a contractor and FDIC shall take such form as the FDIC deems appropriate.

(2) In cases of suspensions, no meeting will be held where a representative of the Department of Justice has advised in writing that the substantial interests of the Government would be prejudiced by such a meeting and the Ethics Counselor determines that a suspension is based on the same facts as pending or contemplated legal proceedings referenced by the representative of the Department of Justice.

(d) Failure to respond to the notice shall be deemed an admission of the existence of the cause(s) for suspension and/or exclusion set forth in the notice and an acceptance of the period of exclusion proposed therein. In such circumstances, the FDIC may proceed to a final decision without further proceedings.

(e) Where a contractor has received more than one notice, the FDIC may consolidate the pending proceedings, including the scheduling of any meetings, in accordance with this section.

§ 367.15 Additional proceedings as to disputed material facts.

(a) In actions not based upon a conviction or civil judgment, if the Ethics Counselor finds that the contractor's submission raises a genuine dispute over facts material to the proposed suspension and/or exclusion, the contractor shall be afforded an opportunity to appear (with counsel, if desired), submit documentary evidence, present witnesses, and confront any witnesses the FDIC presents.

(b) The Ethics Counselor may refer disputed material facts to another official for analysis and recommendation.

(c) If requested, a transcribed record of any additional proceedings shall be made available at cost to the contractor.

§ 367.16 Ethics Counselor decisions.

(a) Standard of proof:

(1) An exclusion must be based on a finding that the cause(s) for exclusion is established by a preponderance of the evidence in the administrative record of the case; and

(2) A suspension must be based on a finding that the cause(s) for suspension is established by adequate evidence in the administrative record of the case.

(b) The administrative record consists of the portion of any information, reports, documents or other evidence identified and relied upon in the Notice of Possible Cause to Exclude, the Notice of Suspension and/or supplemental notices, if any, together with any material portions of the contractor's response. When additional proceedings are necessary to determine disputed material facts, the Ethics Counselor shall base the decision on the facts as found, together with any information and argument submitted by the contractor and any other information in the administrative record.

(c) In actions based upon a conviction, judgment, a final enforcement action by a federal financial institution regulatory agency, or in which all facts and circumstances material to the exclusion action have been finally adjudicated in another forum, the Ethics Counselor may exclude a contractor without regard to the procedures set out in §§ 367.13 and 367.14. Any such decisions will be subject to the review and reconsideration provisions of § 367.20.

(d) *Notice of decisions.* Contractors shall be given prompt notice of the Ethics Counselor's decision in the manner described in § 367.13(c). If the Ethics Counselor suspends a contractor or imposes a period of exclusion, the decision shall:

(1) Set forth the cause(s) for suspension and/or exclusion included in the notice that were found by a preponderance of the evidence with reference to the administrative record support for that finding;

(2) Set forth the effect of the exclusion action and the effective dates of that action;

(3) Refer the contractor to its procedural rights of review and reconsideration under § 367.20; and

(4) Inform the contractor that a copy of the exclusion decision shall be placed in the FDIC Public Reading Room.

(e) If the FDIC Ethics Counselor decides that a period of exclusion is not warranted, the Notice of Possible Cause to Exclude may be withdrawn or the proceeding may be otherwise terminated. A decision to terminate an exclusion proceeding may include the imposition of appropriate conditions on the contractor in their future dealings with the FDIC.

§ 367.17 Duration of suspensions and exclusions.

(a) *Suspensions.* (1) Suspensions shall be for a temporary period pending the completion of an investigation or other legal or exclusion proceedings.

(2) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless a representative of the Department of Justice requests its extension in writing. In such cases, the suspension may be extended for an additional six months. In no event may a suspension be imposed for more than 18 months, unless such proceedings have been initiated within that period.

(3) FDIC shall notify the Department of Justice of an impending termination of a suspension at least 30 days before the 12-month period expires to give the Department of Justice an opportunity to request an extension.

(4) The time limitations for suspension in this section may be waived by the affected contractor.

(b) *Exclusions.* (1) Exclusions shall be for a period commensurate with the seriousness of the cause(s) after due consideration of mitigating evidence presented by the contractor.

(2) If a suspension precedes an exclusion, the suspension period shall be considered in determining the exclusion period.

(3) Exclusion for causes other than the mandatory bars in 12 CFR 366.4(a) generally should not exceed three years, but where circumstances warrant, a longer period of exclusion may be imposed.

(4) The Ethics Counselor may extend an existing exclusion for an additional period if the Ethics Counselor determines that an extension is necessary to protect the integrity of the FDIC contracting program and the public interest. However, an exclusion may not be extended solely on the basis of the facts and circumstances upon which the initial exclusion action was based. The standards and procedures in this part shall be applied in any proceeding to extend an exclusion.

§ 367.18 Abrogation of contracts.

(a) The FDIC may, in its discretion, rescind or terminate any contract in existence at the time a contractor is suspended or excluded.

(b) Any contract not rescinded or terminated shall continue in force in accordance with the terms thereof.

(c) The right to rescind or terminate a contract in existence is cumulative and in addition to any other remedies or rights the FDIC may have under the terms of the contract, at law, or otherwise.

§ 367.19 Exceptions to suspensions and exclusions.

(a) Exceptions to the effects of suspensions and exclusions may be available in unique circumstances, where there are compelling reasons to utilize a particular contractor for a specific task. Requests for such exceptions may be submitted only by the FDIC program office requesting the contract services.

(b) In the case of the modification or extension of an existing contract, the Ethics Counselor may except such a contracting action from the effects of suspension and/or exclusion upon a determination, in writing, that a compelling reason exists for utilization of the contractor in the particular instance. The Ethics Counselor's authority under this section shall not be delegated to any lower official.

(c) In the case of new contracts, the Corporation Ethics Committee may except a particular new contract from the effects of suspension and/or exclusion upon a determination in writing that a compelling reason exists for utilization of the contractor in the particular instance.

§ 367.20 Review and reconsideration of Ethics Counselor decisions.

(a) *Review.* (1) A suspended and/or excluded contractor may appeal the exclusion decision to the Corporation Ethics Committee.

(2) In order to avail itself of the right to appeal, a suspended and/or excluded contractor must file a written notice of intent to appeal within 5 days of the Ethics Counselor's decision.

(3) The appeal shall be filed in writing within 30 days of the decision.

(4) The Corporation Ethics Committee, at its discretion and after determining that it is in the best interests of the FDIC, may stay the effect of the suspension and/or exclusion pending conclusion of its review of the matter.

(b) *Reconsideration.* (1) A suspended and/or excluded contractor may submit a request to the Ethics Counselor to reconsider the suspension and/or exclusion decision, reduce the period of exclusion or terminate the suspension and/or exclusion.

(2) Such requests shall be in writing and supported by documentation that the requested action is justified by:

(i) Reversal of the conviction or civil judgment upon which the suspension and/or exclusion was based;

(ii) Newly discovered material evidence;

(iii) Bona fide change in ownership or management;

(iv) Elimination of other causes for which the suspension and/or exclusion was imposed; or

(v) Other reasons the FDIC Ethics Counselor deems appropriate.

(3) A request for reconsideration based on the reversal of the conviction or civil judgment may be filed at any time.

(4) Requests for reconsideration based on other grounds may only be filed during the period commencing 60 days after the Ethics Counselor's decision imposing the suspension and/or exclusion. Only one such request may be filed in any twelve month period.

(5) The Ethics Counselor's decision on a request for reconsideration is subject to the review procedure set forth in paragraph (a) of this section.

By order of the Board of Directors.

Dated at Washington, DC, this 11th day of December, 1996.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 96–32281 Filed 12–27–96; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–NM–265–AD; Amendment 39–9851; AD 96–25–08]

RIN 2120–AA64

Airworthiness Directives; de Havilland Model DHC–7 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to all de Havilland Model DHC–7 series airplanes, that requires performing a review of the airplane maintenance records to determine if any insulation blankets have been repaired or changed during service, and various follow-on actions, if necessary. This amendment is prompted by reports of corrosion forming on areas of the airplane structure where black film thermal insulation blankets are used. The actions specified by this AD are intended to prevent such corrosion, which could result in degradation of the structural capability of the airplane fuselage and consequent sudden loss of cabin pressure.

DATES: Effective February 3, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 3, 1997.

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sol Maroof, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York 11581; telephone (516) 256–7522; fax (516) 568–2716.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all de Havilland Model DHC–7 series airplanes was published in the Federal Register on September 30, 1996 (61 FR 51062). That action proposed to require performing a review of the airplane maintenance records to determine if any insulation blankets have been repaired or changed during service, and various follow-on actions, if necessary.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 50 de Havilland Model DHC–7 series airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $3,000, or $60 per airplane.

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

Regulatory Impact

The regulations 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.

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) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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:

96–25–08 De Havilland, Inc.: Amendment 39–9851. Docket 95–NM–265–AD.

Applicability: All Model DHC–7 series airplanes, certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent degradation of the structural capability of the fuselage and sudden loss of cabin pressure, accomplish the following:

(a) Within six months after the effective date of this AD, perform a review of the airplane maintenance records to determine if any insulation blankets have been repaired or changed during service, in accordance with de Havilland Service Bulletin S.B. 7–21–30, dated July 6, 1994.

(b) If no insulation blanket has been repaired or changed, no further action is required by this AD.

(c) If any insulation blanket has been repaired or changed, prior to further flight, perform a visual inspection to detect black film insulation of the air conditioning system, in accordance with de Havilland Service Bulletin S.B. 7–21–30, dated July 6, 1994.

(1) If no black film insulation is detected, prior to further flight, perform a review of the airplane modification records to determine if any kit listed in ''Table 1—Modification List'' has been installed, in accordance with the service bulletin.

(i) If no kit listed in ''Table 1–Modification List'' is found to be installed, no further action is required by this AD.

(ii) If any kit listed in ''Table 1–Modification List'' is found to be installed, prior to further flight, perform the various follow-on actions in accordance with the service bulletin. (The follow-on actions include an inspection to detect black film insulation, removal of any black film insulation, an inspection to detect corrosion, repair of corroded structure, and installation of new silver blankets.) However, in lieu of repairing corroded structure in accordance with service bulletin, the repair of any corrosion shall be done in accordance with a method approved by the Manager, New York Aircraft Certification Office (ACO), FAA, Engine and Propeller Directorate.

(2) If any black film insulation is detected, prior to further flight, perform the follow-on actions in accordance with the service bulletin. (The follow-on actions include removal of any black film insulation, an inspection to detect corrosion, repair of any corroded structure, and installation of new silver blankets.) However, in lieu of repairing corroded structure in accordance with service bulletin, the repair of any corrosion shall be done in accordance with a method approved by the Manager, New York ACO.

(d) As of the effective date of this AD, no person shall install black Orcon film insulation, part number AN46B/AN36B, on any airplane.

(e) 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, New York ACO, FAA, Engine and Propeller Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, New York ACO.

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

(f) 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.

(g) The actions shall be done in accordance with de Havilland Service Bulletin S.B. 7–21–30, dated July 6, 1994. This incorporation by reference 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 Bombardier, Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment becomes effective on February 3, 1997.

Issued in Renton, Washington, on December 5, 1996.

S. R. Miller,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–31525 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–13–U

---

14 CFR Part 39

[Docket No. 96–NM–23–AD; Amendment 39–9860; AD 96–25–17]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 737–300, –400, and –500 series airplanes, that requires inspections to detect bent or damaged tie links and washers of the elevator feel and centering unit, and replacement of the centering unit with a new or serviceable unit, if necessary. This amendment also provides an optional replacement of the centering unit, which, if accomplished with the installation of supports and a stop bolt, constitutes terminating action for the repetitive inspections. This amendment is prompted by a report of high control column forces that occurred during takeoff and landing. The actions specified by this AD are intended to prevent such high forces, which could result in restriction of elevator control during takeoff, climbout, and landing.

DATES: Effective February 3, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 3, 1997.

ADDRESSES: 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 Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 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: Kristin Larson, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington; telephone (206) 227–1760; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 737–300, –400, and –500 series airplanes was published in the Federal Register on June 26, 1996 (61 FR 33049). That action proposed to require repetitive visual inspections to detect bent or damaged tie links of the elevator centering unit, and replacement of the elevator centering unit with a new or serviceable unit, if necessary.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

One commenter supports the rule.

Request to Extend the Initial Inspection Compliance Time

Several commenters request that the proposed compliance time of 6 months for the initial inspection be extended to at least 12 or 15 months. The commenters express concern that there may be a shortage of available tie link units to use as replacement units since the proposed rule would require replacement of damaged tie links with new or serviceable parts prior to further flight.

The FAA does not concur with the commenters' request to extend the compliance time. Replacement of the feel and centering unit prior to further flight is required only if the tie links have damage that exceeds the limits as specified in Boeing Alert Service Bulletin 737–27A1194. The manufacturer specifically devised the inspection plan described in the service bulletin to address the concern of the availability of an ample number of replacement tie link units. Damage found to be within the service bulletin's specified limits requires certain repetitive inspections until the elevator feel and centering unit can be serviced or replaced. This is intended to allow relief for the operators if a spare feel and centering unit is not readily available. In developing an appropriate compliance time for this proposal, the FAA considered the safety implications and the parts availability, and finds no basis to extend the 6-month compliance time. However, paragraph (f) of the final rule does provide affected operators the opportunity to request an adjustment of the compliance time if data are presented to justify such an extension.

Request to Revise Inspection Times and Mandate the Terminating Action

Another commenter requests that:

1. The compliance time for the initial inspection be extended to 12 months,
2. Repetitive inspections be required every 12 months thereafter, and
3. ''the modification'' specified in Boeing Alert Service Bulletin 737–27A1194 should be required to be installed within 2 years.

This commenter states that changing the elevator feel and centering unit is labor-intensive and would require at least 8 hours to accomplish. However, this commenter offered no data or technical basis for revising the compliance times or for mandating the terminating action provided in paragraph (e) of the proposed rule.

As for the commenter's request to extend the compliance time to extend the compliance time of the initial and repetitive inspections, the FAA does not concur. As previously explained, the FAA considered the safety implications, parts availability, and maintenance schedules when developing the compliance time. The commenter has offered no new technical data that would indicate a need to revise the compliance times. However, paragraph (f) of the final rule does provide affected operators the opportunity to request an adjustment of the compliance time if data are presented to justify such an extension.

As for the commenter's request to mandate ''the modification,'' the FAA infers that the modification the commenter is referring to is that of the feel and centering unit. (The referenced Boeing alert service bulletin actually describes two different modifications: modification of the supports and stop-bolt, and modification of the feel and centering unit.) The FAA does not concur with this request. The commenter offered no data to justify a compliance time of 2 years for mandating the installation of this modification. The FAA considers that, by providing the modification as an optional terminating action for this AD, prudent operators may accomplish that action at a time of their own discretion. Additionally, the optional terminating action does not preclude any operator from installing the modification before an arbitrary 2-year period, as suggested by the commenter. Further, the FAA finds that the required inspections, and replacement action as necessary, are both adequate and appropriate in addressing the subject damage associated with the elevator feel and centering unit.

Request to Extend the Repetitive Inspection Interval

Two commenters state that, when the stop bolt and support are installed, they will prevent excessive travel of the elevator feel actuator and preclude further damage to the tie links. Therefore, one of these commenters requests that, once the stop bolt and support are installed, the repetitive inspection intervals be extended from those intervals specified in proposed paragraph (c) (and specified in Figure 1 of Boeing Alert Service Bulletin 737–27A1194). This commenter, an operator, proposes that the inspection intervals be increased to coincide with the current maintenance schedules established for its fleet of airplanes.

The FAA does not concur. The commenter provided no substantiating evidence to justify extending the repetitive inspection intervals; and the FAA does not consider it appropriate to revise provisions in an AD to accommodate a single operator's maintenance schedule. The FAA has determined that the repetitive inspection interval described in Boeing Alert Service Bulletin 737–27A1194 (the appropriate service information for this AD) will ensure that any damage to the tie links is identified and corrected in a timely manner. However, paragraph (f) of the final rule does provide affected operators the opportunity to request an adjustment of the compliance time if data are presented to justify such an extension.

Request to Clarify Damage Limits

One commenter, the manufacturer, states that the phrase ''* * * and damage is within limits specified in Figure 1 * * *'', as used in paragraphs (c) and (d) of the proposal is confusing. The manufacturer notes that Figure 1 of Boeing Alert Service Bulletin 737–27A1194, which is referenced as the appropriate source of service information in the proposal, has two action paths: One path depicts actions to follow if damage is within acceptable limits (which starts an inspection program); the other path depicts actions to follow if damage is outside the acceptable limits (which specifies replacement of the unit). The manufacturer requests that the phrase be clarified to read ''* * * and damage is within acceptable limits as specified in Figure 1 * * *''.

The FAA concurs and has revised paragraphs (c) and (d) of the AD accordingly.

Request to Clarify the Unsafe Condition

The manufacturer also suggests that the wording, ''Since an unsafe condition has been identified that is likely to exist or develop * * *.'', which appeared in the preamble to the notice, be changed. The manufacturer requests that this language be revised to specify that a ''possible unsafe condition'' has been identified. The manufacturer states that this change of wording is warranted, since the worst scenario that has been identified is ''high control column forces'' and, even in that situation, an airplane still would be controllable.

The FAA does not concur with the commenter's suggestion. First, all unsafe conditions are ''possible'' events that ''could occur.'' In fact, they are described in the regulations as conditions that are ''likely to exist or develop'' in aircraft. Second, as for this specific AD, in the event that the tie links were to become bent, it could lead to the elevator control forces being higher than normal, thus restricting the elevator control. This would be especially noticeable when larger elevator inputs are necessary, such as during takeoff, climb, and landing. The FAA considers this restriction of elevator control during these critical flight regimes to be an unsafe condition. (Further, since that language is not repeated in this final rule, no change is necessary.)

Request to Refer to Terminating Action

The manufacturer requests that reference to ''see paragraph (e) for terminating action'' be added to paragraph (c)(2) of the proposed rule.

The FAA does not concur. The FAA finds that it is unnecessary to reference paragraph (e) for operators who may be required to accomplish paragraph (c)(2) of the AD, since the terminating action specified in paragraph (e) of this AD is not a required terminating action.

Request to Change the Date of the Referenced Alert Service Bulletin

Additionally, the manufacturer requests that the release date of Boeing Alert Service Bulletin 737–27A1194 be changed from February 1, 1996, as specified in the proposed rule, to the actual release date of February 8, 1996.

The FAA concurs. The FAA notes that the subject alert service bulletin dated February 1, 1996, has been replaced with the February 8, 1996, version. The FAA has revised the final rule accordingly.

Additional Sources of Service Information

Since the issuance of the proposed rule, the FAA has reviewed and approved Boeing Notices of Status Change (NSC) 737–27A1194 NSC 01, dated March 7, 1996, and 737–27A1194 NSC 02, dated April 4, 1996; and Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996. The NSC's and service bulletin revision provide further clarification of the inspection and modification procedures required by this AD. Therefore, the FAA has revised the AD to cite those documents as additional sources of service information.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 1,618 Boeing Model 737–300, –400, and –500 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 684 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 work hours per airplane to accomplish the required actions, and that the average labor rate is $60 per work hour. Required parts will cost approximately $140 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $218,880, or $320 per airplane.

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

Regulatory Impact

The regulations 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.

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) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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:

96–25–17 Boeing: Amendment 39–9860. Docket 96–NM–23–AD.

Applicability: Model 737–300, –400 and –500 series airplanes through line position 2764, inclusive; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent restriction of elevator control during takeoff, climbout, and landing, due to higher than normal elevator control forces caused by damaged tie links in the elevator centering unit, accomplish the following:

(a) Within 6 months after the effective date of this AD: Perform a visual inspection to detect any bent or damaged tie links of the elevator feel and centering unit, in accordance with Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, as revised by Boeing Notice of Status Change 737–27A1194 NSC 01, dated March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996.

(b) If no tie link is found to be broken, bent, or damaged during the inspection required by paragraph (a) of this AD: Accomplish either paragraph (b)(1) or (b)(2) of this AD, in accordance with Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, as revised by Boeing Notice of Status Change 737–27A1194 NSC 01, dated March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996.

(1) Prior to further flight, install supports and a stop-bolt on the elevator centering unit. Once this installation is accomplished, no further action is required by this AD. Or

(2) Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 1,000 flight cycles. Installation of supports and a stop-bolt in accordance with the alert service bulletin, constitutes terminating action for the repetitive inspections required by this AD, provided that no damage is detected during any inspection required by paragraph (a) of this AD.

(c) If any tie link is found to be bent or damaged during the inspection required by paragraph (a) of this AD, and damage is within acceptable limits as specified in Figure 1 of Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, Boeing Notice of Status Change 737–27A1194 NSC 01, dated March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or as specified in Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996: Accomplish paragraphs (c)(1) and (c)(2) of this AD in accordance with the alert service bulletin:

(1) Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed those specified in Figure 1 of the alert service bulletin. And

(2) Within 6 months after the effective date of this AD, install supports and a stop-bolt on the elevator centering unit. This installation does not terminate the repetitive inspection requirements of this paragraph.

(d) If any tie link is found to be bent or damaged during any inspection required by this AD, and the damage is beyond the acceptable limits as specified in Figure 1 of Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, Boeing Notice of Status Change 737–27A1194 NSC 01, dated

March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996: Prior to further flight, replace the elevator centering unit with a new or serviceable unit and accomplish either paragraph (d)(1) or (d)(2) of this AD in accordance with the alert service bulletin:

(1) Install supports and a stop-bolt on the elevator centering unit; or

(2) Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 1,000 flight cycles until the installation specified in paragraph (d)(1) of this AD is accomplished.

(e) Replacement of the elevator centering unit with a unit in which the tie links have been inspected and determined to be acceptable and in which supports and a stop-bolt have been installed, in accordance with Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, as revised by Boeing Notice of Status Change 737–27A1194 NSC 01, dated March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996, constitutes terminating action for the requirements of this AD.

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

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

(g) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(h) The actions shall be done in accordance with Boeing Alert Service Bulletin 737–27A1194, dated February 8, 1996, as revised by Boeing Notice of Status Change 737–27A1194 NSC 01, dated March 7, 1996, and Boeing Notice of Status Change 737–27A1194 NSC 02, dated April 4, 1996; or in accordance with Boeing Alert Service Bulletin 737–27A1194, Revision 1, dated September 26, 1996. This incorporation by reference 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.

(i) This amendment becomes effective on February 3, 1997.

Issued in Renton, Washington, on December 11, 1996.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–32053 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–13–U

---

14 CFR Part 39

[Docket No. 95–NM–257–AD; Amendment 39–9859; AD 96–25–16]

RIN 2120–AA64

Airworthiness Directives; de Havilland Model DHC–7 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain de Havilland Model DHC–7 series airplanes, that requires modification of the power control relay installation of the emergency lights. This amendment also requires revising the FAA-approved Airplane Flight Manual to include procedures for turning off and on the emergency lights switch in certain conditions. This amendment is prompted by a report that the emergency lights do not automatically illuminate when all generated electrical power on the airplane is lost and the power to the left essential bus is maintained from the aircraft batteries. The actions specified by this AD are intended to ensure that the emergency lights illuminate when needed in an emergency situation.

DATES: Effective February 3, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 3, 1997.

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York 11581; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Wing Chan, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York; telephone (516) 256–7511; fax (516) 568–2716.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain de Havilland Model DHC–7 series airplanes was published in the Federal Register on September 11, 1996 (61 FR 47834). That action proposed to require modification of the power control relay installation of the emergency lights. Following accomplishment of the proposed modification, that action also proposed to require revising the Limitations Section of the FAA-approved Airplane Flight Manual to include procedures for turning off and on the emergency lights switch.

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were submitted in response to the proposal or the FAA's determination of the cost to the public.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 47 de Havilland Model DHC–7 series airplanes of U.S. registry will be affected by this AD.

It will take approximately 4 work hours per airplane to accomplish the required modification, at an average labor rate of $60 per work hour. Required parts will cost approximately $2,713 per airplane. Based on these figures, the cost impact of the modification required by this AD on U.S. operators is estimated to be $138,791, or $2,953 per airplane.

It will take approximately 1 work hour per airplane to accomplish the required AFM revision, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the AFM revision required by this AD on U.S. operators is estimated to be $2,820, or $60 per airplane.

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

Regulatory Impact

The regulations 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.

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) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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:

96–25–16 De Havilland, Inc.: Amendment 39–9859. Docket 95–NM–257–AD.

Applicability: Model DHC–7 series airplanes, serial numbers 003 through 113 inclusive; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To ensure that the emergency lights illuminate when needed in an emergency situation, accomplish the following:

(a) Within 6 months after the effective date of this AD, modify the power control relay installation of the emergency lights, in accordance with de Havilland Service Bulletin S.B. 7–33–23, Revision 'A', dated October 20, 1995.

(b) Following accomplishment of paragraph (a) of this AD, revise the Limitations Section of the FAA-approved Airplane Flight Manual (AFM) by inserting a copy of de Havilland Dash 7 Flight Manual PSM 1–71A–1A, Revision 39, dated August 22, 1994, into the AFM.

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

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

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(e) The modification shall be done in accordance with de Havilland Service Bulletin S.B. 7–33–23, Revision 'A', dated October 20, 1995. The AFM revision shall be done in accordance with de Havilland Dash 7 Flight Manual PSM 1–71A–1A, Revision 39, dated August 22, 1994. This incorporation by reference 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 Bombardier, Inc., Bombardier Regional Aircraft Division, Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, Engine and Propeller Directorate, 10 Fifth Street, Third Floor, Valley Stream, New York; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on February 3, 1997.

Issued in Renton, Washington, on December 11, 1996.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 96–32052 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–13–U

---

14 CFR Part 39

[Docket No. 95–ANE–47; Amendment 39–9854; AD 96–25–11]

RIN 2120–AA64

Airworthiness Directives; CFM International Model CFM56–3C–1 and CFM56–3B–2 Turbofan Engines

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to all CFM International (CFMI) CFM56–3C–1 and certain CFM56–3B–2 engines, that currently requires the removal from service of certain fan disk and fan blade hardware, and limits the use of CFM56–3C–1 thrust levels. This amendment requires removal of additional fan blade hardware, requires an Airplane Flight Manual (AFM) revision to impose thrust level limitations for airplanes equipped with affected engines, and requires the installation of redesigned fan blades as a terminating action to the thrust level limitations of this AD. The existing AD requirements for certain CFM56–3B–2 engines are unchanged and carried over into this final rule AD. This amendment is prompted by the availability of redesigned fan blades that are not subject to the thrust level limitations, and the need to clarify the AD requirements by deleting references to specific AFMs. The actions specified by this AD are intended to prevent a fan blade failure that can result in complete loss of engine power.

DATES: Effective January 29, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 29, 1997.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, Publications Department, P.O. Box 3707, Seattle, WA 98124–2207; telephone (206) 544–9058, fax (206) 544–9178; and CFM International, Technical Publications Department, 1 Neumann Way, Cincinnati, OH 45215; telephone (513) 552–2981, fax (513) 552–2816. This information may be examined at the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA 01803–5299; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Glorianne Messemer, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803–5299; telephone (617) 238–7132, fax (617) 238–7199.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 89–13–51, Amendment 39–6425 (55 FR 1401, January 16, 1990), which is applicable to all CFM International (CFMI) CFM56–3C–1 and certain CFM56–3B–2 model turbofan engines, was published in the Federal Register on October 16, 1995 (60 FR 53550). That action proposed to require removal of additional fan blade hardware, thrust level limitations for airplanes equipped with affected engines, and the installation of redesigned fan blades as a terminating action to the thrust level limitations of this AD. The existing AD requirements for certain CFM56–3B–2 engines are unchanged and carried over into this final rule AD. The actions are required to be accomplished in accordance with Boeing Service Bulletin (SB) No. 737–71–1203, Revision 10, dated July 21, 1994, and CFMI CFM56–3/–3B/–3C SB No. 72–543, Revision 4, dated July 29, 1992.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One commenter states that incorrect fan blade part numbers, 7M99P08, 9527M99P09, 9527M99P10, 9527M99P11, and 1285M39P01 were added to compliance paragraph (c). The FAA concurs and has revised this final rule accordingly.

Two comments support the rule as proposed.

Although no comments were received regarding the compliance end-date noted in compliance paragraph (c), the FAA has replaced June 30, 1996, with August 30, 1997, based on the anticipated effective date of this AD.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

There are approximately 289 CFMI CFM56–3C–1 and CFM56–3B–2 series engines of the affected design in the worldwide fleet. The FAA has been advised by the manufacturer that there are no engines on U.S. registered aircraft that are affected by this AD. Therefore, there is no associated cost impact on U.S. operators as a result of this AD.

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.

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) 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 final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it 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 USC 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–6425 (55 FR 1401, January 16, 1990) and by adding a new airworthiness directive, Amendment 39–9854, to read as follows:

96–25–11 CFM International: Amendment 39–9854. Docket 95–ANE–47. Supersedes AD 89–13–51, Amendment 39–6425.

Applicability: CFM International (CFMI) CFM56–3B–2 and CFM56–3C–1 model turbofan engines installed on but not limited to Boeing 737 series aircraft.

Note 1: This airworthiness directive (AD) applies to each engine 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 engines 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 (g) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent fan blade failure that may result in complete loss of power, accomplish the following:

(a) For CFM56–3C–1 model turbofan engines:

(1) Prior to further flight, remove from service stage 1 fan disk Part Number (P/N) 335–014–511–0 that have operated at unrestricted CFM56–3C–1 thrust levels with fan blade P/N's 9527M99P08, 9527M99P09, 9527M99P10, 9527M99P11, or 1285M39P01 and replace with a serviceable fan disk.

(2) Prior to further flight, remove from service stage 1 fan blade P/N's 9527M99P08, 9527M99P09, 9527M99P10, 9527M99P11, and 1285M39P01 that have operated at unrestricted CFM56–3C–1 thrust levels and replace with a serviceable fan blade.

(b) For CFM56–3C–1 model turbofan engines equipped with fan blade P/N's 9527M99P08, 9527M99P09, 9527M99P10, 9527M99P11, or 1285M39P01:

(1) Prior to further flight, for aircraft that have not already complied with any of the revision levels 3 through 10 of Boeing Service Bulletin (SB) No. 737–71–1203, incorporate the provisions of Boeing SB No. 737–71–1203, Revision 10, dated July 21, 1994, as described in item III titled, ‘‘Accomplishment Instructions’’, part V, ‘‘Airplane Wiring Modification for Operation at 22,000 Pounds Thrust Levels with two CFM56–3C–1 Engines Installed.’’

(2) Prior to further flight, revise the engine limitations section of the Boeing 737–400 series Airplane Flight Manuals (AFM) by adding the operational restrictions contained in Appendix I. This may be accomplished by inserting a copy of Appendix I of this AD in the AFM.

(3) Operate engines at or below CFM56–3B–2 thrust levels, or in accordance with the limitations contained in Appendix I of this AD.

Appendix I—Operational Restrictions Referenced in Paragraphs (b)(2) and (b)(3)

(a) Use of fan speed (N1) values for take-off and maximum continuous thrust levels at CFM56–3C–1 (23.5K) thrust levels are restricted.

(b) The following limitations must be observed for all CFM56–3C–1 (23.5K) operations:

(1) Airport pressure altitude must be 2,500 feet or less for take-off.

(2) The auto-throttle must be *OFF* and the thrust must be set manually for take-off.

(3) Both power management controls (PMCs) must be operative for airplane dispatch.

(4) Maximum take-off thrust for CFM56–3C–1 (23.5K) rating must *not* be used above 5,000 feet pressure altitude, or the 5-minute time limit, whichever occurs first.

(5) Maximum continuous or maximum climb thrust for CFM56–3C–1 (23.5K) rating must *not* be used above 10,000 feet pressure altitude.

(6) LANDING:

(i) For landing at destination airport or for less than maximum landing weight the CFM56–3B–2 (22K) go-around rating should be used.

(ii) Go-around at CFM56–3C–1 (23.5K) rating should be used when returning to departure airport or diverting in an emergency situation providing airport pressure altitude is 2,500 feet or less and the landing weight is greater than maximum landing weight.

End of Appendix I

(c) For CFM56–3C–1 model turbofan engines equipped with fan blade P/N's 9527M99P08, 9527M99P09, 9527M99P10, 9527M99P11, or 1285M39P01, install fan blade P/N's 1590M21P01, 1663M24P01, 1663M24P02, 1663M24P03, 1663M24P04, or 1663M24P05 in accordance with CFMI CFM56–3/–3B/–3C SB No. 72–543, Revision 4, dated July 29, 1992, prior to August 30, 1997. The installation of new fan blades in accordance with this paragraph constitutes terminating action to the thrust level limitations required by paragraph (b) of this AD.

(d) For CFM56–3B–2 model turbofan engines, Serial Number (S/N) 725101, 725102, 725103, 725104, 725105, 725107, 725108, 725141, and 725142:

(1) Prior to further flight, remove from service stage 1 fan disk P/N 335–014–511–0 that have operated at unrestricted CFM56–3C–1 thrust levels with fan blade P/N's 9527M99P08, 9527M99P09, 9527M99P10, 9527M99P11, or 1285M39P01 and replace with a serviceable fan disk.

(2) Prior to further flight, remove from service stage 1 fan blade P/N's 9527M99P08, 9527M99P09, 9257M99P10, 9257M99P11, and 1285M39P01 that have operated at unrestricted CFM56–3C–1 thrust levels and replace with a serviceable fan blade.

Note 2: Ground running for maintenance purposes should be conducted in accordance with CFM56–3B–2 rating limitations.

(e) Fan disk removal, fan blade removal, and airplane wiring modifications done in accordance with AD 89–13–51 satisfies the corresponding requirements of paragraphs (a), (b), and (d) of this AD.

(f) For the purpose of this AD, unrestricted CFM56–3C–1 thrust levels include operation at *either* of the following:

(1) More than CFM56–3B–2 maximum take-off thrust above 5,000 feet pressure altitude.

(2) More than CFM56–3B–2 maximum continuous or maximum climb thrust above 10,000 feet pressure altitude.

(g) 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, Engine Certification Office. The request should be forwarded through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Engine Certification Office.

Note 3: Information concerning the existence of approved alternative method of compliance with this AD, if any, may be obtained from the Engine Certification Office.

(h) 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 aircraft to a location where the requirements of this AD can be accomplished.

(i) The actions required by this AD shall be done in accordance with the following SBs:

Document No.	Pages	Revision	Date
Boeing SB No. 737–71–1203	1–35	10	July 21, 1994.
Total pages: 35.			
CFMI:			
CFM56–3/–3B/–3C.			
SB No. 72–543	1–26	4	July 29, 1992
Total pages: 26.			

This incorporation by reference 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 Airplanes, Publications Department, P.O. Box 3707, Seattle, WA 98124–2207; telephone (206) 544–9058, fax (206) 544–9178; and CFM International, Technical Publications Department, 1 Neumann Way, Cincinnati, OH 45215; telephone (513) 552–2981, fax (513) 552–2816. Copies may be inspected at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(j) This amendment becomes effective on January 29, 1997.

Issued in Burlington, Massachusetts, on December 4, 1996.

James C. Jones,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 96–32435 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 730, 732, 734, 736, 738, 740, 742, 744, 748, 750, 768, 772, and 774

[Docket No. 960918265–6366–03]

RIN 0694–AB09

Encryption Items Transferred From the U.S. Munitions List to the Commerce Control List

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule.

SUMMARY: This interim rule amends the Export Administration Regulations (EAR) by exercising jurisdiction over, and imposing new combined national security and foreign policy controls on, certain encryption items that were on the United States Munitions List,

consistent with Executive Order 13026 and pursuant to the Presidential Memorandum of that date, both issued by President Clinton on November 15, 1996.

On October 1, 1996, the Administration announced a plan to make it easier for Americans to use stronger encryption products to protect their privacy, intellectual property and other valuable information. The plan envisions a worldwide key management infrastructure with the use of key escrow and key recovery encryption items to promote electronic commerce and secure communications while protecting national security and public safety. To provide for a transition period for the development of this key management infrastructure, this rule permits the export and reexport of 56-bit key length DES or equivalent strength encryption items under the authority of a License Exception, if an exporter makes satisfactory commitments to build and/or market recoverable encryption items and to help build the supporting international infrastructure. This policy will apply to hardware and software.

DATES: *Effective Date:* This rule is effective December 30, 1996.

Comment Date: February 13, 1997.

ADDRESSES: Written comments (six copies) should be sent to: Nancy Crowe, Regulatory Policy Division, Bureau of Export Administration, Department of Commerce, 14th Street and Pennsylvania Ave., N.W., Room 2705, Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: James A. Lewis, Office of Strategic Trade and Foreign Policy Controls, Telephone: (202) 482-0092.

SUPPLEMENTARY INFORMATION:

Background

Following upon the Administration's October 1 announcement, on November 15, 1996, the President issued the Memorandum directing that all encryption items controlled on the U.S. Munitions List, except those specifically designed, developed, configured, adapted, or modified for military applications, be transferred to the Commerce Control List. The Memorandum and Executive Order 13026 (November 15, 1996, 61 FR 58767) also set forth certain additional provisions with respect to controls on such encryption items to be imposed by the Department of Commerce. The Executive Order also provides for appropriate controls on the export and foreign dissemination of encryption items controlled on the U.S. Munitions List that are placed on the Commerce Control List. In issuing the Memorandum the President stated:

> Encryption products, when used outside the United States, can jeopardize our foreign policy and national security interests. Moreover, such products, when used by international criminal organizations, can threaten the safety of U.S. citizens here and abroad, as well as the safety of the citizens of other countries. The exportation of encryption products must be controlled to further U.S. foreign policy objectives, and promote our national security, including the protection of the safety of U.S. citizens abroad.

This initiative will support the growth of electronic commerce; increase the security of the global information infrastructure; protect privacy, intellectual property and other valuable information; and sustain the economic competitiveness of U.S. encryption product manufacturers during the transition to a key management infrastructure. Under this initiative, non-recoverable encryption items up to 56-bit key length DES or equivalent strength will be permitted for export and reexport after a one-time review of the strength of the item and if the exporter makes satisfactory commitments to build and/or market recoverable encryption items, to support an international key management infrastructure. This policy will apply to hardware and software and will last through December 31, 1998.

The initiative addresses important foreign policy and national security concerns identified by the President. Export controls on cryptographic items are essential to controlling the spread abroad of powerful encryption products which could be harmful to critical U.S. national security, foreign policy and law enforcement interests. This initiative will preserve such controls and foster the development of a key management infrastructure necessary to protect important national security, foreign policy and law enforcement concerns.

Encryption software can be used to maintain the secrecy of information, and thereby may be used by persons abroad to harm national security, foreign policy and law enforcement interests. As the President indicated in E.O. 13026 and in his Memorandum of November 15, 1996, export of encryption software, like export of encryption hardware, is controlled because of this functional capacity to encrypt information on a computer system, and not because of any informational or theoretical value that such software may reflect, contain, or represent, or that its export may convey to others abroad. For this reason, export controls on encryption software are distinguished from other software regulated under the EAR.

The government recognizes that several factors, including the development of common international encryption policies, the need for an international key recovery infrastructure, and technological change, will influence market development in key recovery products. At the same time, the government is committed to a two-year transition period. The government will continually evaluate progress towards key recovery throughout and beyond the two-year period and will tailor the implementation of its policies in consultation with the public.

This interim rule implements the Administration's policy on encryption exports and reexports. This rule amends the Export Administration Regulations (EAR) by imposing national security and foreign policy controls (''EI'' for Encryption Items) on certain information security systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology (''encryption items'). ''Encryption items'' subject to the EAR do not include encryption items specifically designed, developed, configured, adapted or modified for military applications (including command, control and intelligence applications). Such items remain on the U.S. Munitions List, and continue to be controlled by the Department of State, Office of Defense Trade Controls. EI controls apply to encryption software transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of the same date.

This interim rule also amends the Export Administration Regulations by requiring a license for exports and reexports to all destinations, except Canada, of certain encryption items controlled for EI reasons. Except as otherwise noted, applications will be reviewed on a case-by-case basis by BXA in conjunction with other agencies to determine whether the export or reexport is consistent with U.S. national security and foreign policy interests. Exporters should allow 40 days for the processing of licenses, consistent with E.O. 12981. The licensing policy is as follows:

(1) Certain mass-market encryption software. Certain encryption software that was transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and

pursuant to the Presidential Memorandum of that date may be released from ''EI'' controls and thereby made eligible for mass market treatment after a one-time BXA review. To determine eligibility for mass market treatment, exporters must submit a classification request to BXA. 40-bit mass market encryption software may be eligible for a 7-day review process, and company proprietary software may be eligible for 15-day processing. See new Supplement No. 6 to part 742 and § 748.3(b)(3) for additional information. Note that the one-time review is for a determination to release encryption software in object code only. Exporters requesting release of the source code should refer to paragraph (b)(3)(v)(E) of Supplement No. 6 to part 742. If, after a one-time review, BXA determines that the software is released from EI controls, such software is eligible for all provisions of the EAR applicable to other software, such as License Exception TSU for mass-market software. If BXA determines that the software is not released from EI controls, a license is required for export and reexport to all destinations, except Canada, and license applications will be considered on a case-by-case basis.

(2) *Key Escrow, Key Recovery and Recoverable encryption software and commodities.* Recovery encryption software and equipment controlled for EI reasons under ECCN 5D002 or under ECCN 5A002, including encryption equipment designed or modified to use recovery encryption software, may be made eligible for License Exception KMI after a one-time BXA review. License Exception KMI is available for all destinations except Cuba, Iran, Iraq, Libya, North Korea, Syria and Sudan. To determine eligibility, exporters must submit a classification request to BXA. Requests for one-time review of key escrow and key recovery encryption products will receive favorable consideration provided that, prior to the export or reexport, a key recovery agent satisfactory to BXA has been identified (refer to new Supplement No. 5 to part 742) and security policies for safeguarding the key(s) or other material/information required to decrypt ciphertext as described in Supplement No. 5 to part 742 are established to the satisfaction of BXA and are maintained after export or reexport as required by the EAR. If the exporter or reexporter intends to be the key recovery agent, then the exporter or reexporter must meet all of the requirements of a key recovery agent identified in Supplement No. 5 to part 742. In addition, the key escrow or key recovery system must meet the criteria identified in Supplement No. 4 to part 742. Note that eligibility is dependent on continued fulfilment of the requirements of a key recovery agent identified in Supplement No. 5 to part 742. Since the establishment of a key management infrastructure and key recovery agents may take some time, BXA will, while the infrastructure is being built, consider exports of key recovery encryption products which facilitate establishment of the key management infrastructure before a key recovery agent is named, consistent with national security and foreign policy. When BXA approves such cases, exporters of products described in Supplement No. 4 to part 742 are required to furnish the name of an agent by December 31, 1998. Requests for one-time review of recoverable products which allow government officials to obtain, under proper legal authority and without the cooperation or knowledge of the user, the plaintext of the encrypted data and communications will also receive favorable consideration.

(3) *Non-recovery encryption items up to 56-bit key length DES or equivalent strength supported by a satisfactory business and marketing plan for exporting recoverable items and services.* Manufacturers of non-recovery encryption items up to 56-bit key length DES or equivalent strength will be permitted to export and reexport under the authority of License Exception KMI, provided that the requirements and conditions of the License Exception are met. Exporters must submit a classification request for an initial BXA review of the item and a satisfactory business and marketing plan that explains in detail the steps the applicant will take during the two-year transition period beginning January 1, 1997 to develop, produce, and/or market encryption items and services with recoverable features. Producers would commit to produce key recovery products. Others would commit to incorporate such products into their own products or services. Plans will be evaluated in consideration of good faith efforts by the exporter to promote key recovery products and infrastructure. Such efforts can include: the scale of key recovery research and development, product development, and marketing plans; significant steps to reflect potential customer demand for key recovery products in the firm's encryption-related business; and how soon a key recovery agent will be identified. Note that BXA will accept requests for classification of non-recoverable encryption items up to 56-bit key length DES or equivalent strength under this paragraph from distributors, re-sellers, integrators, and other entities that are not manufacturers of the encryption items. The use of License Exception KMI is not automatic; eligibility must be renewed every six months. Renewal after each six-month period will depend on the applicant's adherence to explicit benchmarks and milestones as set forth in the plan approved with the initial classification request and amendments as approved by BXA. This relaxation of controls and use of License Exception KMI will last through December 31, 1998. The plan submitted with classification requests for the export of non-recoverable encryption items up to 56-bit key length DES or equivalent strength must include the elements in new Supplement No. 7 to part 742. Note that distributors, re-sellers, integrators, and other entities that are not manufacturers of the encryption items are permitted to use License Exception KMI for exports and reexports of such items only in instances where a classification has been granted to the manufacturer of the encryption items. The authority to so export or reexport will be for a time period ending on the same day the producer's authority to export or reexport ends.

Exporters authorized to export 56-bit DES or equivalent strength non-key recovery products in exchange for commitments to key recovery will be allowed to service and support the customers of those products during and after the two-year period. Support and service includes maintenance or replacement of products to correct defects or maintain existing functionality. It also includes upgrades that do not increase the strength of the encryption in the product.

Exporters authorized to export 56-bit DES or equivalent strength non-key recovery products during the interim period may also export under a license additional quantities of those 56-bit DES or equivalent strength non-key recovery products after the two-year period to existing customers. Such sales may be made to the customers of any exporter that was authorized to export such products in exchange for key recovery commitments during the two-year period. The additional quantities sold may not be disproportionate to the customer's embedded base.

(4) *All other encryption items*—(i) *Encryption licensing arrangement.* This is intended to continue without change the regulatory treatment of the distribution and warehouse arrangements currently permitted under

the International Traffic in Arms Regulations. Applicants may submit license applications for exports and reexports of certain encryption commodities and software in unlimited quantities for all destinations except Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Applications will be reviewed on a case-by-case basis. Encryption licensing arrangements may be approved with extended validity periods specified by the applicant in block #24 on Form BXA–748P. In addition, the applicant must specify the sales territory and classes of end-users. Such licenses may require the license holder to report to BXA certain information such as item description, quantity, value, and end-user name and address.

(ii) *Applications for encryption items not authorized under an encryption licensing arrangement.* Applications for the export and reexport of all other encryption items will be considered on a case-by-case basis.

(5) *Applications for encryption technology.* Applications for the export and reexport of encryption technology will be considered on a case-by-case basis.

Note that all ''EI'' encryption items are not subject to any mandatory foreign availability procedures of the EAA or the EAR. In section 1(a) of Executive Order 13026, the President states:

I have determined that the export of encryption products described in this section may harm national security and foreign policy interests even where comparable products are or appear to be available from sources outside the United States, and that facts and questions concerning the foreign availability of such encryption products cannot be subject to public disclosure or judicial review without revealing or implicating classified information that could harm United States national security and foreign policy interests. Accordingly, section 4(c) and 6(h)(2)–(4) of the Export Administration Act of 1979 (''the EAA'') * * *, all other analogous provisions of the EAA relating to foreign availability, and the regulations in the EAR relating to such EAA provisions, shall not be applicable with respect to export controls on such encryption products.

This interim rule amends part 768, Foreign Availability, to make clear that the provisions of that part do not apply to encryption items transferred to the Commerce Control List.

This interim rule also amends part 734 to exclude encryption items transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 (61 FR 58767, November 15, 1996) and pursuant to the Presidential Memorandum of that date from the *de minimis* provisions for items exported from abroad. This rule also amends part 734 of the EAR to reflect that encryption software controlled for EI reasons under ECCN 5D002 that has been transferred to the Department of Commerce from the Department of State by Presidential Memorandum will be subject to the EAR even when publicly available. A printed book or other printed material setting forth encryption source code is not itself subject to the EAR (see § 734.3(b)(2)). However, notwithstanding § 734.3(b)(2), encryption source code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR (see § 734.3(b)(3)). The administration continues to review whether and to what extent scannable encryption source or object code in printed form should be subject to the EAR and reserves the option to impose export controls on such software for national security and foreign policy reasons. Note that there is a new definition of ''export of encryption source code and object code software'' (see § 734.2(b)(9)).

This rule creates a new License Exception KMI for exports of certain encryption software and equipment. This rule also amends part 740 and Supplement No. 2 to part 774 to reflect that encryption software will not be eligible for ''mass market'' treatment under the General Software Note or for export as beta-test software under License Exception BETA unless released from EI controls through a one-time BXA review (refer to new Supplement No. 6 to part 742). Encryption items transferred from the USML to the CCL prior to November 15, 1996 are not controlled for EI reasons. Note that License Exception TMP is available for temporary exports and reexports of encryption items except under the provisions for beta-test software. License Exceptions TMP and BAG effectively replace the Department of State's personal use exemption. Software and technology that was controlled by the Department of Commerce prior to December 30, 1996 are not affected by this rule and will continue to be eligible for the publicly available treatment. Software controlled by the Department of Commerce prior to December 30, 1996 will continue to be eligible for mass market treatment under the General Software Note, and License Exception TSU for mass-market software.

For purposes of this rule, ''recovery encryption products'' refers to encryption products (including software) that allow government officials to obtain under proper legal authority and without the cooperation or knowledge of the user, the plaintext of encrypted data and communications. Such products fulfill the objectives of the Administration's encryption policy. Other approaches to access and recovery may be defined in the future.

This interim rule also amends part 742 to reflect the new combined national security and foreign policy controls imposed by this rule, and adds a new Supplement No. 4 titled ''Key Escrow or Key Recovery Products Criteria'' that includes product criteria, a new Supplement No. 5 titled ''Key Escrow or Key Recovery Agent Criteria, Security Policies, and Key Escrow or Key Recovery Procedures'' that includes interim requirements for key recovery agents, a new Supplement No. 6 titled ''Guidelines for Submitting a Classification Request for a Mass Market Software Product that contains Encryption'' that includes the criteria for the one-time review of classification requests for release of certain encryption software from EI controls, and a new Supplement No. 7 titled ''Review Criteria for Exporter Key Escrow or Key Recovery Development Plans.''

This interim rule also amends part 744 to add a general prohibition in § 744.9 with respect to technical assistance in the development or manufacture abroad of encryption commodities and software controlled for EI reasons and makes conforming changes throughout the EAR.

This interim rule makes conforming changes in part 748 for classification requests, amends part 750 of the EAR to reflect the Department of Justice role in the review of encryption license applications, adds new definitions to part 772, and amends the Commerce Control List (Supplement No. 1 to part 774) by adding new EI controls under ECCNs 5A002, 5D002, and 5E002 for commodities, software and technology that are placed under Commerce Department jurisdiction, consistent with E.O. 13026, by Presidential Memorandum.

In certain cases, semiannual reporting requirements on quantities shipped and country of destination will be imposed on exporters, in order to allow the United States to fulfill the reporting requirements of its international obligations, such as the Wassenaar Arrangement.

The scope of controls on the release to foreign nationals of technology and software subject to the EAR may be amended in a separate Federal Register Notice.

This rule involves no new curtailment of exports, because the transfer or removal of items from the United States Munitions List to the CCL maintains a continuity of controls. Therefore, the provisions regarding the impact of new controls do not apply, and contract sanctity also does not apply to this imposition of controls.

U.S. persons holding valid USML licenses and other approvals issued by the Department of State prior to December 30, 1996 may ship remaining balances authorized by such licenses or approvals under the authority of the EAR by filing Shippers Export Declarations (SEDs) with District Directors of Customs, citing this Federal Register Notice and the State Department license number. Such shipments shall be in accordance with the terms and conditions, including the expiration date, existing at the time of issuance of the State license. Any reports required for distribution and other types of agreements previously authorized by the Department of State, valid at the time of this publication, should be henceforth submitted to the Department of Commerce. Actions pending at the Department of State on December 30, 1996, including pending license applications, must be refiled with the Department of Commerce. Export violations, including the terms and conditions of export, shall hereafter constitute a violation of the EAR.

Consistent with the provisions of section 6 of the Export Administration Act, a foreign policy report was submitted to Congress on December 24, 1996, notifying the Congress of the Department's intention to impose controls on certain information security systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology that will be controlled on the CCL and that will be subject to new control procedures.

Although the Export Administration Act (EAA) expired on August 20, 1994, the President invoked the International Emergency Economic Powers Act and continued in effect, to the extent permitted by law, the provisions of the EAA and the EAR in Executive Order 12924 of August 19, 1994, notice of August 15, 1995 (60 FR 42767), and notice of August 14, 1996 (60 FR 42527).

Rulemaking Requirements

1. This interim rule has been determined to be significant for purposes of E.O. 12866. A cost benefit analysis has been prepared and is available upon request by contacting James A. Lewis at (202) 482–0092.

2. Notwithstanding any other provision of 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 Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid OMB Control Number. This rule involves collections of information subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). These collections have been approved by the Office of Management and Budget under control numbers 0694–0048 and 0694–0088. This rule also contains a new collection-of-information requirement subject to the PRA that has received emergency approval under OMB control number 0694–0104. The new information requirement and estimated public burden hours include: marketing plans (40 hours each); semiannual progress reports (8 hours each); safeguard procedures (4 hours); recordkeeping (2 hours); and annual reports (4 hours). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collections of information. Send comments regarding these burden estimates or any other aspect of these collections of information, including suggestions for reducing the burden, to OMB Desk Officer, New Executive Office Building, Washington, DC 20503.

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (Sec. 5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this interim rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 5 U.S.C. or by any other law, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

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

The period for submission of comments will close February 13, 1997. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the person submitting the comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form.

Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

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

This rule has been determined to be a major rule as defined in 5 U.S.C. § 804(2) for purposes of Congressional review under 5 U.S.C. ch. 8. Notwithstanding 5 U.S.C. § 801(a)(3), this rule is effective December 30, 1996 pursuant to authority at 5 U.S.C. § 808(2) as there is good cause to waive the requirement to provide notice and public procedure thereon. This action implements an Administration initiative that is intended to protect the national security and foreign policy interests of the United States and streamlines export controls for encryption items. Therefore, notice and public procedure that would delay implementation of this rule is contrary to the public interest.

List of Subjects

15 CFR Part 730

Administrative practice and procedure, Advisory committees, Exports, Foreign trade, Reporting and recordkeeping requirements, Strategic and critical materials.

15 CFR Parts 732, 740, 748, 750, and 768

Administrative practice and procedure, Exports, Foreign trade, Reporting and Record keeping requirements.

15 CFR Part 734

Administrative practice and procedure, Exports, Foreign trade.

15 CFR Parts 736, 738, 742, 772, and 774

Exports, Foreign trade.

15 CFR Part 744

Exports, Foreign trade, Reporting and Recordkeeping requirements.

Accordingly, parts 730, 732, 734, 736, 738, 740, 742, 744, 748, 750, 768, 772, and 774 of the Export Administration Regulations (15 CFR Parts 730–799) are amended as follows:

1. The authority citation for 15 CFR part 730 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; Sec. 201, Pub. L. 104–58, 109 Stat. 557 (30 U.S.C. 185(s)); 30 U.S.C. 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 11912, 41 FR 15825, 3 CFR, 1976 Comp., p. 114; E.O. 12002, 42 FR 35623, 3 CFR, 1977 Comp., p.133; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12214, 45 FR 29783, 3 CFR, 1980 Comp., p. 256; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12867, 58 FR 51747, 3 CFR, 1993 Comp., p. 649; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Executive Order 13026 (November 15, 1996, 61 FR 58767); Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527); E.O. 12981 (60 FR 62981).

2. The authority citation for 15 CFR parts 732, 736, 740, 748, 768, and 772 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Executive Order 13026 (November 15, 1996, 61 FR 58767) Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527).

3. The authority citation for 15 CFR part 734 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Executive Order 13026 (November 15, 1996, 61 FR 58767); Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527).

4. The authority citation for 15 CFR parts 738 and 774 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 287c; 22 U.S.C. 3201 *et seq.*; 22 U.S.C. 6004; Sec. 201, Pub. L. 104–58, 109 Stat. 557 (30 U.S.C. 185(s)); 30 U.S.C. 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Executive Order 13026 (November 15, 1996, 61 FR 58767); Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527).

5. The authority citation for 15 CFR part 742 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Executive Order 13026 (November 15, 1996, 61 FR 58767); Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527).

6. The authority citation for 15 CFR part 744 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; Notice of August 15, 1995 (60 FR 42767, August 17, 1995); and Notice of August 14, 1996 (61 FR 42527).

7. The authority citation for 15 CFR part 750 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 12924, 59 FR 43437, 3 CFR, 1994 Comp., p. 917; Executive Order 13026 (November 15, 1996, 61 FR 58767); Notice of August 15, 1995 (60 FR 42767, August 17, 1995); E.O. 12981, 60 FR 62981; and Notice of August 14, 1996 (61 FR 42527).

PART 730—[AMENDED]

8. Section 730.5 is amended by adding a new sentence to the end of paragraph (d) to read as follows:

§ 730.5 Coverage of more than exports.

* * * * *

(d) * * * The EAR also restrict technical assistance by U.S. persons with respect to encryption commodities or software.

PART 732—[AMENDED]

9. Section 732.2 is amended by adding two new sentences at the end of the introductory text to paragraph (b) and by adding two new sentences at the end of the introductory text to paragraph (d) to read as follows:

§ 732.2 Steps regarding scope of the EAR.

* * * * *

(b) * * * Note that encryption software controlled for EI reasons under ECCN 5D002 on the Commerce Control List (refer to Supplement No.1 to Part 774 of the EAR) shall be subject to the EAR even if publicly available. Accordingly, the provisions of the EAR concerning the public availability of items are not applicable to encryption items controlled for ''EI'' reasons under ECCN 5D002.

* * * * *

(d) * * * Note that encryption items controlled for EI reasons under ECCN 5A002 or ECCN 5D002 on the Commerce Control List (refer to Supplement No.1 to Part 774 of the EAR) shall be subject to the EAR even if they incorporate less than the *de minimis* level of U.S. content. Accordingly, the provisions of the EAR concerning *de minimis* levels are not applicable to encryption items controlled for ''EI'' reasons under ECCN 5A002, ECCN 5D002, or ECCN 5E002.

* * * * *

10. Section 732.3 is amended by adding two new sentences to the end of paragraph (e)(2) to read as follows:

§ 732.2 Steps regarding the ten general prohibitions.

* * * * *

(e) *Step 10: Foreign-made items incorporating U.S.-origin items and the de minimis rule.* * * *

(2) * * * Note that encryption items controlled for EI reasons under ECCN 5A002 or ECCN 5D002 on the Commerce Control List (refer to Supplement No.1 to Part 774 of the EAR) shall be subject to the EAR even if they incorporate less than the de minimis level of U.S. content. Accordingly, the provisions of the EAR concerning *de minimis* levels are not applicable to encryption items controlled for ''EI'' reasons under ECCN 5A002, ECCN 5D002, or ECCN 5E002.

PART 734—[AMENDED]

11. Section 734.2 is amended by revising paragraphs (b)(1) and (b)(2)

introductory text and by adding a new paragraph (b)(9) to read as follows:

§ 734.2 Important EAR terms and principles.

* * * * *

(b) *Export and reexport*—(1) *Definition of export.* ''Export'' means an actual shipment or transmission of items subject to the EAR out of the United States, or release of technology or software subject to the EAR to a foreign national in the United States, as described in paragraph (b)(2)(ii) of this section. See part 772 of the EAR for the definition that applies to exports of satellites subject to the EAR. See paragraph (b)(9) of this section for the definition that applies to exports of encryption source code and object code software subject to the EAR.

(2) *Export of technology or software.* (See paragraph (b)(9) for provisions that apply to encryption source code and object code software.) ''Export'' of technology or software, excluding encryption software subject to ''EI'' controls, includes:

* * * * *

(9) *Export of encryption source code and object code software.* (i) For purposes of the EAR, the export of encryption source code and object code software means:

(A) An actual shipment, transfer, or transmission out of the United States (see also paragraph (b)(9)(ii) of this section); or

(B) A transfer of such software in the United States to an embassy or affiliate of a foreign country.

(ii) The export of encryption source code and object code software controlled for EI reasons under ECCN 5D002 on the Commerce Control List (see Supplement No. 1 to part 774 of the EAR) includes downloading, or causing the downloading of, such software to locations (including electronic bulletin boards, Internet file transfer protocol, and World Wide Web sites) outside the U.S., or making such software available for transfer outside the United States, over wire, cable, radio, electromagnetic, photooptical, photoelectric or other comparable communications facilities accessible to persons outside the United States, including transfers from electronic bulletin boards, Internet file transfer protocol and World Wide Web sites, unless the person making the software available takes precautions adequate to prevent unauthorized transfer of such code outside the United States. Such precautions shall include:

(A) Ensuring that the facility from which the software is available controls the access to and transfers of such software through such measures as:

(*1*) The access control system, either through automated means or human intervention, checks the address of every system requesting or receiving a transfer and verifies that such systems are located within the United States;

(*2*) The access control system, provides every requesting or receiving party with notice that the transfer includes or would include cryptographic software subject to export controls under the Export Administration Act, and that anyone receiving such a transfer cannot export the software without a license; and

(*3*) Every party requesting or receiving a transfer of such software must acknowledge affirmatively that he or she understands that the cryptographic software is subject to export controls under the Export Administration Act and that anyone receiving the transfer cannot export the software without a license; or

(B) Taking other precautions, approved in writing by the Bureau of Export Administration, to prevent transfer of such software outside the U.S. without a license.

12. Section 734.3 is amended by revising paragraph (b)(3) and by adding a note to paragraphs (b)(2) and (b)(3) to read as follows:

§ 734.3 Items subject to the EAR.

* * * * *

(b) * * *

(3) Publicly available technology and software, except software controlled for EI reasons under ECCN 5D002 on the Commerce Control List, that:

(i) Are already published or will be published as described in § 734.7 of this part;

(ii) Arise during, or result from, fundamental research, as described in § 734.8 of this part;

(iii) Are educational, as described in § 734.9 of this part;

(iv) Are included in certain patent applications, as described in § 734.10 of this part.

Note to paragraphs (b)(2) and (b)(3) of this section: A printed book or other printed material setting forth encryption source code is not itself subject to the EAR (see § 734.3(b)(2)). However, notwithstanding § 734.3(b)(2), encryption source code in electronic form or media (e.g., computer diskette or CD ROM) remains subject to the EAR (see § 734.3(b)(3)).

* * * * *

13. Section 734.4 is amended by revising paragraph (b) and revising paragraph (h) to read as follows:

§ 734.4 De minimis U.S. content.

* * * * *

(b) There is no *de minimis* level for the reexport of foreign-origin items that incorporate the following:

(1) Items controlled by ECCN 9A004.a; or

(2) ''Information security'' systems and equipment, cryptographic devices, software and components specifically designed or modified therefor, and related technology controlled for ''EI'' reasons under ECCN, 5A002 ECCN 5D002, and 5E002. Certain mass market encryption software may become eligible for *de minimis* only after a one-time BXA review (refer to § 742.15(b)(1)).

* * * * *

(h) Notwithstanding the provisions of paragraphs (c) and (d) of this section, U.S.-origin technology controlled by ECCN 9E003a.1 through a.12, and .f, and related controls, and encryption software controlled for ''EI'' reasons under ECCN 5D002 or encryption technology controlled for ''EI'' reasons under ECCN 5E002 do not lose their U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin. Therefore, any subsequent or similar software or technology prepared or engineered abroad for the design, construction, operation, or maintenance of any plant or equipment, or part thereof, which is based on or uses any such U.S.-origin software or technology is subject to the EAR.

14. Section 734.5 is amended by adding paragraph (c) to read as follows:

§ 734.5 Activities of U.S. and foreign persons subject to the EAR.

* * * * *

(c) Technical assistance by U.S. persons with respect to encryption commodities or software as described in § 744.9 of the EAR.

15. Section 734.7 is amended by revising paragraph (b) and by adding paragraph (c) to read as follows:

§ 734.7 Published information and software.

* * * * *

(b) Software and information is published when it is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution. See Supplement No. 1 to this part, Questions G(1) through G(3).

(c) Notwithstanding paragraphs (a) and (b) of this section, note that encryption software controlled under ECCN 5D002 for ''EI'' reasons on the Commerce Control List (refer to Supplement No. 1 to part 774 of the

EAR) remains subject to the EAR even when publicly available.

16. Section 734.8 is amended by adding a sentence to the end of paragraph (a) to read as follows:

§ 734.8 Information resulting from fundamental research.

(a) * * * Note that the provisions of this section do not apply to encryption software controlled under ECCN 5D002 for ''EI'' reasons on the Commerce Control List (refer to Supplement No. 1 to part 774 of the EAR).

* * * * *

17. Section 734.9 is revised to read as follows:

§ 734.9 Educational information.

''Educational information'' referred to in § 734.3(b)(3)(iii) of this part is not subject to the EAR if it is released by instruction in catalog courses and associated teaching laboratories of academic institutions. Dissertation research is discussed in § 734.8(b) of this part. (Refer to Supplement No. 1 to this part, Question C(1) through C(6)). Note that the provisions of this section do not apply to encryption software controlled under ECCN 5D002 for ''EI'' reasons on the Commerce Control List (refer to Supplement No. 1 to part 774 of the EAR).

18. Supplement No.1 to Part 734 is amended by revising the introductory paragraph to read as follows:

Supplement No. 1 to Part 734—Questions and Answers—Technology and Software Subject to the EAR

This Supplement No. 1 contains explanatory questions and answers relating to technology and software that is subject to the EAR. It is intended to give the public guidance in understanding how BXA interprets this part, but is only illustrative, not comprehensive. In addition, facts or circumstances that differ in any material way from those set forth in the questions or answers will be considered under the applicable provisions of the EAR. Exporters should note that the provisions of this supplement do not apply to encryption software (including source code) transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. See § 742.15 of the EAR. This Supplement is divided into nine sections according to topic as follows:

* * * * *

PART 736—[AMENDED]

19. Section 736.2 is amended by revising paragraph (b)(7) to read as follows:

§ 736.2 General prohibitions and determination of applicability.

* * * * *

(7) *General Prohibition Seven—Support of Certain Activities by U.S. persons*—(i) *Support of Proliferation Activities (U.S. Person Proliferation Activity).* If you are a U.S. Person as that term is defined in § 744.6(c) of the EAR, you may not engage in any activities prohibited by § 744.6 (a) or (b) of the EAR which prohibits the performance, without a license from BXA, of certain financing, contracting, service, support, transportation, freight forwarding, or employment that you know will assist in certain proliferation activities described further in part 744 of the EAR. There are no License Exceptions to this General Prohibition Seven in part 740 of the EAR unless specifically authorized in that part.

(ii) You may not, without a license from BXA, provide certain technical assistance to foreign persons with respect to encryption items, as described in § 744.9 of the EAR.

* * * * *

PART 738—[AMENDED]

§ 738.2 [Amended]

20. Section 738.2 is amended by adding ''EI Encryption Items'' in alphabetical order to the list of Reasons for Control in paragraph (d)(2)(i)(A).

PART 740—[AMENDED]

21. Part 740 is amended by redesignating §§ 740.8 through 740.15 as §§ 740.9 through 740.16 and by adding a new § 740.8 to read as follows:

§ 740.8 Key management infrastructure.

(a) *Scope.* License Exception KMI authorizes the export and reexport of certain encryption software and equipment.

(b) *Eligible software and equipment*—(1) *Recovery encryption items.* Eligible items are recovery encryption software and equipment controlled under ECCNs 5D002 or 5A002 made eligible as a result of a one-time BXA review. You may initiate this review by submitting a classification request for your product in accordance with paragraph (d)(1) of this section.

(2) *Non-recoverable encryption items.* Eligible items are 56-bit DES or equivalent strength non-key recovery software and equipment controlled under ECCNs 5D002 or 5A002 made eligible as a result of a one-time BXA review. You may initiate this review by submitting a classification request for your product in accordance with paragraph (d)(2) of this section.

(c) *Eligible destinations.* License Exception KMI is available for all destinations, except Cuba, Libya, North Korea, Iraq, Iran, Syria, and Sudan.

(d) *Additional eligibility requirements*—(1) *Recovery encryption items.* Classification requests for recovery encryption software and equipment must meet the following criteria:

(i) *Key escrow and key recovery products.* (A) Key escrow and key recovery products must meet the criteria identified in Supplement No. 4 to part 742 of the EAR;

(B) Key recovery agents must meet the criteria identified in Supplement No. 5 to part 742 of the EAR;

(C) Key recovery agents must implement the security policies and key escrow/key recovery procedures identified in Supplement No. 5 to part 742 of the EAR;

(D) Key recovery agents must comply with all applicable EAR Record keeping requirements, including record retention requirements; and

(E) Key recovery agents must carry out the key holding obligations as approved by BXA, and any violation of any of the key holding obligations shall also constitute a violation of the EAR. Note that the key recovery agent's continuing compliance with key recovery agent requirements and key safeguard procedures is a condition for use of License Exception KMI. The exporter or reexporter, whether that person is the key recovery agent or not, must submit a new classification request to BXA if there are any changes (e.g., termination, replacement, additions) to the previously approved key recovery agent.

(ii) *Other recoverable encryption items.* Requests for one-time review of recoverable products which allow government officials to obtain, under proper legal authority and without the cooperation or knowledge of the user, the plaintext of the encrypted data and communications will receive favorable consideration.

(2) *Non-recoverable encryption items.* Upon approval of your classification request submitted in accordance with this paragraph (d)(2), you will become eligible to use License Exception KMI for six months. In order to continue using this License Exception, you must renew your eligibility by submitting the progress report described in paragraph (d)(2)(ii) of this section. Classification requests for 56-bit DES or equivalent strength non-key recovery software and

equipment must meet the following criteria:

(i) Initial request must be submitted with a business plan that explains in detail the steps the applicant will take during the two-year transition period according to the criteria identified in Supplement No. 7 to part 742 of the EAR;

(ii) Renewal for use of this License Exception is contingent upon progress reports sent to BXA every six months and the applicant's adherence to benchmarks and milestones as set forth in the plan submitted for the initial classification request.

(iii) Applicants may inform their authorized distributors that an approved classification and plan has been granted to them and the distributors' authority to so export or reexport will be for a time period ending on the same day the applicant's authority to export or reexport ends.

(e) *Reporting requirements.* (1) You must provide semiannual reports to BXA identifying:

(i) Ultimate consignee; specific end-user name and address, if available; and country of ultimate destination; and

(ii) Quantities of each encryption item shipped.

(2) You must submit reports no later than March 1 and no later than September 1 of any given year.

22. Newly designated § 740.9 is amended by revising paragraph (c)(3) to read as follows:

§ 740.9 Temporary imports, exports, and reexports (TMP).

* * * * *

(c) * * *

(3) *Exports of beta test software.* All software that is controlled by the Commerce Control List (Supplement No. 1 to part 774 of the EAR), and under Commerce licensing jurisdiction, is eligible for export and reexport, subject to the restrictions of this paragraph, except encryption software controlled for EI reasons under ECCN 5D002. Certain encryption software may become eligible after a one-time BXA review (refer to § 742.15(b)(1) of the EAR).

* * * * *

23. Newly designated § 740.11 is amended by revising paragraphs (b)(2)(iii) and (b)(2)(iv) to read as follows:

§ 740.11 Governments and international organizations (GOV).

* * * * *

(b) * * *

(2) * * *

(iii) *Items for official use within national territory by agencies of cooperating governments.* This License Exception is available for all items consigned to and for the official use of any agency of a cooperating government within the territory of any cooperating government, except:

(A) Computers with a CTP greater than 10,000 MTOPS when destined for Argentina, Hong Kong, South Korea, Singapore or Taiwan;

(B) Items identified on the Commerce Control List as controlled for missile technology (MT), chemical and biological warfare (CB), or nuclear nonproliferation (NP) reasons;

(C) Regional stability items controlled under Export Control Classification Numbers (ECCNs) 6A002, 6A003, 6D102, 6E001, 6E002, 7D001, 7E001, 7E002, and 7E101 as described in § 742.6(a)(1) of the EAR; or

(D) Encryption items controlled for EI reasons as described in the Commerce Control List.

(iv) *Diplomatic and consular missions of a cooperating government.* This License Exception is available for all items consigned to and for the official use of a diplomatic or consular mission of a cooperating government located in any country in Country Group B (see Supplement No. 1 to part 740), except:

(A) Computers with a CTP greater than 10,000 MTOPS when destined for Argentina, Hong Kong, South Korea, Singapore or Taiwan;

(B) Items identified on the Commerce Control List as controlled for missile technology (MT), chemical and biological warfare (CB), or nuclear nonproliferation (NP) reasons;

(C) Regional stability items controlled under Export Control Classification Numbers (ECCNs) 6A002, 6A003, 6D102, 6E001, 6E002, 7D001, 7E001, 7E002, and 7E101 as described in § 742.6(a)(1) of the EAR; or

(D) Encryption items controlled for EI reasons as described in the Commerce Control List.

* * * * *

24. Newly designated § 740.13 is amended by revising paragraph (d)(2) to read as follows:

§ 740.13 Technology and software—unrestricted (TSU).

* * * * *

(d) * * *

(2) *Software not eligible for this License Exception.* This License Exception is not available for encryption software controlled for ''EI'' reasons under ECCN 5D002. (Refer to §§ 742.15(b)(1) and 748.3(b) of the EAR for information on item classifications regarding a one-time BXA review for release from EI controls.)

* * * * *

PART 742—[AMENDED]

25. Part 742 is amended by revising § 742.15 to read as follows:

§ 742.15 Encryption items.

Encryption items can be used to maintain the secrecy of information, and thereby may be used by persons abroad to harm national security, foreign policy and law enforcement interests. As the President indicated in E.O. 13026 and in his Memorandum of November 15, 1996, export of encryption software, like export of encryption hardware, is controlled because of this functional capacity to encrypt information on a computer system, and not because of any informational or theoretical value that such software may reflect, contain, or represent, or that its export may convey to others abroad. For this reason, export controls on encryption software are distinguished from controls on other software regulated under the EAR.

(a) *License requirements.* Licenses are required for all destinations, except Canada, for ECCNs having an ''EI'' (for ''encryption items'') under the ''Control(s)'' paragraph. Such items include: encryption commodities controlled under ECCN 5A002; encryption software controlled under ECCN 5D002; and encryption technology controlled under ECCN 5E002. (Refer to part 772 of the EAR for the definition of ''encryption items'). For encryption items previously on the U.S. Munitions List and currently authorized for export or reexport under a State Department license, distribution arrangement or any other authority of the State Department, U.S. persons holding valid USML licenses and other approvals issued by the Department of State prior to December 30, 1996 may ship remaining balances authorized by such licenses or approvals under the authority of the EAR by filing Shippers Export Declarations (SEDs) with District Directors of Customs, citing the provisions of this section effective on December 30, 1996 and the State Department license number. Such shipments shall be in accordance with the terms and conditions, including the expiration date, existing at the time of issuance of the State license. Violations of such authorizations, terms and conditions constitute violations of the EAR. Any reports required for distribution and other types of agreements previously authorized by the Department of State, valid prior to December 30, 1996, should be henceforth submitted to BXA at the following address: Office of Strategic Trade and Foreign Policy Controls, Bureau of Export Administration, Department of Commerce, 14th Street and Pennsylvania Ave., N.W., Room 2705, Washington, D.C. 20230.

(b) *Licensing policy.* The following licensing policies apply to items identified in paragraph (a) of this section. This section refers you to Supplements No. 4, No. 5, and No. 7 to this part 742. For purposes of these supplements, ''products'' refers to commodities and software. Except as otherwise noted, applications will be reviewed on a case-by-case basis by BXA, in conjunction with other agencies, to determine whether the export or reexport is consistent with U.S. national security and foreign policy interests.

(1) *Certain mass-market encryption software.* Consistent with E.O. 13026 of November 15, 1996 (61 FR 58767), certain encryption software that was transferred from the U.S. Munitions List to the Commerce Control List pursuant to the Presidential Memorandum of November 15, 1996 may be released from ''EI'' controls and thereby made eligible for mass market treatment after a one-time review. To determine eligibility for mass market treatment, exporters must submit a classification request to BXA. 40-bit mass market encryption software may be eligible for a 7-day review process, and company proprietary software may be eligible for 15-day processing. Refer to Supplement No. 6 to part 742 and § 748.3(b)(3) of the EAR for additional information. Note that the one-time review is for a determination to release encryption software in object code only unless otherwise specifically requested. Exporters requesting release of the source code should refer to paragraph (b)(3)(v)(E) of Supplement No. 6 to part 742. If, after a one-time review, BXA determines that the software is released from EI controls, such software is eligible for all provisions of the EAR applicable to other software, such as License Exception TSU for mass-market software. If BXA determines that the software is not released from EI controls, a license is required for export and reexport to all destinations, except Canada, and license applications will be considered on a case-by-case basis.

(2) *Key Escrow, Key Recovery and Recoverable encryption software and commodities.* Recovery encryption software and equipment controlled for EI reasons under ECCN 5D002 or under ECCN 5A002, including encryption equipment designed or modified to use recovery encryption software, may be made eligible for license exception KMI after a one-time BXA review. License Exception KMI is available for all destinations except Cuba, Iran, Iraq, Libya, North Korea, Syria and Sudan. To determine eligibility, exporters must submit a classification request to BXA. Requests for one-time review of key escrow and key recovery encryption items will receive favorable consideration provided that, prior to the export or reexport, a key recovery agent satisfactory to BXA has been identified (refer to Supplement No. 5 to part 742) and security policies for safeguarding the key(s) or other material/information required to decrypt ciphertext as described in Supplement No. 5 to part 742 are established to the satisfaction of BXA and are maintained after export or reexport as required by the EAR. If the exporter or reexporter intends to be the key recovery agent, then the exporter or reexporter must meet all of the requirements of a key recovery agent identified in Supplement No. 5 to part 742. In addition, the key escrow or key recovery system must meet the criteria identified in Supplement No. 4 to part 742. Note that eligibility is dependent on continued fulfilment of the requirements of a key recovery agent identified in Supplement No. 5 to part 742. Since the establishment of a key management infrastructure and key recovery agents may take some time, BXA will, while the infrastructure is being built, consider requests for eligibility to export key recovery encryption products which facilitate establishment of the key management infrastructure before a key recovery agent is named, consistent with national security and foreign policy. When BXA approves such cases, exporters of products described in Supplement No. 4 to part 742 are required to furnish the name of an agent by December 31, 1998. Requests for one-time review of recoverable products which allow government officials to obtain, under proper legal authority and without the cooperation or knowledge of the user, the plaintext of the encrypted data and communications will receive favorable consideration.

(3) *Non-recovery encryption items up to 56-bit key length DES or equivalent strength supported by a satisfactory business and marketing plan for exporting recoverable items and services.* (i) Manufacturers of non-recovery encryption items up to 56-bit key length DES or equivalent strength will be permitted to export and reexport under the authority of License Exception KMI provided that the requirements and conditions of the License Exception are met. Exporters must submit a classification request for an initial BXA review of the item and a satisfactory business and marketing plan that explains in detail the steps the applicant will take during the two-year transition period beginning January 1, 1997 to develop, produce, and/or market encryption items and services with recoverable features. Manufacturers would commit to produce key recovery products. Others would commit to incorporate such products into their own products or services. Such efforts can include: the scale of key recovery research and development, product development, and marketing plans; significant steps to reflect potential customer demand for key recovery products in the firm's encryption-related business; and how soon a key recovery agent will be identified. Note that BXA will accept requests for classification of non-recoverable encryption items up to 56-bit key length DES or equivalent strength under this paragraph from distributors, re-sellers, integrators, and other entities that are not manufacturers of the encryption items. The use of License Exception KMI is not automatic; eligibility must be renewed every six months. Renewal after each six-month period will depend on the applicant's adherence to explicit benchmarks and milestones as set forth in the plan approved with the initial license classification and amendments as approved by BXA. This relaxation of controls and use of License Exception KMI will last through December 31, 1998. The plan submitted with classifications for the export of non-recoverable encryption items up to 56-bit key length DES or equivalent strength must include the elements in Supplement No. 7 to part 742.

(ii) BXA will make a determination on such classification requests within 15 days of receipt. Exports and reexports of non-recoverable encryption items up to 56-bit key length DES or equivalent strength will be authorized under the provisions of License Exception KMI, contingent upon BXA's review and approval of a satisfactory progress report related to the ongoing plan submitted by the applicant. The applicant must submit a letter to BXA every six months requesting approval of the progress report. Note that distributors, re-sellers, integrators, or other entities that are not manufacturers of the encryption items are permitted to use License Exception KMI for exports and reexports of such items only in instances where a classification has been granted to the manufacturer of the encryption items or a classification has been granted to the distributors, re-sellers, integrators, or other entities. The authority to so export or reexport will be for a time period ending on the same day the producer's authority to export or reexport ends.

(4) *All other encryption items*—(i) *Encryption licensing arrangement.* Applicants may submit license applications for exports and reexports of certain encryption commodities and software in unlimited quantities for all destinations except, Cuba, Iran, Iraq, Libya, North Korea, Syria, and Sudan. Applications will be reviewed on a case-by-case basis. Encryption licensing arrangements may be approved with extended validity periods specified by the applicant in block #24 on Form BXA–748P. In addition, the applicant must specify the sales territory and classes of end-users. Such licenses may require the license holder to report to BXA certain information such as item description, quantity, value, and end-user name and address.

(ii) *Applications for encryption items not authorized under an encryption licensing arrangement.* Applications for the export and reexport of all other encryption items will be considered on a case-by-case basis.

(5) *Applications for encryption technology.* Applications for the export and reexport of encryption technology will be considered on a case-by-case basis.

(c) *Contract sanctity.* Contract sanctity provisions are not available for license applications reviewed under this section.

(d) [Reserved]

26. Part 742 is amended by revising Supplement No. 4 and Supplement No. 5, and by adding a new Supplement No. 6 and a new Supplement No. 7 to read as follows:

Supplement No. 4 to Part 742—Key Escrow or Key Recovery Products Criteria

Key Recovery Feature

(1) The key(s) or other material/information required to decrypt ciphertext shall be accessible through a key recovery feature.

(2) The product's cryptographic functions shall be inoperable until the key(s) or other material/information required to decrypt ciphertext is recoverable by government officials under proper legal authority and without the cooperation or knowledge of the user.

(3) The output of the product shall automatically include, in an accessible format and with a reasonable frequency, the identity of the key recovery agent(s) and information sufficient for the key recovery agent(s) to identify the key(s) or other material/information required to decrypt the ciphertext.

(4) The product's key recovery functions shall allow access to the key(s) or other material/information needed to decrypt the ciphertext regardless of whether the product generated or received the ciphertext.

(5) The product's key recovery functions shall allow for the recovery of all required decryption key(s) or other material/information required to decrypt ciphertext during a period of authorized access without requiring repeated presentations of access authorization to the key recovery agent(s).

Interoperability Feature

(6) The product's cryptographic functions may interoperate with:

(i) Other key recovery products that meet these criteria, and shall not interoperate with products whose key recovery feature has been altered, bypassed, disabled, or otherwise rendered inoperative; and

(ii) Non-key recovery products only when the key recovery product permits access to the key(s) or other material/information needed to decrypt ciphertext generated or received (i.e., one direction at a minimum) by the key recovery product.

Design, Implementation and Operational Assurance

(7) The product shall be resistant to efforts to disable or circumvent the attributes described in criteria one through six.

(8) The product's cryptographic function's key(s) or other material/information required to decrypt ciphertext shall be escrowed with a key recovery agent(s) (who may be a key recovery agent(s) internal to the user's organization) acceptable to BXA, pursuant to the criteria in Supplement No. 5 to Part 742. Since the establishment of a key management infrastructure and key recovery agents may take some time, BXA will, while the infrastructure is being built, consider exports of key recovery encryption products which facilitate establishment of the key management infrastructure before a key recovery agent is named.

Exporters of products described in this Supplement No. 4 to part 742 are required to furnish the name of an agent by December 31, 1998.

Supplement No. 5 to Part 742—Key Escrow or Key Recovery Agent Criteria, Security Policies, and Key Escrow or Key Recovery Procedures

Key Escrow or Key Recovery Agent Requirements; Security Policies; Key Escrow or Key Recovery Procedures

This Supplement sets forth criteria that the Department of Commerce will use to approve key recovery agents to support approval of the export or reexport of key recovery encryption items controlled for EI reasons under ECCNs 5A002 and 5D002. Any arrangements between the exporter or reexporter and the key recovery agent must reflect the provisions contained in this Supplement in a manner satisfactory to BXA, in conjunction with other agencies. This Supplement outlines the criteria for employing key recovery agent personnel for key recovery procedures. An applicant for eligibility to export or reexport key recovery items shall provide, or cause the proposed key recovery agent to provide, to BXA sufficient information concerning any proposed key recovery agent arrangements to permit BXA's evaluation of the key recovery agent's security policies, key recovery procedures, and suitability and trustworthiness to maintain the confidentiality of the key(s) or other material/information required to decrypt ciphertext. The key recovery agent, who must be approved by BXA, may be the applicant for the classification request. When there is no key recovery agent involved, or the customer will self-escrow abroad, with or without a legal obligation to the exporter, the customer must be approved by BXA. BXA retains the right, in addition to any other remedies, to revoke eligibility for License Exception KMI if BXA determines that a key recovery agent no longer meets these criteria. The requirements related to the suitability and trustworthiness, security policies, and key recovery procedures of the key recovery agent shall be made terms and conditions of the License Exception for key recovery items. BXA shall require the key recovery agent to provide a representation that it will comply with such terms and conditions.

Note: Use of key recovery agents located outside the U.S. is permitted if acceptable to BXA in consultation with the host government, as appropriate.

I. Key Recovery Agent Requirements

(1)(a) A key recovery agent must identify by name, date and place of birth, and social security number, individual(s) who:

(i) Is/are directly involved in the escrowing of key(s) or other material/information required to decrypt ciphertext; or

(ii) Have access to key(s) or other material/information required to decrypt ciphertext, or

(iii) Have access to information concerning requests for key(s) or other material/information required to decrypt ciphertext; or

(iv) Respond to requests for key(s) or other material/information required to decrypt ciphertext; or

(v) Is/are in control of the key recovery agent and have access or authority to obtain key(s) or other material/information required to decrypt ciphertext, and

(b) Must certify that such individual(s) meet the requirements of the following paragraphs (b)(i) or (b)(ii). BXA reserves the right to determine at any time the suitability and trustworthiness of such individual(s). Evidence of an individual's suitability and trustworthiness shall include:

(i) Information indicating that the individual(s):

(A) Has no criminal convictions of any kind or pending criminal charges of any kind;

(B) Has not breached fiduciary responsibilities (e.g., has not violated any surety or performance bonds); and

(C) Has favorable results of a credit check; or,

(ii) Information that the individual(s) has an active U.S. government security clearance of Secret or higher issued or updated within the last five years.

(2) The key recovery agent shall timely disclose to BXA when an individual no longer meets the requirements of paragraphs I.(1)(b)(i) or (ii).

(3) A key recovery agent must, to remain eligible for License Exception KMI, identify to BXA by name, date and place of birth, and social security number any new individual(s)

who will assume the responsibilities set forth in paragraph I.(1)(a) of this Supplement. Before that individual(s) assumes such responsibilities, the key recovery agent must certify to BXA that the individual(s) meets the criteria set forth in subparagraphs I.(1)(b)(i) or (b)(ii) of this Supplement. BXA reserves the right to determine at any time the suitability and trustworthiness of such personnel.

(4) If ownership or control of a key recovery agent is transferred, no export may take place under previously issued approvals until the successor key recovery agent complies with the criteria of this Supplement.

(5) Key recovery agents shall submit suitable evidence of the key recovery agent's corporate viability and financial responsibility (e.g., a certificate of good standing from the state of incorporation, credit reports, and errors/omissions insurance).

(6) Key recovery agents shall disclose to BXA any of the following which have occurred within the ten years prior to the application:

(a) Federal or state felony convictions of the business;

(b) Material adverse civil fraud judgments or settlements; and

(c) Debarments from federal, state, or local government contracting.

The applicant shall also timely disclose to BXA the occurrence of any of the foregoing during the use of License Exception KMI.

(7) Key recovery agent(s) shall designate an individual(s) to be the security and operations officer(s).

(8) A key recovery agent may be internal to a user's organization and may consist of one or more individuals. BXA may approve such key recovery agents if sufficient information is provided to demonstrate that appropriate safeguards will be employed in handling key recovery requests from government entities. These safeguards should ensure: the key recovery agent's structural independence from the rest of the organization; security; and confidentiality.

II. Security Policies

(1) Key recovery agents must implement security policies that assure the confidentiality, integrity, and availability of the key(s) or other material/information required for decryption of the ciphertext.

(a) Procedures to assure confidentiality shall include:

(i) Encrypting all key(s) or other material/information required to decrypt ciphertext while in storage, transmission, or transfer; or

(ii) Applying reasonable measures to limit access to the database (e.g. using keyed or combination locks on the entrances to escrow facilities and limiting the personnel with knowledge of or access to the keys/combinations).

(b) Procedures to assure the integrity of the database (i.e. assuring the key(s) and other material/information required to decrypt ciphertext are protected against unauthorized changes) shall include the use of access controls such as database password controls, digital signatures, system auditing, and physical access restrictions.

(c) Procedures to assure the availability of the database (i.e. assuring that key(s) and other material/information required to decrypt ciphertext are retrievable at any time) shall include system redundance, physical security, and the use of cryptography to control access.

(2) Policies and procedures shall be designed and operated so that a failure by a single person, procedure, or mechanism does not compromise the confidentiality, integrity and availability of key(s)or other material/information required to decrypt ciphertext. Security policies and procedures may include, but are not limited to, multi-person control of access to recoverable keys, split keys, and back-up capabilities.

(3) Key recovery agents shall implement policies that protect against unauthorized disclosure of information regarding whose encryption material is stored, the fact that key(s) or other material/information required to decrypt ciphertext was requested or provided, and the identity of a requester. Procedures to assure the confidentiality of this information shall include those described in paragraph II.(1)(a) of this supplement.

(4) Key recovery agents shall provide to BXA prompt notice of a compromise of a security policy or of the confidentiality of key(s) or other material/information required to decrypt ciphertext.

III. Key Recovery Procedures

(1) Key recovery agents shall maintain the ability to make the key(s) or other material/information required to decrypt ciphertext available until notified otherwise by BXA. Key recovery agents shall make requested key(s) or other material/information required to decrypt ciphertext available, to the extent required by the request, within two hours from the time they receive a request from a government agency acting under appropriate legal authority.

(2) Key recovery agents shall maintain data regarding key recovery requests received, release of key(s) or other material/information required to decrypt ciphertext, database changes, system administration access, and dates of such events for purposes of audits by BXA.

(3) The key recovery agent must transfer all key recovery equipment, key(s) and/or other material/information required to decrypt ciphertext, key recovery database, and all administrative information necessary to its key recovery operations to another key recovery agent approved by BXA in the event that:

(a) The key recovery agent dissolves or otherwise terminates escrowing operations, or

(b) BXA determines that there is a risk of such dissolution or termination, or

(c) BXA determines that the key recovery agent is no longer suitable or trustworthy.

Supplement No. 6 to Part 742—Guidelines for Submitting a Classification Request for a Mass Market Software Product That Contains Encryption

Classification requests for release of certain mass market encryption software from EI controls must be submitted on Form BXA-748P, in accordance with § 748.3 of the EAR. To expedite review of the request, clearly mark the envelope ''Attn.: Mass Market Encryption Software Classification Request''. In Block 9: Special Purpose of the Form BXA-748P, you must insert the phrase ''Mass Market Encryption Software. Failure to insert this phrase will delay processing. In addition, the Bureau of Export Administration recommends that such requests be delivered via courier service to: Bureau of Export Administration, Office of Exporter Services, Room 2705, 14th Street and Pennsylvania Ave., N.W., Washington, D.C. 20230.

(a) Requests for mass market encryption software that meet the criteria in paragraph (a)(2) of this Supplement will be processed in seven (7) working days from receipt of a properly completed request. Those requests for mass market encryption software that meet the criteria of paragraph (a)(1) of this Supplement only will be processed in fifteen (15) working days from receipt of a properly completed request. When additional information is requested, the request will be processed within 15 working days of the receipt of the requested information.

(1) A mass market software product that meets *all* the criteria established in this paragraph will be processed in fifteen (15) working days from receipt of the properly completed request:

(i) The commodity must be mass market software. Mass market software is computer software that is available to the public via sales from stock at retail selling points by means of over-the-counter transactions, mail order transactions, or telephone call transactions;

(ii) The software must be designed for installation by the user without further substantial support by the supplier. Substantial support does not include telephone (voice only) help line services for installation or basic operation, or basic operation training provided by the supplier; and

(iii) The software includes encryption for data confidentiality.

(2) A mass market software product that meets *all* the criteria established in this paragraph will be processed in seven working days from receipt of the properly completed request:

(i) The software meets all the criteria established in paragraph (a)(1) (i) through (iii) of this Supplement;

(ii) The data encryption algorithm must be RC4 and/or RC2 with a key space no longer than 40 bits. The RC4 and RC2 algorithms are proprietary to RSA Data Security, Inc. To ensure that the subject software is properly licensed and correctly implemented, contact RSA Data Security, (415) 595–8782;

(iii) If both RC4 and RC2 are used in the same software, their functionality must be separate. That is, no data can be operated sequentially on by both routines or multiply by either routine;

(iv) The software must not allow the alteration of the data encryption mechanism and its associated key spaces by the user or any other program;

(v) The key exchange used in data encryption must be:

(A) A public key algorithm with a key space less than or equal to a 512 bit modulus and/or;

(B) A symmetrical algorithm with a key space less than or equal to 64 bits; and

(vi) The software must not allow the alteration of the key management mechanism and its associated key space by the user or any other program.

(b) Instructions for the preparation and submission of a classification request that is eligible for seven day handling are as follows:

(1) If the software product meets the criteria in paragraph (a)(2) of this Supplement, you must call the Department of Commerce on (202) 482–0092 to obtain a test vector. This test vector must be used in the classification process to confirm that the software has properly implemented the approved encryption algorithms.

(2) Upon receipt of the test vector, the applicant must encrypt the test plain text input provided using the commodity's encryption routine (RC2 and/or RC4) with the given key value. The applicant should not pre-process the test vector by any compression or any other routine that changes its format. Place the resultant test cipher text output in hexadecimal format on an attachment to form BXA–748P.

(3) You must provide the following information in a cover letter to the classification request:

(i) Clearly state at the top of the page ''Mass Market Encryption Software—7 Day Expedited Review Requested'';

(ii) State that you have reviewed and determined that the software subject to the classification request meets the criteria of paragraph (a)(2) of this Supplement;

(iii) State the name of the single software product being submitted for review. A separate classification request is required for each product;

(iv) State how the software has been written to preclude user modification of the encryption algorithm, key management mechanism, and key space;

(v) Provide the following information for the software product:

(A) Whether the software uses the RC2 and/or the RC4 algorithm and how the algorithm(s) is used. If both of these algorithms are used in the same product, also state how the functionality of each is separated to assure that no data is operated on by both algorithms;

(B) Pre-processing information of plain text data before encryption (e.g. the addition of clear text header information or compression of the data);

(C) Post-processing information of cipher text data after encryption (e.g. the addition of clear text header information or packetization of the encrypted data);

(D) Whether a public key algorithm or a symmetric key algorithm is used to encrypt keys and the applicable key space;

(E) For classification requests regarding source code:

(*1*) Reference the applicable executable product that has already received a one-time review;

(*2*) Include whether the source code has been modified by deleting the encryption algorithm, its associated key management routine(s), and all calls to the algorithm from the source code, or by providing the encryption algorithm and associated key management routine(s) in object code with all calls to the algorithm hidden. You must provide the technical details on how you have modified the source code;

(3) Include a copy of the sections of the source code that contain the encryption algorithm, key management routines, and their related calls; and

(F) Provide any additional information which you believe would assist in the review process.

(c) Instructions for the preparation and submission of a classification request that is eligible for 15 day handling are as follows:

(1) If the software product meets only the criteria in paragraph (a)(1) of this supplement, you must prepare a classification request. Send the original to the Bureau of Export Administration. Send a copy by Express Mail to:

Attn.: 15 day Encryption Request Coordinator P.O. Box 246 Annapolis Junction, MD 20701-0246.

(2) You must provide the following information in a cover letter to the classification request:

(i) Clearly state at the top of the page ''Mass Market Software and Encryption—15 Day Expedited Review Requested'';

(ii) State that you have reviewed and determined that the software subject of the classification request, meets the criteria of paragraph (a)(1) of this Supplement;

(iii) State the name of the single software product being submitted for review. A separate classification request is required for each product;

(iv) State that a duplicate copy, in accordance with paragraph (c)(1) of this Supplement, has been sent to the 15 day Encryption Request Coordinator; and

(v) Ensure that the information provided includes brochures or other documentation or specifications relating to the software, as well as any additional information which you believe would assist in the review process.

(3) Contact the Bureau of Export Administration on (202) 482–0092 prior to submission of the classification to facilitate the submission of proper documentation.

Supplement No. 7 to Part 742—Review Criteria for Exporter Key Escrow or Key Recovery Development Plans

Exporter Key Recovery Plan

(1) Export of 56-bit digital encryption standard (DES) or equivalent strength encryption products, without key recovery, will be permitted, in exchange for specific commitments to key recovery products and services and a key management infrastructure. After a one-time review of the strength of the product, the 56-bit DES or equivalent strength products will be eligible for export License Exception KMI, provided that the exporter submits an acceptable plan.

(2) Acceptable plans include: export licenses issued for, and demonstrations of, key recovery products to appropriate U.S. agencies; plans describing products under development with key recovery features (see paragraph (3) of this Supplement), and for distributors, a plan describing intentions to offer for distribution key recovery products.

(3) Following are topical areas to include in the plan, which should be submitted to the Department of Commerce, Bureau of Export Administration, in the form of a letter from senior corporate management:

(i) Steps the applicant has taken or will take (depending on its line of business) to develop, produce, distribute, market, and/or transition to encryption products with key recovery features. The plan should include benchmarks and milestones for incorporating key recovery features into products and services, and for the supporting key management infrastructure, including key recovery agent(s); and

(ii) Provision, at the applicant's discretion, of other information to indicate commitment to the development of a key management infrastructure, such as participation in U.S. Government pilot programs, current key recovery products or services provided, role in NIST's Technical Advisory Committee on a Key Management Infrastructure, participation in other encryption policy committees or groups, or other support for the key management infrastructure.

(4) Renewal of License Exception KMI must be sought by sending a letter to BXA every six months reporting progress in meeting milestones set forth in the exporter's plan for key recovery products and services.

PART 744—[AMENDED]

27. Part 744 is amended by adding a new § 744.9 to read as follows:

§ 744.9. Restrictions on technical assistance by U.S. persons with respect to encryption items.

(a) *General prohibition.* No U.S. person may, without a license from BXA, provide technical assistance (including training) to foreign persons with the intent to aid a foreign person in the development or manufacture outside the United States of encryption commodities and software that, if of United States origin, would be controlled for ''EI'' reasons under ECCN 5A002 or 5D002. Note that this prohibition does not apply if the U.S. person providing the assistance has a license or is otherwise entitled to export the encryption commodities and software in question to the foreign person(s) receiving the assistance. Note in addition that the mere teaching or discussion of information about cryptography, including, for example, in an academic setting, by itself would not establish the intent described in this section, even where foreign persons are present.

(b) *Definition of U.S. person.* For purposes of this section, the term U.S. person includes:

(1) Any individual who is a citizen or permanent resident alien of the United States;

(2) Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and

(3) Any person in the United States.

(c) *License review standards.* Applications involving activities described in this section will be reviewed on a case-by-case basis to determine whether the activity is consistent with U.S. national security and foreign policy interests.

PART 748—[AMENDED]

28. Section 748.3 is amended by adding a new paragraph (b)(3) to read as follows:

§ 748.3 Classification and Advisory Opinions.

* * * * *

(b) * * *

(3) Classification requests for a one-time Department of Commerce review of encryption software transferred from the U.S. Munitions List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date are required prior to export to determine eligibility for release from EI controls. Refer to Supplement No. 6 to part 742 for instructions on submitting such requests for mass market encryption software. For requests for Key Escrow, Key Recovery, or Recovery encryption products, include the word ''Encryption'' in Block 24: Additional Information.

* * * * *

PART 750—[AMENDED]

29. Section 750.3 is amended by adding a new paragraph (b)(2)(v) to read as follows:

§ 750.3 Review of license applications by BXA and other government agencies and departments.

* * * * *

(b) * * *

(2) * * *

(v) The Department of Justice is concerned with controls relating to encryption items.

PART 768—[AMENDED]

30. Section 768.1(b) is revised to read as follows:

§ 768.1 Introduction.

* * * * *

(b) *Scope.* This part applies only to the extent that items are controlled for national security purposes. This part does not apply to encryption items that were formerly controlled on the U.S. Munitions List and that were transferred to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date, which shall not be subject to any mandatory foreign availability review procedures.

* * * * *

31. Section 768.3 is amended by adding a new sentence at the end of paragraph (a) to read as follows:

§ 768.3 Foreign availability assessment.

(a) * * * The effect of any such determination on the effectiveness of foreign policy controls may be considered independent of this part.

* * * * *

PART 772—[AMENDED]

32. Part 772 is amended by adding new definitions of ''Encryption items,'' ''Encryption object code,'' ''Encryption software,'' and ''Encryption source code,'' in alphabetical order and by revising the definitions of ''Advisory Committee on Export Policy (ACEP),'' ''Commodity,'' ''Export Administration Review Board (EARB),'' and ''Operating Committee (OC),'' to read as follows:

PART 772—DEFINITIONS OF TERMS

* * * * *

Advisory Committee on Export Policy (ACEP). The ACEP voting members include the Assistant Secretary of Commerce for Export Administration, and Assistant Secretary-level representatives from the Departments of State, Defense, Justice (for encryption exports), Energy, and the Arms Control and Disarmament Agency. The appropriate representatives of the Joint Chiefs of Staff and the Director of the Nonproliferation Center of the Central Intelligence Agency are non-voting members. The Assistant Secretary of Commerce for Export Administration is the Chair. Appropriate acting Assistant Secretary, Deputy Assistant Secretary or equivalent strength of any agency or department may serve in lieu of the Assistant Secretary of the concerned agency or department. Such representatives, regardless of rank, will speak and vote on behalf of their agencies or departments. The ACEP may invite Assistant Secretary-level representatives of other Government agencies or departments (other than those identified above) to participate in the activities of the ACEP when matters of interest to such agencies or departments are under consideration. Decisions are made by majority vote.

* * * * *

Commodity. Any article, material, or supply except technology and software. Note that the provisions of the EAR applicable to the control of software (e.g. publicly available provisions) are not applicable to encryption software. Encryption software is controlled because, like the items controlled under ECCN 5A002, it has a functional capacity to encrypt information on a computer system, and not because of any informational or theoretical value that such software may reflect, contain or represent, or that its export may convey to others abroad.

* * * * *

Encryption items. The phrase encryption items includes all encryption commodities, software, and technology that contain encryption features and are subject to the EAR. This does not include encryption items specifically designed, developed, configured, adapted or modified for military applications (including command, control and intelligence applications) which are controlled by the Department of State on the U.S. Munitions List.

Encryption object code. Computer programs containing an encryption source code that has been compiled into a form of code that can be directly executed by a computer to perform an encryption function.

Encryption software. Computer programs that provide capability of encryption functions or confidentiality of information or information systems. Such software includes source code, object code, applications software, or system software.

Encryption source code. A precise set of operating instructions to a computer that, when compiled, allows for the execution of an encryption function on a computer.

* * * * *

Export Administration Review Board (EARB). EARB voting members are the Secretary of Commerce, the Secretary of State, the Secretary of Defense, the Secretary of Energy, the Attorney General (for encryption exports), and the Director of the Arms Control and Disarmament Agency. The Chairman of the Joint Chiefs of Staff and the Director of Central Intelligence are non-voting members. The Secretary of Commerce is the Chair of the EARB. No alternate EARB members may be designated, but the acting head or deputy head of any agency or department may serve in lieu of the head of the concerned agency or department. The EARB may invite the heads of other Government agencies or departments (other than those identified in this definition) to participate in the activities of the EARB when matters of interest to such agencies or departments are under consideration. Decisions are made by majority vote.

* * * * *

Operating Committee (OC). The OC voting members include representatives of appropriate agencies in the Departments of Commerce, State, Defense, Justice (for encryption exports), and Energy and the Arms Control and Disarmament Agency. The appropriate representatives of the Joint Chiefs of Staff and the Director of the Nonproliferation Center of the Central Intelligence Agency are non-voting members. The Department of Commerce representative, appointed by the Secretary, is the Chair of the OC and serves as the Executive Secretary of the Advisory Committee on Export Policy. The OC may invite representatives of other Government agencies or departments (other than those identified in this definition) to participate in the activities of the OC when matters of interest to such agencies or departments are under consideration.

* * * * *

PART 774—[AMENDED]

33. In Supplement No. 1 to part 774 (the Commerce Control List), Category 5—Telecommunications and Information Security is amended by revising ECCNs 5A002, 5D002 and 5E002, to read as follows:

Category 5—Telecommunications and Information Security

* * * * *

II. Information Security

* * * * *

5A002 Systems, Equipment, Application Specific ‘‘Electronic Assemblies’’, Modules or Integrated Circuits for ‘‘Information Security’’, and Specially Designed Components Therefor

License Requirements

Reason for Control: NS, AT, EI
Control(s) Country Chart
NS applies to entire entry—NS Column 1
AT applies to entire entry—AT Column 1

EI applies only to encryption items transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. Refer to § 742.15.

License Exceptions

LVS: N/A
GBS: N/A
CIV: N/A

List of Items Controlled

Unit: $ value
Related Controls: N/A
Related Definitions: N/A
Items:

a. Designed or modified to use ‘‘cryptography’’ employing digital techniques to ensure ‘‘information security’’;

b. Designed or modified to perform cryptanalytic functions;

c. Designed or modified to use ‘‘cryptography’’ employing analog techniques to ensure ‘‘information security’’;

Note: 5A002.c does not control the following:

1. Equipment using ‘‘fixed’’ band scrambling not exceeding 8 bands and in which the transpositions change not more frequently than once every second;
2. Equipment using ‘‘fixed’’ band scrambling exceeding 8 bands and in which the transpositions change not more frequently than once every ten seconds;
3. Equipment using ‘‘fixed’’ frequency inversion and in which the transpositions change not more frequently than once every second;
4. Facsimile equipment;
5. Restricted audience broadcast equipment; and
6. Civil television equipment;

d. Designed or modified to suppress the compromising emanations of information-bearing signals;

Note: 5A002.d does not control equipment specially designed to suppress emanations for reasons of health and safety.

e. Designed or modified to use cryptographic techniques to generate the spreading code for ‘‘spread spectrum’’ or hopping code for ‘‘frequency agility’’ systems;

f. Designed or modified to provide certified or certifiable ‘‘multilevel security’’ or user isolation at a level exceeding Class B2 of the Trusted Computer System Evaluation Criteria (TCSEC) or equivalent;

g. Communications cable systems designed or modified using mechanical, electrical or electronic means to detect surreptitious intrusion.

Note: 5A002 does not control:

a. ‘‘Personalized smart cards’’ or specially designed components therefor, with any of the following characteristics:

1. Not capable of message traffic encryption or encryption of user-supplied data or related key management functions therefor; or
2. When restricted for use in equipment or systems excluded from control under the note to 5A002.c, or under paragraphs b through h of this note.

b. Equipment containing ‘‘fixed’’ data compression or coding techniques;

c. Receiving equipment for radio broadcast, pay television or similar restricted audience television of the consumer type, without digital encryption and where digital decryption is limited to the video, audio or management functions;

d. Portable or mobile radiotelephones for civil use (e.g., for use with commercial civil cellular radiocommunications systems) that are not capable of end-to-end encryption;

e. Decryption functions specially designed to allow the execution of copy-protected ‘‘software’’, provided the decryption functions are not user-accessible;

f. Access control equipment, such as automatic teller machines, self-service statement printers or point of sale terminals, that protects password or personal identification numbers (PIN) or similar data to prevent unauthorized access to facilities but does not allow for encryption of files or text, except as directly related to the password or PIN protection;

g. Data authentication equipment that calculates a Message Authentication Code (MAC) or similar result to ensure no alteration of text has taken place, or to authenticate users, but does not allow for encryption of data, text or other media other than that needed for the authentication;

h. Cryptographic equipment specially designed and limited for use in machines for banking or money transactions, such as automatic teller machines, self-service statement printers or point of sale terminals.

5D002 Information Security ‘‘Software’’

License Requirements

Reason for Control: NS, AT, EI
Control(s) *Country Chart*
NS applies to entire entry—NS Column 1
AT applies to entire entry—AT Column 1

EI controls apply to encryption software transferred from the U.S. Munitions List to the Commerce Control List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. Refer to § 742.15 of the EAR.

Note: Encryption software is controlled because of its functional capacity, and not because of any informational value of such software; such software is not accorded the same treatment under the EAR as other ''software''; and for export licensing purposes encryption software is treated under the EAR in the same manner as a commodity included in ECCN 5A002. License Exceptions for commodities are not applicable.

Note: Encryption software controlled for EI reasons under this entry remains subject to the EAR even when made publicly available in accordance with part 734 of the EAR, and it is not eligible for the General Software Note (''mass market'' treatment under License Exception TSU for mass market software). After a one-time BXA review, certain encryption software may be released from EI controls and made eligible for the General Software Note treatment as well as other provisions of the EAR applicable to software. Refer to § 742.15(b)(1) of the EAR, and Supplement No. 6 to part 742.

License Exceptions

CIV: N/A
TSR: N/A

List of Items Controlled

Unit: $ value
Related Controls: N/A
Related Definitions: 5D002.a controls ''software'' designed or modified to use ''cryptography'' employing digital or analog techniques to ensure ''information security''.
Items:

a. ''Software'' specially designed or modified for the ''development'', ''production'' or ''use'' of equipment or ''software'' controlled by 5A002, 5B002 or 5D002.

b. ''Software'' specially designed or modified to support ''technology'' controlled by 5E002.

c. Specific ''software'' as follows:

c.1. ''Software'' having the characteristics, or performing or simulating the functions of the equipment controlled by 5A002 or 5B002;

c.2. ''Software'' to certify ''software'' controlled by 5D002.c.1;

c.3. ''Software'' designed or modified to protect against malicious computer damage, e.g., viruses;

Note: 5D002 does not control:

a. ''Software required'' for the ''use'' of equipment excluded from control under the Note to 5A002;

b. ''Software'' providing any of the functions of equipment excluded from control under the Note to 5A002.

5E002 ''Technology'' According to the General Technology Note for the ''Development'', ''Production'' or Use of Equipment Controlled by 5A002 or 5B002 or ''Software'' Controlled by 5D002

License Requirements

Reason for Control: NS, AT, EI
Control(s) Country Chart

NS applies to entire entry—NS Column 1

AT applies to entire entry—AT Column 1

EI controls applies only to encryption technology transferred from the U.S. Munitions List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. Refer to § 742.15 of the EAR.

License Exceptions

CIV: N/A

TSR: N/A

List of Items Controlled

Unit: N/A

Related Controls: N/A

Related Definitions: N/A

Items:

The list of items controlled is contained in the ECCN heading.

34. In Supplement No. 2 to Part 774 the ''General Software Note'' is revised to read as follows:

Supplement No. 2 to Part 774—General Technology and Software Notes

I. *General Technology Note.* * * *

* * * * *

II. *General Software Note.* License Exception TSU (''mass market'' software) is available to all destinations, except Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria, for release of software that is generally available to the public by being:

a. Sold from stock at retail selling points, without restriction, by means of:

1. Over the counter transactions;

2. Mail order transactions; or

3. Telephone call transactions; and

b. Designed for installation by the user without further substantial support by the supplier.

Note: License Exception TSU for mass market software does not apply to encryption software controlled for EI reasons under ECCN 5D002. Encryption software may become eligible after a one-time BXA review according to the provision of § 742.15(b)(1) of the EAR.

Dated: December 23, 1996.

Sue E. Eckert,

Assistant Secretary for Export Administration.

[FR Doc. 96–33030 Filed 12–26–96; 8:45 am]

BILLING CODE 3510–33–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 33–7376; 34–38068; IC–22413; File No. S7–12–96]

RIN 3235–AG78

Odd-Lot Tender Offers by Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting an amendment to Rule 13e–4 under the Securities Exchange Act of 1934 (''Exchange Act''). The amendment removes the rule's requirement that an issuer cash tender offer made to odd-lot holders specify a record date of ownership for eligibility to tender into the offer. The amendment enables issuers to conduct continuous, periodic, or extended odd-lot offers for their equity securities. The Commission also is granting a class exemption from Rule 10b–13, and a temporary class exemption from Rule 10b–6, under the Exchange Act to permit issuers to conduct odd-lot offers, to ''round-up'' odd-lots on behalf of odd-lot holders, and to make purchases of their securities otherwise than pursuant to the odd-lot offer.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Lauren C. Mullen, Attorney, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 5–1, Washington, DC 20549, at (202) 942–0772.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is adopting an amendment to paragraph (h)(5) of Rule 13e–4 (''Rule 13e–4'' or ''Rule'')[1] under the Exchange Act,[2] and is granting a class exemption from Rule 10b–13,[3] and a temporary class exemption from Rule 10b–6,[4] under the Exchange Act in connection with issuers' odd-lot tender offers. The amendment, which was published for comment on April 25, 1996 (''Proposing Release''),[5] and the class exemptions permit issuers to conduct continuous, periodic, or extended odd-lot offers for their equity

[1] 17 CFR 240.13e–4.

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.10b–13.

[4] 17 CFR 240.10b–6.

[5] Securities Exchange Act Release No. 37132 (April 25, 1996), 61 FR 18306.

securities without seeking exemptions from Rules 10b–6, 10b–13, and 13e–4 from the Commission.

II. Discussion of the Amendment

Rule 13e–4 governs cash tender and exchange offers by issuers for their equity securities. Paragraph (h)(5) of Rule 13e–4 excepts issuers' odd-lot offers from the provisions of the Rule, other than the ''all holders'' and ''best price'' provisions of paragraphs (f)(8)(i) and (f)(8)(ii), respectively.[6] In an odd-lot offer, the offer to purchase is limited to securityholders who own fewer than 100 shares of the subject security.

Prior to this amendment, paragraph (h)(5) of Rule 13e–4 required an issuer making an odd-lot offer to set a record date prior to the offer's announcement for the purpose of determining a securityholder's eligibility to participate in the offer. As discussed in the Proposing Release, the record date requirement was imposed to prevent certain perceived abuses.[7] The Commission's experience with odd-lot offers, and the two comments received in response to the Proposing Release, indicate that such abuses rarely, if ever, occur. Therefore, to reduce the regulatory burdens for issuers conducting odd-lot offers, and to eliminate the need for the Commission to grant exemptions from Rule 13e–4 on a case-by-case basis for extended odd-lot offers, the Commission proposed amending Rule 13e–4 to delete the record date requirement from paragraph (h)(5). The amendment was proposed to permit issuers to conduct odd-lot offers on a continuous, extended, or periodic basis, and also to enable odd-lot holders who obtain their holdings prior to or during the odd-lot offer to participate in the offer.

The Commission has determined to adopt the amendment to Rule 13e–4(h)(5) as proposed, with a minor modification.[8] In order to provide issuers with flexibility, the rule as amended permits, but does not require, an issuer to set a record date for eligibility to participate in an odd-lot offer.

One commenter requested clarification regarding the appropriate procedures under the Rule for notifying beneficial holders of odd-lots about the offer. As previously noted, paragraph (h)(5) of Rule 13e–4 excepts issuers from the Rule's requirements other than the ''all holders'' and ''best price'' provisions. Nonetheless, in proposing paragraph (h)(5), the Commission noted an issuer's affirmative duty under the Exchange Act, and various rules promulgated thereunder, to disclose material information to its shareholders as well as its own interest in the success of an odd-lot offer.[9] In adopting the odd-lot exception, the Commission further stated that odd-lot offers are required to be extended equally to beneficial holders and record holders.[10]

The ability to participate equally means that beneficial holders should have the same access to information about the offer as record holders.[11] Accordingly, while Rule 13e–4(h)(5) does not contain dissemination requirements, an issuer or its agent must take reasonable steps to disseminate information about an odd-lot offer to beneficial holders in a manner comparable to the dissemination to record holders.

The same commenter also suggested excepting issuer tender offers made to a class of shareholders owning, in the aggregate, less than five percent of the issuer's outstanding securities; this commenter also suggested redefining the term ''odd-lot'' to include more than 99 shares. The Commission believes that the odd-lot exception to Rule 13e–4 is meant to cover an offer for economically *de minimis* holdings, *e.g.*, an amount of securities for which high transaction costs create a disincentive for trading the shares and which also is too small to warrant servicing by the issuer. Moreover, increasing the exception's threshold to an amount greater than 99 shares would raise various concerns under the Rule, including the ''all-holders'' provisions. Nevertheless, the Commission recognizes that the odd-lot exception is intended to allow issuers to reduce the number of small shareholdings where the costs to issuers of servicing small shareholders, and the costs to shareholders of selling small holdings, are disproportionate to the value of the security. Accordingly, the Commission will consider, on a case-by-case basis, issuer offers involving tenders of more than 99 shares from each holder, where such offers involve a number of securities that represent a *de minimis* proportion of the value of the issuer's outstanding securities.[12]

III. Class Exemption From Rule 10b–13 and Temporary Class Exemption From Rule 10b–6

As discussed in the Proposing Release, odd-lot offers also raise issues under Rule 10b–13, which prohibits an issuer conducting a cash tender or exchange offer from purchasing the same security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the offer. Rule 10b–13 is designed, *inter alia*, to prevent larger shareholders from demanding greater or different consideration for the tender of their shares than that which is paid pursuant to the tender offer. Larger shareholders are ineligible to participate in odd-lot offers because, by definition, an odd-lot offer is available only to shareholders owning 99 or fewer shares of the issuer's securities. Accordingly, the Commission believes that purchases of an issuer's securities otherwise than pursuant to an odd-lot offer do not raise the concerns that Rule 10b–13 is designed to address.

The Commission, therefore, hereby grants an exemption from Rule 10b–13 to permit any issuer or agent acting on behalf of an issuer in connection with an odd-lot offer to purchase or arrange to purchase the security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the odd-lot offer from the time that the odd-lot offer is publicly announced or otherwise made known to odd-lot holders, until the offer's expiration. Among other things, this will allow the issuer or its agent to purchase the issuer's securities to satisfy requests of odd-lot holders to

---

[6] 17 CFR 240.13e–4(h)(5); *see* Securities Exchange Act Release No. 19988 (July 21, 1983), 48 FR 34251 (''Release No. 34–19988'') (adopting the paragraph now designated as (h)(5) of Rule 13e–4, which excepts odd-lot offers from the Rule's requirements).

Rule 13e–4(f)(8)(i) requires that the tender offer be open to all securityholders of the class of securities subject to the tender offer. 17 CFR 240.13e–4(f)(8)(i). Rule 13e–4(f)(8)(ii) requires that consideration paid to any securityholder pursuant to an issuer tender offer be the highest consideration paid to any other security holder during such tender offer. 17 CFR 240.13e–4(f)(8)(ii).

[7] *See* Securities Exchange Act Release No. 19246 (November 17, 1982), 47 FR 53398, 53400 (''Release 34–19246'') (proposing adoption of the paragraph now designated as (h)(5) of Rule 13e–4).

[8] One commenter suggested that the Commission exempt issuers that conduct odd-lot offers from the broker-dealer registration requirements under Section 15(a) of the Exchange Act. The Commission notes that this commenter's concerns were specifically addressed by the staff in *Letter regarding Shareholder Communications Corporation* (July 25, 1996), 1996 SEC. No-Act. LEXIS 610. This letter discusses the extent to which issuers may participate in an odd-lot offer without requiring registration as a broker-dealer.

[9] Release No. 34–19246, 47 FR at 53399 n. 18.

[10] Release No. 34–19988, 48 FR at 34252.

[11] *Cf.* paragraph (e)(1)(ii) of Rule 13e–4, 17 CFR 240.13e–4(e)(1)(ii), and paragraph (a)(2) of Rule 14a–7 under the Exchange Act, 17 CFR 240.14a–7(a)(2), respectively.

[12] The Commission, through its Division of Market Regulation, will consider requests regarding such programs. Such requests should be directed to the Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 5–1, Washington, DC 20549 at (202) 942–0772.

''round-up'' their holdings to 100 shares.

Also, the Commission today is adopting Regulation M under the Exchange Act, the Securities Act of 1933,[13] and the Investment Company Act of 1940,[14] and is rescinding Rule 10b–6 under the Exchange Act, among other rules.[15] Rule 102 of Regulation M, which along with Rule 101 replaces Rule 10b–6, contains an exception that permits issuers to purchase odd-lots while engaged in a distribution of the same or related securities. This exception allows issuers to conduct odd-lot tender offers, including continuous, periodic, or extended odd-lot offers, during a distribution of the same or related securities. The exception also allows issuers to purchase securities on behalf of odd-lot holders who wish to ''round-up'' their holdings to a round lot (*i.e.*, 100 shares).[16] The exceptions for odd-lot transactions under Regulation M will accomplish the same relief intended by the class exemption from Rule 10b–6 that was discussed in the Proposing Release.[17] The exception for odd-lot transactions from Rule 102 of Regulation M, and a similar exception from Rule 101 for distribution participants and their affiliated purchasers, will be effective as of 60 days from publication of Regulation M in the Federal Register.

To accommodate odd-lot offers in the interim, the Commission hereby grants an exemption from Rule 10b–6 on a temporary basis to permit an issuer, or an agent acting on behalf of the issuer, to bid for or purchase odd-lots, or to effect transactions to allow odd-lot holders to ''round-up'' their holdings to 100 shares during an odd-lot offer conducted pursuant to Rule 13e–4(h)(5), during a distribution for the purposes of Rule 10b–6. This class exemption will terminate as of the effective date of Regulation M.

IV. Regulatory Flexibility Act Analysis

The Chairman of the Securities and Exchange Commission certified in connection with the Proposing Release that the proposed amendment to Rule 13e–4 and the proposed class exemptions from Rules 10b–6 and 10b–13, if adopted, would not have a significant impact on a substantial number of small entities. None of the comments addressed the certification.

V. Effects on Competition and Other Findings

Section 23(a)(2) of the Exchange Act[18] requires the Commission, in adopting rules under the Exchange Act, to consider the anti-competitive effects of such rules, if any, and to balance any impact against regulatory benefits gained in terms of furthering the purposes of the Exchange Act. Furthermore, Section 2 of the Securities Act of 1933[19] and Section 3 of the Exchange Act,[20] as amended by the recently enacted National Securities Markets Improvement Act of 1996 (''Markets Improvement Act''),[21] provide that whenever the Commission is engaged in rulemaking, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission also shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Commission has considered the amendment to Rule 13e–4 and the class exemption from Rule 10b–13 in light of the standards cited in Sections 3 and 23(a)(2) of the Exchange Act and believes that, for the reasons stated herein, the adoption of the amendment and the granting of the class exemption will promote efficiency for issuers conducting odd-lot offers, will have no adverse effect on capital formation, and will not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act.

The Commission finds, in accordance with the Administrative Procedure Act,[22] that the adoption of the amendment to Rule 13e–4 and the class exemptions from Rules 10b–6 and 10b–13 relieve mandatory restrictions and are exemptive in nature. Accordingly, the foregoing action becomes effective immediately.

VI. Statutory Basis

Pursuant to Sections 3(b), 9(a)(6), 10(b), 13(e), 14(e), and 23(a) of the Exchange Act; 15 U.S.C. 78c(b), 78i(a)(6), 78j(b), 78m(e), 78n(e), and 78w(a); the Commission amends Rule 13e–4 in Chapter II of Title 17 of the Code of Federal Regulations by amending paragraph (h)(5) of § 240.13e–4.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendment

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. Section 240.13e–4 is amended by revising paragraph (h)(5) to read as follows:

§ 240.13e–4 Tender offers by issuers.

* * * * *

(h) * * *

(5) Offers to purchase from security holders who own an aggregate of not more than a specified number of shares that is less than one hundred: *Provided, however,* That:

(i) The offer complies with paragraph (f)(8)(i) of this section with respect to security holders who own a number of shares equal to or less than the specified number of shares, except that an issuer can elect to exclude participants in an issuer's plan, as that term is defined in § 242.100 of Regulation M, or to exclude security holders who do not own their shares as of a specified date determined by the issuer; and

(ii) The offer complies with paragraph (f)(8)(ii) of this section or the consideration paid pursuant to the offer is determined on the basis of a uniformly applied formula based on the market price of the subject security;

* * * * *

Dated: December 20, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–33061 Filed 12–27–96; 8:45 am]

BILLING CODE 8010–01–P

[13] 15 U.S.C. 77a *et seq.*

[14] 15 U.S.C. 80a–1 *et seq.*

[15] Securities Exchange Act Release No. 38067 (December 20, 1996).

[16] Additionally, the Commission notes that sales of tendered odd-lots into the open market are not subject to Rules 101 and 102 of Regulation M (or Rule 10b–6) where such sales do not satisfy the magnitude and special selling efforts and selling methods elements of a distribution for purposes of those provisions.

[17] Proposing Release, 61 FR at 18307.

[18] 15 U.S.C. 78w(a)(2).

[19] 15 U.S.C. 77b.

[20] 15 U.S.C. 78c.

[21] Pub. L. No. 104–290, § 106, 110 Stat. 3416 (1996).

[22] 5 U.S.C. 553(d).

17 CFR Parts 240 and 270

[Release No. 34–38073, IC–22415, File No. S7–32–96]

RIN 3235–AH10

Securities Transactions Exempt From Transaction Fees

AGENCY: Securities and Exchange Commission.

ACTION: Final Rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting amendments to Rule 31–1 under the Securities Exchange Act of 1934 and an amendment to Rule 24e–2 under the Investment Company Act of 1940. The purpose of these amendments is to conform Rules 31–1 and 24e–2 to recently enacted legislation. Rule 31–1 is being amended to conform the Rule to legislation which extends transaction fees to transactions in OTC securities (other than bonds, debentures, and other evidences of indebtedness) subject to prompt last-sale reporting.

EFFECTIVE DATES: Section 270.24e–2 paragraph (a) is effective December 30, 1996.

Section 240.31–1 Preliminary Notes and paragraph (f) are revised effective January 1, 1997.

Section 240.31–1 is revised effective September 1, 1997.

Section 240.31–1 Preliminary Note is revised effective October 1, 1997.

FOR FURTHER INFORMATION CONTACT: David Oestreicher, Esq. or James McHale, Esq. regarding the amendments to Rule 31–1 under the Securities Exchange Act of 1934 at 202/942–0173 or 202/942–0190; Office of Market Supervision, Division of Market Regulation, Mail Stop 5–1. For further information regarding the amendment to Rule 24e–2 under the Investment Company Act of 1940, please contact Robin Gross at 202/942–0640; Office of Regulatory Policy, Division of Investment Management, Mail Stop 10–2, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. 20549.

SUPPLEMENTARY INFORMATION:

I. Introduction

Pursuant to recently enacted legislation, beginning January 1, 1997, transaction fees will be collected on all Nasdaq securities. Initially, for transactions occurring over-the-counter (''OTC'') these fees will be collected pursuant to the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (''Appropriations Act'').[1] Beginning on September 1, 1997, these fees will be collected under Section 31 of the Exchange Act as amended.

The amendments to Rule 31–1[2] under the Securities Exchange Act of 1934 (''Exchange Act'') will modify, effective January 1, 1997, the existing exemption from transaction fees for Nasdaq securities contained in Rule 31–1 so that transactions in OTC securities occurring on a national securities exchange pursuant to unlisted trading privileges (''UTP'') would be subject to transaction fees collected by national securities exchanges. The amendments also would revise the Preliminary Notes to Rule 31–1 in three phases to coincide with legislative changes. The amendments will be effective January 1, 1997, September 1, 1997, and October 1, 1997. Moreover, the Commission also is taking action to eliminate the existing exemption for Nasdaq securities in its entirety. Finally, the amendments clarify that off-exchange transactions in OTC securities subject to UTP will be subject to section 31(d) of the Exchange Act, as amended (rather than section 31(c)).

The Commission also is adopting an amendment to Rule 24e–2 under the Investment Company Act of 1940 (''Investment Company Act''), the rule that governs the payment of fees by certain registered investment companies for additional securities registered on a post-effective amendment to a registration statement.

II. Background

Section 31 of the Exchange Act[3] currently requires transaction fees to be paid to the Commission based on sales of securities registered on a national securities exchange. Specifically, section 31 requires every national securities exchange to pay an annual fee to the Commission based on the aggregate dollar amount of the sale of securities (other than bonds, debentures, and other evidences of indebtedness) transacted on that exchange.[4] In addition, section 31 requires payment of similar fees by broker-dealers for OTC transactions in securities registered on a national securities exchange (''third market trades'').[5] Section 31 also provides the Commission with authority to exempt any sale of securities or any class of sales of securities from imposition of the transaction fee if the Commission finds that such exemption is consistent with the public interest, the equal regulation of markets and brokers and dealers, and the development of a national market system.[6]

In September 1985, the Commission allowed exchanges to trade OTC securities without listing these securities, on a UTP basis (''OTC/UTP securities'').[7] A collateral effect of this action would have been to subject securities principally traded OTC (*i.e.* Nasdaq securities) to section 31 fees, even though section 31 was not designed to apply to transactions in such securities.[8] Therefore, pursuant to its exemptive authority, the Commission amended Rule 31–1 to exempt transactions in Nasdaq securities from section 31 by adding paragraph (f).[9] This exemption was predicated on the Commission's belief that it was preferable to address the application of section 31 fees to the OTC market in a uniform and orderly manner, rather than through the automatic application

[1] Pub. L. 104–208, 110 Stat. 3009 (1996).

[2] 17 CFR 240.31–1

[3] 15 U.S.C. 78ee.

[4] The fee is equal to 1/300 of one percent of the aggregate dollar value of securities sold.

[5] For transactions otherwise than on a national securities exchange, the fee is currently paid by the broker-dealer on the sale side of the transaction. If, however, there is no broker-dealer on the sale side of the transaction, then the broker-dealer on the buy side of the transaction is required to pay the fee. Where no broker-dealer is involved in the transaction, no fee is required. See Rule 31–1.

[6] In response to The National Securities Markets Improvement Act of 1996, the Commission plans at a later time to solicit comment on a prior Commission proposal to exempt certain transactions effected after regular trading hours from the imposition of transaction fees. See Securities Exchange Act Release No. 29238 (May 28, 1991), 56 FR 25056 (June 3, 1991).

[7] The Commission's grant of UTP was conditioned on, among other things, the Commission approving a joint plan to consolidate exchange and OTC quotations and transaction reports in OTC securities upon which UTP are granted. See Securities Exchange Act Release No. 22412 (September 16, 1985), 50 FR 38640 (September 24, 1985); and Securities Exchange Act Release No. 22413 (September 16, 1985), 50 FR 38515 (September 23, 1985).

[8] As a technical matter, under section 12(f)(6) of the Exchange Act (15 U.S.C. 781(f)(6)), securities trading OTC, which are also admitted to UTP on an exchange are deemed to be ''registered.'' Therefore, if construed literally, section 31 would have required payment of fees by the exchange(s) for transactions in OTC/UTP securities occurring on the exchange, as well as by broker-dealers trading such securities OTC. Similarly, stocks that were listed on a regional exchange and then received concurrent Nasdaq National Market System (''NMS'') designation would have been subject to section 31, *i.e.*, both the exchange and OTC trades in such securities would have been subject to section 31 transaction fees.

[9] See Securities Exchange Act Release No. 23229 (May 13, 1986), 51 FR 18578 (May 21, 1986). The Commission amended the Rule again in June 1987. See Securities Exchange Act Release No. 24635 (June 23, 1987), 52 FR 24149 (June 29, 1987). In May 1988, the Commission extended the effectiveness of Rule 31–1(f) for an additional year. See Securities Exchange Act Release No. 25671 (May 6, 1988), 53 FR 17180 (May 16, 1988). Finally, in May 1989, the Commission extended the effectiveness of Rule 31–1(f) indefinitely. See Securities Exchange Act Release No. 26790 (May 6, 1989), 54 FR 20524 (May 12, 1989).

of section 31 as a result of an exchange's decision to trade OTC/UTP securities or the concurrent designation of Nasdaq/ NMS securities. [10] In light of recent legislation, however, the exemption afforded to these Nasdaq securities is no longer appropriate.

III. Discussion

On September 30, 1996, the SEC's appropriation for fiscal year 1997 was enacted as part of the Appropriations Act. In addition to funding the agency for fiscal year 1997, the Appropriations Act extends transaction fees to all sales of securities transacted otherwise than on a national securities exchange (other than bonds, debentures and other evidences of indebtedness) subject to prompt last-sale reporting, [11] effective January 1, 1997.[12]

On October 11, 1996, The National Securities Markets Improvement Act of 1996 (''Improvement Act''),[13] was signed into law. The Improvement Act amends section 31 of the Exchange Act to extend transaction fees to transactions in OTC securities subject to prompt last sale reporting, effective September 1, 1997.[14] The Improvement Act also explicitly amends section 31 of the Exchange Act to provide that, effective October 1, 1997, the transaction fee arising out of the sale of third market trades will be payable by each national securities association.[15] The Improvement Act further amends section 31, effective October 1, 1997, to require payment of section 31 fees to the Commission two times per year, instead of one time per year as section 31 presently requires.[16]

Currently, sales of OTC/UTP securities occurring on a national securities exchange are exempted from section 31 fees. This exemption is no longer appropriate in view of Congress' express intention to extend transaction fees to all OTC securities subject to prompt last sale reporting. The Commission believes that the law intends fees on transactions in Nasdaq securities to apply equally, whether such transactions occur on an exchange or OTC. Accordingly, the Commission is eliminating, effective January 1, 1997, the current exemption in Rule 31–1(f) with respect to transactions in those Nasdaq securities occurring on a national securities exchange pursuant to OTC/UTP. As a result, as of January 1, 1997, the same fees will apply to OTC and exchange trades in Nasdaq securities, consistent with the equal regulation of markets, brokers and dealers, and the development of a national market system.

The Commission also is phasing in amendments to the Preliminary Notes to Rule 31–1 on three dates (January 1, 1997, September 1, 1997, and October 1, 1997), to make them consistent with the changes in law. Finally, effective September 1, 1997, the Commission is implementing a technical amendment to Rule 31–1 to clarify that fees arising out of off-exchange transactions in OTC/ UTP securities will be collected pursuant to section 31(d) of the Exchange Act, and not section 31(c).[17] In amending the Rule, the Commission has considered the amendments' impact on efficiency, competition, and capital formation.[18]

Because the Appropriations Act extends transaction fees to the OTC market effective January 1, 1997, the Commission is issuing this release and amending Rule 31–1 on an emergency basis. A delay in amending the Rule could lead to confusion over the responsibilities of those persons affected by the new legislation.

Although the Administrative Procedure Act (''APA'') states that an agency must provide general notice of proposed rulemaking and an opportunity for comment, these requirements do not apply if the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' [19] The Commission finds that good cause exists, and that notice and comment are unnecessary, because the amendments to Rule 31–1 are being adopted to make the Rule consistent with the Appropriations Act and the Improvement Act. In addition, the Commission finds that good cause exists, and that notice and comment are unnecessary for the amendment to Rule 24e–2 under the Investment Company Act (eliminating the $100 minimum fee), because the Commission has ceased collecting the fee pursuant to the Improvement Act.

Moreover, although the APA generally requires publication of an adopted rule at least thirty days before its effective date,[20] this requirement does not apply if the agency determines, for good cause, not to provide pre-effective publication. As mentioned above, a delay in amending Rule 31–1 until after the January 1, 1997 effective date of the Appropriations Act could lead to confusion over the responsibilities of those persons affected by the legislation. Accordingly, the Commission finds good cause not to provide pre-effective publication for the amendments to Rule

[10] Without the exemption, the application of section 31 fees to all transactions in particular OTC securities would have depended entirely on exchange decisions to trade OTC/UTP securities, or on issuer decisions to retain an exchange listing despite the stock being designated an Nasdaq/NMS security.

[11] The Commission notes that Congress intended transaction fees to be applied to OTC securities subject to prompt last sale reporting in the same circumstances as section 31 fees currently are applied to transactions in exchange-traded securities. Accordingly, all of the exemptions presently contained in Rule 31–1 (for example, initial public offering transactions) will apply to transactions in securities subject to the Appropriations Act fee, except for the exemption for Nasdaq securities in paragraph ''(f)'' of Rule 31–1.

[12] Specifically, the Appropriations Act provides that effective January 1, 1997, every national securities association shall pay to the Commission a fee at a rate of 1/300th of one percent of the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange (of securities) (other than bonds, debentures, and other evidences of indebtedness), subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association, excluding any sales for which (a) fee is paid under section 31 of the Exchange Act. Moreover, the legislation requires every national securities association to pay the fee on or before September 30, 1997, with respect to transactions and sales occurring during the period beginning on January 1, 1997, and ending at the close of August 31, 1997. Beginning September 1, 1997, a similar fee will be required by section 31(d) of the Exchange Act as amended by Title IV of the National Securities Markets Improvement Act of 1996. See section III, C ''Off-Exchange Trades of OTC Securities,'' *infra.*

[13] Pub. L. No. 104–290, 110 Stat. 3416 (1996).

[14] Specifically, section 31(d)(1) of the Exchange Act will provide, in part, that ''(e)ach national securities association shall pay to the Commission a fee at a rate equal to 1/300 of one percent of the aggregate dollar amount of sales transacted by or through any member of such association otherwise than on a national securities exchange of securities (other than bonds, debentures, and other evidences of indebtedness) subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association, excluding any sales for which a fee is paid under subsection (c) * * *.''

[15] Presently, section 31 requires broker-dealers to remit directly to the Commission transaction fees arising out of third market trades. This procedure will continue until October 1, 1997. See section III, D ''Third Market Transactions,'' *infra.*

[16] Section 31(e) will require payment of all transaction fees on or before March 15, with respect to transactions occurring during the period beginning on the preceding September 1 and ending at the close of the preceding December 31. The fee for transactions occurring during the period beginning on the preceding January 1 and ending at the close of the preceding August 31, will be payable to the Commission on September 30. Pursuant to section 31(g) of the Exchange Act, as amended, the Commission will publish in the Federal Register notices of the fee rates applicable under section 31 for each fiscal year, beginning with fiscal year 1998.

[17] The Commission notes that the purpose of this exemption is to carry out the intent of Congress, based on the revenue projections used by Congress at the time of the Appropriations Act and the Improvement Act, that transaction fees for these types of trades be collected pursuant to section 31(d) of the Exchange Act.

[18] 15 U.S.C. 78c(f) and 15 U.S.C. 80a–2(c).

[19] 5 U.S.C. 553(b)(B).

[20] 5 U.S.C. 553(d).

31–1. The Commission also finds that good cause exists not to provide pre-effective publication for the amendment to Rule 24e–2 under the Investment Company Act because the amendment is intended to eliminate a source of confusion for registrants and a delay would only serve to prolong the potential confusion of registrants. Finally, under 5 U.S.C. 804, the revisions to Rules 31–1 and 24e–2 are exempt from the definition of the term ''rule'' for purposes of Chapter 8, entitled ''Congressional Review of Agency Rulemaking,'' because the revisions are to rules of ''agency organization, procedure, or practice * * *'' and conform agency practice and procedure to that required by the Appropriations Act and the Improvement Act.

The following sections describe the interim and permanent obligations of each national securities exchange, national securities association and broker-dealer with regard to the payment of transaction fees.

A. Exchange-Registered Securities Transacted on an Exchange

The only substantive change for a national securities exchange remitting transaction fees arising out of the sale of exchange-registered securities [21] on the exchange is the timing for payment of such fees.[22] As noted above, the amendments made to section 31 by the Improvement Act require, among other things, payment of transaction fees two times per year, instead of one time per year. This change, however, does not go into effect until October 1, 1997, and will not affect the fee payment schedule until January 1, 1998. Accordingly, the fee arising out of transactions occurring between January 1, 1996 and December 31, 1996 will be payable on March 15, 1997. Likewise, the fee arising out of transactions occurring between January 1, 1997 and December 31, 1997 will be payable to the Commission on March 15, 1998. Pursuant to section 31(e), however, the section 31 fee arising from transactions that occur between January 1, 1998 and August 31, 1998, will be due to the Commission on or before September 30, 1998. The fee arising from transactions between September 1, 1998 and December 31, 1998, will be payable to the Commission on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

B. OTC Securities Transacted on an Exchange Pursuant to OTC/UTP

Effective January 1, 1997, Rule 31–1(f) will be amended to effectively include within the coverage of existing section 31 of the Exchange Act transactions in those Nasdaq securities occurring on a national securities exchange pursuant to OTC/UTP. Therefore, beginning January 1, 1997, every national securities exchange will be responsible for remitting transaction fees to the Commission for exchange transactions in OTC/UTP securities, pursuant to existing section 31 of the Exchange Act. Effective October 1, 1997, every national securities exchange will be responsible for the payment of these fees pursuant to section 31(b) of the Exchange Act, as revised by the Improvement Act.

Once section 31(e) of the Exchange Act becomes effective on October 1, 1997, the transaction fee payable by an exchange arising from the sale of OTC/UTP securities on such exchange will be payable in two installments per year. Accordingly, the payment schedule for fees arising out of transactions in OTC/UTP securities is identical to the payment schedule for fees arising out of transactions in exchange-registered securities effected on an exchange.[23]

C. Off-Exchange Trades of OTC Securities

As discussed above, both the Appropriations Act and section 31 as amended by the Improvement Act extend transaction fees to securities (other than bonds, debentures and other evidences of indebtedness) traded otherwise than on a national securities exchange, and subject to prompt last sale reporting pursuant to the rules of the Commission or a registered national securities association. The phrase ''securities subject to prompt last sale reporting'' as used in the legislation includes securities designated as Nasdaq National Market securities,[24] securities designated as Nasdaq SmallCap securities,[25] and securities traded on the NASD's Bulletin Board system (''OTCBB'').[26] Moreover, although the NASD's rules do not require transaction reporting for certain types of transactions, if the underlying securities are subject to prompt last sale reporting, the NASD is responsible for collecting a transaction fee even if the particular transaction is not subject to last-sale reporting.[27]

Pursuant to the Appropriations Act, fees arising from off-exchange transactions in OTC securities occurring between January 1, 1997 and August 31, 1997 will be payable to the Commission by a national securities association on or before September 30, 1997.[28] Pursuant to sections 31(d) and 31(e) of the Exchange Act as amended by the Improvement Act, transaction fees arising from such trades occurring from September 1, 1997 to December 31, 1997 will be due from a national securities association on March 15, 1998.[29] Off-exchange transactions in OTC securities occurring between January 1, 1998 and August 31, 1998 will result in a fee due to the Commission from a national securities association on or before September 30, 1998. Fees due for such transactions occurring between September 1, 1998 and December 31, 1998 will be payable on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

D. Third Market Transactions

Broker-dealers will continue to remit transaction fees arising out of third

[21] As used herein, the term ''exchange-registered securities'' refers to those securities registered on a national securities exchange by an issuer taking an affirmative action (*e.g.* filing Form 8–A), and not OTC securities deemed ''registered'' under section 12(f)(6) of the Exchange Act based on OTC/UTP trading. *Cf.* note 8, *supra.*

[22] The Commission also notes that, as a result of the amendments to Rule 31–1 made herein, effective January 1, 1997, every national securities exchange will be responsible for remitting section 31 transaction fees based on sales of OTC/UTP securities transacted on such exchange. See ''OTC Securities Transacted on an Exchange pursuant to OTC/UTP,'' section III, B, *infra.*

[23] See Section III, A, ''Exchange-Registered Securities Transacted on an Exchange,'' *supra.*

[24] See National Association of Securities Dealers, Inc. (''NASD'') Rule 4632.

[25] See NASD Rule 4642.

[26] See NASD Rule 6550.

[27] Among other trades, NASD Rule 4632(e) excludes from its transaction reporting requirements odd-lot transactions, and purchases or sales of securities effected upon the exercise of an option. The NASD, however, is required to collect fees on both of these types of transactions, unless the underlying security is not subject to prompt last sale reporting. The NASD also is required to collect transaction fees for after-hours trades in securities subject to prompt last sale reporting. The Commission notes, however, that no transaction fee will arise for transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, *e.g.* to enable the seller to make a gift. See NASD Rules 4632(e)(5), 4642(e)(4), 6420(e)(5), and 6620(e)(3). Finally, the Commission notes that as prompt last sale reporting is extended to additional securities, such securities will become subject to transaction fees.

[28] Even though Rule 31–1(f) will continue to exempt these types of transactions from existing Section 31 of the Exchange Act until September 1, 1997, when section 31(d) of the Exchange Act takes effect, these transactions will be covered by the Appropriations Act beginning January 1, 1997.

[29] Effective September 1, 1997, fees arising out of off-exchange trades of OTC securities subject to OTC/UTP will be payable pursuant to section 31(d). A clarifying amendment to Rule 31–1(f) will become effective on September 1, 1997, in order to exempt these types of trades from the payment of fees under section 31(c). As a result, fees arising out of these types of transactions will be collected pursuant to Section 31(d). As noted above, this technical amendment is necessary in order to carry out the intent of Congress that all trades in OTC securities be treated equally no matter where those trades occur.

market trades directly to the Commission until October 1, 1997, pursuant to existing section 31 of the Exchange Act. Section 31(c) of the Exchange Act as amended by the Improvement Act, requires fees arising out of third market trades to be paid by each national securities association effective October 1, 1997.[30] Specifically, the fee arising from third market transactions occurring between January 1, 1997 and September 30, 1997 will be payable by each broker-dealer on or before March 15, 1998, pursuant to current section 31 of the Exchange Act. Based on the Improvement Act's amendments to section 31, the fee arising from third market transactions occurring between October 1, 1997 and December 31, 1997 also will be due from a national securities association on or before March 15, 1998. The fee arising from third market transactions occurring between January 1, 1998 and August 31, 1998 will be due from a national securities association on or before September 30, 1998. For third market trades occurring between September 1, 1998 and December 31, 1998, the transaction fee is due from a national securities association on or before March 15, 1999. This payment schedule will continue in this manner indefinitely.

E. Options Transactions

With respect to options transactions occurring on a national securities exchange, the options exchanges, or the Options Clearing Corporation (''OCC'') on behalf of the exchanges, will continue to be responsible for the payment of section 31 fees on such options transactions.[31] Moreover, any sale of exchange-registered securities to or by a person exercising an exchange-registered option contract shall require the exchange itself or the OCC on behalf of the exchange to pay a section 31 fee in an amount determined on the basis of the exercise price. In addition, as a result of the Appropriations Act, effective January 1, 1997, any sale of OTC securities (subject to prompt last sale reporting) to or by a person exercising an exchange-registered option contract shall require payment of a transaction fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association or the OCC on behalf of the association.[32] Further, when section 31(d) of the Exchange Act becomes effective on September 1, 1997, any sale of securities covered by section 31(d) to or by a person exercising an exchange-registered option contract will require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association or the OCC on behalf of such association.

With regard to transactions in OTC options, no transaction fee will arise because these securities are not currently subject to prompt last sale reporting.[33] However, broker-dealers will continue to remit section 31 fees directly to the Commission for any sale of exchange-registered securities to or by a person exercising an OTC option, in an amount determined on the basis of the exercise price, until October 1, 1997, when these fees will be collected by the appropriate national securities association.[34] Moreover, as a result of the Appropriations Act and the Reform Act, effective January 1, 1997, any sale of OTC securities to or by a person exercising an OTC option also shall require payment of a transaction fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association.[35]

V. Amendment to Rule 24e–2 Under the Investment Company Act

The Commission is adopting an amendment to Rule 24e–2 under the Investment Company Act of 1940, the rule that governs the payment of fees by certain registered investment companies for additional securities registered on a post-effective amendment to a registration statement filed under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (''Securities Act''). The amendment eliminates the $100 minimum fee currently in the Rule. The Rule's $100 minimum fee was designed to correspond to the $100 minimum fee requirement under section 6(b) of the Securities Act (15 U.S.C. 77f(b)), which was eliminated by the Improvement Act. The Commission ceased collecting the fee under Rule 24e–2 on October 11, 1996 and the amendment would eliminate a source of confusion for registrants.

V. Effects on Competition and Regulatory Flexibility Act Considerations

Section 23(a)(2) of the Exchange Act,[36] requires the Commission, in adopting rules under the Exchange Act, to consider the competitive effects of such rules, if any, and to balance any impact with the regulatory benefits gained in terms of furthering the purposes of the Exchange Act. As noted above, in amending Rule 31–1 the Commission is merely conforming the Rule to recently enacted legislation. Moreover, adoption of the amendment to Rule 31–1 will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The amendment will promote efficiency and capital formation by equalizing the treatment of exchange-listed and OTC securities.

The Regulatory Flexibility Act[37] is not applicable to the revisions to Rule 31–1, nor is it applicable to the amendment to Rule 24e–2 under the Investment Company Act. The Regulatory Flexibility Act's flexibility analysis requirements are limited to rulemaking for which the Commission would be required by the APA to publish general notice of proposed rulemaking.[38]

The Paperwork Reduction Act does not apply because the proposed amendments do not impose recordkeeping or information collection requirements, or other collections of information which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

VI. Statutory Basis

The amendments to Rule 31–1 under the Exchange Act are being adopted pursuant to 15 U.S.C. 78a *et seq.*, particularly sections 23(a) and 31 of the Exchange Act, and pursuant to Pub. L. No. 104–208. The amendment to Rule 24e–2 under the Investment Company Act is being adopted pursuant to 15

---

[30] Section 31(d) of the Exchange Act as amended by the Improvement Act, excludes any sales for which a fee is paid under section 31(c).

[31] The Commission notes that this transaction fee arises on the options transaction regardless of whether the underlying security is traded on a national securities exchange, or otherwise than on an exchange. Moreover, the payment schedule for fees arising out of options transactions occurring on a national securities exchange is the same as for exchange-registered equity securities discussed above.

[32] The payment schedule for these fees is the same as the payment schedule for off-exchange trades of OTC securities discussed above.

[33] Pursuant to the Appropriations Act and the Improvement Act, should options traded otherwise than on a national securities exchange become subject to prompt last sale reporting in the future, transaction fees also will be applicable to those options transactions. Accordingly, effective October 1, 1997, the Preliminary Notes to Rule 31–1 will provide for the collection of section 31 fees for transactions in OTC options subject to prompt last sale reporting.

[34] See section III, D, ''Third Market Transactions,'' *supra.*

[35] The Commission notes that the NASD, as the only currently registered national securities association, will be responsible for the collection of these fees effective January 1, 1997.

[36] 15 U.S.C. 78w(a)(2).

[37] 5 U.S.C. 601–612.

[38] 5 U.S.C. 603(a). As noted above, the Commission is not required to solicit public comment due to the nature of the Commission's revisions to Rule 31–1.

U.S.C. 80a–1 *et seq.*, 80a–37, and 80a–39 unless otherwise noted.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

VII. Text of the Amendments

For the reasons set forth above, the Commission amends part 240 of chapter II, title 17 of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a 20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. Effective January 1, 1997, § 240.31–1 is amended by revising the Preliminary Notes and paragraph (f) to read as follows:

§ 240.31–1 Securities transactions exempt from transaction fees.

Preliminary Notes

If a sale of a security for which a fee is paid under section 31 of the Act is effected on a national securities exchange, the transaction fee must be paid by that exchange. With regard to sales of securities for which a fee is paid under section 31, effected otherwise than on a national securities exchange, the fee is to be paid by the registered broker or dealer on the sale side of the transaction. When there is no registered broker or dealer on the sale side of the transaction (as, for example, where a third market dealer purchases securities for its own account from a public customer), the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. Where no registered broker or dealer is involved in the transaction, no fee arises.

The fee for options transactions occurring on a national securities exchange is to be paid by the exchange itself, or by the Options Clearing Corporation on behalf of the exchange, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option, and the exercise price of the option in the event of its exercise. In addition, any sale of securities for which a fee is paid under section 31, occurring otherwise than on a national securities exchange, to or by a person exercising an option contract shall require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the registered broker or dealer selling the securities. If there is no registered broker or dealer on the sale side of such transaction, then the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. If no registered broker or dealer is involved in the transaction, no fee arises.

* * * * *

(f) Transactions in Nasdaq securities as defined in § 240.11Aa3–1 (Rule 11Aa3–1 under the Act) except for:

(1) Transactions in those Nasdaq securities for which transaction reports are collected, processed, and made available pursuant to the plan originally submitted to the Commission pursuant to § 240.17a–15 (subsequently amended and redesignated as Rule 11Aa3–1) under the Act, which plan was declared effective as of May 17, 1974; and

(2) Transactions in those Nasdaq securities occurring on a national securities exchange pursuant to unlisted trading privileges.

3. Effective September 1, 1997, § 240.31–1 is revised to read as follows:

§ 240.31–1 Securities transactions exempt from transaction fees.

Preliminary Notes

If a sale of a security for which a fee is paid under section 31 of the Act is effected on a national securities exchange, the transaction fee must be paid by that exchange. With regard to sales of securities for which a fee is paid under section 31, effected otherwise than on a national securities exchange (except those securities for which a fee is paid under section 31(d)), the fee is to be paid by the registered broker or dealer on the sale side of the transaction. When there is no registered broker or dealer on the sale side of the transaction (as, for example, where a third market dealer purchases securities for its own account from a public customer), the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. Where no registered broker or dealer is involved in the transaction, no fee arises.

The fee for options transactions occurring on a national securities exchange is to be paid by the exchange itself, or by the Options Clearing Corporation on behalf of the exchange, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option, and the exercise price of the option in the event of its exercise. In addition, any sale of securities for which a fee is paid under section 31 (except those securities for which a fee is paid under section 31(d)), occurring otherwise than on a national securities exchange, to or by a person exercising an option contract, shall require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the registered broker or dealer selling the securities. If there is no registered broker or dealer on the sale side of such transaction, then the fee is to be paid by the registered broker or dealer on the purchase side of the transaction. If no registered broker or dealer is involved in the transaction, no fee arises. Finally, any sale of securities for which a fee is paid under section 31(d), to or by a person exercising an option contract, shall require payment of a section 31 fee, in an amount determined on the basis of the exercise price, by the appropriate national securities association or by the Options Clearing Corporation on behalf of the association.

(a) The following shall be exempt from section 31 of the Act:

(1) Transactions in securities offered pursuant to an effective registration statement under the Securities Act of 1933 (except transactions in put or call options issued by the Options Clearing Corporation) or offered in accordance with an exemption from registration afforded by section 3(a) or 3(b) thereof (15 U.S.C. 77c(a) or 77c(b)), or a rule thereunder.

(2) Transactions by an issuer not involving any public offering within the meaning of section 4(2) of the Securities Act of 1933 (15 U.S.C. 77d(2));

(3) The purchase or sale of securities pursuant to and in consummation of a tender or exchange offer;

(4) The purchase or sale of securities upon the exercise of a warrant or right (except a put or call), or upon the conversion of a convertible security; and

(5) Transactions which are executed outside the United States and are not reported, or required to be reported, to a transaction reporting association as defined in § 240.11Aa3–1 (Rule 11Aa3–1 under the Act) and any approved plan filed thereunder;

(b) Over-the-counter (''OTC'') transactions in OTC securities which are subject to unlisted trading privileges on a national securities exchange shall be exempt only from section 31(c) of the Act.

4. Effective October 1, 1997, the Preliminary Note to § 240.31–1 is revised to read as follows:

§ 240.31–1 Securities transactions exempt from transaction fees.

Preliminary Note

The section 31 fee for options transactions occurring on a national securities exchange, or transactions in options subject to prompt last sale reporting occurring otherwise than on an exchange, is to be paid by the exchange or the national securities association itself, respectively, or the Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the option premium (market price) for the sale of the option. In the event of the exercise of an option, whether such option is traded on an exchange or otherwise, a section 31 fee is to be paid by the exchange or the national securities association itself, or the Options Clearing Corporation on behalf of the exchange or association, and such fee is to be computed on the basis of the exercise price of the option.

* * * * *

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

5. 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;

* * * * *

6. Section 270.24e–2 is amended by revising paragraph (a) to read as follows:

§ 270.24e–2 Computation of fee.

* * * * *

(a) The fee to be paid at the time of filing of such amendment shall be calculated in the manner specified in section 6(b) of the Securities Act of 1933 except that, for the purposes of such calculation, the maximum aggregate price at which the securities are proposed to be offered may be deemed to be the maximum aggregate offering price, as determined by Rule 457(d) (17 CFR 230.457(d)) under the Securities Act of 1933, of:

(1) The amount of securities (number of shares or other units) being registered reduced by;

(2) The amount of securities (number of shares or other units) of the same class redeemed or repurchased by the issuer in its previous fiscal year (which amount of securities must, for purposes of this paragraph (a)(2), be reduced by the amount of any securities used in a reduction made by the issuer with respect to such shares pursuant to paragraph (c) of section 24f–2 of the Act during the current fiscal year) provided that, when more than one such amendment is filed by an issuer in any one fiscal year, the total amount of securities used for such reductions during any fiscal year in which such reductions are made may not exceed the total amount of securities which were redeemed or repurchased by the issuer during its previous fiscal year; and

* * * * *

Dated: December 23, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–33056 Filed 12–24–96; 2:38 pm]

BILLING CODE 8010–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 2

[Docket No. RM96–6–000; Order No. 592]

Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statememt

Issued December 18, 1996.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy statement.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to update and clarify the Commission's procedures, criteria and policies concerning public utility mergers in light of dramatic and continuing changes in the electric power industry and the regulation of that industry. The purpose of this Policy Statement is to ensure that mergers are consistent with the public interest and to provide greater certainty and expedition in the Commission's analysis of merger applications.

EFFECTIVE DATE: December 18, 1996.

FOR FURTHER INFORMATION CONTACT:
Jan Macpherson (Legal Matters), Kimberly D. Bose (Legal Matters), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; Telephone: (202) 208–0921, (202) 208–2284.
Wilbur C. Earley (Technical Matters), Office of Economic Policy, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; Telephone: (202) 208–0023.
Michael A. Coleman (Technical Matters), Office of Electric Power Regulation, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; Telephone: (202) 208–1236.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Commission's Public Reference Room, Room 2A, 888 First Street, N.E., Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 208–1397 if dialing locally or 1–800–856–3920 if dialing long distance. CIPS is also available through the Fed World System (by Modem or Internet). To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400 or 1200bps full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this final rule will be available on CIPS in ASCII indefinitely and WordPerfect 5.1 format for one year. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, LaDorn Systems Corporation, also located in Room 2A, 888 First Street, N.E., Washington, D.C. 20426.

The Commission's bulletin board system also can be accessed through the FedWorld system directly by modem or through the Internet. To access the FedWorld system by modem:

- Dial (703) 321–3339 and logon to the FedWorld system
- After logging on, type: /go FERC

To access the FedWorld system through the Internet, a telnet application must be used either as a stand-alone or linked to a Web browser:

- Telnet to: fedworld.gov
- Select the option: [1] FedWorld
- Logon to the FedWorld system
- Type: /go FERC

or

- Point your Web Browser to: http://www.fedworld.gov
- Scroll down the page to select FedWorld Telnet Site
- Select the option: [1] FedWorld
- Logon to the FedWorld system
- Type: /go FERC

Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger Is Consistent With the Public Interest

Issued December 18, 1996.

I. Introduction

This Policy Statement updates and clarifies the Federal Energy Regulatory Commission's (Commission) procedures, criteria and policies concerning public utility mergers in light of dramatic and continuing changes in the electric power industry and corresponding changes in the regulation of that industry. The Commission believes it is particularly important to refine and modify its merger policy at this critical juncture for the electric industry. The Commission recognizes that the electric industry now is in the midst of enormous technological, regulatory and economic changes. At the heart of these changes is the transition to competitive power supply markets, prompted in part by this Commission's open access transmission policies. These changes are fundamental, and mergers and consolidations are among the strategic options available for companies seeking to reposition themselves in response to the emerging competitive business landscape.

In this Policy Statement, the Commission has two broad goals. First, we intend to ensure that future mergers are consistent with the competitive goals of the Energy Policy Act of 1992 (EPAct) [1] and the Commission's recent Open Access Rule.[2] This means that the Commission, in applying the Federal Power Act standard that mergers must be consistent with the public interest, must account for changing market structures and pay close attention to the possible effect of a merger on competitive bulk power markets and the consequent effects on ratepayers. Second, the Commission believes that as the pace of industry change increases, market participants require greater regulatory certainty and expedition of regulatory action in order to respond quickly to rapidly changing market conditions. Accordingly, this Policy Statement offers procedural innovations and more specific information that we would expect applicants to file to facilitate the Commission acting more quickly on merger requests. [3]

We will generally take into account three factors in analyzing proposed mergers: the effect on competition, the effect on rates, and the effect on regulation. First, our analysis of the effect on competition will more precisely identify geographic and product markets and will adopt the Department of Justice/Federal Trade Commission Merger Guidelines (Guidelines) as the analytical framework for analyzing the effect on competition. The Guidelines adopt a five-step procedure for analyzing mergers

First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally, the Agency assesses whether, but for the merger, either party to the transaction would be likely to fail, causing its assets to exit the market.[4]

By applying an analytic ''screen'' based on the Guidelines early in the merger review process, the Commission will be able to identify proposed mergers that clearly will not harm competition.

Second, in assessing the effect of a proposed merger on rates, we will no longer require applicants and intervenors to estimate the future costs and benefits of a merger and then litigate the validity of those estimates. Instead, we will require applicants to propose appropriate rate protection for customers. The most promising and expeditious means of addressing this issue is for parties to engage in a pre-filing consensus-building effort that will result in a filing that includes appropriate rate protection. If merger applicants and their affected wholesale customers are able to agree on appropriate ratepayer safeguards, it should not be necessary to set this aspect of the merger for hearing.[5] Even where the parties have been unable to come to an agreement before the merger is filed, they should continue to attempt to negotiate a settlement. While there are several potential mechanisms available, which we discuss herein, adequate ratepayer protection will necessarily depend on the particular circumstances of the merging utilities and their ratepayers. There is no one-size-fits-all approach, and the Commission strongly encourages parties to resolve this issue without a formal hearing. However, we also recognize the possibility that parties may not be able to reach an agreement on appropriate ratepayer protection and that there may be situations in which the Commission nevertheless would be able to approve a merger. This could occur either after a hearing or on the basis of parties' filings if we determine that the applicants' proposal sufficiently insulates the ratepayers from harm.

Finally, with regard to the effect of the merger on regulation, we will adopt the approach we have used in recent cases. With respect to shifts of regulatory authority to the Securities and Exchange Commission (SEC) where the applicants will be part of a registered public utility holding company, they may either commit themselves to abide by this Commission's policies with regard to affiliate transactions, or we will set the issue for hearing. With respect to the merger's effect on state regulation, where the state commissions have authority to act on the merger, we intend to rely on the state commissions to exercise their authority to protect state interests.

In order to provide more certainty and expedition in our handling of merger applications, this Policy Statement explains how merger applicants should address each of the three factors as part of their case-in-chief in support of their application. For the effect on competition factor, applicants who demonstrate that their merger passes the market power screen established in this Policy Statement will establish a presumption that the merger raises no market power concerns. In that event, a trial-type hearing on this factor should not be necessary. We are also setting forth guidance on the other two factors and ways to resolve any concerns about these factors without a trial-type hearing.

For mergers that do not pass the market power screen, we will engage in a more detailed analysis, which may include a trial-type hearing. As discussed below, if we find that a merger will have an adverse effect on competition, and if the additional factors examined do not mitigate or counterbalance the adverse competitive effects of the merger, we may impose various remedies where necessary to make a merger consistent with the public interest.

In this Policy Statement, we also provide guidance on what kind of evidence is needed for each factor. Thus, applicants will be able to provide the necessary information at the outset. This should provide more certainty and help focus our review on specific issues that require more scrutiny. We believe that the additional information that we would expect parties to file will expedite the merger review process and enable the Commission to act on section 203 applications more quickly. We intend to process most merger applications within 12–15 months after

[1] Energy Policy Act of 1992, Pub. L. No. 102–486, 106 Stat. 2776, 2905 (1992).

[2] *See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, (Open Access Rule) 61 FR 21540 (May 10, 1996), III FERC Stats. & Regs. ¶ 31,036 (1996), *reh'g pending.*

[3] In the near future, the Commission will also issue a notice of proposed rulemaking to set forth more specific filing requirements consistent with this Policy Statement and additional procedures for improving the merger hearing process.

[4] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines,* issued April 2, 1992, 57 FR 41552 (1992).

[5] Parties may choose to use alternative dispute resolution or other settlement processes to reach mutually agreeable ratepayer protection resolutions.

the applications are completed, as discussed below under ''Procedures.''

In general, we expect that a merger approved by the Commission will satisfy each of the three factors that form the basis of our merger review, *i.e.*, post-merger market power must be within acceptable thresholds or be satisfactorily mitigated, acceptable customer protections must be in place, and any adverse effect on regulation must be addressed. However, we recognize that there may be unusual circumstances in which, for example, a merger that raises competitive concerns may nevertheless be in the public interest because customer benefits (such as the need to ensure reliable electricity service from a utility in severe financial distress) may clearly compel approval. Consistent with the Guidelines, the Commission would continue to account for such circumstances and could, in a particular case, conclude that on balance the merger is consistent with the public interest.

Finally, the Commission recognizes that, as the industry evolves to meet the challenges of a more competitive marketplace, new types of mergers and consolidations will be proposed. For example, in addition to mergers between public utilities, market participants already are considering restructuring options that include mergers between public utilities and natural gas distributors and pipelines, consolidations of electric power marketer businesses with other electric or gas marketer businesses, and combinations of jurisdictional electric operations with other energy services.[6] As a consequence, our merger policy must be sufficiently flexible to accommodate the review of these new and innovative business combinations that are subject to our jurisdiction under section 203 and to determine their implications on competitive markets. We believe that the analytical framework articulated in this Policy Statement provides a suitable methodology for determining whether such mergers will be consistent with the public interest.[7] However, it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets. In these cases, the proposed merger will not have an adverse competitive impact (*i.e.*, there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis. If the Commission is unable to conclude that the applicants meet this standard, the Commission will require the applicants to supply the competitive analysis screen data described in Appendix A.

II. Background

Section 203(a) of the Federal Power Act (FPA) provides that no public utility shall sell, lease, or otherwise dispose of the whole of its facilities that are subject to the Commission's jurisdiction, or any part thereof with a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities with those of any other person, or purchase, acquire, or take any security of another public utility without first securing the Commission's approval.[8] Section 203(a) also says that ''if the Commission finds that the proposed * * * [merger] will be consistent with the public interest, it shall approve the same.''[9] Under section 203(b), the Commission may approve a proposed merger ''in whole or in part and upon such terms and conditions as it finds necessary or appropriate. * * *'' This power is to be exercised ''to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.''[10]

Thirty years ago, in the *Commonwealth* case,[11] the Commission set forth six non-exclusive factors for evaluating mergers:

(1) the effect of the proposed merger on competition;

(2) the effect of the proposed merger on the applicants' operating costs and rate levels;

(3) the reasonableness of the purchase price;

(4) whether the acquiring utility has coerced the to-be-acquired utility into acceptance of the merger;

(5) the impact of the merger on the effectiveness of state and federal regulation; and

(6) the contemplated accounting treatment. Of these factors, the first two—the effect on competition and the effect on costs and rates—have presented the most significant issues in recent merger cases.

Since *Commonwealth*, however, both the electric utility industry and utility regulation have changed dramatically. The Commission's Open Access Rule[12] describes these changes at length. Advances in technology now allow scale economies to be exploited by smaller-size units, thereby allowing smaller new plants to be brought on line at costs below those of the large plants of the 1970s and earlier.[13] Technological advances in transmission have made possible the economic transmission of electric power over long distances at higher voltages.[14] State public utility commissions have been relying more on competitive contracting as the primary vehicle for adding new generating capacity.[15] This Commission has authorized market-based rates for wholesale electricity sales when it has found that the public utilities lack market power.

In 1992, a landmark change occurred when Congress enacted the EPAct. That statute permitted new power suppliers, called exempt wholesale generators, to enter wholesale power markets, and expanded the Commission's authority to require transmitting utilities to provide eligible third parties with transmission access. In 1996, consistent with the competitive goals of EPAct, the Commission adopted a sweeping regulatory policy change with the promulgation of the Open Access Rule. That rule requires each public utility that owns, operates or controls interstate transmission facilities to file an open access transmission tariff that offers both network and point-to-point service. The rule is designed to remedy the undue discrimination that is inherent when a utility does not offer truly comparable transmission service to others, and to promote competitive bulk power markets. Thus, EPAct and the Commission's Open Access Rule have fundamentally changed federal regulation of the electric utility industry. In addition, many states are contemplating retail access, which may

[6] See, for example, among others, the proposed merger of Enron Corporation with Portland General Corporation (Docket No. ER96–36–000) and the proposed acquisition of PanEnergy Corporation by Duke Power Company, announced November 25, 1996.

[7] We recognize that, as some energy products possibly become more suitable alternatives to others, or as the combination of complementary energy services possibly affects barriers to entry, the focus of our analysis may have to be adjusted to encompass those products, markets, and factors that are relevant to analyzing the exercise of market power in the future business environment.

[8] While many types of transactions, including relatively minor ones, may require section 203 authorization, this Policy Statement focuses on mergers.

[9] 16 U.S.C. 824b(a) (1994).

[10] 16 U.S.C. 824b(b) (1994).

[11] *See* Commonwealth Edison Company (Commonwealth), Opinion No. 507, 36 F.P.C. 927, 936–42 (1966), *aff'd sub nom.* Utility Users League v. FPC, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1969).

[12] *See* Open Access Rule, 61 FR at 21540.

[13] *See Id.* at 21544.

[14] *See Id.* at 21544–45.

[15] *See* Paul L. Joskow, Regulatory Failure, Regulatory Reform, and Structural Change in the Electrical Power Industry, in Brookings Papers on Econ. Activity, Microeconomics 125 (1989).

prompt even more significant changes in the industry.

Because these changes have implications for the Commission's regulation of mergers,[16] we issued a Notice of Inquiry (NOI)[17] soliciting comments on whether our thirty-year-old criteria for evaluating mergers should be revised. While most commenters agree that we should revise our merger policies, there are differences of opinions on the general direction of the change needed. The comments are summarized in Appendix D.[18]

III. Discussion

A. General Comments on Revising Merger Policy

1. Direction of Change

As noted above, under section 203, the Commission evaluates mergers to determine whether they are ''consistent with the public interest.'' Congress did not intend the Commission to be hostile to mergers.[19] We have found that the transaction taken as a whole must be consistent with the public interest.[20] Thus, even if certain aspects of a proposed merger are detrimental, the merger can still be consistent with the public interest if there are countervailing benefits that derive from the merger.[21]

Almost all commenters argue that we need to revise our merger policies and standards in light of the changes in the industry.[22] On one side, many commenters argue that mergers may prevent markets from becoming truly competitive.[23] On the other side, some commenters suggest that the Commission should approve a merger unless harm to the public interest is demonstrated.[24] These commenters claim that most mergers are procompetitive and should be approved unless a problem is identified.

We do not agree either with commenters who argue that we should actively encourage mergers or those who argue that we should discourage them. The statutory standard is that a merger must be ''consistent with'' the public interest. While we believe that the Commission has broad flexibility in determining what is in the public interest, particularly in light of changing conditions in the industry, we do not read the statutory language as creating a presumption against mergers.[25] Nor are we prepared to presume that all mergers are beneficial. It is the applicants' responsibility to demonstrate that the merger is consistent with the public interest.

We believe that if the Commission is to fulfill its statutory responsibilities, it must determine what is consistent with the public interest in light of conditions in the electric industry in general as well as the specific circumstances presented by a proposed merger. In an era of traditional, cost-of-service based regulation, the Commission defined its public interest responsibilities consistent with that structure. Today, we believe that the public interest requires policies that do not impede the development of vibrant, fully competitive generation markets. We are refining our analysis of the effects of proposed mergers on competition in order to protect the public interest in the development of such highly competitive markets, as discussed below.

The Commission's interpretation of the public interest standard has never been static. In the *El Paso* case,[26] we explained that our view of what it takes to mitigate market power sufficiently to allow approval of a merger had evolved over time. We pointed out that as the industry had become more competitive, we began examining market power in transmission more closely, and that comparable access was now required. Moreover, we explained in *El Paso* that while in the past we had focused only on *increases* in market power, we no longer believed that we could find any merger to be consistent with the public interest, whether or not the merger created increased market power, unless the merging utilities provided open access. We adopted this revised view of the public interest in light of EPAct's goal of encouraging greater wholesale competition and the significant increase in actual competition.

2. How to Implement New Policies

We are adopting our new policies through this Policy Statement rather than through other means, such as acting on a case-by-case basis or through a rulemaking. While some commenters suggested other means,[27] we believe that a Policy Statement is needed. Proceeding on a case-by-case basis would not give applicants and intervenors the guidance needed to facilitate the presentation of the kinds of well-focused evidence and arguments that will improve and expedite the merger review process. On the other hand, a binding rule would be too rigid at this time. Because the industry continues to change rapidly, we must maintain flexibility in fulfilling our statutory responsibilities.

Commenters disagree on whether we should apply the new policy to pending merger proposals.[28] Those proposing mergers have been on notice since we issued the NOI that the Commission is considering revising its criteria for evaluating proposed mergers. In several recent merger hearing orders, we have discussed the NOI and have indicated that we intend to evaluate pending proposals in light of any new criteria we might adopt.[29] We do not believe that any applicants will be seriously disadvantaged by application of this policy to pending cases. Our analysis of the effect of a proposed merger on competition has been evolving for some time, particularly since the enactment of EPAct and the issuance of the Open Access Rule. Thus, we are not applying radically new analyses or standards. The same is true of the other two remaining factors, the effects on regulation and on rates. We will address the specific application of the policy to pending cases on a case-by-case basis. If necessary, we will require the parties to supplement the record in any pending case, and we do not expect that this will cause any substantial delay. In fact, if anything, we expect this Policy Statement will make it easier to resolve any remaining issues, because of our clarification of our policies.

---

[16] Many of the commenters in the Open Access Rule proceeding suggested that the Commission reevaluate its merger policy in concert with the open access rulemaking. *See* Open Access Rule at 61 FR 21555.

[17] *See* Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Docket No. RM96–6–000, 61 FR 4596 (February 7, 1996), FERC Stats. & Regs. ¶ 35,531.

[18] Appendix C sets forth the full names and acronyms of the commenters.

[19] Pacific Power & Light Co. v. FPC, 111 F.2d 1014, 1016 (9th Cir. 1940) (*PP&L*); *also see* Northeast Utilities Service Co. v. FERC (*NU*), 993 F.2d 937 (1st Cir. 1993).

[20] Entergy Services Inc. and Gulf States Utilities Company (*Entergy*), Opinion No. 385, 65 FERC ¶ 61,332 at 62,473 (1993), *order on reh'g,* Opinion No. 385–A, 67 FERC ¶ 61,192 (1994), *appeal pending.*

[21] *See NU,* 993 F.2d at 945.

[22] See Appendix D, Section IA.

[23] For example, APPA, NRECA at 7–8; ELCON at 12–13.

[24] For example, Utilicorp United at 2, 7, 10.

[25] In *NU,* 993 F.2d at 947, the court pointed out that the FPA differs from the Bank Merger Act in that the latter contains an ''implicit presumption that mergers are to be disapproved.''

[26] El Paso Electric Company and Central and Southwest Services Inc., 68 FERC ¶ 61,181 61,914–15 (1994), *dismissed,* 72 FERC ¶ 61,292 (1995).

[27] See Appendix D at Section IB.

[28] *Id.*

[29] Union Electric Company and Central Illinois Public Service Company (Union Electric), 77 FERC ¶ 61,026 (1996), *reh'g pending;* Public Service Company of Colorado and Southwestern Public Service Company (PS Colorado), 75 FERC ¶ 61,325 (1996), *reh'g pending;* Baltimore Gas & Electric and Potomac Electric Power Company, 76 FERC ¶ 61,111 (1996).

B. Effect on Competition and Remedies

1. Background

In response to the NOI, we received many comments on our market power analysis. Commenters generally divide into two groups, one recommending stricter scrutiny of the effect of mergers on competition, while the other argues that less concern is warranted in today's more competitive environment.

Those in the first group support more stringent scrutiny because they believe that mergers can cause competitive harm, particularly in a transitional era. Many commenters [30] argue that mergers increase generation market power, increase monopsony buying power, encourage self-dealing, discourage alternative suppliers under retail access, and tend to preserve certain competitive advantages associated with vertical integration. These commenters criticize the analysis the Commission has been using to evaluate mergers. They argue that the Commission has not given enough consideration to important factors, including generation dominance, the effect of transmission constraints on competition, the merged company's ability to exercise market power in localized areas and in short-term energy sales, the effects on markets in which little or no effective competition exists, and the significant anticompetitive advantages that vertically integrated utilities possess as a result of the long-existing statutory and regulatory system.

The second broad group of commenters [31] argues that mergers are procompetitive. These commenters maintain that mergers lower costs, create economies of scale and geographic scope, create large strong competitors, allow rapid movement into new markets, allow diversification to minimize shareholder exposure to business fluctuation, and let the most efficient companies operate facilities, among other reasons.

2. Discussion

a. The role of competition. The electric industry's rapid restructuring, and the Commission's regulatory response to it, have made the effect of mergers on competition, and the way the Commission evaluates that effect, critically important.

The Open Access Rule was a watershed for electric industry regulation. In the Rule, we recognized that, where it exists, competition has become the best way to protect the public interest and to ensure that electricity consumers pay the lowest possible price for reliable service. Before the Open Access Rule, the Commission took the approach that traditional regulation could cure many market power problems. The size of the company, the territory it covered, and the assets it held did not matter greatly because regulatory oversight could hold market power in check. Indeed, the creation of larger utilities allowed some utilities to take advantage of scale economies and pass the cost savings on to consumers under regulatory supervision.

With the open transmission access resulting from the Open Access Rule and the continuing evolution of competitive wholesale power markets, we believe that competition is now the best tool to discipline wholesale electric markets and thereby protect the public interest. But the competition needed to protect the public interest will not be efficient and deliver lower prices in poorly structured markets. For example, a concentration of generation assets that allows a company to dominate a market will dampen or preclude the benefits of competition. In sum, as customer protection is increasingly dependent upon vibrant competition, it is critically important that mergers be evaluated on the basis of their effect on market structure and performance.

This means that the Commission must find ways to assess more accurately the competitive impact of merger proposals. In doing so, however, we must be sensitive to another pressing concern: the industry's need for more analytic and procedural certainty from the Commission. The increased pace of merger proposals has tested our ability to respond in a timely way. We recognize that merger proposals are business decisions made in response to market pressures and opportunities. Some merger proposals may strengthen weak firms and create stronger competitors. Some, however, may result in firms that will dominate or manipulate electricity markets and thwart competition. In either case, applicants are entitled to timely decisions from this Commission. The policies and procedures adopted in this Policy Statement are intended to promote that goal.

b. Definition of markets. An accurate assessment of the effect on markets depends on an accurate definition of the markets at issue. The Commission's current analytic approach defines geographic markets in a manner that does not always reflect accurately the economic and physical ability of potential suppliers to access buyers in the market. This approach uses what has come to be known as a hub-and-spoke method. It identifies affected customers as those that are directly interconnected with the merging parties. It then identifies potential suppliers as: (1) those suppliers that are directly interconnected with the customer (the ''first-tier'' suppliers); and (2) those suppliers that are directly interconnected with the merging parties and that the customer thus can reach through the merging parties' open access transmission tariff (the ''second-tier'' suppliers).

A drawback of this method of defining geographic markets is that it does not account for the range of parameters that affect the scope of trade: relative generation prices, transmission prices, losses, and transmission constraints. Taking these factors into account, markets could be broader or narrower than the first- or second-tier entities identified under the hub-and-spoke analysis. For example, a supplier that is directly interconnected with a buyer may not be an economic supplier to that buyer if transmission capability across that interconnection is severely constrained or if the transmission charges are greater than the difference between the decremental cost of the buyer and the price at which the supplier is willing to sell. In contrast, a supplier that is three or four ''wheels'' away from the same buyer may be an economic supplier if the sum of the wheeling charges and the effect of losses is less than the difference between the decremental cost of the buyer and the price at which the supplier is willing to sell. In other words, mere proximity is not always indicative of whether a supplier is an economic alternative.

Another concern with the approach we have used in the past is its analytic inconsistency. It defines the scope of the market to include the directly interconnected utilities that are accessible due to the applicants' open access tariff, but does not expand the market to recognize the access afforded by other utilities' tariffs. This was acceptable before open access was established as an industry-wide requirement for public utilities. Now that virtually all public utilities have open access transmission tariffs on file, it is no longer appropriate to recognize only the effect of certain entities' tariffs on the size of the market.

In modifying our competitive analysis, we are adopting the Guidelines as the basic framework for evaluating the competitive effects of merger proposals. The Guidelines are a well-

[30] These include, for example, CA Com, Joint Consumer Advoc., APPA, NRECA, Environmental Action *et al.*, RUS, Salt River, Lubbock, Wisconsin Customers, and TAPS.

[31] Such as UtiliCorp, Southern, PanEnergy, and Southwestern.

accepted standard approach for evaluating the competitive effects of mergers, and they received substantial support from commenters.

c. Use of the Guidelines. The Guidelines set out five steps for merger analysis: (1) define markets likely to be affected by the merger and measure the concentration and the increase in concentration in those markets; (2) evaluate whether the extent of concentration and other factors that characterize the market raise concerns about potential adverse competitive effects; (3) assess whether entry would be timely, likely, and sufficient to deter or counteract any such concern; (4) assess any efficiency gains that reasonably cannot be achieved by other means; and (5) assess whether either party to the merger would be likely to fail without the merger, causing its assets to exit the market. We note, however, that the Guidelines are just that—guidelines. They provide analytical guidance but do not provide a specific recipe to follow. Indeed, applying the Guidelines to the electric power industry is one of our biggest analytic challenges, both because the industry is evolving very rapidly and because the industry has some unique features, such as very limited opportunities for storage (hence the importance of time-differentiated markets). An analysis that follows the Guidelines still requires many assumptions and judgments to fit specific fact situations.

While this Policy Statement provides guidance on how the Commission intends to more sharply focus its analysis of a merger's effect on competition, we cannot reduce this analysis to a purely mechanized computation of the same data inputs for all merger applications. Rather, the Commission will need to evaluate the relevant product and geographic markets affected by each merger proposal; these markets, in turn, depend on the specific characteristics of the merger applicants and the products and markets in which they potentially trade. Consequently, mergers may require analysis of different product and geographic markets due to factors (such as the existence of constrained transmission paths) that affect the size of a particular market or the hours in which trade of the product is critical to determine whether merger applicants possess market power. Such distinguishing factors will need to be identified and analyzed on a case-by-case basis. Thus, the analytical process explained in this Policy Statement is a framework under which appropriate adjustments may be required to be incorporated to take account of factors unique to a merger. Furthermore, as noted above, this Policy Statement also is intended to be sufficiently flexible to accommodate the kinds of new merger proposals that will be presented to the Commission as the energy industry evolves to meet the challenges of a more competitive marketplace.

We note that the Guidelines contemplate using remedies to mitigate any harm to competition. There will be mergers where, at the end of an analysis, market power concerns persist but that could be made acceptable with measures to mitigate potential market power problems. We encourage applicants to identify market power problems and to propose remedies for such problems in their merger proposals. In many cases, such a remedy could avoid the need for a formal hearing on competition issues and thus result in a quicker decision. As discussed further in Section III B (2)(e), if a proposed long-term remedy is not capable of being effectuated at the time the merger is consummated, applicants may propose effective interim remedial measures.

d. Analytic screen. It is important to give applicants some certainty about how filings will be analyzed and what will be an adequate showing that the merger would not significantly increase market power. This will allow applicants to avoid or minimize a hearing on this issue. Consequently, we will to use an analytic screen (described in Appendix A) that is consistent with the Guidelines. If applicants satisfy this analytic screen in their filings, they typically would be able to avoid a hearing on competition. We would expect applicants to perform the screen analysis as part of their application and to supply the Commission and the public with electronic files of all data used in the analysis as well as other related specified data. The Commission will need this information in order to perform its competitive analysis. If an adequately supported screen analysis shows that the merger would not significantly increase concentration, and there are no interventions raising genuine issues of material fact that cannot be resolved on the basis of the written record, the Commission will not set this issue for hearing. Applicants may, of course, submit an alternative competitive analysis in addition to the screen.

The Commission believes that the screen will be a valuable analytical tool in all cases. It is conservative enough so that parties and the Commission can be confident that an application that clears the screen would have no adverse effect on competition. The screen also will be valuable in identifying potential competitive problems early in the process. The result will be more narrowly focused issues at hearings when they are necessary. We also note that the screen is intended to be somewhat flexible. It sets out a general method, but we will consider other methods and factors where applicants properly support them.

We believe that the analytic screen will produce a reliable, conservative analysis of the competitive effects of proposed mergers. However, it is not infallible. In some cases, the screen may not detect certain market power problems. There also may be disputes over the data used by applicants or over the way applicants have conducted the screen analysis. These claims may be raised through interventions and by the Commission staff. However, such claims must be substantial and specific. In other words, they should focus on errors in or other factual challenges to the data or assumptions used in the analysis, or whether the analysis has overlooked certain effects of the merger. Unsupported, general claims of harm are insufficient grounds to warrant further investigation of an otherwise comprehensive analysis developed by the applicants. Intervenors may also file an alternative competitive analysis, accompanied by appropriate data, to support their arguments. The Commission realizes that the need for more rigor in intervention showings could require additional efforts by potential intervenors. We will therefore routinely allow 60 days from filing for intervenors and others to comment on a merger filing.[32]

A detailed illustrative description of the analytic screen that we will use is in Appendix A. The following is a brief summary of the screen. There are four steps the applicant must complete and the Commission will follow:

(1) *Identify the relevant products.* Relevant products are those electricity products or substitutes for such products sold by the merging entities.

(2) *Geographic markets: identify customers who may be affected by the merger.* Generally, these would include, at a minimum, all entities directly interconnected to a merging party and those that historical transaction data indicate have traded with a merging party.

[32] Merger applicants that wish to facilitate the merger review process should serve potential intervenors with copies of their filing (via overnight delivery), including electronic versions, when they file their applications with the Commission. *Cf.* Open Access Rule, 61 FR 21618 n.510.

(3) *Geographic markets: identify potential suppliers that can compete to serve a given market or customer.* Suppliers must be able to reach the market both physically and economically. There are two parts to this analysis. One is determining the economic capability of a supplier to reach a market. This is accomplished by a delivered price test, which accounts for the supplier's relative generation costs and the price of transmission service to the customer, including ancillary services and losses. The second part evaluates the physical capability of a supplier to reach the customer, that is, the amount of electric energy a supplier can deliver to a market based on transmission system capability.

(4) *Analyze concentration.* Concentration statistics must be calculated and compared with the market concentration thresholds set forth in the Guidelines.[33]

The usefulness of the screen analysis depends critically on the data that are supplied with the application. These data are described in Appendix A. Applicants should file in electronic format the data specified as well as any other data used in their analysis.

If the Guidelines' thresholds are not exceeded, no further analysis need be provided in the application. As stated earlier, if an adequately supported screen analysis shows that the merger would not significantly increase concentration, and there are no interventions raising genuine issues of material fact that cannot be resolved on the basis of the written record, the Commission will not set this issue for hearing. If the thresholds are exceeded, then the application should present further analysis consistent with the Guidelines. The Commission will also consider any applicant-proposed remedies at this stage. If none is presented, or if the analysis does not adequately deal with the issues, we will need to examine the merger further.

The Commission will set for hearing the competitive effects of merger proposals if they fail the above screen analysis, if there are problems concerning the assumptions or data used in the screen analysis, or if there are factors external to the screen which put the screen analysis in doubt. We may also set for hearing applications that have used an alternative analytic method the results of which are not adequately supported. As discussed in Section III F, the Commission will attempt to summarily address issues where possible and may use procedural mechanisms that permit us to dispose of issues without having a trial-type hearing.

e. *Mitigation.* Although a competitive analysis pursuant to the Guidelines may show that a proposed merger would have anticompetitive effects, the Commission may be able to approve the merger as consistent with the public interest if appropriate mitigation measures can be formulated. In the past, in some cases the Commission has conditionally approved a merger if applicants agreed to conditions necessary to mitigate anticompetitive effects. In some instances, applicants themselves have voluntarily offered commitments to address various concerns.[34] Commenters suggested a variety of conditions that we could impose (or remedies that applicants could adopt voluntarily) to solve competitive problems with a merger. These include, for example, the formation of an Independent System Operator (ISO), divestiture of assets, elimination of transmission constraints, efficient regional transmission pricing, and offering an open season to allow the merging utilities' customers to escape from their contracts. Other commenters oppose some or all of these remedies. Some commenters also argue that we should monitor the situation after a merger and impose any new remedies that are needed; other commenters oppose such post-merger review.[35]

As noted, the Commission's review of merger applications has frequently resulted in the development of particular conditions that are designed to remedy problems associated with the merger. These conditions are imposed as part of our approval of the merger application. We expect that practice to continue. For example, we expect the competition analysis to focus extensively on generation market power and on whether a proposed merger exacerbates market power problems. We also expect applicants to propose remedies for market power problems identified in their analysis. It is our hope that as our market power analysis becomes more refined to cope with changing circumstances in the industry, applicant-proposed remedies or mitigation strategies will also become more refined or tailored to address the identified harm. Of course, one remedy that an applicant could consider is to propose to divest a portion of its generating capacity so that its market share falls below the share that poses anticompetitive concerns under the Guidelines. This remedy is discussed in the Appendix A section entitled ''Competitive Analysis Screen.''

Similarly, an applicant's ability to exercise generation market power may be affected by transmission constraints and transmission pricing. In particular, the scope of the geographic market may be limited both by transmission constraints and by the need to pay cumulative transmission rates in order to transmit power across the systems of the merging utilities and neighboring utilities. It is likely that both market concentration and the applicant's market share would be greater within such a circumscribed geographic market. Hence, the opportunity to exercise market power also would be greater. Potential remedies for such market power could include the following. First, a proposal by the applicants to turn over control of their transmission assets to an ISO might mitigate market power. In particular, an ISO might facilitate the implementation of efficient transmission pricing and thereby expand the effective scope of the geographic market. Second, an up-front, enforceable commitment to upgrade or expand transmission facilities might mitigate market power, because the constraint relieved by such an upgrade or expansion no longer would limit the scope of the relevant geographic market. These and other remedies also are discussed in Appendix A. We intend to tailor conditions and remedies to address the particular concerns posed by a merger on a case-by-case basis.

If an applicant does not propose appropriate remedies to mitigate the anticompetitive impact of a merger, the Commission intends to fashion such remedies during the course of its consideration of an application.

We do not intend to rely on post-merger review or on new remedies

[33] The Guidelines address three ranges of market concentration: (1) an unconcentrated post-merger market—if the post-merger Herfindahl-Hirschman Index (HHI) is below 1000, regardless of the change in HHI the merger is unlikely to have adverse competitive effects; (2) a moderately concentrated post-merger market—if the post merger HHI ranges from 1000 to 1800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns; and (3) a highly concentrated post-merger market—if the post-merger HHI exceeds 1800 and the change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.

[34] *E.g.*, Northeast Utilities Services Company/Re Public Service Company of New Hampshire, 50 FERC ¶ 61,266, *reh'g denied*, 51 FERC ¶ 61,177, *clarification*, 52 FERC ¶ 61,046 (1990), *order on reh'g*, 58 FERC ¶ 61,070 (1992), *order on reh'g*, 59 FERC ¶ 61,042 (1992), *aff'd in part sub nom.* Northeast Utilities Services Company v. FERC, 993 F.2d 937 (1st Cir. 1993); Midwest Power Systems, Inc. and Iowa-Illinois Gas & Electric Company, 71 FERC ¶ 61,386 (committed to offer wholesale requirements customers an open season).

[35] The comments on remedies are summarized in more detail in Appendix D, Section VI D.

imposed after a merger is approved. We must find that a merger is consistent with the public interest before we approve a merger.[36] Moreover, heavy reliance on post-merger review would expose the merging entities to too much uncertainty. However, as the Commission has noted in past merger cases, the Commission does retain authority under section 203(b) to issue supplemental orders for good cause shown as it may find necessary or appropriate.[37]

The Commission acknowledges that many of the solutions that would mitigate market power or anticompetitive effects cannot be implemented quickly and, in fact, could take an extended period to accomplish (*e.g.*, siting and constructing new transmission lines to alleviate a transmission constraint, divestiture of generation assets, formation of an ISO). While long-term remedies may be necessary to allow the Commission to determine that a merger is consistent with the public interest, a requirement to satisfy such conditions prior to consummating a merger may jeopardize the ability of parties to merge. In turn, customers will experience unnecessary delays in receiving benefits accruing from the merger. Therefore, we will entertain proposals by merger applicants to implement interim mitigation measures that would eliminate market power concerns during the period that it takes to put in place the long-term remedies necessary to address the anticompetitive effects of their proposed merger.[38] Such interim measures must fully and effectively address the specific market power problems identified for the merger but should not be viewed as substitutes for the long-term remedies required by the Commission. Applicants should implement long-term remedies as quickly as practical.

C. Effect on Rates

1. Background

In determining whether a merger is consistent with the public interest, one of the factors we have considered is the effect the proposed merger will have on costs and rates. In the past we have considered whether the elimination of the independence of the companies and resulting combination of the facilities of the separate entities would be likely to lead to unnecessary rate increases or inhibit rate reductions.[39] We have also been concerned with whether the merged companies would be able to operate economically and efficiently as a single entity.[40] In connection with these concerns, the Commission has investigated applicants' claims about the potential costs and benefits of their proposed mergers and weighed that information to determine whether the costs are likely to exceed the benefits. Our investigations have frequently required trial-type hearings. Although we have considered the applicants' burden of proof to be met by a generalized showing of likely costs and benefits,[41] these hearings have often been time-consuming, and there has been considerable controversy over whether the estimates of future costs and benefits are truly meaningful. Moreover, there has been controversy over the position we have taken that benefits are to be ''counted'' even if they could reasonably be obtained by means other than the merger. There also has been controversy over the allocation of the projected merger benefits.[42]

In more recent cases, the Commission has focused on ratepayer protection. We have either accepted a hold harmless commitment (a commitment from the applicant that any net merger-related costs will not raise rates) or have set for hearing the issue of whether the applicants' hold harmless commitment or some other proposed ratepayer protection was adequate. For example, in *Primergy*, the Commission held that wholesale ratepayers would be adequately protected if the applicants were to commit that, for a period of four years after the merger is consummated, the merging companies would not seek to increase rates to wholesale requirements customers.

In *PS Colorado*,[43] the applicants submitted evidence on costs and benefits, but also proposed a hold harmless commitment. We noted several concerns with the hold harmless commitment, pointing out that it did not cover most of the merger-related costs.[44] We set for hearing the issue of whether the applicants' hold harmless commitment provided adequate protection for ratepayers (those who receive unbundled generation and transmission services as well as those who receive bundled service) and, if not, what ratepayer protection mechanisms would be sufficient. We did not set for hearing the effect on rates as such; that is, we did not instruct the administrative law judge to conduct a factual investigation into the alleged costs and benefits of the merger. In *Cincinnati Gas & Electric Company and PSI Energy, Inc.*, the Commission modified the hold harmless provision, stating that the applicants would have the burden of convincingly demonstrating in future section 205 filings that their wholesale customers had, in fact, been held harmless; that is, they would have to show any rate increase was not related to the merger.[45] The applicants would be required to make an affirmative showing in their initial case-in-chief that their proposed rates did not reflect merger-related costs unless such costs were offset by merger-related benefits.[46]

In *Union Electric*,[47] the applicants proposed an open season guarantee for the first five years after the merger was consummated. The open season guaranteed that existing wholesale customers could terminate their contracts by giving notice on the day the applicants filed for a rate increase affecting that customer. The Commission was concerned that the open season commitment might not provide adequate protection for wholesale ratepayers (those that receive bundled generation and transmission service as well as those that receive unbundled generation or transmission service) and set that issue for hearing. We stated that if at hearing it was determined that the open season

[36] For example, an expansion or upgrade of facilities to alleviate a transmission constraint would not be an acceptable mitigation measure unless uncertainties about the utilities' ability to complete the upgrade or expansion are resolved prior to consummation of the merger.

[37] *See* FPA section 203(b), 16 U.S.C. § 824b(b) (1994).

[38] For example, an applicant could sell its transmission rights on congested transmission paths to third parties or not trade in markets where it has market power until long-term remedies are implemented.

[39] Commonwealth, 36 FPC at 938.

[40] Edison, 47 FERC ¶ 61,196 at 61,672 (1989).

[41] Entergy Services Inc. (*Entergy*), 65 FERC ¶ 61,332, at 62,473 (1993), *order on reh'g*, 67 FERC ¶ 61,192 (1994), *appeal pending.*

[42] These benefits have included items such as fuel cost savings; bankruptcy resolution; reducing administrative and general costs; lowering net production costs; and eliminating or deferring construction of new generating units.

[43] 75 FERC at 62,043–44.

[44] The commitment was not to seek an increase in base rates for five years after the merger. We found, however, that this provided little protection, since the five years would be over before most of the claimed merger savings were projected to be realized. Moreover, the applicants proposed to amortize merger-related costs over five years, but their hold harmless commitment covered only costs that would be ''booked to the merger'' through the first two years.

[45] See Cincinnati Gas & Electric Company and PSI Energy, Inc., 64 FERC ¶ 61,237 at 62,714 (1993), order withdrawing authorization of merger and instituting settlement procedures, 66 FERC ¶ 61.028, order denying rehearing and approving settlements and unilateral offers as conditioned and modified, 69 FERC ¶ 61,005 (1994), order granting clarification, 69 FERC ¶ 61,088 (1994).

[46] Id. at 62,714.

[47] 77 FERC ¶ 61,026 at 61,107–08 (1996), reh'g pending.

commitment was not adequate protection, a determination should be made as to what ratepayer protection mechanisms might be suitable for the proposed merger.

In response to the NOI, only a few commenters suggest that we dispose of the effect on rates factor altogether.[48] Most commenters consider this factor to be essential in deciding whether to approve a merger.[49] However, commenters differ on how this factor should be assessed.

2. Discussion

We disagree with the argument presented by a few commenters that we need not be concerned about the effect of a merger on rates in this competitive environment because prices will be set by market forces and customers can choose their suppliers accordingly. Also, while it may be true that most of the rate issues in connection with the typical merger affect retail ratepayers and are subject to state jurisdiction, the Commission in order to ensure that a merger is consistent with the public interest still must protect the merging utilities' wholesale ratepayers and transmission customers from the possible adverse effects of the merger. As mentioned in our discussion above on the effect on competition and in our discussion in the Open Access Rule, we recognize that even in an open access environment, markets may not work perfectly or even well.[50] This is particularly the case during the transition from a monopoly cost-of-service market structure to a competitive market-based industry. For instance, during the transition some customers may be unable to take immediate advantage of competition because of contractual commitments or because of stranded costs obligations. Furthermore, because transmission remains effectively a natural monopoly and will continue to be regulated on a cost-of-service basis, the Commission has reason to be concerned that mergers do not affect transmission rates adversely. For these reasons, we will not abandon the effect on rates factor.[51]

Rather than requiring estimates of somewhat amorphous net merger benefits and addressing whether the applicant has adequately substantiated those benefits, we will focus on ratepayer protection. Merger applicants should propose ratepayer protection mechanisms to assure that customers are protected if the expected benefits do not materialize. The applicant bears the burden of proof to demonstrate that the customer will be protected. This puts the risk that the benefits will not materialize where it belongs—on the applicants.

Furthermore, we believe that the most promising and expeditious means of addressing ratepayer protection is for the parties to negotiate an agreement on ratepayer protection mechanisms. The applicants should attempt to resolve the issue with customers even before filing, and should propose a mechanism as part of their filing. Even if these negotiations have not succeeded by the time of filing, the parties should continue to try to reach a settlement. What constitutes adequate ratepayer protection necessarily will depend on the particular circumstances of the merging utilities and their ratepayers, and we strongly encourage parties to minimize contentious issues and to resolve them without the time and expense of a formal hearing. Parties may not be able to reach an agreement on an appropriate ratepayer protection and the Commission may still be able to approve the merger. As mentioned earlier, this could occur either after a hearing or on the basis of parties' filings if we determine that the applicants' proposal sufficiently insulates the ratepayers from harm.

As described above, the Commission has accepted a variety of hold harmless provisions, and parties may consider these as well as other mechanisms if they appropriately address ratepayer concerns. Among the types of protection that could be proposed are:

- O*pen season for wholesale customers*—applicants agree to allow existing wholesale customers a reasonable opportunity to terminate their contracts (after notice) and switch suppliers. This allows customers to protect themselves from merger-related harm.
- *General hold harmless provision*—a commitment from the applicant that it will protect wholesale customers from any adverse rate effects resulting from the merger for a significant period of time following the merger. Such a provision must be enforceable and administratively manageable.
- *Moratorium on increases in base rates (rate freeze)*—applicants commit to freezing their rates for wholesale customers under certain tariffs for a significant period of time.[52]
- *Rate reduction*—applicants make a commitment to file a rate decrease for their wholesale customers to cover a significant period of time.[53]

Although each mechanism provides some benefit to ratepayers, we believe that in the majority of circumstances the most meaningful (and the most likely to give wholesale customers the earliest opportunity to take advantage of emerging competitive wholesale markets) is an open season provision. We urge merger applicants to negotiate with customers before filing and to offer an adequate open season proposal or other appropriate ratepayer protection mechanism in their merger applications. If intervenors raise a substantial question as to the adequacy of the proposal, parties should continue to pursue a settlement. If no agreement can be reached, we may decide the issue on the written record or set the issue for hearing.

D. Effect on Regulation

When the Commission in *Commonwealth* referred to impairment of effective regulation by this Commission and appropriate state regulatory authorities, its concern was with ensuring that there is no regulatory gap.[54] The potential for impairment of effective regulation at the Federal level has been increased by the *Ohio Power* decisions.[55] That case holds that if the SEC approves a contract for sales of non-power goods or services between affiliates in a registered holding company, this Commission in its rate review may not disallow any part of the payment under the contract in order to protect ratepayers against affiliate abuse.[56]

In recent cases, the Commission has developed its policy regarding the effect of proposed mergers on both state and Federal regulation. For instance, *PS Colorado* involved the creation of a new multistate registered holding company. On the question of a shift of regulation from the state commissions to this Commission, we declined to order a

[48] *See* Appendix D, section III(A).

[49] *Id.*

[50] *See* Open Access Rule, 61 FR at 21553.

[51] In the past, we have referred to this factor as the "effect on costs and rates." However, the basic concern is with the effect on rates. Accordingly, we will refer to it as the "effect on rates."

[52] A rate freeze, however, does not insulate the merged utility from a rate reduction if the Commission, pursuant to section 206, determines that the utility's rates are no longer just and reasonable. Also, in circumstances in which ratepayers clearly would be entitled to a rate reduction in the absence of the merger, *e.g.*, expiration of a current surcharge or some other clearly defined circumstance, a simple rate freeze may not provide adequate ratepayer protection.

[53] Whether these types of proposals are appropriate in a particular case will depend on the circumstances of the merging companies and the customers and the details of the proposals.

[54] Cinergy, 64 FERC at 61,710 n. 278; Commonwealth, 36 FPC at 931.

[55] Ohio Power Company v. FERC, 954 F.2d, 779, 782–86 (D.C. Cir. 1992), *cert. denied,* 498 U.S. 73 (1992) (*Ohio Power*).

[56] *Cf.* AEP Power Marketing, Inc., 76 FERC ¶ 61,307 at 62,515 (1996).

hearing, noting that the state commissions had authority to disapprove the merger and that they did not argue that their regulation would be impaired. On the question of a shift of authority from this Commission to the SEC, we pointed out that pre-merger, we had authority to review for rate purposes all the costs the companies incurred, but if the merger were approved, under *Ohio Power* we would lose that authority if the SEC approved an inter-affiliate transaction. Thus, the costs could be flowed through to ratepayers, even if the goods or services were obtained at an above-market price or the costs were imprudently incurred. To guard against this possibility, we gave the applicants two options.[57] They could either choose to have the issue set for hearing, or they could agree to abide by our policies on intra-system transactions.[58]

In response to the NOI, commenters generally argue that it is important for the Commission to continue to look at the effect of a merger on the effectiveness of state and Federal regulation.[59]

2. Discussion

We will continue to examine the effect on regulation as a factor in our analysis of proposed mergers and will use the approach adopted in *PS Colorado* and subsequent cases. Thus, in situations involving registered public utility holding companies, we will require the applicants to choose between two options and to make that choice clear in their filing. They may commit themselves to abide by this Commission's policies with respect to intra-system transactions within the newly-formed holding company structure, or they may go to hearing on the issue of the effect of the proposed registered holding company structure on effective regulation by this Commission. If applicants choose the first option, we will set the issue for hearing only if intervenors raise credible arguments that because of special factual circumstances, the commitment will not provide sufficient protection.

With respect to the effect of a merger on state regulatory authority, where a state has authority to act on a merger, as in *PSColorado*, we ordinarily will not set this issue for a trial-type hearing. The application should tell us whether the states have this authority. If the state lacks this authority and raises concerns about the effect on regulation, we may set the issue for hearing; we will address these circumstances on a case-by-case basis.

E. Other Commonwealth Factors

The other *Commonwealth* factors are evidence of coercion, the proposed accounting treatment, and the reasonableness of the purchase price.

These three factors elicited very little comment. As to evidence of coercion, a few commenters suggest that this should be evaluated by the marketplace rather than by the regulatory process.[60] Several commenters say that this factor should be considered only if someone demonstrates that it is relevant.[61] OK Com is among the few commenters who favor retaining this factor. It suggests that coercion is a means by which some companies will try to gain oligopolistic control of the market in the coming competitive environment.

As to accounting treatment, some commenters support elimination of accounting concerns as a factor.[62] PaineWebber notes that most recent mergers were mergers of equals, involving minimal premiums over current market prices. It suggests that a similar market discipline would likely cause shareholders to reject merger transactions involving large merger premiums and excessive amortization. Florida and Montaup argue that the accounting treatment of a merger should not be an issue for hearing unless an applicant seeks treatment different from the Commission's standards. Southern Company contends that the Commission's analysis of this factor should be subsumed within the analysis of the merger's impact on costs and rates.

NY Com and OK Com are concerned about the accounting consequences of mergers. OK Com favors keeping the historical cost approach to accounting for plant acquisitions during mergers and business combinations until competitive market structures are achieved at the national, regional, and state levels. NY Com also urges the Commission to continue to require unrestricted access to all books and records of newly merged entities.

We also received a few comments on looking at the reasonableness of the purchase price as a factor. A number of commenters[63] urge that the Commission not substitute its judgment for the workings of market forces, which will determine the reasonableness of the purchase price. Others[64] believe that this issue should be examined only if its relevance is raised. However, OK Com argues that purchase price still has some relevance in this era of diversification. It is concerned that the purchase price may be based on expected returns on non-regulated investments, which, if they fail to materialize, may dilute the value of utility stock.

We will no longer consider these three matters as separate factors. Any evidence of coercion will be considered as part of our analysis of the effect of the merger on competition. We have treated the reasonableness of the purchase price as an issue only insofar as it affects rates, so this issue is subsumed in the effect on rates factor. As for the proposed accounting treatment, this is not really a factor to be balanced along with other factors; proper accounting treatment is simply a requirement for all mergers.[65]

If a merger application seeks to recover acquisition premiums through wholesale rates, we will address the issue in post-merger rate applications. However, the Commission historically has not permitted rate recovery of acquisition premiums.

F. Procedures for Handling Merger Cases

We received many suggestions as to how to improve our procedures for handling merger cases. The commenters focused particularly on the need for certainty and the need to expedite the process, at least for some mergers. They suggested various screens or hold harmless provisions. Some suggested that we set forth filing requirements. There were also many comments on coordination with other agencies that are reviewing the merger.[66]

Although we plan to issue a Notice of Proposed Rulemaking in the near future to set forth more specific filing requirements consistent with this Policy Statement and additional procedures for improving the merger hearing process, we have determined that the best way to improve the Commission's handling

[57] 75 FERC at 62,045–46.

[58] *Accord*, Union Electric, 77 FERC at 61,108–09 (state expressed concern over shift of regulatory authority from itself and this Commission to SEC; Commission noted that state had authority to disapprove merger).

[59] Appendix B at Section IV.

[60] East Texas Coop., EEI, PaineWebber, and Southern Company.

[61] Florida and Montaup.

[62] East Texas Coop, EEI, and PaineWebber. Although they do not support keeping this factor, EEI and PaineWebber suggest that in light of broad industry changes, this may be the right time for a generic re-examination of accounting concerns, of which accounting for mergers could be a part.

[63] CINergy, East Texas Coop, EEI, PaineWebber, and Southern.

[64] Florida and Montaup.

[65] *See, e.g.*, Public Service Company of Colorado and Southwestern Public Service Company, 75 FERC ¶ 61,325 (1996); Entergy Services, Inc. and Gulf States Utilities Company, Opinion No. 385, 65 FERC ¶ 61,332 (1993), *order on reh'g*, 67 FERC ¶ 61,192 (1994).

[66] Appendix D, Section VI.

of merger proposals is to update our merger review policy. As outlined in this Policy Statement, we will generally limit the number of factors we examine in order to determine whether a merger is in the public interest.

The principal area that will require a fact-based review is the effect of a proposed merger on competition. By using the Guidelines as a screen and by informing applicants of the type of information we expect them to file with us when they apply, we hope to expedite our review of applications considerably.

As discussed above under ''Effect on Competition,'' ''Effect on Rates,'' and ''Effect on Regulation,'' we are setting forth for each factor guidance to enable merger applicants ordinarily to avoid a trial-type hearing or to have a hearing focused on limited issues. Moreover, we have set forth above under ''Effect on Competition'' and in Appendix A the information that we think we need at this point to determine whether a merger would impair competition. We have also discussed ways to mitigate anticompetitive effects. Our consideration of the other two factors, the effect on rates and the effect on regulation, should not require a lot of data or analysis, since we will be relying primarily on the applicants' commitments. This should make it possible for applicants to make filings that can be processed more quickly. The Commission intends to propose a rule to set forth detailed filing requirements.

Another step that can make our processing of merger applications more efficient is to discourage redundant or irrelevant pleadings. We agree with commenters who argue that we should not consider extraneous issues, and we will not consider interventions that raise matters unrelated to the merger. Moreover, in the past, the process has been bogged down by repetitive filings such as answers to answers. We will not consider such filings, nor will we consider ''new'' information unless it is genuinely new and relevant.

With all the streamlining changes discussed above, we believe that we will be able to act on mergers more quickly after a *complete* application is filed. A complete application is one that adequately and accurately describes the merger being proposed and that contains all the information necessary to explain how the merger is consistent with the public interest, including an evaluation of the merger's effect on competition, rates, and regulation.[67] We expect applicants to be able to provide all the necessary information, given the guidance in this Policy Statement. We also emphasize that applicants should not expect speedy action if their merger proposals change, as has frequently happened in the past. The Commission cannot be expected to act quickly on a moving target. If applicants change the mechanism or terms under which they intend to merge or supplement the supporting information in their application, the Commission's review process will restart.

Once we have a *complete* application, we will make every reasonable effort to issue an initial order 60–90 days after the comment period closes. An initial order could take any of several actions, including: requesting additional information from the applicants or intervenors; setting some or all issues for a trial-type or paper hearing; approving the merger; or rejecting the merger. If we determine in the initial order that further procedures are necessary, we will choose among the available procedural options based on the completeness of the record before us, the types of issues that need to be resolved (factual, policy or legal), and the need to give parties adequate due process. However, we are hopeful that the guidance in this Policy Statement will result in more complete applications and more focused and detailed interventions and that we will be able to act summarily on many (or in some cases all) issues in the initial order.

If the Commission determines in an initial order that trial-type or paper hearing procedures are necessary, we believe that we will be able to issue a final order on most applications within 12–15 months from the date that the completed application was filed. We emphasize that this assumes no significant changes in the proposal; any such changes will start the process over and will require that a new notice be issued. Of course, some applications will take more time than others. For example, if a merger raises extraordinarily complex factual disputes, or if the development of competitive remedies or hold harmless agreements is entirely deferred to the hearing, case processing may take longer. On the other hand, if a merger falls below the HHI screen, the applicants propose adequate ratepayer protection mechanisms, and the applicants make the commitments necessary to assuage our concerns about the effect on regulation, we should be able to act much more quickly.

The Commission believes that in order to meet routinely the target dates we have set forth in this Policy Statement, it is appropriate to reexamine whether our procedures for processing merger applications, including hearing procedures, can be tailored better to meet the specific needs of participants in merger proceedings. To that end, in the proposed rulemaking on information filing requirements (see note 3), we will also request public comment on merger processing procedures.

We will not delay our processing of merger applications to allow the states to complete their review, as some commenters suggest. However, we will be willing to consider late interventions by state commissions where it is practicable to do so. In cases where a state commission asks us to address the merger's effect on retail markets because it lacks adequate authority under state law, we will do so.

In response to commenters who are concerned that our decisions be consistent with those of other agencies, we note that since we are adopting the *Guidelines* as a framework for our analysis of the effect on competition, our analysis should be generally consistent with the DOJ's and the FTC's analyses.

G. *Other Issues*

According to FERC Policy Project, recent changes in the industry may make mergers financially unattractive without planning and operational changes; these changes can harm the environment. FERC Policy Project argues that we should revise our rule that provides that merger applications will not generally require preparation of an EIS or EA. The rule ''categorically excludes'' mergers unless circumstances indicate that the action may be a major Federal action significantly affecting the qualify of the human environment.[68] FERC Policy Project also argues that the effect on the environment should be considered as a factor in deciding whether to approve a merger. Moreover, it believes we should require applicants to provide with their applications information on the environmental effects of the merger and that we should require mitigation of environmental effects through various means.

The Commission has recognized that a particular merger can have environmental effects and has been willing to study the issue in an

[67] The information would include all applicable exhibits and accompanying testimony and other data that will constitute applicants' showing that the merger is consistent with the public interest. In addition, a copy of all applications or other information filed with other regulatory bodies regarding the merger must be provided to the Commission to initiate our review process.

[68] 18 CFR 380.4 (a)(16) and (b).

individual case where it is justified.[69] We do not see the need to change our regulation, which explicitly addresses the possibility that an EA or EIS may, on rare occasions, be needed. However, both our categorical exclusion rule and the absence of environmental concerns from the list of three factors in this Policy Statement reflect the simple fact that most mergers do not present environmental concerns.

Low-Income Representatives argues that the ''public interest'' standard requires us to consider matters such as the need for service to all households, the need for consumer input into the decisions made by utilities, and other matters. We clarify that the three factors discussed in this Policy Statement are not necessarily the only factors that make up the public interest, and, if appropriate, we will consider other matters that are under our jurisdiction. However, we believe such matters as the need for service to all households are more appropriately the concern of the states.

IV. Administrative Effective Date and Congressional Notification

Under the terms of 5 U.S.C. 553 (d)(2), this Policy Statement is effective immediately. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, that this Policy Statement is not a major rule within the meaning of section 351 of the Small Business Regulatory Enforcement Act of 1996.[70] The Commission is submitting the Merger Policy Statement to both Houses of Congress and to the Comptroller General.

List of Subjects in 18 CFR Part 2

Administrative Practice and Procedure, Electric power, Natural gas, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Lois D. Cashell,

Secretary.

In consideration of the foregoing, the Commission amends Part 2, Chapter I, Title 18 of the Code of Federal Regulations as set forth below.

PART 2—GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for Part 2 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 792–825r, 2601–2645; 42 U.S.C. 4321–4361, 7101–7352.

2. Part 2 is amended by adding § 2.26, to read as follows:

§ 2.26 Policies concerning review of applications under section 203.

(a) The Commission has adopted a Policy Statement on its policies for reviewing transactions subject to section 203. That Policy Statement can be found at 77 FERC ¶ 61,263 (1996). The Policy Statement is a complete description of the relevant guidelines. Paragraphs (b)–(e) of this section are only a brief summary of the Policy Statement.

(b) *Factors Commission will generally consider.* In determining whether a proposed transaction subject to section 203 is consistent with the public interest, the Commission will generally consider the following factors; it may also consider other factors:

(1) The effect on competition;

(2) The effect on rates; and

(3) The effect on regulation.

(c) *Effect on competition.* Applicants should provide data adequate to allow analysis under the Department of Justice/Federal Trade Commission Merger Guidelines, as described in the Policy Statement and Appendix A to the Policy Statement.

(d) *Effect on rates.* Applicants should propose mechanisms to protect customers from costs due to the merger. If the proposal raises substantial issues of relevant fact, the Commission may set this issue for hearing.

(e) *Effect on regulation.* (1) Where the merged entity would be part of a registered public utility holding company, if applicants do not commit in their application to abide by this Commission's policies with regard to affiliate transactions, the Commission will set the issue for a trial-type hearing.

(2) Where the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commission. The application should state whether the state commissions have this authority.

(3) Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation.

Note: These Appendices will not appear in the *Code of Federal Regulations.*

Appendix A—Competitive Analysis Screen

The analytic screen provides applicants with a standard analytic method and data specification to allow the Commission to quickly determine whether a proposed merger presents market power concerns. Some past merger cases were delayed or set for hearing because an adequate analysis was not part of the application or because sufficient data that would allow the Commission to corroborate or independently check applicants' conclusions was not provided in the application. This is especially true regarding the effect that transmission prices and capability may have on the scope of the geographic market. The chances for hearings and delays will be reduced if the screen analysis and data described below are filed with the application.

A. Consistency With DOJ Guidelines

In this policy statement, the Commission has adopted the DOJ Merger Guidelines (the Guidelines)[1] as the basic framework for evaluating the competitive effects of proposed mergers. The analytic screen applies the Guidelines. Before describing the screen, the Guidelines are briefly summarized so that the screen's consistency with them is clear.

In general, the Guidelines set out five steps for merger analysis: (1) assess whether the merger would significantly increase concentration; (2) assess whether the merger could result in adverse competitive effects; (3) assess whether entry could mitigate the adverse effects of the merger; (4) assess whether the merger results in efficiency gains not achievable by other means; and (5) assess whether, absent the merger, either party would likely fail, causing its assets to exit the market.

The analytic screen focuses primarily on the Guidelines— first step. This step can be broken down into two components:

Defining product and geographic markets that are likely to be affected by a proposed merger and measuring concentration in those markets. The products to consider are those sold by the merging parties. The Guidelines suggest a way of defining geographic markets based on identifying the suppliers that are feasible alternative suppliers to the merged firm from a buyer's perspective: the hypothetical monopolist test. Essentially, if a hypothetical and unregulated monopoly that owned all the supplies inside the geographic market being tested could profitably sustain a small but significant price increase (i.e., suppliers external to the market are not, by definition, sufficiently good substitutes for the buyers in the market), then the limit of the geographic market has been reached.[2] The sustainability of a price increase depends on both sellers entering the market and the response of buyers to the increase. The concentration of suppliers included in the market is then measured (by summary statistics such as the Herfindahl-Hirschman Index, or HHI, and single seller market share)

[69] *See* Southern California Edison Company, 47 FERC ¶ 61,196 (1989), *order on reh'g*, 49 FERC 61,091 (1989).

[70] 5 U.S.C. 804 (2).

[1] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, 57 FR 41552 (1992).

[2] The Guidelines suggest that a 5% price increase be used for the test, but allow that larger or smaller price increases may also be appropriate. DOJ Guidelines at 41555.

and used as an indicator of the potential for market power.

Evaluating the change in concentration using the Guidelines' thresholds to indicate problematic mergers. The Guidelines address three ranges of market concentration: (1) an unconcentrated post-merger market—if the post-merger HHI is below 1000, regardless of the change in HHI the merger is unlikely to have adverse competitive effects; (2) a moderately concentrated post-merger market—if the post merger HHI ranges from 1000 to 1800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns; and (3) a highly concentrated post-merger market—if the post-merger HHI exceeds 1800 and the change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.[3]

If the concentration analysis indicates that a proposed merger may significantly increase concentration in any of the relevant markets, the Guidelines suggest examination of other factors that either address the potential for adverse competitive effect or that could mitigate or counterbalance the potential competitive harm. Such factors include the ease of entry in the market and any efficiencies stemming from the merger.[4] If the additional factors examined do not mitigate or counterbalance the adverse competitive effects of the merger, remedial conditions would be explored at this stage.

B. Analytic Screen Components

There are four steps to the screen analysis.

1. Identify the Relevant Products

The first step is to identify one or more products sold by the merging entities. Products may be grouped together when they are good substitutes for each other from the buyer's perspective. If two products are not good substitutes, an entity with market power can raise the price of one product and buyers would have a limited ability to shift their purchases to other products. In the past, the Commission has analyzed three products: non-firm energy, short-term capacity (firm energy), and long-term capacity.[5] These remain reasonable products under the prevailing institutional arrangements, and applicants should recognize such products in their analysis. Other product definitions may also be acceptable. For example, the lack of on-site buyer storage creates products differentiated by time. Thus, peak and off-peak energy (seasonal and daily) may be distinct products.

The Commission encourages parties to propose even more precise definitions of relevant products where appropriate. Indeed, we would expect to see greater precision in product differentiation as market institutions develop.

2. Geographic Markets: Identify Customers Who May Be Affected by the Merger

This is the first of a two-step process of determining the geographic size of the market. To identify customers potentially affected by a merger, at a minimum, applicants should include all entities directly interconnected to either of the merging parties. Additional entities should be included in the analysis if historical transaction data indicates such entities have been trading partners with a merging party. Applicants and others may argue either that there are other customers to be included as relevant buyers or that identified customers are not relevant buyers. Intervenors also may argue that other customers not identified by the applicants will be affected by the merger.

3. Geographic Markets: Identify Potential Suppliers to Each Identified Customer

This second, and key, step in determining the size of the geographic market is to identify those suppliers that can compete to serve a given market or customer and how much of a competitive presence they are in the market. Alternative suppliers must be able to reach the market both economically and physically. There are two parts to this analysis. One is determining the economic capability of a supplier to reach a market. This is accomplished by a delivered price test. The second part evaluates the physical capability of a supplier to reach a market, i.e., the amount of the defined product a supplier can deliver to a market based on transmission capacity availability.

Supply and demand conditions in electricity markets vary substantially over time, and the market analysis must take those varying conditions into account. Applicants should present separate analyses for each of the major periods when supply and demand conditions are similar. One way to do this is to group together the hours when supply and demand conditions are similar; for example, peak, shoulder and off-peak hours. There may even be smaller groupings to reflect periods of significantly constrained transmission capability available for suppliers to reach a market.

The screen analysis also examines historical trade data as a check on which suppliers should be included in the relevant markets.

a. *Delivered price test.* The screen analysis should first identify those suppliers with the potential to economically supply power to the destination market or customer. The merging companies as well as non-traditional suppliers should be included in this test to identify potential suppliers. Basically, suppliers should be included in a market if they could deliver the product to a customer at a cost no greater than 5% above the competitive price to that customer.[6] The delivered cost of the product to the relevant market for each potential supplier is found by adding the potential supplier's variable generation costs and all transmission and ancillary service charges that would be incurred to make the delivery.[7] Thus, the farther away a supplier, the more transmission and ancillary service prices that must be added to its power costs. Suppliers that would have to traverse a non-open access system can be included as potential suppliers only to the extent they have firm access rights. The analysis should also take into account the effect of line losses on the economics of trade with a distant supplier.

If a supplier can deliver the product to the market at a cost no more than 5% above the market price,that supplier should be included in the geographic market. Applicants are expected to provide product-specific delivered price estimates for each destination market or customer.

The delivered price test uses the following data. Applicants should provide in electronic format these data and any other data relied upon in their analysis.

- *Transmission prices.* Applicants should use the ceiling prices in utilities' open access tariffs on file with the Commission. Where a non-jurisdictional entity's transmission system is involved, the ceiling price in its "NJ" tariff should be used. If the entity has not filed an "NJ" tariff, applicants should use their best efforts to secure or estimate transmission ceiling prices. Prices that are not found in a tariff on file with the Commission should be adequately supported. While we are aware that ceiling prices are frequently discounted, this screen analysis is to be conservative. Applicants may present an additional alternative analysis using discounted prices if they can support it with evidence that discounting is and will be available.
- *Potential suppliers' generation costs.* The Commission will consider various measures of costs. Applicants are free to use any appropriate cost data as long as it is verifiable and supported with reasoned analysis. Possibilities include generating plant cost data from the FERC Form 1 annual reports or unit specific data. Another is system lambda data. Either of these data can be used to calculate a potential supplier's costs at various time periods. Other measures or data sources may also be appropriate. The Commission has not reached a firm conclusion on a specific cost measure.
- *Competitive market price.* Electricity markets have not sufficiently matured yet to exhibit single market clearing prices for various products. In addition, price discovery is difficult because the reporting of actual transaction prices is still in its formative stage. Until market institutions mature enough to reveal single market clearing prices, applicants may use surrogate measures as long as they are properly supported. For example, a buyer's system lambda may be used because a buyer is not likely to purchase from a supplier that is more costly than its own costs of production

[3] DOJ Guidelines at 41558.

[4] In assessing market concentration, the Guidelines state "* * * market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." DOJ Guidelines at 41558 .

[5] See Baltimore Gas & Electric and Potomac Electric Power Company, 76 FERC ¶ 61,111 (1996) at 61,572. The factor that is considered in evaluating long term capacity markets is the effect of a merger on barriers to entry into those markets.

[6] The Guidelines suggest a 5% price threshold but acknowledge that others may be appropriate. Applicants have the burden of justifying a different price threshold.

[7] This would include the unbundled transmission rates of a seller that is a vertically integrated public utility.

at specific times.[8] Another possibility might be the price at which the affected customer has been purchasing power.

For each supplier, the screen analysis should then show the amount of each product the supplier could supply to the market. Generation capacity measures are appropriate for this showing.[9] Different capacity measures should be used, as appropriate, for different products. It is also appropriate, even desirable, to use several measures for one product. Given that competitive analysis is an inexact science and that electricity markets are changing rapidly, using several measures for a particular product will corroborate the result of the analysis. While the Commission has not firmly decided on specific measures for analyzing products, the following discussion of capacity measures is intended to offer guidance on this matter. These are some ways to measure a supplier's ability to supply a particular product to a market. They are not product definitions.

• *Economic capacity.* This is the most important of the measures because it determines which suppliers may be included in the geographic market. Economic capacity is that from generating units whose variable costs are such that they could deliver energy to a relevant market, after paying all necessary transmission and ancillary service costs, at a price close to the competitive price in the relevant market. For example, if the average competitive price in the wholesale market is 2.2 cents/kWh during a particular period, all capacity that can sell into the market at 2.3 cents/kWh (5% above the competitive price) should be included in the market. If a seller has no economic capacity, it should not be considered in the market at this stage of the analysis. The economic capacity measure provides a sense of which suppliers own or control the largest shares of low cost generating capacity that has a pronounced competitive advantage over higher cost capacity in the market.[10]

• *Available economic capacity.* This measure indicates how much economic capacity a supplier identified in the previous step might actually have available to sell into a market. It includes capacity from generating units that are not used to serve native load (or are contractually committed) and whose variable costs are such that they could deliver energy to a market at a price close to the competitive price in the market. The presumption underlying this measure is that the lowest running cost units are used to serve native load and other firm contractual obligations and would not be available for other sales. As competition develops, this presumption may not be valid.[11] Because of its focus on variable costs, available economic capacity is useful for evaluating energy (in contrast to capacity) markets.

• *Uncommitted capacity.* This traditional measure is useful for evaluating intermediate-capacity markets. For each supplier included in the relevant market, this measure is computed by subtracting native load and firm contractual obligations from total capacity.

• *Total capacity.* Total capacity has traditionally been used by the Commission and others to analyze markets. While this measure does not account for native load obligations and does not capture the availability or cost of generation, and thus is not useful for a delivered price analysis, it does provide a sense of the overall size of a supplier that is included in the relevant market.

b. *Accounting for transmission capability.* Once the suppliers that might economically supply the product to a market or customer are identified, and the relevant capacity measures are calculated, each supplier's capacity measures should be adjusted to account for how much of the product that seller can physically deliver to that market. The extent of transmission capability determines the extent of a supplier's ability to physically reach a market.

The flows on a transmission system can be very different under different supply and demand conditions (e.g. peak vs. off-peak). Consequently, the amount and price of transmission available for suppliers to reach wholesale buyers at different locations throughout the network can vary substantially over time. If this is the case, the analysis should treat these narrower periods separately and separate geographic markets should be defined for each period.

It is important to assess accurately the amount of transmission capability available for each supplier's use. The key to incorporating transmission limitations into the merger analysis is to include each supplier in the relevant market only to the extent of the transmission capability available to them. This would be calculated as the combination of the available transmission capability (ATC)[12] and any firm transmission rights held by the supplier that are not committed to long-term transactions.

In many cases, multiple suppliers could be subject to the same transmission path limitation to reach the same destination market and the sum of their economic generation capacity could exceed the transmission capability available to them. In these cases, the ATC must be allocated among the potential suppliers for analytic purposes. There are various methods for accomplishing this allocation. Applicants should support the method used.

Applicants should also present evidence regarding how transmission capability will be affected by the merger. Transmission line loadings are likely to change as a result of the merging parties'' combined operations. These changes are likely to result in transmission availability that is different from historical experience. Applicants should include in their application the following data: hourly TTC[13] and hourly firm and non-firm ATC, and firm transactions between relevant control areas. The ATC and TTC data should come directly from the OASIS systems once they are implemented. Until then, applicants should file estimates of TTC and ATC with data or other background material that will allow the Commission to verify that the estimates are reasonable. Given these data, the Commission will be able to assess independently the amount of generation capacity that may be available to the market by each supplier.

c. *Trade data check.* It would be expected that there be some correlation between the suppliers included in the market by the delivered price test and those actually trading in the market. As a check, actual trade data should be used to compare actual trade patterns with the results of the delivered price test. For example, it may be appropriate to include current trading partners in the relevant market even if the above analysis indicates otherwise. Alternatively, if there has been little or no trade between a customer and a specific supplier, it may be appropriate to exclude that supplier from the market, unless the applicants can show why it should be included prospectively. The lack of open access in the past may have prevented trade between the entities but trade may be more likely in an open access environment. Applicants should file historical trade data showing transactions between potential suppliers identified in the steps discussed above and the customers in question. The trade data filed should identify the supplier, customer, and characteristics of the transactions (duration, firmness, etc.). Any adjustments to the suppliers included in the market under the delivered price test must be fully supported.

4. *Analyze concentration.* The final step in the screen analysis is to analyze the effect of the proposed merger on market concentration and competition. To do so, concentration statistics should be calculated using the capacity measures discussed above for each relevant market identified. In cases where limited transmission capability during certain time periods results in a number of time differentiated markets, concentration statistics should be calculated for each. Both HHIs and single firm market share statistics should be presented for both pre- and post-

[8] System lambda data are usually reported by control area. For smaller entities that are within a control area, the area's system lambda may be a reasonable proxy for the cost of energy from the marginal resource.

[9] The DOJ Guidelines support using capacity measures in industries with homogenous products, such as electricity. DOJ Guidelines, at 41557. We note that energy measures (MWH) may also be appropriate.

[10] Economic capacity and similar measures were recommended by the DOJ and FTC. See FTC comments at 10 and DOJ comments, Appendix at 8.

[11] For example, in a market with full retail access and a bid-based power exchange, all generation units would be in the market.

[12] As used by the industry, ATC is a measure of the transfer capability remaining in the physical transmission network for further commercial activity over and above already committed uses. See for example, NERC, *Available Transfer Capability Definitions and Determination,* June 1996 at page 2. In hours when ATC is zero, a transmission constraint is said to be binding. This prevents the dispatcher from scheduling any additional transactions between the two points in the constrained direction.

[13] As used by the industry, total transmission capability (TTC) is the amount of electric power that can be transferred over the interconnected network in a reliable manner while meeting all of a specific set of defined pre- and post-contingency conditions. NERC, *id.* at page 2.

merger conditions.[14] In calculating HHIs and market shares, the relevant generation capacity of the customers in each market should be included in the denominator of the ratio statistics. For example, if the economic capacity measure is being used, then the customer's economic capacity should be included. Such capacity would be available and turned to as a response to a significant price increase by external suppliers.

The HHI measures should be compared with the thresholds given in the DOJ Merger Guidelines. The Guidelines address three ranges of market concentration: (1) an unconcentrated post-merger market—if the post-merger HHI is below 1000, the merger is unlikely to have adverse competitive effects regardless of the change in HHI; (2) moderately concentrated post-merger market—if the post merger HHI ranges from 1000 to 1800 and the change in HHI is greater than 100, the merger potentially raises significant competitive concerns; and (3) highly concentrated post-merger market—if the post-merger HHI exceeds 1800 and the change in the HHI exceeds 50, the merger potentially raises significant competitive concerns; if the change in HHI exceeds 100, it is presumed that the merger is likely to create or enhance market power.[15]

If the Guidelines' thresholds are not exceeded, no further analysis need be provided in the application. We emphasize, however, that the Guidelines are just that: guidelines. There will undoubtedly be instances where concentration statistics may fall just above or just below the thresholds for concern and some additional analysis or judgement is needed.[16] For example, if a proposed merger's effect on concentration falls just below a threshold, the Commission might still want to see further analysis if intervenors have raised significant concerns regarding the proposed merger. It is reasoned analysis, not blind faith in the thresholds, that must carry the day.

Instances where high concentration is indicated in markets that are defined by fairly short-lived periods of low transmission capability will require additional analysis. The concern with high concentration in a market is that firms will be able to raise prices substantially and adversely impact the market. Relatively short periods of high concentration could be significant if the concentration is high enough. The factors that affect whether such a situation is problematic are the degree of concentration, as measured by HHI statistics, and how long that concentration lasts. High concentration is an indicator for how easy it would be for firms to behave strategically (e.g., collude, or if concentration is high enough, act unilaterally) to raise prices. It is a proxy measure for the degree to which prices could be raised. This, together with the length of time the concentration lasts, gives some idea of the potential severity of anticompetitive impact.

The Commission has insufficient experience to adopt at this time specific thresholds for the various possible combinations of HHI and length of time at which the constrained periods would be problematic. Applicants and other parties are strongly encouraged to analyze short-lived periods of high concentration using the framework discussed above and to support the conclusions drawn from it. There may be cases in which the applicant may be able to show that the anticompetitive effect of constrained transmission availability is *de minimis.* While the Commission has insufficient experience to establish a specific *de minimis* test in this policy statement, applicants may argue in a specific case that the anticompetitive effect of a constraint is *de minimis.* We offer the following general guidance to applicants that seek to make such a showing regarding short-lived transmission constraints. First, peak periods may be more problematic than other periods, because the opportunity to exercise market power likely would lead to significantly higher prices during those hours. Second, some level of market concentration above the DOJ threshold may be acceptable if the applicant can show that there are multiple sellers in the constrained area and/or that there are multiple holders of capacity into the constrained area. And finally, our concern with short-lived periods of high concentration is greater if the merged firm will have market-based pricing authority. Without such authority, the firm may not be able to substantially raise prices.

If the DOJ Guideline concentration thresholds are exceeded, including instances where short-lived periods of high concentration are indicated to be problematic, then the application should present further analysis consistent with steps 2 to 5 in the Guidelines. The additional analysis could address the potential for adverse competitive effects, the potential for entry in the market and the role entry could play in mitigating the increased market power, any efficiency gains that reasonably could not be achieved by other means, and whether, but for the merger, either party would likely fail causing its assets to exit the market.

If entry is considered as a potential mitigating factor, applicants should address entry barriers, such as the time needed to install any necessary transmission capacity. All entry barriers should be addressed, even if they are not controlled by the applicants. Good market structure can be stymied by entry barriers, regardless of the source, e.g., transmission constraints on a neighboring utility's system.

C. Data

The usefulness of this screen depends on the quality and comprehensiveness of the data filed with the application. The data needed for the screen generally are publicly available. It is important for applicants to file electronically all data used for the screen analysis, including supporting data, and the data specified in this policy statement.[17] The Commission must be able to check on the applicants' analysis independently. To do so, the Commission must have ready access to the data. Otherwise, data requests could result in delay. If there are problems in obtaining or understanding the data, the Commission is interested in developing informal means, such as technical conferences, to gather additional needed data or resolve questions or misunderstandings concerning the screen analysis, before the Commission addresses the merger. This approach could reduce the time needed to get useable data and perhaps reduce the need to set a merger for evidentiary hearing.

D. Other Considerations

We note that the above description of the analytic screen focuses only on monopoly (seller) power. This is not intended to exclude monopsony (buyer) power as a relevant consideration. An analysis of monopsony power should be developed if appropriate. Long-term purchases and sales data for interconnected entities are already collected and could be used to assess buyer concentration in the same way that seller concentration is calculated. In any event, intervenors may raise this issue if it is a concern.

The Commission understands that the screen analysis described in this policy statement will evolve with industry restructuring and market maturation. For example, as unbundling occurs, companies may have market power for sales from individual generating units (e.g., ''must-run units''). In addition, markets are developing in response to competition and are spawning new products and increasingly short term exchanges. Markets will probably be differentiated by product (e.g., firm and non-firm energy and reactive power), by time (e.g., peak, off-peak) or by geography (e.g., markets separated by transmission constraints). The definition of relevant geographic and product markets must account for these new realities. Further, methods for trading and information availability are changing. As regional institutions, such as ISOs, and regional markets develop, transmission services may no longer be a series of transactions based on utility-by-utility corporate boundaries, but rather single regional transactions. This will

[14] Post-merger geographic markets could include more or fewer suppliers than the pre-merger markets due to the effect of combining transmission rates. In cases where the merged company will charge a single system wide transmission rate, the merger will result in just one transmission rate where there were two before the merger. Thus, after the merger, some suppliers that were excluded from some destination markets could be included if the elimination of one of the transmission charges allows them to economically reach the market. While a stable geographic market would be preferable for analytic reasons, the effect described here reflects the reality of current transmission pricing policy and market organization. A buyer inside the transmission area of one of the merging companies could see higher transmission rates as a result of a single system rate for the merged company thereby decreasing the competitive options available to it. We also note that a decrease in transmission prices paid could result in increased demand, congestion, and no increase of suppliers in some markets.

[15] DOJ Guidelines, at 41558.

[16] The Guidelines state that the HHI statistics provide a useful framework for merger analysis but they suggest ''greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues.'' Guidelines, at 41558.

[17] The data that should be electronically filed in an application is listed in Appendix B.

have important implications for entry, customer response to price changes, and the number of suppliers that have competitive delivered prices.

The means of our analysis may also change. For example, flow based network models that include constraints on transmission networks are likely to be needed for the screen analysis. In the future, the Commission will have to rely less on methods that use costs to assess markets. Generation cost data will become increasingly sensitive, market participants will be less willing to report them, and accounting costs will be increasingly irrelevant to market behavior. The Commission will rely more on actual transaction prices because they will be more available as market institutions such as ISOs and power exchanges produce this information and because they are a better measure of market boundaries. New market institutions will change the ability to exercise market power. High transactions costs of trading tend to exclude competitors. Transactions costs include the costs of obtaining information, searching for trading partners, and completing a transaction. Further, the improved ability of buyers to respond quickly to price changes can significantly reduce market power. ISOs provide one vehicle for reducing transactions costs and making information available to traders via such means as the OASIS. Real-time pricing provides buyers with an improved ability to respond quickly to price changes.

We note that we intend to apply the analytic screen to mergers between firms that are not solely engaged in electricity markets, *e.g.*, electric-gas mergers. However, it will not be necessary for the merger applicants to perform the screen analysis or file the data needed for the screen analysis in cases where the merging firms do not have facilities or sell relevant products in common geographic markets. In these cases, the proposed merger will not have an adverse competitive impact (*i.e.*, there can be no increase in the applicants' market power unless they are selling relevant products in the same geographic markets) so there is no need for a detailed data analysis. If the Commission is unable to conclude that the applicants meet this standard, the Commission will require the applicants to supply the competitive analysis screen data described in Appendix A.

D. Remedy

A problematic merger may be made acceptable if certain remedial actions are taken. In some cases, the Commission may recommend them if we determine that a proposed merger will cause significant adverse effects on competition without a remedy. In other cases, the applicants may propose certain actions to be taken if the Commission approves the proposed merger. We offer the following guidance concerning standards for remedies and specific remedial options.

1. Standards

Any remedies proposed by the applicants or relied upon by the Commission to mitigate the anticompetitive effect of a proposed merger should meet the following standards.

Nexus. Remedies should be clearly designed to mitigate the specific competitive problems identified in the analysis.

Approval of other authorities. Full and effective mitigation must be in place at the time the merger is consummated. Some, and maybe all, of the possible remedies to market power require the approval of other Federal, state and local authorities. For example, local authorities must approve many aspects of transmission line siting and construction and state commissions would surely have to approve any divestiture of generating plants also used to provide retail service. Promises to the Commission that such actions will be taken in exchange for merger approval are empty if not accompanied by all approvals necessary. We recognize, however, that final approvals may require quite some time to secure. In such cases, we will consider interim mitigation measures that can be implemented more quickly so as not to unduly delay a merger's consummation. We will require, however, that any interim measure must be fully effective in mitigating the identified market power problems.

Specificity. Remedial commitments must specify exactly which facilities are affected by the commitment, e.g., which generating unit(s) will be divested.

2. Remedial options

The remedies discussed in this section are intended to mitigate the market concentration problem caused by the merger. We stress that the options discussion is meant only as guidance and not as an exhaustive list of potentially acceptable remedies.

(a) *Require transmission expansion.* Limitations on available transmission capability that prevent competitors from participating in a market can give substantial market power to incumbents in the market. Conditioning merger approval on eliminating a known constraint could help to mitigate this type of market power. Where constraints on other systems are a problem, the applicants would also be required to seek transmission expansion on those systems. As with relieving constraints on their own system, applicants should show that all necessary approvals have been secured before the Commission could approve the merger. This process does not need to wait for the Commission to identify a problem. Applicants wanting fast approval could include this as part of the application.

(b) *No trade over constrained paths.* If constrained paths are responsible for market concentration problems and they cannot be relieved for any reason, the company could agree to not use those paths for its own off-system trade when other transmission service requests are pending. This condition would keep the merged company from exercising market power in trade in the constrained areas.

(c) *Generation plant divestiture.* In concentrated markets, including those subject to severe and long lasting transmission limitations, splitting up different generating units into independent and separately owned companies could reduce horizontal market power. Where there are only a few generating units in the market area, divesting those units to just a few owners may not mitigate the market power problem. In such a case, one alternative might be to divest the ownership rights to each unit's energy and capacity to a number of owners. The unit could then be operated as a competitive joint venture and parts of its output could be bid or sold independently.

(d) *Defer to an ISO's analysis and mitigation efforts.* Although ISOs are just now in their formative changes, they hold some promise of playing a part in mitigating certain sources of market power. Applicants' membership in, or commitment to join, an ISO with the authority necessary to mitigate market power could allow the Commission to rely on the ISO to identify and remedy market power problems. The ISO would have access to more information than does the Commission and would possess greater technical expertise to assess problems. More importantly, the ISO would have the proper incentives to mitigate the problems if the ISO's governing body is broadly comprised of market participants. This potential role for ISOs highlights the critical importance of balanced ISO governance.

An ISO would also be a mitigating influence on market power to the extent that it attracts new entrants into a market. An ISO assures comparable and independent access to all customers. These institutional guarantees will serve both to attract new entrants and to encourage continued participation in markets that would otherwise be dominated by vertically integrated utilities.

ISOs are generally thought to be the proper vehicle for dealing with vertical market power, e.g., ensuring transmission expansion or preventing the strategic manipulation of generation dispatch. An ISO would be able to deal with horizontal market power issues to the extent it has the ability to control the dispatch or prices paid to generators. For example, an ISO could identify units with market power (such as must-run units) and those units could be subject to contracts that mitigate those units' ability to raise prices excessively. To take advantage of this option, applicants would be expected to show that: (1) the ISO meets the Commission's standard for independence; (2) already exists or will come into existence before the merger is completed; (3) has a mandate to identify both vertical and horizontal market power issues; and (4) has the authority to either remedy any problems it finds or bring those that it cannot remedy to the Commission.

(e) *Real-time pricing.* Real-time pricing, when combined with other mitigation measures, could help constrain the ability of a firm to raise prices excessively. Buyers who can see the higher prices in real time can respond by conserving. This makes demand more elastic, thereby making it more difficult to exercise market power.

APPENDIX B.—DATA USED FOR COMPETITIVE ANALYSIS SCREEN

Analysis and data element	Sources[1]
Delivered Price Test:	
Hourly System Lambda	FERC Form No. 714.
Plant Generation Costs/Capability	FERC Form No. 1.
Unit Generation Costs:	
Heat Rates	EIA Form 860.
Fuel Costs	FERC Form 423.
Transmission Rates	Filed tariffs, Applicants' filing.
Transmission Capability Test:	
Hourly Capability (ATC)	OASIS, Applicants' filing.
Total Capability	OASIS, NERC Reports.
Developing Capacity Measures:	
Hourly System Lambda	FERC Form No. 714.
Plant Generation Costs/Capability	FERC Form No. 1.
Unit Generation Costs:	
Heat Rates	EIA Form 860.
Fuel Costs	FERC Form 423.
Transmission Rates	Filed tariffs, Applicants'' filing.
Adjusting for LT Sales, Purchases, and NUGS:	
Trade Data (Firm Capacity ales)	FERC Form No. 1, OE–411, NERC Reports, Applicants' filing.
Adjusting for Tx Capability:	
Hourly/Total Capability (ATC, TTC)	OASIS, NERC Reports Applicants' filing.

[1] Most of the data listed is publicly available, however the Applicants should assemble the data and file it electronically with their merger application.

APPENDIX C.—COMMENTERS ON MERGER NOTICE OF INQUIRY

Short name	Commenter
APPA	American Public Power Association.
Attorneys General *et al.*	Attorneys General of the States of Iowa, Maine, Maryland, Minnesota, Oklahoma and Wisconsin.
CA Com	California Public Utilities Commission.
Carolina Association	Carolina Utility Customers Association, Incorporated.
Centerior	Centerior Energy Corporation.
Central and South West	Central and South West Corporation.
CINergy	CINergy Corporation.
Colorado Municipals	Colorado Association of Municipal Utilities.
Com Ed	Commonwealth Edison Company.
Competitive Coalition	Coalition for a Competitive Electric Market.
Diamond and Edwards	Diamond, Joseph and Edwards, Jon D.
DOE	U.S. Department of Energy.
DOJ	U.S. Department of Justice.
East Texas Coop	East Texas Electric Cooperative, Incorporated.
Economists	Economists Incorporated (Mark W. Frankena).
EEI	Edison Electric Institute.
EGA	Electric Generation Association.
Environmental Action *et al.*	Environmental Action Foundation and Consumer Federation of America.
FERC Policy Project	Project for Sustainable FERC Energy Policy.
Florida and Montaup	Florida Power Corporation and Montaup Electric Company.
FTC	Bureau of Economics of the Federal Trade Commission.
Georgia Municipal	Municipal Electric Authority of Georgia.
Hawes and Behrends	Hawes, Douglas W. and Behrends, Sam (IV).
Illinois Industrials	Illinois Industrial Energy Consumers.
IN Com	Indiana Utility Regulatory Commission.
Industrial Consumers	Electricity Consumers Resource Council, American Iron and Steel Institute, and Chemical Manufacturers Association.
International Brotherhood	International Brotherhood of Electrical Workers.
Joint Consumer Advoc.	Joint Consumer Advocates of Maryland People's Counsel.
KS Com	Kansas Corporation Commission.
Low-Income Representatives	Consolidated Low-Income Representatives.
Lubbock	Lubbock Power & Light.
Madison G&E	Madison Gas and Electric Company.
MidAmerican	MidAmerican Energy Company.
Missouri Basin	Missouri Basin Municipal Power Agency.
MN Public Service	Minnesota Department of Public Service.
MO Com	Missouri Public Service Commission.
NARUC	National Association of Regulatory Utility Commissioners.
NIEP	National Independent Energy Producers.
NM Industrials	New Mexico Industrial Energy Consumers.
NRECA	National Rural Electric Cooperative Association.
NRRI	National Regulatory Research Institute.

APPENDIX C.—COMMENTERS ON MERGER NOTICE OF INQUIRY—Continued

Short name	Commenter
NV Com	Public Service Commission of Nevada.
NY Com	Public Service Commission of the State of New York.
OH Com	Public Utilities Commission of Ohio.
OK Com	Oklahoma Corporation Commission.
OK Industrials	Oklahoma Industrial Energy Consumers.
Otter Tail	Otter Tail Power Company.
PA Com	Pennsylvania Public Utility Commission.
PaineWebber	PaineWebber Incorporated.
PanEnergy	PanEnergy Corporation.
PP&L	Pennsylvania Power & Light Company.
PS Colorado	Public Service Company of Colorado.
RUS	Rural Utilities Service.
Salt River	Salt River Project.
Sierra Pacific	Sierra Pacific Power Company.
Southern Company	Southern Company Services, Incorporated.
Southwestern Electric	Southwestern Electric Cooperative, Incorporated.
Southwestern PS	Southwestern Public Service Company.
TAPS	Transmission Access Policy Study Group.
TDU Systems	Transmission Dependent Utility Systems.
Texas Industrials	Texas Industrial Energy Consumers.
Texas Utilities	Texas Utilities Electric Company.
TX Com	Public Utility Commission of Texas.
UtiliCorp	UtiliCorp United Incorporated.
WI Com	Public Service Commission of Wisconsin.
Wisconsin Customers	Wisconsin Wholesale Customers.
Wisconsin PS	Wisconsin Public Service Corporation.

Appendix D—Summary of Comments on Merger Policies

I. General Comments on Revising the Commission's Merger Policy

A. Direction of Change

Almost all commenters argue that we need to revise our merger policies and standards in light of the changes in the industry. However, they do not agree on the direction of the change. On one side, many commenters argue that mergers may prevent markets from becoming truly competitive. [1] On the other side, some commenters suggest that the Commission should approve a merger unless harm to the public interest is demonstrated.[2] These commenters claim that most mergers are procompetitive and should be approved unless a problem is identified.

Commenters [3] who argue that moving to a more competitive market warrants stricter merger approval criteria are concerned that the recent wave of mergers threatens the development of competitive markets. For example, Industrial Consumers and TAPS believe that the Commission's current policy is too lax. These commenters offer numerous reasons for opposing mergers, including the detrimental effects of large ''mega-utilities'' and diversion of management's attention from cost minimization. RUS fears that mega-utilities could have market power in generation and political power at the state and federal levels that could suppress competition in transmission and distribution. Madison G&E is also concerned about the challenge mega-utilities pose to effective state regulation. UtiliCorp notes that the need for efficient dispositions and transfers of capital, which are critical to the transition from a regulated to a competitive industry, warrant a revised merger policy.

Many of these commenters criticize the ''consistent with'' standard as we have interpreted it—that is, as a ''do no harm'' standard. They argue that this approach, which was developed in an era of tight regulation, is inconsistent with the public interest in the transition to a competitive environment.[4] Joint Consumer Advoc. suggests that a merger is not consistent with the public interest unless dollars invested in a merger could not have been used otherwise to lower costs more.

Numerous commenters [5] argue that we should revise our merger criteria because of general industry restructuring due to open access or new state and federal laws and policies that provide incentives to merge.

On the other hand, commenters who support more relaxed merger criteria argue that the marketplace can best decide the future path of the industry. They argue that the Commission's current policy is simply too stringent; [6] we should recognize that the transformation to a competitive industry requires a certain amount of industry reshuffling, best accomplished without the Commission's intervention.

For example, CINergy believes that consolidation may be a necessary step toward industry rationalization and disaggregation as companies seek critical mass to spin off generation. This suggests that we should monitor the merger process closely, but not try to predict or dictate the path of industry restructuring. Similarly, Central and South West says that the nearly 150 control areas and the utilities that operate them will not survive competitive restructuring and that mergers may allow market forces to bring about a competitive and workable market structure. UtiliCorp notes that mergers and acquisitions are likely to increase as utilities act to improve their ability to compete in increasingly competitive markets. Some of these commenters argue for automatic approval of a merger if no harm to the public interest is demonstrated. PanEnergy and Hawes and Behrends believe that certain types of mergers are either procompetitive or have no effect on competition and warrant a streamlined approval process.

The Commission also received comments from parties that neither favor nor oppose mergers but suggest a revised approach, for a variety of reasons. For example, NIEP and Diamond and Edwards believe that as markets become more competitive and the Commission reduces some aspects of its regulatory scrutiny, merger standards should be adjusted so that they more closely track traditional antitrust principles. On the other hand, PA Com and KS Com support a ''wait and see'' approach. PA Com comments that reevaluating merger policy may be premature at this time because the Open Access Rule is being reviewed by the industry and power pools do not have to file their open access tariffs until December 31, 1996. KS Com believes that the public interest and state and federal review processes will benefit if a

[1] For example, APPA, NRECA at 7–8; ELCON at 12–13.

[2] For example, Utilicorp at 2, 7, 10.

[3] Among others, APPA, NRECA, EEI, Texas Utilities, Southern, East Texas Coop (endorsing the joint petition of APPA/NRECA and comments of NRECA), NIEP, Colorado Municipals (endorsing the views of APPA), IN Com, DOJ, Joint Consumer Advoc., TAPS, TX Com, and NY Com.

[4] East Texas Coop, Joint Consumer Advoc., and TAPS.

[5] These commenters include Texas Utilities, Southern, DOJ, TAPS, TX Com, NARUC, and APPA.

[6] UtiliCorp, PaineWebber, Texas Utilities, Southwestern, and Southern.

consistent view of the appropriate markets and regulatory framework, designed to achieve an efficient and sustainable generation market, is developed before merger evaluation standards.

Project argues that our merger policies must ensure that the market functions under rules that promote environmental quality and economic efficiency; specifically, a policy of sustainability.

B. How to Implement New Policies

We received a few comments on whether to adopt our new policies on a case-by-case basis, through a policy statement, or through a rulemaking.[7]

Commenters also expressed differing views on whether our new policies should be applied to pending mergers. Lubbock urges the Commission evaluate all pending mergers under the new merger standards. Wisconsin Customers recommend, however, that the new merger policy be applied only to mergers filed after the date of issuance of the NOI.

Enviromental Action *et al.* recommends that mergers be prohibited until the Commission's new merger policy is established through a NOPR process. However, if mergers are not prohibited during this period, there should be a moratorium on unconditional approvals; any mergers approval should be conditional and required to conform to the merger final rule.

The Pennsylvania Commission urges the Commission to let competitive wholesale restructuring develop before approving mergers among the members of power pools.

On the other side, Florida and Montaup argue that any new rule resulting from this proceeding should apply only to merger applications filed after the effective date of a final rule. Merger applications filed before that date should be considered under the filing requirements and standards in effect at the time of their filing. EEI and UtiliCorp request that the Commission move quickly to review those merger applications already before it without waiting to develop a new merger policy.

II. Comments Concerning Effect on Competition

A. Defining the Relevant Markets

1. Defining Product Markets

Some commenters emphasize that relevant product markets should be established from the buyer's perspective, that is, in terms of the delivered product.[8] Such an approach would examine generation and transmission in combination, since neither is of use to a customer by itself. They add that in an open access environment, where transmission rates will remain regulated, transmission should be viewed as a substitute for local generation, rather than as a separate market.[9]

Commenters suggest that the Commission examine two or more product markets. However, there is little consensus on which markets to consider. For example, Environmental Action, *et al.* suggests existing generation, new generation, transmission, retail aggregation and sales, physical distribution, demand side management services, ancillary services associated with generation transmission and distribution, and fuels. Industrial Consumers suggests firm and non-firm bulk power, short-term capacity, short-term energy, long-term capacity, and energy and transmission services. To minimize opportunities for affiliate abuse, RUS recommends examining at least markets for generation, transmission, and ancillary services. For applying the Guidelines to the electric power industry, DOJ and FTC suggest that we look at four product markets: short-term energy, intermediate-term energy, long-term capacity, and ancillary services. FTC notes that sales to differently situated customers may constitute separate markets if differential pricing is feasible. APPA proposes similar markets, but suggests considering short-term energy or capacity. EEI proposes a short-term energy and capacity market (up to about two years) and a medium-term (two- to five-year) capacity contract market involving capacity and associated energy sales from excess capacity from existing facilities. MO Com suggests focusing on the commodities market (hourly energy from existing generation facilities) and the contracts market (capacity and energy from existing and new generation). NIEP proposes two broad product markets, generation sales and retail sales. Several commenters suggest that the Commission consider ancillary services as a product market.[10]

Other commenters argue that long-term product markets should not be subject to market power analysis. For example, EEI says that the long-term capacity market where sales from new capacity compete with long-term contracts for sales from existing capacity should not be subject to the analysis. APPA makes the same argument for long-run sales from new capacity, since such capacity represents potential entry. Similarly, UtiliCorp argues that we should disregard the long-run generation product market because of our finding in the Open Access Rule that long-run markets are generally competitive. CINergy believes that open access, the absence of artificial impediments to expansion of generation capacity by existing suppliers, and the prospect of entry into the generation business by new suppliers preclude market power in the long run. However, DOJ questions the presumption that utilities do not have market power over long-run energy and capacity.

Com Ed argues that the Commission should disregard short-term energy markets because these markets involve buyers who are able to make purchases to replace energy otherwise available at a higher cost, such as from the buyer's own installed capacity. The cost of energy from such otherwise available capacity effectively limits the price at which short-term energy is offered.

Several commenters cite the need to consider the temporal characteristics of product markets. For example, Florida and Montaup suggest dividing them into short-term and medium-term markets and further dividing these into various product markets as appropriate to the area. Others[11] suggest that delivered capacity and energy be analyzed under market conditions during peak and off-peak hours and summer and winter conditions.

As to whether the Commission should examine only the wholesale market, leaving concerns over retail competition to the states, Southern says yes. Several commenters believe that we should also examine the impact on retail competition.[12] They suggest that the Commission has both the authority[13] and the responsibility to examine the impact of mergers on actual or potential retail competition.

2. Defining Geographic Markets

We received a significant response from commenters on various aspects of defining relevant geographic markets. Most of these comments relate to the approaches (such as generic versus case-by-case) to defining markets, factors that are important to consider in defining markets, and the use of modeling.

DOJ and others[14] define the relevant geographic market as the area in which the seller operates and to which the purchaser can turn for supplies. They suggest that the best way to determine which suppliers are in the relevant market is to look at the physical location of the generating unit (as opposed to disposition of power from the unit). DOJ suggest that we could determine the geographic markets immediately for the electric utility industry for the United States through a rulemaking or technical conference.

Some commenters urge the Commission to recognize the effects of open access on the extent of geographic markets.[15] For example, the Commission should revise its current two-tier analysis because open access will broaden the relevant geographic market beyond two tiers. EEI suggests that the Commission first define the smallest geographic area (under the trading patterns existing before open access) and then broaden the market as choices available to the purchasers increase under open access.

However, some commenters are skeptical that defining the geographic market to include suppliers two or more tiers away is

[7] For example, DOJ, East Texas Coop, OH Com, NRECA, and Southwestern Electric suggest a rulemaking as the vehicle to implement the Commission's new merger policy; CINergy advocates a case-by-case approach; APPA suggests a combination of various methods; DOJ suggests that we convene a technical conference immediately to delineate the relevant geographic markets for the electric utility industry for the entire U.S. DOJ says that this would greatly facilitate the Commission's (and DOJ's) review of merger applications and enable the Commission quickly to establish safe harbors or screens for any merger application based upon changes in market concentration for a known geographic market.

[8] For example, EEI, UtiliCorp, and Centerior.

[9] These include, for instance, EGA, Low-Income Representatives, NIEP, and TAPS.

[10] These include, for example, Industrial Consumers, DOJ, Enviromental Action *et al.*, CA Com, CINergy, and UtiliCorp.

[11] *E.g*, Madison G&E and CINergy.

[12] These include PP&L, DOJ, and TAPS.

[13] Citing *FPC* v. *Conway*, 426 U.S. 271 (1976).

[14] *E.g.*, EEI, Wisconsin Customers, APPA, and TX Com.

[15] *E.g.*, Industrial Consumers, RUS, UtiliCorp, EEI, Wisconsin Customers, Texas Utilities, TDU Systems, and CINergy.

a wise approach. For example, RUS warns that defining the market too broadly can understate the problems in sparsely populated areas. It argues that the Commission must allow competitors to present evidence that the market is narrower than the first or second tier. TDU Systems question whether suppliers two tiers away can put competitive pressure on the merging utilities. It explains that a seller two transmission charges away incurs transmission costs of approximately 15 to 20 percent of the product price, which is significantly higher than the 5 percent price increase used by the antitrust agencies. Wisconsin Customers argue that the Commission's method of defining the geographic market results in markets that are too large because all first-tier utilities are included, which leads to underestimates of the true market power of the merged entity. RUS emphasizes that the price increase test in the *Guidelines* is inadequate in an industry emerging from a monopoly situation and in which mega-utilities could rapidly acquire excessive market power.

Other commenters suggest various approaches to defining geographic markets. For example, NIEP proposes that Electric Reliability Council areas be used. Many commenters emphasize the importance of the actual behavior of the grid in defining relevant markets. RUS recommends that a separate geographic market for each state be defined for mergers involving utilities or holding companies operating in more than one state. TX Com argues that we must consider the *future* geographic scope of markets.

MO Com suggests three models of competition in defining relevant markets: the utility, the wholesale, and the retail direct access models. The utility model considers utility/non-utility generator competition to meet jurisdictional loads with no retail access. The wholesale model expands the utility model to consider direct access to all wholesale customers, and the retail model expands the wholesale model to reflect direct access to all end-use customers.

Many commenters list factors to consider in defining relevant geographic markets. The most significant factors discussed are transmission constraints and transmission pricing. There is a wide-spread view that we must take account of transmission constraints, particularly because constraints can lead to shifting geographic markets over time and the ability to wield market power in local markets.[16] For example, DOJ, EGA, and TAPS argue that the Commission should give great emphasis to transmission constraints, since they can be exacerbated by mergers and can lead to significant market power in localized areas. Wisconsin PS and Madison G&E note the importance of assessing transmission constraints both alone and together with strategically located generation to give an advantage to a merging entity's own power sales.

[16] Industrial Consumers, FTC, Lubbock, EEI, Wisconsin PS, DOJ, TAPS, NY Com, Enviromental Action *et al.*, Southern, TX Com, RUS, Centerior, CINergy, UtiliCorp, MO Com, and CINergy all support this view.

CINergy emphasizes that the extent to which transmission constraints are binding is critical for accurately assessing market conditions. It will be necessary to develop market concentration statistics that account for the distribution of capacity beyond a binding constraint and that include only realistically available supplies inside the area bounded by the constraints. MO Com emphasizes the importance of determining whether constraints will prevent alternative suppliers from having access to the customers of the merged utilities. If available transfer capability is reduced as a result of the merger, the merger increases market power. Even if the merger expands transfer capability as the number of alternative generation sources decreases, the increase in transfer capability may be of little value unless it increases access to generation alternatives. MO Com believes that the burden should be on the applicants to show that limits on transfer capability would not allow them to exercise market power. Further, the Commission should require applicants to have sufficient transfer capability available to meet the net import requirements for base-load power that might be requested by current customers.

On the other hand, Southern cautions the Commission against over-emphasizing transmission constraints, noting that isolated or short-term constraints should not affect the definition of the relevant geographic market. Constraints should be considered only if they impede wholesale trade. Moreover, Southern questions our authority to order the construction of transmission facilities to alleviate constraints. In assessing the significance of transmission constraints, the Commission should consider the ability of new generation to locate in the region, mitigating the problem; the feasibility of alternative transactions (such as transmission capacity resale or arrangements with brokers) to bypass the constraint; and the possibility that new power sales would simply displace existing sales, reducing the likelihood that the constraint would occur.

Finally, various commenters recognize that constraints depend on time and location, which may make defining the relevant market difficult.[17] For example, constraints may be affected by line loadings on a system that vary over the course of a day, week, or year. As a result, increases in congestion on transmission lines under high load conditions can change the boundaries of the relevant geographic market. EEI makes similar arguments, suggesting that time-differing transmission use patterns lead to similarly differing relevant geographic markets if constraints arise during peak periods. DOJ and TAPS note that constraints are affected by how the transmission system is operated in terms of, for example, dispatch, decisions on which utilities to make sales to or purchases from, equipment ratings, maintenance outage scheduling, and decisions concerning equipment sizing and locations. Thus, we should investigate the possibility of operational manipulation of transmission systems that gives merging utilities a competitive advantage.

[17] *E.g.*, DOJ, EGA, Enviromental Action *et al.*, TX Com, and TAPS.

Enviromental Action *et al.* suggests that the extent of the geographic market may be unclear because transmission constraints are physical or economic barriers to electricity sales in many locations. DOJ and TX Com caution the Commission not to rely too heavily on historical patterns of trade in determining transmission constraints because open access could create very different constraints in the future.

The second factor mentioned by many commenters as significant in defining the geographic market is transmission costs.[18] For example, Madison G&E believes that pancaking of transmission rates can influence the extent of the market; moreover, postage stamp rates and distance-sensitive rates will lead to different numbers of competitors. FTC believes that geographic markets defined in terms of distance-sensitive rates would correspond to underlying cost conditions more accurately than markets defined in terms of postage stamp pricing. The MO Com proposes that merging utilities be required to specify the market region where they have a strong competitive influence and file a study showing both short- and long-run marginal transmission costs for the region. Industrial Consumers notes that transmission costs include stranded costs.

Commenters mention various other factors as important in defining geographic markets. Some note that institutional arrangements can affect the extent of the market.[19] FTC notes that differences in the degree and sources of geographic competition may arise from temporal distinctions between product markets such as existing transmission and generating obligations.

FTC suggests that computer models of transmission systems be used to simulate the effects of a small, non-transitory price increase imposed by groupings of power suppliers over various alternative geographic areas. This would allow us to determine whether the price increase would be profitable for a hypothetical monopolist and, therefore, which of the areas are relevant geographic markets. FTC also suggests that the Commission consider developing sufficient data and system modeling tools to be able to screen mergers expeditiously, examining the likely relevant geographic market under different assumptions about future transmission rates, different projected transmission improvements, and different generation siting assumptions. However, Madison G&E opposes the use of models. It says that models do not address conditions in the market for delivered capacity and are inherently incapable of taking into account strategic behavior or the potential effectiveness of threats.

Some commenters offer their views on the merits of a generic verses case-by-case

[18] *E.g.*, DOJ, FTC, TAPS, NY Com, TDU Systems, EEI, Industrial Consumers, CINergy, Centerior, TDU Systems, MO Com, Madison G&E, and Com Ed. DOJ argues that it is vital that the Commission quickly replace its case-by-case approach to transmission pricing with a general rule to avoid a merger policy that is inconsistent, inefficient, and inequitable.

[19] *E.g.*, EEI, FTC, Industrial Consumers, and Centerior.

approach to defining markets. For example, Southern believes that the Commission should perform case-specific analyses in which it weighs the effects of significantly reduced entry barriers and open access. Diamond and Edwards disagree, suggesting that this approach is not consistent and that a better approach would be to look at a large area and determine subregions based on trade patterns. Wisconsin Customers warn that using theoretical bases to determine the boundaries of the relevant markets can be misleading because market power can be exercised even on an hourly basis.

B. Determining the Effect on Competition

Many commenters recommend that once the relevant markets have been defined, the Commission determine the effect of a merger on competition by examining market shares, market concentration, and ease of entry.

1. Market Shares

Commenters offer various views on how to measure market shares and how frequently to do so. They generally argue for more frequent calculation of market shares, particularly for energy products.

DOJ suggests that market shares can be assigned based on production, sales, or capacity. It favors capacity because electricity is a homogenous product and because the capability of producing can be readily translated into actual sales. FTC suggests, similarly, that market shares may reflect either output or capacity. It argues that in homogeneous product markets, capacity is a better measure, while in differentiated product markets, output-based measures are usually a better indicator of firms' future competitive significance. The structure of intermediate and long-term markets is reasonably measured by capacity, and the structure of short-term markets is reasonably measured by output if differentiating factors such as reliability and access are important. Madison G&E suggests that market shares for delivered firm capacity be measured by uncommitted capacity, while market shares for energy be measured by the amount of deliverable energy at competitive prices during the time period in question. EEI suggests examining market shares associated with installed capacity and uncommitted capacity or energy that are excess to the capacity committed to serve native load customers, existing contracts, and other obligations. Southern Company believes that excess capacity is a better indicator of a merging entity's ability to exercise market power than is total capacity.

Others also suggest that when calculating market shares, we exclude contractually-obligated capacity; for example, FTC emphasizes that capacity or output that is contractually obligated may not be relevant to calculating market shares of potential suppliers for other customers. For instance, supply that is contractually obligated to local load is unlikely to be a part of the market for short-term capacity. Similarly, Southern Company claims that capacity committed to serve native load, wholesale requirements service, or sales outside the relevant market should not be considered.

As to the frequency with which market shares should be calculated, several commenters note that generation dominance can create anticompetitive effects in localized markets during certain times (daily, seasonally) due to transmission constraints. Madison G&E would calculate market shares beginning with the year in which the merger is expected to be consummated and several years into the future. It believes that market shares for energy should be calculated for peak and off-peak periods. Similarly, CINergy proposes examining market conditions monthly for energy markets to address problems of market power in particular periods.

As a final word of caution, DOJ states that not all market shares are equal. For example, a utility may possess market power that is disproportionate to its market share if the marginal costs of that utility's generators are closest to the market-clearing price for electricity in that market.

2. Measuring Market Concentration

There is wide support among the commenters for using HHI analysis to measure concentration in relevant markets, but many suggest modifications. For example, EEI suggests that considerable judgment is needed to arrive at the combination of HHIs that best reflects an appropriate structural analysis of market power. If several suppliers have enough excess capacity to meet anticipated incremental market requirements, the Commission can treat each as having an equal contribution to market concentration. EGA suggests that we consider reasonably predictable effects of recent or ongoing changes in market conditions, such as the creation of ISOs, in interpreting market concentration and market share data.

Several commenters suggest that HHI analysis be used as a ''screen'' for market power to create some sort of ''safe harbor'' allowing mergers to be quickly approved if they meet certain tests.[20] For example, Southern Company believes that the Commission should establish threshold HHI levels that would be safe harbors in the merger review process. It contends that increases in market concentration resulting from mergers often do not pose a significant threat to competition, and that mergers are a means by which industries and individual firms adjust to market change to maximize efficiency and consumer welfare. Similarly, UtiliCorp endorses HHI screens, but suggests that we consider the transitional circumstances of the electric utility industry in designing the screens. The Commission should analyze the effects of the merger under criteria similar to those contained in the *Guidelines* if the merger does not pass the screen.

EEI and APPA argue that the Commission need not be concerned about mergers with a post-merger HHI at or below 2000 (that is, five equal-sized firms). However, EEI emphasizes that selection of a particular threshold value is based upon judgment, not science. The Commission may want to consider specifying more refined thresholds based on experience in wholesale power markets. Precise numerical HHI thresholds are less important than how these thresholds are used, that is, as screening devices to distinguish mergers that are clearly benign from those requiring further scrutiny. The Commission should be mindful that HHI analyses are based on historical data and that changing regulation and market developments that increase competition may allow the use of higher HHI thresholds or a more liberal interpretation of results. On the other hand, Central and South West proposes that where HHI values are up to 2500, there should be a rebuttable presumption that the region is workably competitive. It believes that the market will eventually encompass all synchronously connected regions under the Commission's jurisdiction.

Some commenters caution against putting too much emphasis on HHI analysis, suggesting that the Commission look at additional factors.[21] For example, Wisconsin PSC asserts that HHIs (incorporating transmission constraints) can be used as a screen but should not substitute for the Commission identifying potential discriminatory practices in areas such as maintenance, planning, system modeling, equipment ratings, system design, operation control, and use of generation, all of which Wisconsin PSC asserts affect transmission constraints.

Other commenters suggest standards other than HHI analysis for determining if market power would result from a merger.[22] Some would require having at least five reasonably comparable suppliers, no single dominant supplier, and reasonably free entry to all segments of the relevant market. Diamond and Edwards opposes this view, stating that the number of firms and level of competition are only loosely related; competition can be intense with only two firms or nonexistent with many firms. It suggests that the Commission entertain the possibility that in the intermediate term, competition among the few (such as between regions), with appropriate market power mitigation measures such as ISOs, retail access, or divestiture, may be necessary as the industry moves toward ''workable competition.''

NIEP argues that a merger should be presumed to be anticompetitive if the merged entity would have a 20 percent market share, based on either generation sales or retail sales within a reliability council area. Com Ed disagrees, contending that for an undifferentiated product like electric power, the *Guidelines* suggest a higher figure of 35 percent. NIEP further argues that mergers not presumptively anticompetitive would still be scrutinized on the basis of whether the merged firm could sustain a 5 percent price increase.

Centerior and Com Ed oppose HHI analysis. Centerior believes that HHI measures are inadequate to measure market dominance. Rather, an assessment of market power should be based on the number and characteristics of a customer's options. For example, if a customer could look at several generation options and combine them with

---

[20] This ''safe harbor''-type issue is discussed further below under ''Procedures for Handling Merger Cases.''

[21] *E.g.*, East Texas Coop and Wisconsin PSC.

[22] For example, IN Com, Industrial Consumers, and Enviromental Action *et al.*

available transmission, so that there are several ''delivered power'' options, a proposed merger should be acceptable. Centerior notes that EEI's criteria do not account for the potential loss of native load customers, which could create excess capacity that, under HHI analysis, could lead to a finding of market power. An adequate market power screen could be based on regional concentration of competing utilities in the relevant market and/or market shares, as proposed by EEI.

Com Ed objects to any market concentration ratio for energy or even capacity markets based on a capacity measure because the capacity that utilities have available to make economy energy sales fluctuates constantly, depending on system conditions. Only generating units operating on the margin are capable of conferring any degree of market power, and identification of those units requires a rigorous analysis of the mix of generating units controlled by all utilities who could participate in the market. This leads Com Ed to conclude that generating capacity is not a meaningful indicator of market power in the markets for either capacity or energy. As an alternative to looking at market concentration ratios, Com Ed suggests that we review actual competitive conditions and assess the potential for anticompetitive behavior by determining whether there are feasible market manipulation mechanisms that are likely to succeed. Com Ed argues that for the Commission must recognize as a competitive issue the likely effects of a proposed merger on the operations and costs of neighboring utility systems, including effects on the loadings of their transmission systems. EGA shares a similar view, specifically recommending that the Commission focus on whether the merger will increase the transmission costs of potential competitors.

3. Ease of Entry

The Commission received a number of comments on considering the possibility of entry by new competitors in assessing market power. These comments address both the types of entry barriers that might exist in the industry and the importance of entry analysis.

Commenters suggest that there are various barriers to entry in this industry.[23] These include existing law and regulation and economic incentives created by a utility's role as monopolist and competitor; regulatory approval requirements; the amount of time it takes to move from planning to operation of new facilities; the existence of excess capacity in the relevant market; economies of scale and capital requirements; favorable location and access to raw materials; and access to distribution channels (including access to transfer capability of the transmission system and pancaked transmission pricing).

Some commenters believe that entry is a critical factor in merger analysis. For example, Joint Consumer Advoc. and TAPS argue that careful analysis will indicate significant barriers to entry. TAPS notes that measures of market dominance such as concentration indicate whether a utility currently can dictate price levels, while analysis of barriers to entry indicates whether a utility can foreclose competition prospectively. NY Com urges the Commission to focus its analysis of barriers to entry on factors such as transmission power flow analyses, availability of generation plants, reserve margins, load pocket constraints, and system stability.

Several commenters are skeptical that entry analysis, as done in the *Guidelines*, makes sense for the electric utility industry; they argue that entry will not mitigate market power. For example, Industrial Consumers notes that the *Guidelines* recognize that market power can be defeated if entry is ''easy,'' that is, timely, likely, and sufficient to deter or counteract the anticompetitive effects. However, Industrial Consumers believes that entry into the transmission and distribution business is not easy—nor accomplishable in two years—given the nature of monopoly franchises, obstacles to siting, and ''need justification'' standard for regulatory approval. Stranded cost recovery also raises a significant barrier to entry by a new participant into the market, even under open access.

DOJ notes that market entry is not likely to mitigate the anticompetitive effects of a merger when there is chronic excess capacity because a new entrant would have to recover both operating and fixed costs, while the merged entity would need to recover only operating costs until excess supply is eliminated. FTC doubts that entry is significant for most electric power merger cases because it may take more than two years to complete new generation and transmission facilities (due to lags in regulatory approvals and construction). These forms of entry are unlikely to respond to an anticompetitive merger in time to deter or constrain the exercise of market power. APPA also believes that potential entry is not an effective restraint where existing capacity is concentrated.

On the other hand, CINergy suggests that even in the short run, pricing behavior can be constrained by potential entry because customers can make long-term commitments to purchase from developers of new generation resources and incumbent suppliers will account for potential long-term load losses in setting their prices in the short run. Southern Company argues that with open access, entry is now easy.

4. Factors Affecting the Market Analysis That Can Change Over Time

There is substantial support among the commenters for the use of dynamic standards, at least to some degree, rather than static standards that may become obsolete as competitive energy markets develop. Some[24] recommend that we consider both immediate and long-range effects of mergers. Others[25] believe that any anticompetitive consequences should be evaluated not only in the context of the industry as it is structured today (vertically-integrated utilities serving both at wholesale and retail), but also as to how the industry may evolve. UtiliCorp argues that we should also consider the current state of transition in the industry when we examine merger applications that do not satisfy the market concentration and competition screen. It notes that requirements contracts currently in effect impede competition, but will cause the potential anticompetitive effects of mergers to be exaggerated because more alternatives will be available when the contracts expire.

Most commenters argue that, although open access may enlarge geographic markets and lower entry barriers, we should not expect that market power problems will disappear so that merger analysis will not be needed in the future. They believe that factors such as transmission constraints and lack of true comparability in the use of open access tariffs will continue to warrant market power and merger analysis.[26]

UtiliCorp recommends that the Commission consider the contingencies of retail competition and restructuring as we analyze the future impacts on competition of market concentration, market power and mergers. Southern Company contends that the Commission should not consider retail competition issues because state regulators are effective watchdogs who protect the interests of retail customers and assess the impact of mergers on competition in retail markets.

Wisconsin PS argues that opening retail markets to competition will result in substantial uncommitted capacity on the systems of merging utilities and will put pressure on them to market capacity through a more intense use of their transmission systems. Centerior suggests that the market analysis may need to consider the effect of competition policies promulgated by the state at the retail level in the future. Excess capacity may increase if retail customers get the right to select a new supplier based solely on lower rates. Therefore, a utility that did not have market power in the past may find that it has increased excess capacity and may thus acquire market power.

CINergy suggests that restructuring should be considered in the review of mergers only if there is a plan already approved by the state regulator, with a set implementation schedule beginning within three years of the consummation of the proposed merger. Future potential changes in the basic structure or regulation of the industry should be addressed by exercising the continuing authority to supplement merger orders under section 203(b), including the possibility of requiring divestiture.

5. Consideration of the Separate Effects of a Merger of Transmission and Distribution Facilities

A horizontal merger of vertically integrated utilities can be viewed as a generation merger, a transmission merger, and a distribution merger. A merger of transmission-owning utilities may have various effects on the grid, such as better planning, coordination, fewer pancaked rates, and strategic control of regional

[23] These commenters include, *e.g.*, Enviroment Action *et al.*, FTC, Madison G&E, MO Com, IN Com, and NY Com.

[24] *E.g.*, Lubbock and Low-Income Representatives.

[25] *E.g.*, Com Ed and CINergy.

[26] *E.g.*, FTC, East Texas Coop, and Industrial Consumers.

transmission grids. NIEP urges the Commission to recognize that mergers of entities that own only transmission should not raise substantial competitive concerns if the transmission is operated by an ISO. CA Com and DOJ intimate that mergers may occur in order to avoid pancaked rates. CA Com recommends that the Commission use the open access tariffs to remove the anticompetitive factor of pancaking and thus make mergers less attractive.

Several commenters address the effects of mergers at the distribution level.[27] Some argue that the consolidation of distribution assets and the creation of large retail monopsonists are competitive concerns that we should address. IN Com believes that physical and economic interactions blur the distinction between the wholesale and retail sectors, requiring that the effects on the retail market be considered to analyze the merger implications in the wholesale market. It would reject a merger that has negative retail effects even if the merger has positive effects in the wholesale market.

Other commenters fault the Commission for disregarding market power in the distribution sector of the industry. They suggest that mergers are likely to increase barriers to entry into the distribution market and monopsony power over sellers of generation.[28] As larger distribution systems are created through mergers, smaller, independent generators may be disadvantaged because they lack the resources required to meet thousand-megawatt solicitations with complicated delivery requirements. Environmental Action et al. also contends that the larger distribution systems created by vertical mergers heighten the opportunity for anticompetitive self-dealing between the distribution and generation arms and diminish the prospect for effective retail competition.

6. Vertical Mergers

Com Ed suggests that, in the future, vertical or conglomerate mergers rather than horizontal mergers may offer strategic opportunities to utilities. It recommends that our merger policy be flexible enough to deal with differences in the concerns raised by such mergers and horizontal mergers.

7. Application to Electric Power Purchases

A few commenters raised the issue of monopsony power stemming from mergers. Joint Consumer Advoc. points out that a utility may exercise monopsony power over sellers of generation, obtaining power at a lower price than its competitors.

8. Linked Consideration of Contemporaneous Mergers That Have Interdependent Market Effects

Several commenters argue that the Commission should consider such mergers on a cumulative basis.[29] Some argue that one merger may alter the boundaries of the relevant geographic market in which the other merger occurs; that is, transmission constraints in one market may be altered by new economy energy transactions associated with a merger in a neighboring market. APPA suggests consolidating contemporaneous proceedings that have interdependent market effects. Colorado Municipals notes that regulating the cumulative effect of contemporaneous mergers may be difficult.

III. Comments Concerning the Effect on Costs and Rates Factor

A. General Comments

Many commenters consider the effect on costs and rates to be a critical factor in deciding whether to approve a merger.[30] In fact, DOJ notes that the *Guidelines* recognize that some otherwise anticompetitive mergers may be justifiable because they produce important net efficiencies that, on balance, benefit competition and consumers (for example, through rate decreases).

However, commenters supporting this approach differ on how the costs and rates standard should be applied in cases where competitive harm is shown. For example, TDU Systems suggests that when a merger lessens competition, the Commission should not give substantial weight to cost savings and other benefits that could be achieved absent the merger. Moreover, the burden should be on the applicants to show that benefits not attainable without the merger outweigh the harm. IN Com recommends that applicants be required to show a low probability of harm to competition and to show significant, quantifiable net benefits to consumers. CINergy believes that the consideration of benefits should be limited to ratepayer protection and that applicants should be allowed to make an affirmative showing that such benefits will flow back to the ratepayers.

Other commenters argue that the costs and rates factor should be abandoned. For instance, Com Ed suggests that analysis of costs and rates has no place in an emerging competitive arena as long as mergers do not harm the competitive market, because prices will be set by market forces and customers can choose their suppliers based on price. Southwestern PS supports this view, arguing that most regulatory cost and rate issues that remain relevant are retail-related and under state jurisdiction; the Commission should defer to state commissions on such matters.

Others state that the analysis of the effect of the merger on rates is one of the most costly components of a merger analysis.[31] They assert that in a competitive environment, there will be little need for the Commission to speculate about future costs, as utility managers will be reluctant to enter into mergers that would increase costs.

EEI argues that elimination of the costs and rates analysis would substantially reduce the time to prepare a merger application and the Commission's time to process it. Although merger efficiencies can be substantial, their measurement and allocation serve a limited purpose in the Commission's analysis. Merger applicants should not be required (but can volunteer) to demonstrate merger efficiencies as part of a filing.

B. Determining the Net Benefits

We received a variety of comments on how to determine the benefits of a merger, the costs of the merger, and the degree to which one offsets the other. Many parties stress the importance of rate reductions.[32] International Brotherhood contends that in an era when customers should be able to anticipate rate reductions from competition, rate freezes are not sufficient. Com Ed agrees that consideration of cost and rate impacts may still be appropriate for segments of the industry that are not competitive (transmission and distribution). The KS Com asserts that cost savings from combining the merging companies' stand-alone transmission and distribution systems should be evaluated and that we should require assurances that efficient transactions cannot be arbitrarily discouraged in favor of the merged entity. Some contend that we should look at the effect of a merger on the costs and rates of competitors; however, they admit that this may be another way of assessing the effect of the merger on competition.

Many commenters[33] assert that no weight should be given to efficiencies and benefits that can be obtained by means other than the merger. CA Com suggests that formation of ISOs may provide many of the transmission operational and efficiency benefits typically claimed by merger applicants. Others suggest that the Open Access Rule will facilitate coordination among utilities so that in some cases, mergers will not be required to achieve economies.[34] Some argue that we should refuse to count as a merger benefit the substitution of efficient practices for inefficient practices that could be achieved without a merger.[35] Personnel reductions may be one example, as many businesses are downsizing without merging. OK Com contends that many of the efficiencies proposed to be passed along to customers through lower rates may actually reflect unavoidable cost reductions forced upon the merging utilities by competition.

However, Southern Company cautions that, in assessing what merger savings could be achieved through coordination without a merger, the Commission must consider section 1 of the Sherman Act, which prohibits certain joint actions as anticompetitive and restricts the sharing of information between competitors. What appear to be benefits achievable outside the merger may only be achievable if the companies illegally collude.

NY Com proposes that, instead of relying on claimed merger benefits related to scale economies, the Commission should look at the results of the merger: how the merger will affect price, ease of competitive entry, and quality of service (for example, closings of customer service centers). Environmental Action *et. al*. believes that, in comparing

[27] *E.g.*, CCEM and NIEP.

[28] *E.g.*, Joint Consumer Advoc, Enviromental Action *et al.*

[29] *E.g.*, APPA, NRECA, Enviromental Action *et al.*, Joint Consumer Advoc., and Colorado Municipals.

[30] *E.g.*, CINergy, TDU Systems, IN Com, DOJ, and Centerior.

[31] *E.g.*, CINergy, PaineWebber.

[32] *E.g.*, NV Com, NRECA, Joint Consumer Advoc., and TX Com.

[33] Including APPA, EA & CF of A, IN Com, East Texas Coop, Otter Tail, and Industrial Consumers.

[34] *E.g.*, Enviromental Action *et al.*, IN Com.

[35] *E.g.*, Industrial Consumers and Enviromental Action *et al.*

costs and benefits, the acquisition cost and its rate treatment should be considered; it suggests that the Commission reject a merger if the merged company intends to seek recovery of the acquisition premium from captive customers. OK Com is concerned that mergers may require utilities to incur costs such as construction of transmission lines to meet the integration requirement.

Some commenters contend that the Commission should not count claimed savings if the applicants are not willing to bear the risk of not achieving the savings.[36] They say that the level of claimed savings is typically insignificant compared to total company costs. Industrial Consumers argues that the concept of savings from ''deferral'' of capacity is meaningless.

With respect to how net benefits of a merger should be calculated, some commenters maintain that claimed savings should be discounted to present value, as cost savings tomorrow are worth less than cost savings today.[37] RUS recommends that the Commission calculate the ''revenues gained'' by the prospective merged entity, adapted from the revenues lost approach set forth in Open Access Rule for determining stranded cost exposure on a net present value basis.[38]

Several commenters contend that the savings claimed for previously approved mergers did not materialize. They urge the Commission to scrutinize claimed savings more carefully.[39]

Low-Income Representatives recommends that the Commission carefully scrutinize claimed savings to ensure that cost reduction does not mean service or quality reduction. Enviromental Action *et al.* notes that despite the vigorous efforts made by merging companies to win merger approvals with promises of rate reductions, little time is spent in Commission proceedings reviewing the effects on rates. It believes that more scrutiny on rates in the merger proceeding will establish more clearly, before final commitments are made, who is bearing what risk. It also explains that there are good reasons to be skeptical about savings from a proposed consolidation of generating assets because studies suggest that unit scale economies are reached at 400 MW and multi-unit plant economies at 1600 MW. Similarly, NRRI states that for the majority of firms in the industry, average costs would not be reduced through the expansion of generation, numbers of customers, or the delivery system.

C. Allocation of Benefits and Costs

Several commenters raise the issue of how net benefits should be allocated between investors and customers. East Texas Coop says that net benefits should not include any part of the benefits allocated to shareholders; benefits not allocated to ratepayers cannot be claimed as a benefit to the public interest. APPA and NRECA want the Commission to develop standards for allocating cost savings and other benefits among customers, ratepayers, and shareholders. NY Com further proposes that requiring merger applicants to share claimed savings between customers and shareholders would discourage utilities from overstating the claimed benefits of a merger.

Some commenters argue that an acquisition premium is a cost of the merger that should not be recoverable from ratepayers if it would lead to an increase in rates.[40] NY Com contends that allowing recovery of such premiums from ratepayers may inflate purchase prices and result in exaggerated claims of merger savings to increase chances of approval, rewarding the purchaser. OK Com would give rate consideration to an acquisition adjustment for mergers determined to be consistent with the public interest, and says that states should have a role in defining the public interest. Enviromental Action et al. would prohibit the merger if the merged utility has a retail sales monopoly and the state does not have a policy of excluding the acquisition premium from retail rates.

Enviromental Action *et al.* also believes that the proper cost allocation arrangement for a merging company, where the customer groups have different cost histories associated with different assets, is to have the price charged by the seller in inter-affiliate transactions be a market price. In this manner, the ''buying'' customers will take the power only if it is the best price on the market, and the ''selling'' customers will receive a reward commensurate with their risk. If the merging companies cannot, under this treatment, come up with sufficient benefits to satisfy the acquired company, the merger does not meet market standards and should not be approved. Enviromental Action *et al.* claims that any other approach makes the acquiring company's ratepayers unwilling donors to the financial success of an expansion strategy.

IV. Comments Concerning the Effect on Regulation Factor

Most commenters agree that regulatory impact continues to be relevant and important. EEI argues that mergers could affect regulatory effectiveness either through impacts arising from the transfer of authority from one regulatory jurisdiction to another or problems associated with cost allocation. EEI notes that merger does not change the Commission's authority over transmission in interstate commerce and sales for resale nor state commission authority over retail rates. Neither does merger affect the Commission's ongoing jurisdiction to determine cost allocation and to specify proper accounting treatment of cost allocations generically.

Several commenters stress that mergers resulting in multi-jurisdiction utilities and creating possible federal preemption deserve special attention.[41] OK Com also argues that regional regulatory bodies may be necessary in the future and is concerned that mergers can interfere with their effectiveness and formation.

CINergy dismisses the relevance of the effect on regulation, given that the Commission has held that a transfer of jurisdiction from one regulatory body to another in no way implies that regulation will be any less effective.[42] CINergy agrees with the Commission's holding and suggest that the regulatory effectiveness criteria be eliminated.

Others commenters stress the importance of this factor, but link it to other factors. Southern Company recommends that analysis of this factor should be subsumed within analysis of the merger's impact on costs and rates. APPA believes that the analysis of the merger's impacts on regulation should be linked to a requirement that merger produce affirmative public benefits, including structural changes that enhance competition and reduce the need for regulation. It also argues that the Commission should give deference to state action when assessing the impact on state regulation, although the Commission must make the final call on this factor.

V. Comments Concerning the Other Commonwealth Factors

The other *Commonwealth* factors are evidence of coercion, the proposed accounting treatment, and the reasonableness of the purchase price. These factors elicited very little comment. As to evidence of coercion, a few commenters suggest that this should be evaluated by the marketplace rather than by the regulatory process.[43] Several commenters say that this factor should only be considered if someone demonstrates that it is relevant.[44] OK Com is among very few commenters who favor the retention of coercion as a criterion. It suggests that coercion is a means by which some companies try to gain oligopolistic control of the market in the coming competitive environment.

As to the accounting treatment, some commenters support elimination of accounting concerns as a factor.[45] PaineWebber notes that most recent mergers were mergers of equals, involving minimal premiums over current market prices. It suggests that a similar market discipline would likely cause shareholders to reject merger transactions involving large merger premiums and excessive amortization. Florida and Montaup argue that the accounting treatment of a merger should not be an issue for hearing unless an applicant seeks treatment different from the Commission's standards. Southern Company contends that the Commission's analysis of

[36] *E.g.*, Joint Consumer Advoc., TX Com, and Enviromental Action *et al.*

[37] Industrial Consumers, East Texas Coop, and RUS.

[38] Open Access Rule, 61 FR at 21662.

[39] Joint Consumer Advoc., TX Com, Industrial Consumers, and NRECA.

[40] *E.g.*, Joint Consumer Advoc. and NY Com.

[41] NV Com, WI Com and NRECA.

[42] Entergy Services, Inc. and Gulf States Utilities Company, 62 FERC ¶ 61,073 at 61,373–74, *order on reh'g*, 64 FERC ¶ 61,001 (1993), *appeal pending*, 94–1414 (D.C. Cir).

[43] East Texas Coop., EEI, PaineWebber, and Southern.

[44] Florida and Montaup.

[45] East Texas Coop., EEI, and PaineWebber. Although they do not support keeping this factor, EEI and PaineWebber suggest that in light of broad industry changes, this may be the right time for a generic re-examination of accounting concerns, of which accounting for mergers could be a part.

this factor should be subsumed within the analysis of the merger's impact on costs and rates.

NY Com and OK Com are concerned about the accounting consequences of mergers. OK Com favors retention of the historical cost approach to accounting for plant acquisitions during mergers and business combinations until competitive market structures are achieved at the national, regional, and state levels. NY Com also urges the Commission to continue to require unrestricted access to all books and records of newly merged entities.

We also received a few comments on looking at the reasonableness of the purchase price as a factor. A number of commenters[46] urge that the Commission should not substitute its judgment for that of market forces, which will determine the reasonableness of the purchase price. Others [47] believe this issue should be examined only if its relevance is raised. However, OK Com argues that purchase price retains some relevance in this era of diversification. It is concerned that the purchase price may be based on expected returns on non-regulated investments, which, if they fail to materialize, may dilute utility stock.

VI. Procedures for Handling Merger Cases

A. Comments Concerning Filing Requirements

Some commenters [48] urge the Commission not only to spell out the precise standards it will use to review merger applications, but also to establish understandable filing requirements that clearly identify the necessary information on the effects of the proposed merger on competition and on rates. East Texas Coop says that having more substantive filing requirements and early access to computer studies and simulations would benefit all parties and the Commission. Low-Income Representatives believes that a merger applicant should be required to show that there is workable competition for each customer class in any market in which it participates. NY Com proposes that the Commission require merger applicants to submit estimates of the price elasticity of both supply and demand in the relevant markets, and an analysis of entry barriers to new supply. Southern Company advocates the adoption of filing requirements designed to support use of the *Guidelines*, as modified for the electric power industry.

Commenters also recommend that the Commission adopt new filing requirements to enhance and expedite our analysis of the rate impacts of merger applications. Florida and Montaup argue that the Commission should set out filing requirements related to merger cost and savings, which would have to be met only if the applicants claim that the merger results in consumer savings. International Brotherhood asks the Commission to require merger applicants to file an economic impact statement analyzing the effect of the proposed savings (many achieved through layoffs) on the economy of the communities served.

Project proposes that the Commission require merger applicants to include an assessment of the environmental and related economic impacts of the planning and operational changes that are expected to result from the merger. The required information would include changes in dispatch, resource planning procedures, and resource acquisition plans; changes in emissions of SO_2, NO_X, CO_2, and particulates; and changes in resources devoted to research and development, DSM programs, and renewable technology investments.

Many utility commenters want a faster merger consideration process.[49] Some claim that delays in processing merger applications harm the public interest in various ways: utilities lose the ability to respond to market forces quickly (thereby retarding procompetitive restructuring efforts); benefits to consumers are postponed; investors experience uncertainty (creating problems in capital markets and the efficient flow of capital); utility employees lose productivity as doubts linger about their future roles; and the public loses confidence in the regulatory process. Some commenters argue that we could act faster if we looked at any one or two of the *Commonwealth* factors.[50]

Com Ed believes that in the coming competitive marketplace, it will be important for the Commission not to allow the merger approval process to become captive to intervenors, who allegedly are often seeking merely to gain a competitive advantage through delay. Noting that the DOJ and FTC initial review process can be completed within 30 days, Com Ed and others question why the Commission's review needs to take significantly longer.

Some commenters ask for faster merger consideration for certain types of mergers,[51] particularly for uncontested applications; mergers between a utility and a non-utility firm; mergers between affiliates; and mergers between small, non-dominant utilities. Haves and Brehrenda also advocate expedited treatment for: a disaggregation (an internal disaggregation within a holding company, a spin-off to shareholders, and a disaggregation coupled with a merger); a merger of a jurisdictional electric utility with a gas utility; a combination of non-interconnected electric utilities; and a merger of a jurisdictional utility with a company that is not an electric utility, even if the latter owns a power marketer.

Some utility commenters [52] recommend that we identify specific time frames or themselves suggest time frames for the Commission either to rule on the application or to request further information. Florida and Montaup argue that we should not routinely set all merger cases for hearing. The Commission should use procedures that would allow intervenors to conduct voluntary discovery before an application is set for full hearing and refer the proceeding to an Administrative Law Judge (ALJ) for the limited purpose of resolving discovery issues. Another suggestion is that we streamline discovery and coordinate the activities of parties with similar positions during the hearing and the briefing phases of cases set for hearing by working the ALJ.[53]

On the other hand, some commenters argue that mergers that create large utilities are being processed too quickly.[54] They say that intervenors do not have time to obtain information and develop a case. Some of these commenters urge the Commission to lengthen the time period for interventions in merger proceedings, and to permit intervenors to conduct discovery during this period. East Texas Coop also requests that the Commission not allow answers to protests and not allow merger applicants to have a formal right to ''the last word.''

APPA and East Texas Coop both oppose the adoption of strict time schedules for Commission action. Many commenters urge the Commission not to approve a merger before it can assess adequately the effects of increased concentration in the industry.

B. Safe Harbor Suggestions

DOJ and EGA urge the Commission to ''refine and sharpen'' the focus of its merger review analysis so that mergers are processed more efficiently, with desirable mergers receiving swift approval, while undesirable mergers are set for hearing.

Other commenters [55] suggest that we use a two-stage process allowing a merger passing a safe harbor test to be approved quickly. EEI proposes detailed regulations covering pre-filing consultation, initial filing requirements, a two-step review process based on an initial market power screen (consisting of an initial filing and an initial finding order), the hearing process, appeal, and interests to be balanced by the proposed regulations.

Commenters generally suggest that the first stage analysis be simple, with basic filing requirements and, if the applicants pass certain merger screens, approval would be automatic or quick, perhaps with a paper hearing. Applications that do not pass the merger screen would face additional, more detailed filing requirements and a more in-depth second stage analysis, probably with a trial-type hearing. Some would allow ample opportunity to settle, however, and so avoid a lengthy hearing.

EEI urges that if a merger does not pass the initial merger review screen, it should not be rejected; rather, this merely indicates that the Commission needs to consider other evidence regarding the merger's impact on the competitive market.

East Texas Coop's two-stage procedure has a slight variation: the opportunity for an intervenor to show that a proposed merger will result in the strategic control of

---

[46] CINergy, East Texas Coop, EEI, PaineWebber, and Southern.

[47] Florida and Montaup.

[48] Missouri Basin, NIEP, Centerior, Florida and Montaup, APPA, and Southern.

[49] *E.g.*, Texas Utilities, Southwestern PS, Sierra Pacific, Southern Company, UtiliCorp, and EEI.

[50] *E.g.*, Southwestern, Southern, and PS Colorado.

[51] UtiliCorp, PaineWebber, PanEnergy, Com Ed, Centerior, Southern, APPA, NRECA.

[52] *E.g.*, Sierra Pacific, UtiliCorp, MidAmerican, and PP&L.

[53] PP&L.

[54] *E.g.*, International Brotherhood, Joint Consumer Advoc., East Texas Coop, and Enviromental Action *et al.*

[55] *E.g.*, Texas Utilities, Southern, EGA, DOJ, CINergy, East Texas Coop, and NRECA.

transmission assets, even if the merger application passes the Commission's stage-one screens.

Some commenters [56] propose that if the safe harbor screens are satisfied, the merger should be approved automatically, either by the Commission's staff under delegated authority or under a ''limited review'' procedure. Under the ''limited review'' procedure, the case would be referred to an ALJ with a short time schedule to render a decision, after which approval would be granted by staff through delegated authority unless the ALJ or staff determines that the issue should be considered by the Commission. PanEnergy also argues that an unopposed merger should be approved by delegated authority without a hearing.

Various factors were suggested for setting the screens. Commenters suggest that the Commission consider the merged company's absolute size, its market share, its ownership or control of transmission, its affiliation with suppliers of competing forms of energy (such as natural gas), absolute market concentration, the effect of the merger on market concentration, whether a small group of firms could act in a collusive or coordinated manner, whether the acquisition is by a new entrant, and the existence of barriers to entry in the wholesale generation market in which the merged entity would participate, among other factors.

A number of commenters [57] recommend that the Commission use market concentration screens similar to those adopted by DOJ and FTC. With regard to the HHI screen used in the *Guidelines,* DOJ uses two HHI screens for a horizontal merger: (1) the increase in the HHI caused by the merger, and (2) the post-merger HHI. The *Guidelines* indicate that a merger falls within a safe harbor if the post-merger HHI for the relevant market is no higher than 1,000 or the increase in the HHI is no more than 50. (The HHI approaches 0 if there is a large number of small competitors, and is 10,000 if there is just one firm.) APPA would screen from full analysis any merger for which the market's post-merger HHI is less than 1000.

Other commenters [58] oppose a safe harbor or two-stage screening process to expedite merger approval. Some argue that this proposal would not give the Commission enough time to closely scrutinize the effects of the merger on such important factors as barriers to entry and short-term monopoly rates. PP&L argues that the Commission should not use merger screens until it has more experience with analyzing mergers in a more competitive electric market.

C. Coordination With Other Agencies

Many commenters say that the Commission should coordinate its consideration with that of other state or federal agencies. The New York Commission calls for improved coordination between the Commission and the states in order to give the industry clear regulatory guidance on the treatment of mergers during the transition to competition. NARUC, CA Com, and IN Com suggest several alternative coordination options. Commenters offered the following specific proposals on how the Commission could coordinate better its merger review with those of the states.

First, several commenters support having a ''scheduling conference'' with the Commission and all state regulatory agencies. NARUC suggests that, when the Commission receives a merger application, we should convene a scheduling conference with representatives of the relevant state commissions to coordinate the schedules for the federal and state reviews of the merger applications. Such an arrangement would permit each agency to consider the merger proposal fully, while also providing state regulators with the means of conveying their views to the Commission. Sierra Pacific urges us to rely more frequently on joint conferences with state regulators.[59] Such an approach would expedite the processing of mergers, limit unnecessary duplication of procedures, and produce more uniform federal-state results.

Second, several commenters recommend that the Commission let state regulatory commissions complete their review and then comment in the Commission's proceeding.[60] NARUC and others observe [61] that during the state proceeding, state regulators cannot take a position in a Commission proceeding without prejudging the outcome of the state proceeding. They ask that the Commission defer its decision until after state proceedings have been concluded, or that we give states a reasonable opportunity to conclude their proceedings before they must file testimony here. Similarly, APPA argues that the Commission should give deference under FPA section 201(b) to state determinations by adapting our procedures to allow states to intervene after state review is completed. The Commission could distinguish between two kinds of state intervenors: state consumer advocates or executive branch representatives, who must meet the same intervention requirements as do other parties; and state commissions acting in parallel on the same merger application, who would file later.

Third, a number of commenters say that there should be some joint federal-state vehicle to coordinate merger consideration with state regulators, such a joint filing requirement, a joint record, or a joint proceeding.[62] Environmental Action *et al.* suggests that a merger application should be filed as one document with the Commission and relevant state regulatory commissions at the same time. PP&L asks that we require any state applications to be filed simultaneously with and attached to the Commission application. NARUC suggests that a joint record be developed by the Commission and the states. It also suggests that the Commission consider a joint proceeding. However, PP&L opposes this, arguing that because state commission issues and procedures might differ considerably from those before the Commission, joint or concurrent hearings probably would not save any resources and could complicate the hearing process. Accordingly, PP&L argues that we should continue to process mergers separately from the states.

Fourth, some parties say that the Commission should defer to state commissions on certain matters. Some argue for deference regarding a merger's effect on retail costs and rates.[63] PaineWebber argues that the responsibility for determining the effects of a merger on retail customers is not subject to this Commission's review. NARUC, however, says that both state and federal regulatory agencies should evaluate a merger's effect on rates, as well as on generation competition and on access to transmission facilities. Similarly, some parties argue that the Commission should generally defer to state commissions regarding the impact of mergers on competition in retail markets.[64]

Another suggestion is raised by the Ohio PUC, which proposes a specific new process for federal-state coordination of merger consideration. The purpose is to analyze market power in unbundled electric service markets, with the Commission assessing the merger's effect on transmission market power and the state commissions assessing the merger's impact on generation and distribution market power. The proposal contains five steps: (1) the applicants file their applications simultaneously at both the federal and state levels; (2) each state commission determines whether the merging utility operating in the state has pre-merger market power (with the several states sharing their data resources, methodologies, and modeling capabilities, and possibly undertaking a joint review); (3) the Commission analyzes the transmission systems affected by the merger, relying on a *Guideline*-type analysis to assure that transmission constraints do not create barriers to entry by competing generators; (4) all regulators then collaborate to determine if the merging entities will likely possess any regional post-merger market power; and (5) the merger is either approved outright, approved with conditions, or set for hearing by the various regulators. Whether it is set for hearing would depend on whether there is agreement among the state regulators that the applicants will possess no local or regional generation market power, and whether the Commission determines that no transmission barriers to market entry can be identified.

DOJ urges the Commission to adopt the *Guidelines* so that there will be consistency between DOJ and the Commission. As discussed above, many others echo this view. PP&L urges the Commission routinely to obtain the views of DOJ and the FTC about each merger application. Further, PP&L suggests that the Commission could require an evidentiary hearing if DOJ or the FTC suggests that a hearing is necessary or opposes the merger. PP&L also proposes that the Commission require the filing of the Premerger Notification forms that merging

[56] *E.g.,* Hawes and Behrends.

[57] *E.g.,* Utilicorp.

[58] *E.g.,* PP&L, Joint Consumer Advoc.

[59] *Citing* Subpart M of our Rules of Practice and Procedure (sections 1301, *et seq.*)

[60] *E.g.,* NARUC, APPA, KS Com, Environmental Action, *et al.*

[61] KS Com, Environmental Action, *et al.*

[62] NARUC and Sierra Pacific.

[63] *E.g.,* Southwestern.

[64] Southern, NY Com, and OH Com.

parties must file with the DOJ and the FTC under the Hart-Scott-Rodino Antitrust Improvements Act.[65] PP&L claims that the information in these forms would be useful to the Commission in evaluating mergers.

Several commenters argue that we should limit the scope of merger proceedings to issues that are directly related to the merger and not allow intervenors to raise extraneous issues or extract concessions.[66] Moreover, we should not use merger proceedings as an alternative means of promoting or requiring the generic restructuring of the electric industry.[67]

D. Remedies

No commenter says that a merger must be rejected if it fails initially to satisfy the public interest test. Commenters recommend certain courses of action to remedy the initial failure. These include items such as: settlement; a merger condition closely related to the difficulty (*i.e.*, divestiture, releasing wholesale customers); and voluntary mitigation measures.

Several commenters ask the Commission to monitor the effects of a merger after it is approved either to verify claimed benefits or to detect anticompetitive effects that escaped the analysis.[68] We could grant relief from negative effects or impose new conditions.[69] APPA recommends that approval of a merger be conditioned on a post hoc review of market performance, including consideration of the effect on rates. EGA suggests that the Commission should impose ''provisional'' or ''contingent'' conditions on a merger; that is, conditions that the merged companies must comply with if certain future circumstances occur.

CINergy suggests post-merger analysis as an alternative to extensive pre-merger analysis. It urges the Commission not to burden merger applicants with a requirement to forecast potential merger effects under various industry and state restructuring scenarios. Such a requirement would paralyze the merger application process and yield only speculative results. CINergy suggests that, if the Commission does ask for such an extensive analysis, we should offer merger applicants the alternative of filing a new market analysis every three years for ten years after merger approval; as a condition of merger approval, the applicants would agree that if the Commission finds too much market power in a new market analysis, they will implement any necessary mitigation measures, including generation divestiture.

On the other hand, some commenters advise against post-merger reviews and conditions.[70] They argue that ongoing Commission review or a suggestion that approval may be reversed would introduce uncertainty in the market and prevent the proper pricing of a merger.

Most commenters do not deny that the Commission has authority under section 203 to impose conditions on its approval of a merger. Rather, some commenters debate the scope of such conditions.[71] Several say that the Commission has the authority to impose conditions only if there is a detriment to the public interest, and then only in ways related to the specific detrimental effects. Florida and Montaup asserts that there is no authority to order divestiture as a condition.

Project recognizes that NEPA does not expand our powers under the FPA. However, it says that the Commission has ample authority under the FPA, given its NEPA obligations, to condition its approval of mergers to promote NEPA goals and policies.

Several commenters urge the Commission to impose a particular condition on its approval of all or most mergers. Their principal argument is that mergers generally have a negative effect on competition. Recently, the Commission counterbalanced this effect by requiring open transmission access, which enhanced competition. The Commission should replace the open access condition with a new condition that enhances competition to ensure that the merger is procompetitive. TAPS, for example, supports this view.

Other commenters would impose a condition only to remedy a specific problem. For example, EGA and DOJ argue that the Commission should impose a procompetitive condition only to prevent harm to competition. TDU Systems suggests that the Commission consider mitigation of harm to competition only after it has assessed the likely competitive consequences of an unconditioned merger on the market structure. TDU Systems also believes that we should remedy each likely anticompetitive effect of a merger, even in cases in which the merger overall seems likely to have public benefits. Enviromental Action *et al.* would approve mergers with anticompetitive effects only if the Commission can impose conditions that will mitigate the anticompetitive effects of the merger.

Some commenters distinguish imposing a condition on a merger (for example, an open access tariff that must be filed for the merger to be approved) from conditional approval of a merger (the merger is approved for now but if it has a negative effect, the approval can be revoked or made subject to a new condition). Several commenters (*e.g.*, NRECA, PP&L and RUS) caution the Commission to use only sparingly its authority to approve mergers on a conditional basis. While this ''reach-back'' authority may be appropriately used in ''fast-track'' merger approvals, it should not be routinely relied upon as a substitute for either the rejection or mitigation of mergers that are likely to have significant anticompetitive effects.

Centerior argues that conditioning authority should be used sparingly and only in those situations where the Commission finds that there is a high possibility of specific harm to competition. Commenters offer several arguments against imposing a generic merger condition or having a low threshold for imposing a condition.

Not all mergers are alike, so it is not appropriate to impose the same condition on all merger approvals, according to others.[72] A condition should be related to the effects of a specific merger.

Southern argues that any generic merger conditions would go far beyond the approach of the *Guidelines*, which are aimed merely at preventing mergers that would ''create or enhance market power or facilitate its exercise.'' Generic merger conditions are typically designed to require merger applicants to establish positive merger benefits, contrary to FPA and antitrust precedent. Some argue that we should not use merger approval as a tool for achieving an unrelated policy goal. They say that this would discourage procompetitive mergers.[73]

Commenters proposed over a dozen specific conditions for merger approval. Some conditions are proposed for all mergers and others to remedy a problem with a specific merger. Most of the suggested conditions are designed to mitigate market power or to ensure that rates do not increase as a result of the merger. The proposals are to require the merged company to:

(a) Form an ISO. Some urge the Commission to require merging parties to form an ISO or to participate in a regional ISO, resulting in single-system, regionwide, nonpancaked transmission rates.[74] For instance, the WI Com would require an ISO or transmission divestiture where the merging companies own a major transmission bottleneck. Otter Tail and Industrial Consumers view the ISO as one possible way to mitigate market power.

(b) Divest generation or transmission assets. Some commenters support generation divestiture as a remedy for an anticompetitive merger.[75] The FTC believes that this remedy would remove the anticompetitive effect of the merger without hampering its procompetitive or efficiency-enhancing aspects. Wisconsin PS would impose divestiture only if it would prevent the exercise of market power. Project would require all merging companies to separate their distribution assets and functions from the generation business within a reasonable time, creating legally and functionally separate entities to provide the different services.

Wisconsin Customers appear to advocate divestiture of transmission from generation and distribution as a condition of all merger approvals. It sees divestiture as preferable to an ISO because the Commission would not have to perpetually construct rules to avoid unfair use of the transmission system and then monitor compliance.

Both Southern and Centerior oppose divestiture as a drastic action that would probably kill efficient mergers or limit the ability of the merged company to compete.

(c) Reform transmission pricing. Several commenters argue that elimination of rate

[65] 15 U.S.C. § 18a (Supp. 1996).

[66] *E.g.*, Southwestern, Com Ed.

[67] *E.g.*, Southwestern, Southern.

[68] *E.g.*, APPA, Joint Consumers Advoc., NRECA.

[69] *E.g.*, APPA, EGA, NRECA.

[70] Among others, PaineWebber.

[71] For example, FTC, PS Colorado, Southwestern, and Southern.

[72] For example, Southern, DOJ, FTC, and Wisconsin PS.

[73] For example, Com Ed, Southwestern, DOJ, FTC, Paine Webber, EEI, Wisconsin PS, and Florida and Montaup.

[74] TAPS, Wisconsin Customers, WI Com, and APPA.

[75] For example, FTC, PP&L, Wisconsin Customers, and Lubbock.

pancaking should be a condition for all mergers.[76]

APPA and TDU Systems urge the Commission to codify or apply as a general condition its current requirement of single system transmission pricing for all merged systems, unless the applicants show a public interest basis for different treatment. TDU Systems also suggests that all merging parties be prevented from reducing the transmission capacity presently available for use by transmission customers. Environmental Action *et al.* would prohibit market pricing for power transactions among affiliates of merged companies in regions lacking regional transmission pricing.

(d) Eliminate transmission constraints. Some commenters state that transmission constraints should be addressed by conditioning the approval of the merger on the applicants' building facilities to alleviate the constraints or taking other measures to eliminate local market power.[77]

Competitive Coalition and TDU Systems suggest that where two constrained systems are merging, divestiture of transmission assets should always be considered.

Southern Company cautions against becoming overly concerned with remedying transmission constraints by imposing conditions or by market definition, since other potential remedies or alternatives exist.

(e) Have retail access. Competitive Coalition realizes that the Commission's authority does not extend to ordering direct access at the retail level, but suggests that the concerns over monopsony would be eliminated if merging parties offered open-access distribution. Industrial Consumers, supported by Otter Tail, recommend that, where necessary to avoid anticompetitive effects, we condition approval of mergers by adjacent suppliers on their agreement to provide nondiscriminatory direct access or a finding that a state's adoption of a direct access initiative avoids anticompetitive concerns.

(f) Forego stranded cost recovery. Several commenters see a need to require all merging parties to forego stranded cost recovery in order to mitigate market power.[78]

(g) Reform contracts. Commenters argue that all merging utilities should be required to offer an open season for all of their wholesale requirements contracts and transmission contracts. UtiliCorp argues that many utilities and wholesale customers remain bound to requirements contracts that impede their ability to take advantage of the benefits of the recent competitive influences in the market.[79]

To achieve unrestricted wholesale competition, Competitive Coalition calls for the complete unbundling of transmission services to be required of all merger applicants, including the transmission services contained in existing requirements contracts. It would also extend the unbundling requirement to the transmission services embodied in pooling or bilateral coordination and joint transmission agreements to which merger applicants are parties.

(h) Eliminate affiliate advantage. APPA urges the Commission to adopt standard conditions for utility mergers to govern affiliate transactions.

(i) Monitor achievement of claimed benefits. Joint Consumer Advoc. argues that there should be a mechanism to monitor whether claimed benefits are actually achieved, but does not offer any specific proposals.

(j) Freeze or reduce rates. Several commenters advocate guaranteed cost reductions to be passed on to consumers or rate freezes by the merger applicants.[80] This would be a condition to overcome the potentially anticompetitive effects of the merger and to ensure that claimed benefits of the merger are received.

Environmental Action *et al.* believes that a better approach than rate freezes is to simply set rates appropriately.

Florida and Montaup argues that the Commission should not require rate freezes as a condition of approving a merger or a condition to avoiding a hearing on a rate freeze. WI Com discounts the value of a four-year rate freeze if a utility will no longer have restrictions on its pricing other than the market by the year 2000. It prefers a market structure that ensures that customers have access to many suppliers, none of which will be able to exercise significant market power over the long term.

CINergy, with support from OK Com, argues that rather than debating claims of net benefits, the Commission should protect customers by requiring all merging companies to commit not to recover merger-related costs from ratepayers. Low-Income Representatives would condition all mergers to: (1) continue existing rates, payment programs, protections regarding customer service, and shut-offs for low-income consumers; and (2) assure no impact on attaining or maintaining universal service.

(k) *Retain generation reserve sharing and other coordination arrangements.* TAPS and TDU Systems believe that the Commission should consider imposing a requirement that all merged utilities engage in joint planning and joint ownership of future facilities, continue to offer basic reserve sharing and coordination services, and continue to offer cost-based firm full requirements and partial requirements service.

(l) Maintain reliability and the quality of service. International Brotherhood would require every merger application to contain a plan to maintain or improve reliability and the quality of service.

(m) Eliminate economic impacts. International Brotherhood would require every merger application to demonstrate a lack of adverse economic impact on the economy of the communities served.

(n) Eliminate environmental impacts. Project would condition mergers to mitigate significant adverse environmental impacts identified in an environmental assessment. It would require applicants to bring existing generation units up to standards comparable to the environmental restrictions on their competitors, in effect, to hold the environment harmless from merger-related impacts.

[76] For example, OK Com, NV Com, CCEM, and TDU Systems.

[77] For example, Florida and Montaup and Wisconsin PS.

[78] Industrial Consumers, Otter Tail, TAPS, and Wisconsin Customers.

[79] For example, UtiliCorp, CCEM, Wisconsin Customers, and Southwestern Electric.

[80] Joint Consumer Advoc., Industrial Consumers, Otter Tail, CINergy, Illinois Industrials, and Texas Industrials.

[FR Doc. 96–32766 Filed 12–27–96; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 96F–0101]

Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of triisopropanolamine as a component of phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester, as a stabilizer for olefin polymers intended for use in contact with food. This action is in response to a petition filed by General Electric Co.

DATES: Effective December 30, 1996; written objections and requests for a hearing by January 29, 1997.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Vir D. Anand, Center for Food Safety and Applied Nutrition (HFS–216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3081.

SUPPLEMENTARY INFORMATION: In a notice published in the Federal Register of June 19, 1996 (61 FR 31141), FDA announced that a food additive petition (FAP 6B4507) had been filed by General Electric Co., 1 Lexan Lane, Mt. Vernon, IN 47620–9364. The petition proposed to amend the food additive regulations in § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) to provide for the safe use of triisopropanolamine as a component of phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester, as a stabilizer for olefin polymers intended for use in contact with food. The additive, triisopropanolamine, was identified in the filing notice (61 FR

31141) as being a component of the stabilizer, phosphorous acid, cyclic butylphenyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester. The correct identity of the stabilizer is phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester and is used throughout this final rule.

FDA has evaluated the data in the petition and other relevant material. The agency concludes that the proposed use of the additive is safe, that the additive will achieve its intended technical effect, and therefore, that the regulations in § 178.2010 should be amended as set forth below.

In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and relied upon in reaching its decision to approve the petition are available for inspection at the Center for Food Safety and Applied Nutrition by appointment with the information contact person listed above. As provided in § 171.1(h), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

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

Any person who will be adversely affected by this regulation may at any time on or before January 29, 1997, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Director, Center for Food Safety and Applied Nutrition, 21 CFR part 178 is amended as follows:

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR part 178 continues to read as follows:

Authority: Secs. 201, 402, 409, 721 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 379e).

§ 178.2010 [Amended]

2. Section 178.2010 *Antioxidants and/or stabilizers for polymers* is amended in the table in paragraph (b) in the entry for ''Phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester (CAS Reg. No. 161717–32–4'' by adding the phrase '', which may contain not more than 1 percent by weight of triisopropanolamine (CAS Reg. No. 122–20–3)'' before the period.

Dated: December 19, 1996.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 96–33099 Filed 12–27–96; 8:45 am]

BILLING CODE 4160–01–F

---

21 CFR Part 201

[Docket No. 92N–0165]

Specific Requirements on Content and Format of Labeling for Human Prescription Drugs; Revision of ''Pediatric Use'' Subsection in the Labeling; Extension of Compliance Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; extension of compliance date.

SUMMARY: The Food and Drug Administration (FDA) is extending the compliance date of a final rule, that published in the Federal Register of December 13, 1994. The document revised the ''Pediatric use'' subsection of the professional labeling requirements for prescription drugs. This final rule extends to April 7, 1997, the date for submission of supplemental applications to comply with the new regulation for those manufacturers who notify FDA in writing by January 29, 1997 of their intent to submit a supplement. The agency is taking this action in response to a request for an extension of the compliance date.

EFFECTIVE DATE: December 30, 1996

FOR FURTHER INFORMATION CONTACT: Erica L. Keys, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301–594–1046.

SUPPLEMENTARY INFORMATION: In the Federal Register of December 13, 1994 (59 FR 64240), FDA published a final rule that amended its regulations governing the content and format of labeling for human prescription drug products. The regulation revised the ''Pediatric use'' subsection of the professional labeling requirements for prescription drugs (21 CFR 201.57(f)(9)) to provide for the inclusion of more complete information about the use of a drug in the pediatric population (ages birth to 16 years). The regulation requires sponsors to reexamine existing data to determine whether the ''Pediatric use'' subsection of the labeling can be modified based on adequate and well-controlled studies in adults and other information supporting pediatric use, and, if appropriate, submit a supplemental application to comply with the new requirements by December 13, 1996. The final regulation gave manufacturers 2 years in which to submit supplements, in response to comments requesting that FDA extend the 1–year implementation period originally proposed.

On November 6, 1996, FDA sent a letter to 250 manufacturers asking them to notify the agency whether and when they intended to file supplements. FDA has received responses from only 40 manufacturers. On November 20, 1996, the Pharmaceutical Research and Manufacturers of America (PhRMA) requested that FDA extend the compliance date of the final rule because some of their members with large numbers of products had encountered unexpected problems in gathering the required information.

The absence of adequate pediatric labeling continues to present a significant public health issue and the level of response to the December 13, 1994, final rule is cause for concern. To identify appropriate next steps to address this issue, it is essential that FDA identify the number of supplements that will be filed. Therefore, FDA is extending the compliance date under the following condition. If a manufacturer notifies FDA in writing by January 29, 1997, of their intent to submit a supplement, the agency will not consider the manufacturer's supplement to be late if it is received by April 7, 1997.

Because this action only extends the compliance date, FDA finds that there is good cause to dispense with a notice of proposed rulemaking, under 5 U.S.C. 553(b)(3)(B), as impracticable and unnecessary and is publishing this revision as a final rule effective December 30, 1996.

Dated: December 23, 1996.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 96–33098 Filed 12–27–96; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR PARTS 1301 and 1311

[DEA Number 140R]

RIN NUMBER 1117–AA34

Registration and Reregistration Application Fees

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule; remanded for further notice and comment.

SUMMARY: On October 6, 1992, Congress passed the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102–395, 106 Stat. 1828 (1992) (codified at 21 U.S.C. 886a) (Act). In section 886a(3) of this Act, Congress directed that ''fees charged by the DEA under its Diversion Control Program (DCP) shall be set at a level that ensures the recovery of the full costs of operating the various aspects of the (diversion control) program.'' On December 18, 1992, DEA published its proposal to adjust the existing registration fee schedule. 57 FR 60,148. After notice and comment, DEA published a Final Rule on March 22, 1993, setting the new registration fees. 58 FR 15,272.

Following publication of the final rule, a complaint was filed by the American Medical Association (AMA) and others in the United States District Court for the District of Columbia. On July 5, 1994, the district court issued its final order granting the government's motion for summary judgment, and thus disposed of all claims with respect to all parties. *American Medical Association* v. *Reno,* 857 F. Supp. 80 (D.D.C. 1994). The AMA appealed. On June 27, 1995, the United States Court of Appeals for the District of Columbia Circuit issued its decision holding that DEA's rulemaking was inadequate and that the rule must be remanded, without being vacated, to the DEA for further proceedings in which DEA provides both an opportunity for meaningful notice and comment on, and an explanation of, the components of the diversion control program. 57 F.3d 1129 (D.C. Cir. 1995) On August 29, 1995, the United States Court of Appeals for the District of Columbia Circuit remanded this action to the district court with instructions. On November 22, 1995, the District Court remanded the matter to DEA for proceedings consistent with the opinion of the United States Court of Appeals for the District of Columbia Circuit. This document responds to that requirement and provides a description of the components of the fee-funded diversion control program.

DATES: Comments and objections must be submitted on or before March 31, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. G. Thomas Gitchel, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION: The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993 (Pub. L. 102–395) required that DEA recover the costs associated with the DCP through fees charged by DEA under that program. Therefore, DEA published a notice of proposed rulemaking (NPRM) in the Federal Register on December 18, 1992 (57 FR 60148) proposing to amend the fees set forth in Title 21, Code of Federal Regulations (21 CFR), §§ 1301.11 and 1311.11. On March 22, 1993, following notice and comment, DEA published a final rule in the Federal Register amending the fees.

DEA's rulemaking was challenged in court, in part on the grounds that it failed to provide adequate notice or explanation of the costs and scope of the DCP to be funded through the fees. While the United States District Court upheld the rule, on appeal, the United States Court of Appeals, District of Columbia Circuit decided on August 29, 1995, that the rulemaking was to be remanded, without being vacated, to DEA in order to identify the components of the fee-funded DCP and provide a brief explanation of why DEA deemed each component to be part of that program. Such description was to provide the opportunity for meaningful notice and comment regarding the established fee. *AMA, et al.* v. *Janet Reno, Attorney General, et al.,* 57 F.3d 1129 (D.C. Cir. 1995). In response to the decision of the court, the following explanation of the various components of the DCP is provided. Since the court did not vacate the final rule, DEA is not republishing either the original NPRM or final rule. Persons seeking further information regarding those notices should see the December 18, 1992 issue of the Federal Register (57 FR 60148) for the NPRM and the March 22, 1993 issue of the Federal Register (58 FR 15272) for the final rule.

Background of The Budget Item ''Diversion Control Program''

The Comprehensive Drug Abuse Prevention and Control Act of 1970 (Pub. L. 91–513, commonly known as the Controlled Substances Act and the Controlled Substances Import and Export Act (CSA)), established the current Federal authority and programs to control the manufacture, distribution, importation, exportation and dispensing of ''controlled substances'' and to prevent the diversion of such substances from legitimate medical, scientific, research, and industrial channels into the illicit traffic. The CSA established a system of scheduling of substances, registration of legitimate handlers, production quotas, dispensing and distribution controls, record-keeping and reporting, import/export provisions, and penalties for violations of the CSA. It also mandated administrative and enforcement provisions, and cooperative efforts with state and local authorities. Additionally, as discussed in the later section regarding international activities, the United States has obligations under the United Nations Single Convention on Narcotic Drugs, 1961 (1961 Convention), and the Convention on Psychotropic Substances, 1971 (1971 Convention) (referred to collectively as the international treaties), to which it is a party, with respect to international control and cooperation to prevent the diversion of controlled substances. The CSA programs relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances are the domestic mechanism for implementing these treaty provisions. Over the past 25 years, the CSA has been amended to include various enhancements and refinements needed to achieve the goals of the CSA and fulfill the U.S.'s obligations under international treaties in an ever changing milieu of diversion, abuse and illicit trafficking of drugs. These modifications include, among others, the Narcotic Addict Treatment Act of 1974 (Pub. L. 93–281), The Psychotropic Substance Act of 1978 (Pub. L. 95–633), the Diversion Control Amendments of 1984 (Pub. L. 98–473), the Anti-Drug Abuse Act of 1986 (Pub. L. 99–570), and the Anabolic Steroids Control Act of 1990 (Pub. L. 101–647).

In executing the CSA mandates and international treaty obligations related to the registration and control of the manufacture, distribution, dispensing, importation and exportation of controlled substances, Congress and the DEA (and its predecessor agency the Bureau of Narcotics and Dangerous Drugs, BNDD) established an identified work force and programs generally known as the DCP. Within DEA, the programmatic authority and responsibility for this effort is exercised by the Office of Diversion Control (OD) using the Congressionally authorized resources identified in the budget category DCP which are committed to those responsibilities and programs.

Historically, for the purposes of budget formulation and appropriation, only resources, along with their individual ''modular'' or overhead costs, devoted to diversion control efforts, were administratively identified as the DCP within the annual budget request to Congress. Other resources which support a broad range of DEA activities, including ''Diversion Control'', were carried for administrative purposes in the budget formulation and appropriation process under other budget categories, such as legal support. For example, DEA's Office of Chief Counsel, which is carried as part of the DEA Budget Category ''Management and Administration,'' exists primarily to provide legal support to the entire agency. Although that office has a full section devoted to ''Diversion Control'' support, such as legal interpretation, DEA registration revocation actions, and quota hearings, no resources of the Office of Chief Counsel are included in the ''DCP'' category of DEA's annual budget submission, since the overall Chief Counsel function is not primarily devoted to Diversion Control and is carried elsewhere in the DEA budget.

Since 1970, the CSA has provided that the Attorney General ''is authorized to promulgate rules and regulations and to charge reasonable fees'' relating to the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances. See 21 U.S.C. 821 and 958. Prior to 1993, the fees collected solely for registration to handle controlled substances were deposited into the general fund of the United States Treasury; they did not accrue to DEA.

In October 1992, during the annual Congressional appropriation process, Congress established the ''Diversion Control Fee Account.'' This was an amendment to the Department of Justice and Related Agencies Appropriations Act, and did not purport to realign or curtail any DEA programs, activities, or priorities; the amendment established legislatively the future funding mechanism for Congressionally approved resources related to ''the operation of the diversion control program.'' In setting the parameters for this funding mechanism, Congress identified the functions and resources within DEA which have historically been assigned to the administratively determined budget category ''DCP'', as submitted by DEA, the Department of Justice, Office of Management and Budget, and the President of the United States. Any future Congressionally approved adjustment of resources devoted to these components, or Congressionally approved realignment of appropriated resources from other DEA budget categories which are related to the registration and control of the manufacture, distribution, and dispensing of controlled substances and herein identified, will be encompassed in the Diversion Control Fee Account.

Diversion Control Program and Responsibilities

The components of the DCP have their basis in the CSA and international treaties to which the U.S. is a party. The resources approved by Congress are directed toward these responsibilities. The components of the DCP as they relate to the specific provisions of the CSA and the treaties are set forth below:

Regulatory Development and Maintenance

(21 U.S.C. 821—Rules and regulations.)

The CSA sets the requirements with respect to the control of the manufacture, distribution, and dispensing of controlled substances. Development and refinement of the regulations set out in 21 CFR Parts 1301–1308, 1311–1312, and 1316 are an essential part of the DCP, for they establish the specific procedures and guidelines that are necessary to implement the requirements of the CSA.

The control of drug diversion and abuse is not static. Shifts in health care practices, patterns of diversion and drug abuse, drug treatment, industry practices, and technology present an ever-changing milieu of diversion and abuse. Regulatory changes are necessary to adjust to these shifts. The Attorney General (AG) is authorized to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances. See 21 U.S.C. 821. The AG has delegated that authority to DEA. See 28 CFR 0.100(b) and 0.104.

DEA, through the DCP, is responsible for regulatory development or change. In order to carry out these functions DEA employs a specialist staff that identifies the need for regulatory change or development, performs the research and data collection in support of changes, promulgates the regulatory changes, and provides guidance to DEA personnel, other regulatory and law enforcement personnel, and industry regarding the regulatory requirements.

Activities in support of these functions include meetings and national conferences with representatives of the regulated industry, representatives of the law enforcement community, and other interested parties to discuss the current regulatory program and identify areas that may need to be addressed. There are five different industry workgroups: Practitioner, Distributor, Manufacturer, Pharmacy, and Mid-Level Practitioner. Meetings with each workgroup are scheduled on a regular basis. In addition, separate national conferences are held approximately every 24 months for the pharmaceutical manufacturers and distributors and for drug control personnel. In addition to the administrative work required to prepare for such meetings and conferences, including the solicitation of agenda topics from the attendees, DCP personnel conduct research and prepare position papers and briefing materials regarding the various agenda topics.

If regulatory change is needed, DCP personnel conduct the research, reviews of scientific and technical literature and other Federal and state laws and regulations; collect data; and consult with industry, law enforcement/ regulatory sources, or other interested parties. Following drafting and publication of the notice of proposed rulemaking, personnel review all comments and determine whether substantive issues have been raised that require adjustment to the proposed regulations. In drafting the final rule, issues raised in the comments are addressed and, where appropriate, adjustments to the proposed regulations are made to accommodate any substantive issues. Following establishment of new regulations, DCP staff prepare and distribute interpretations, guidelines and informational material regarding the new requirements for DEA personnel, industry, and other law enforcement/ regulatory personnel. As needed, direct consultations to clarify the requirements of new regulations are also held with industry and law enforcement/ regulatory groups.

In addition to the activities relating to regulatory changes, DCP personnel respond to requests from industry and law enforcement/regulatory personnel for information and interpretation of existing regulatory requirements and policy; respond to congressional inquiries regarding issues related to controlled substances; draft legislation relating to controlled substances; and prepare testimony and briefings for congressional hearings on the diversion of controlled substances.

Classification of Substances

(21 U.S.C. 811, 812, and 813—Authority to Control; Authority and criteria for classification of Substances; Schedules of Controlled Substances; Treatment of analogues; 1961 Convention, Articles 2 and 3—Substances under control; Changes in the scope of control; 1971 Convention, Articles 2 and 3—Scope of control; Control of preparations)

The authority to control substances of abuse is central to the effective application of the CSA and DEA's programs relating to the registration and control of the manufacture, distribution and dispensing of controlled substances. The CSA provides the criteria for the classification of substances into five schedules of control. The DCP collects, monitors, and analyzes data for recommendations to add, transfer between, or delete from such schedules any drug or other substance. These activities include the development of methodologies to predict and confirm the abuse potential of substances and combinations of substances; the application of scientific knowledge concerning the actual and relative potential of abuse of substances; the collection and appraisal of international scientific literature and information from DEA, and other Federal, state, local and foreign sources regarding the abuse, abuse and trafficking of substances; and the maintenance of liaison and information exchange with the Department of Health and Human Services (HHS) and other domestic and international agencies, such as the World Health Organization and the International Narcotics Control Board, having similar scientific, regulatory, law enforcement, and drug control interests.

In addition to collecting information regarding the control of substances, DEA provides scientific and other information for international, national, and state scheduling of substances; responds to scheduling petitions and reviews and determines the status of controlled, excepted, excluded, or exempted drugs and analogues; and provides training, guidance, expert testimony, assistance and/or information on drug control and classification to law enforcement agencies, the scientific community, industry, the public, and other interested parties.

DEA has initiated over a dozen drug reviews of both controlled and non-controlled substances in the recent past. Examples of controlled substances reviewed are fenfluramine, methylphenidate, flunitrazepam, quazepam, dronabinol, and marijuana (to Schedule II for medical or industrial use). The review of noncontrolled substances being considered for control include ketamine, butorphanol, gamma hydroxy butyrate, and carisoprodol to determine if control of the manufacture, distribution, and dispensing of the substances is appropriate. Each review requires a comprehensive study of the national and international scientific literature regarding the properties and use of the drugs, the current national and international controls over the drugs, data regarding annual production and consumption, and information from domestic and international law enforcement, regulatory, and medical sources regarding the diversion, trafficking, and abuse of the drugs. As appropriate, action may be taken, through formal rulemaking on the record with opportunity for hearing, to schedule, reschedule, or decontrol the drugs.

Identification of Controlled Substances

(21 U.S.C. 825—Labeling and packaging; 1961 CONVENTION, ARTICLE 30—Trade and distribution; 1971 CONVENTION, ARTICLE 10—Warnings on packages)

In conjunction with the classification of substances as controlled under the law, the CSA and international treaties require that such substances contain certain identifying symbols, warnings, and seals. DCP personnel monitor compliance with the requirements of 21 U.S.C. 821 as promulgated by 21 CFR 1302 pertaining to labeling and packaging requirements by reviewing 200 to 300 labels per year which are collected by DEA or are submitted to DEA by manufacturers. Additionally, DCP personnel provide interpretation of the requirements to registrants and Federal and state authorities, and review and enforce the requirements on an ongoing operational basis.

Registration

(21 U.S.C. 822, 823, 824, 957, 958—Persons required to register; Registration Requirements; Denial, revocation, or suspension of registration; 1961 Convention, Article 30—Trade and distribution; 1971 Convention, Article 8—Licenses)

Another component of the DCP is the registration of those persons authorized to manufacture, distribute, dispense, import, or export controlled substances. The CSA requires that every person who manufactures, distributes, dispenses, imports, or exports a controlled substance shall obtain a registration, and establishes the requirements for such registration. The CSA also includes provisions relating to the denial, revocation, or suspension of registrations. The international treaties require that the signatories allow trade and distribution of controlled substances only under license.

DEA manages and operates the registration and reregistration process for over 900,000 handlers of controlled substances. DCP personnel process an average of 300,000 renewal applications and 48,000 new applications per year. The process includes reviewing the forms, processing and accounting for the fees, entering the appropriate data into the registration system, obtaining corrections from applicants when appropriate, and referring the applications to the appropriate office for review of the applicant's qualifications and bona fides for registration. Applications for the bulk manufacture or importation of Schedule I and II controlled substances require the preparation of notices of application for publication in the Federal Register. New applications to conduct research with Schedule I controlled substances and for narcotic treatment programs must be evaluated and considered in conjunction with the Food and Drug Administration. Further, all new applications for registration must be examined and evaluated with the appropriate state authorities to ensure that the applicant has been granted the appropriate state authorization.

DCP personnel process over 150,000 requests per year from registrants for modification of registration (name, address, drug schedule changes, etc.), voluntary retirement of registration, or for order forms; respond to over 10,000 telephonic inquiries per month from applicants and registrants regarding registration; respond to Freedom of Information Act and Congressional requests regarding registrant information; and prepare affidavits and certification statements regarding the registration status of DEA registrants and applicants for use in DEA hearings and other proceedings.

DCP personnel also prepare and distribute registrant information to other DEA elements, Federal, state and local regulatory personnel, and registrants for the purpose of confirming registrant status; and initiate studies and new systems to support and enhance the registration program.

Records and Reports

(21 U.S.C. 827, 828 AND 829—Records and Reports of Registrants; Order Forms; Prescriptions; 1961 CONVENTION, ARTICLES 19, 20, AND 30—Estimates of drug requirements, Statistical returns furnished to the Board; Trade and distribution; 1971 CONVENTION, ARTICLES 11, 16 AND 9—Records and Reports to be furnished by the parties; Prescriptions)

The CSA and international conventions provide for the maintenance of a system of records and accountability for controlled substances by authorized handlers. Registrants are required by the CSA to maintain records and inventories of controlled substances manufactured, received, distributed, dispensed, imported, exported, or otherwise disposed of; make such records available for inspection and copying; and make certain reports to the Attorney General (DEA).

Establishment and enforcement of the record-keeping and reporting provisions of the CSA and examination of the records to identify potential diversion constitute a substantial part of the DCP activities. With respect to records, program personnel conduct comprehensive cyclic investigations of registrants' records and inventories to ensure the integrity of the diversion control system. Investigations of registrants for failure to comply with the record-keeping and reporting provisions of the CSA are conducted and the appropriate administrative, civil, or criminal action is pursued. Additional discussion of these investigations can be found in the section relating to Enforcement Activities.

DCP personnel conduct a variety of duties utilizing various reports required to be submitted by registrants. As part of the closed system to control the manufacture, distribution and dispensing of controlled substances, registrants must make reports to DEA regarding the bulk or dosage form manufacture of all Schedule I and II controlled substances, all narcotic controlled substances in Schedules III–V, and certain psychotropic controlled substances in Schedules III and IV; and the repackaging and relabeling of and the distribution of all Schedule I and II controlled substances and all narcotic controlled substances in Schedule III. In addition, registrants must provide copies of order forms documenting the distribution of Schedule I and II controlled substances, excessive purchase and suspicious order reports, theft or loss reports, and reports of the disposal of controlled substances.

The order forms, excessive purchase, suspicious order, and theft or loss of reports are reviewed by DCP personnel, both on an individual basis and with reference to other reports that have been filed to determine whether further investigation is required. Theft or loss data are also electronically compiled and tracked to allow for identification of suspicious or unusual local, regional, or national trends in the theft or loss of controlled substances.

Manufacturing reports are reviewed by DCP personnel to determine if registrants are complying with quota requirements and to determine various trends and availability of substances. The information is then extracted and collated for domestic manufacturing reports required by the U.N. conventions.

DCP personnel receive and process over 9,500 reports per year regarding controlled substances distributions, commonly referred to as ''ARCOS'' reports, from approximately 1,400 registrants. The reports contain data regarding approximately 14,000,000 controlled substances transactions per year. Each report must be processed, corrected, and entered into the ARCOS system. From this, as mandated by the CSA, DEA operates a diversion targeting system for DEA and state and local officials. In addition, special reports regarding regional distribution and distributions to specific registrants are generated as needed.

Production Quotas

(21 U.S.C. 826—Production Quotas for Controlled Substances; 1961 CONVENTION, ARTICLE 21—Limitations on Manufacture and Importation; 1971 CONVENTION, ARTICLE 5—Limitation of use to medical and scientific purposes)

The CSA and international treaties require that DEA determine the total quantity of certain controlled substances that is necessary for medical, scientific, research, and industrial use in the U.S. and that the manufacture of such substances be limited accordingly through a system of production quotas.

In fulfilling this mandate, the DCP collects and analyzes information regarding the legitimate use, trafficking and abuse of Schedule I and II controlled substances in the U.S. from such sources as manufacturing and distribution reports, treatment and prescription utilization data, case data, drug abuse indicators, and HHS estimates of medical use. Based on the information collected, more than 1200 manufacturing and procurement quotas are established annually for Schedule I and II controlled substances. Aggregate production quotas are then determined for each basic class of controlled substance in Schedule I and II. Notices regarding the aggregate production quotas are provided to the Federal Register for publication. The DCP monitors the manufacture, utilization, trafficking and abuse of controlled substances against the quotas, processes requests for adjustments to specific quotas, and, where appropriate, drafts notices adjusting specific quotas for publication in the Federal Register. To facilitate the quota process, DCP staff also conduct training seminars for the industry. The DCP conducts domestic and international reviews of controlled substances utilization trends and coordinates with the UN control and scientific bodies regarding such trends, and prepares reports concerning the domestic manufacture of controlled substances.

Import and Export of Controlled Substances

(21 U.S.C. 952, 953, 954 AND 958—Importation of controlled substances; Exportation of controlled substances; Transshipment and in-transit shipment of controlled substances; 1961 CONVENTION, ARTICLE 31—Special provisions relating to international trade; 1971 CONVENTION, ARTICLE 12—Provisions relating to international trade)

The CSA and the international treaties require that controlled substance imports and exports be subject to registration requirements; be allowed only when necessary to provide for the medical, scientific, or other legitimate needs of the United States; and be subject to a system of permits or declarations for each individual importation or exportation. Further, the U.N. International Narcotics Control Board (INCB), which administers the international conventions, establishes annual ''estimates'' of the amount of

Schedule I and II narcotic drugs that each country may import.

In addressing these requirements, the DCP operates a system of declarations and permits for imports and exports. Under this system, DCP personnel receive and examine requests for permission to import or export controlled substances to determine if they are in compliance with the CSA, the international treaties, and the laws of the country that is involved in the transaction. DCP personnel maintain records of all controlled substance imports and exports, and of international treaty and specific foreign country provisions relating to the import and export of controlled substances. DCP personnel also monitor all Schedule I and II narcotic imports and exports to insure that they are consistent with the legitimate needs of the United States and the INCB estimates. If an import or export appears inconsistent with legitimate need or will exceed the estimates, DCP personnel will examine the circumstances of the request to import or export. DEA will subsequently either pursue a course of action to comply with the international obligations or initiate proceedings to deny the request to import or export.

As required by the international conventions, DCP personnel prepare reports of controlled substances imports and exports for submission to the UN control bodies; provide support and assistance to foreign governments in the establishment and maintenance of import/export control programs; and coordinate with foreign authorities and the INCB in monitoring the international commerce of controlled substances.

International Activities

The registration and control of the manufacture, distribution, and dispensing of controlled substances is not restricted by domestic borders. The CSA's system of controls was not developed, and is not administered, parochially; it is part of a global system comprised of international laws and obligations designed to establish a consistent, worldwide structure of control of the manufacture, distribution, and dispensing of controlled substances to prevent the compromise of any country's systems of controls by preventing the diversion of pharmaceutical controlled substances from one country for abuse in another. The international treaties mandate that each party to the conventions shall establish a domestic program of controls relating to the registration and control of the manufacture, distribution (including import/export), and dispensing of controlled substances. The treaty provisions include requirements for licensure, scheduling, quotas, records and reports, import/export investigation, control and cooperation, prescriptions, penalties, and mutual assistance. The international community, through the International Narcotics Control Board and the Commission on Narcotic Drugs, continuously monitors the workings of the treaties and recommends and adopts resolutions to maintain the safeguards against trafficking, with which the United States is obliged to comply. The United States participates in the debates and discussions to insure that its interests are considered.

The United States' obligations under the conventions are recognized in the specific language of the CSA and the implementing regulations (see 21 USC 801, 801(a), 811(d)(1), 823(a) and 958(a), and 21 CFR 1307.02). Further, upon the United States becoming a signatory to the Psychotropic Convention, Congress acknowledged that before the Senate could ratify the convention, the CSA would have to be amended to bring it into compliance with the requirements of the convention, acknowledging that the conventions are an integral part of the United States' programs regarding the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances. By implementing the CSA and ratifying the international treaties, Congress recognized that a strong domestic program relating to the registration and control of the manufacture, distribution, dispensing, import, and export of controlled substances is inter-dependent on the establishment and maintenance of strong international controls.

In meeting the U.S. treaty obligations, the DCP participates in international policy activities, including the development and formulation of United Nations (UN) resolutions, position papers, other background documents, and briefing materials relating to controlled substances for use by U.S. delegations to several UN bodies. DCP personnel also participate in a number of international conferences and meetings related to drug control. For example, in Fiscal Year (FY) 1995 there were two such conferences which were organized, sponsored, and funded jointly by DEA and the European Union (EU): the first was held in Austria to improve the design and administration of, and cooperation regarding, controlled substance and chemical controls in the Commonwealth of Independent States (CIS) [the former Soviet Republics] which was attended by representatives from the CIS, EC and the INCB. The second conference was held in Istanbul regarding illicit drug traffic, the diversion of psychotropic substances, and chemical controls in the Middle East, which was attended by national authorities in the region, the EC, Interpol, and the INCB. The DEA share of the costs for these multi-topic conferences (approximately 50% of total conference cost) was split between the free account and appropriated funds in approximation to the subject matter covered. In FY 1995, DCP personnel also participated in the annual Commission on Narcotic Drugs meeting in Austria, a meeting with EC officials in Spain to discuss programs to control the manufacture and distribution of steroids, and an INCB drug training seminar for African drug control authorities regarding the establishment of effective national controls of the manufacture and distribution of controlled substances. The fee account expenditures for these activities totaled less than $150,000 in FY 1995.

In addition to those activities directly related to the administration of the controls under the international conventions, DCP personnel conduct conferences and operational initiatives with representatives from the appropriate foreign governments regarding specific controlled substances to provide and collect information regarding the use and abuse of the substances and, where necessary, to promote the strengthening of controls of the manufacture, distribution, dispensing, import, and export of the substances to prevent their diversion from international sources into the United States. Recent examples include meetings with officials of several European governments to discuss programs relating to pain management, the distribution and use of methylphenidate, narcotic treatment programs, and the medical use of marihuana, and meetings with officials in Colombia and Mexico regarding the manufacture and distribution of products containing flunitrazepam which are being illegally distributed and abused in the U.S.

The DCP compiles and analyzes information on the U.S. production and distribution of, and estimated needs for narcotic and psychotropic substances, as well as trafficking data, and prepares periodic reports for submission to the UN.

The above demonstrates the variety of international activities that fall within the purview of the Diversion Control Fee Account by virtue of the United States' obligations under the international conventions relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances. However, these activities, as funded through the fee account, are limited to those carried out by personnel assigned to domestic offices of DEA; expenses of diversion personnel assigned to overseas positions are funded by appropriated funds, not through the Diversion Control Fee Account, even though they may conduct activities in support of the DCP.

Enforcement Activities

(21 U.S.C. 841, 842, 843, 853, 875, 876, 878, 879, 880, 881, 883, 886, 960, 961, and Related Penalty and Enforcement Proceedings Sections—Penalties for violations of the CSA, and related enforcement proceedings; 1961 CONVENTION, ARTICLES 36 AND 37—Penal provisions; Seizure and Confiscation; 1971 CONVENTION, ARTICLE 22—Penal provisions)

The DCP has responsibility for monitoring, in large part through investigations, all activities related to legitimately manufactured substances for which registration is required or excepted and where those controls are circumvented or disregarded. As such, it initiates and conducts investigations of individuals and institutions which are suspected of violating the CSA or which undermine public confidence in the safety and authenticity of controlled substances found within pharmaceutical and health care channels. The targets and types of investigations conducted by the DCP pursuant to 21 U.S.C. 821 are identified below.

(1) Registrants and their agents or employees suspected of diverting controlled substances from legitimate channels;

(2) Persons who engage in the smuggling, theft, robbery and/or trafficking of pharmaceutical controlled substances, including, where appropriate, identifying and immobilizing their sources of supply, whether domestic or foreign, through enforcement of the controls relating to the manufacture, distribution, import, export, and dispensing of controlled substances;

(3) Persons, both registered and non-registered, who conduct controlled substances activities for which they do not have the required DOA or state authorization;

(4) Persons who obtain pharmaceutical controlled substances from registrants through fraud, deceit, or circumvention of the controls on manufacturing, distribution, or dispensing, i.e. fraudulent use of another person's DEA registration number to obtain controlled substances, doctor shoppers, prescription forgers, etc.;

(5) The trafficking by non-registrants in controlled substances which are fraudulently promoted as legitimate therapies (such as ''herbal remedies'' sold ''under the counter'' which actually contain a controlled substance);

(6) Persons who use their DEA registrations to assist in the diversion or misuse of controlled substances for other than medical purposes, such as health care fraud, self-abuse, trading controlled substances for non-medical purposes, etc.

A majority of the efforts of the field elements of the DCP is devoted to the investigation of manufacturing, distributing, dispensing, importing, and exporting activities under the requirements of the law and regulations and to collecting evidence and preparing material in support of administrative, civil, and criminal proceedings against violators. The investigations conducted by DCP personnel fall into three categories.

Pre-Registrant Investigations

The CSA requires that all individuals and institutions proposing to manufacture, distribute, or dispense controlled substances must obtain a registration from the Attorney General who is further authorized to inspect the establishment of a registrant or applicant for registration. DEA Diversion Investigators and registration personnel must insure that all applicants for registration and reregistration are authorized to conduct the activities for which they are applying within their jurisdiction. DEA Diversion Investigators are required to inspect the physical premises, interview appropriate applicant personnel, conduct employee background checks, and review record-keeping and security procedures for manufacturers, distributors, importers, exporters, and narcotic treatment programs to determine if the proposed registration is consistent with the public interest.

Cyclic Investigations

In exercising the controls of the CSA, DCP personnel conduct periodic investigations of all controlled substance manufacturers, distributors, importers, exporters, and narcotic treatment programs for the purpose of (1) ensuring that the registrants are complying with the requirements of the CSA by maintaining effective controls and procedures to prevent the diversion of controlled substances, and (2) detecting criminal or civil violations by such registrants or practices which undermine or neglect such controls. See 21 CFR 1316.01–1316.13. In the course of conducting such investigations, DCP personnel perform a wide variety of activities. These include taking a physical inventory of controlled substances; interviewing the appropriate registrant personnel; reviewing records relating to the receipt, distribution, and disposal of controlled substances; verifying transactions against the records of other registrants; reviewing manufacturing/distribution records and reports to ascertain their accuracy and validity; inspecting and testing the adequacy of physical and procedural safeguards to detect and deter diversion; identifying and pursuing questionable or illegal distributions; and collecting samples of controlled substances.

Complaint Investigations

Complaint investigations are those investigations that may result in an administrative, civil, or criminal complaint being filed against the subject for violations of the CSA or regulations. Complaint investigations are initiated upon information or evidence received from public sources, other law enforcement or regulatory personnel, or review of registrant records or reports, etc., that violations of the CSA have, or may have, occurred. DCP personnel undertake investigative activities to determine the type and extent of the violations, the identity of the violators, and the source and methods of diversion. The types of investigative activities performed include: audits of controlled substance records, examination and collection of related business records, prescription surveys, interviews and debriefings, undercover purchases of evidence, reviews of manufacturer/distribution records and reports, service of administrative inspection warrants and search warrants, and intelligence gathering and analysis.

The conduct of complaint investigations often involves cooperation and coordination with other Federal, state, and local law enforcement and regulatory officials and occasionally international officials. In some instances, investigations may also involve cooperation and coordination with members of the legitimate drug industry. Investigators, in conjunction with other agencies, evaluate and pursue evidence of health care fraud, falsification of records, and other crimes that can establish key elements of proof that controlled substance violations have occurred.

Upon completion of the investigation, a number of actions may be undertaken depending on the severity of the violations. The case may be referred to the United States Attorney's Office or State's Attorney for civil or criminal prosecution. Violators may be referred for an enforcement hearing pursuant to 21 U.S.C. 883 and 21 CFR 1316.31, at which the registrant is provided with details regarding alleged violations and afforded the opportunity to present his/her views and proposed actions to come into compliance with the law. The investigation may result in an administrative hearing, pursuant to a show cause order, to determine whether registration of the person should be revoked or denied.

Cooperative Efforts

(21 U.S.C. 801, 801a, 872, and 873—Congressional findings; Education and research programs of Attorney General; Cooperative Arrangements; 1961 Convention, Preamble; 1971 Convention, Article 21—Action against the illicit traffic)

DEA is not alone in the efforts to combat the diversion of controlled substances. There are related authorities regarding the control of the manufacture, distribution, dispensing, import, and export of controlled substances in other Federal, state, and local regulatory and law enforcement agencies. In addition, the national and local organizations representing the pharmaceutical and health care industry actively participate in diversion control efforts. Internationally, there are foreign government agencies and international organizations, such as the United Nations International Narcotics Control Board and the Drug Control Program which administer the requirements of the international conventions; the World Health Organization, which is involved with international drug scheduling matters; and Interpol which helps coordinate international law enforcement activities directed against the international traffic in licitly produced controlled substances, committed to the establishment and maintenance of consistent international control of the manufacture, distribution, and dispensing of controlled substances. The CSA and the international treaties, recognizing the need for a coordinated effort against diversion, demand cooperative efforts between the interested parties.

As noted, the DCP engages in extensive cooperative efforts with other officials involved in diversion control activities. DCP personnel meet regularly with state and local law enforcement and regulatory personnel to share information, identify areas of concern, and coordinate joint initiatives and investigations. DCP personnel also provide special training regarding controlled substances diversion to local regulatory and law enforcement personnel and hold a national conference regarding the control and diversion of controlled substances approximately every 24 months, to which regulatory and law enforcement administrators from each state and territory are invited. DCP personnel also engage in a variety of activities with UN bodies, international organizations, and foreign governments in meeting the U.S. responsibilities under the international conventions.

In addition to its activities with other law enforcement and regulatory agencies, the DCP maintains an active program of liaison with the pharmaceutical industry. DCP activities in this area include scheduling biannual workgroup meetings with five different industry groups (manufacturers, distributors, pharmacies, practitioners, and mid-level practitioners) and a national industry conference held approximately every 24 months, which is attended by representatives from the national associations representing the controlled substances industry and by individual registrants. DCP personnel also prepare and conduct training sessions at universities for medical and pharmacy students, make presentations to industry conferences and meetings, participate in the development of pharmacy certification examinations; and draft for publication articles regarding the controlled substances laws and programs.

To assist registrants in understanding and complying with the controlled substances laws, DCP personnel create informational manuals (Pharmacist's Manual, Practitioner's Manual, Mid-Level Practitioner's Manual, and the Security Outline to the Controlled Substances Act) which are distributed to registrants. Where new laws or regulations require, specific guides and informational circulars are prepared and made available to the affected parties. DCP personnel also meet directly with individual registrants to provide information and assistance regarding the controlled substances laws.

New Initiatives

Since publication of the proposed rule in 1993, DEA has established two new initiatives, the National Forensic Laboratory Information System (NFLIS) and the Tactical Diversion Squads (TDS), which were not previously identified in the rulemaking. Each of these initiatives will enhance the DCP's ability to administer and enforce the program relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances, and investigate and act against persons who would violate those controls, as discussed above. Congress has been notified of these new initiatives and has approved funding for them.

The collection of accurate and validated data concerning the abuse of controlled substances and the scientific review of actual or potential drugs of abuse is a necessary function for scheduling controlled substances, setting quotas for manufacturing levels, and to provide more effective leadership in establishing drug policy under the CSA. The NFLIS will provide in a single system information from analyzed drug evidence associated with criminal activity collected from non-Federal forensic laboratories across the country. That information must currently be obtained by separate contacts with individual laboratories across the country. The system will also enhance the investigative ability of DCP personnel by allowing efficient and quick identification of local, regional, and national division and abuse trends and distribution patterns of diverted and abused controlled substances.

The TDS program is a modernization of a program that was operated in the late 1970's and early 1980's in as many as 24 states in a form designed to address present diversion trends. DEA has received approval to fund the formation of two enforcement teams consisting of Federal, state, and local law enforcement personnel fully dedicated to the investigation and prosecution of persons involved in the diversion of controlled substances from legitimate manufacturing, distributing, and dispensing sources. The program will allow the unification of separate, and sometimes disparate, Federal, state, and local information, authorities, and enforcement programs; provide State and local law enforcement authorities with assistance in developing more effective enforcement programs against diversion; and help coordinate the various jurisdictional responsibilities of agencies that otherwise may hinder investigations and prosecutions of those involved in the diversion of controlled substances. Funding has also been provided to establish another 2 to 3 TDS's in 1997.

Budget and Appropriations

In order to accomplish the mandates of the CSA and the international treaties, Congress in past years authorized and appropriated funds within the ''Diversion Control Decision Unit'' of the DEA Salaries and Expenses Appropriation. The President's annual budget request to Congress contained proposed appropriations for the Department of Justice, including the DEA. DEA's budget requests are required to meet OMB policy guidelines for budget preparation. [OMB Circular No. A–11]

Once Congress and the President approve the appropriation level, funds are made available from the appropriate source in the U.S. Treasury. Prior to fiscal year 1993, registration fees collected under the CSA were deposited into the general fund of the U.S. Treasury. Prior to fiscal year 1993, registration fees collected under the CSA were deposited into the general fund of the U.S. Treasury and scored to DEA's Salaries and Expenses Appropriation. [31 U.S.C. 3302; 21 U.S.C. 821; OMB Circular No. A–25 (1959)].

On October 6, 1992, the President signed the Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L. No. 102–395, 102d Cong. 2d Sess., 106 Stat. 1828, 1835 (1992) (''Appropriations Act'') (DEA Salaries and Expenses Appropriation). Section 111(b) of the Appropriations Act established in the U.S. Treasury, for fiscal year 1993 and thereafter, a separate account, to be known as the Diversion Control Fee Account. The Appropriations Act directed that ''[n]otwithstanding [a]ny [o]ther [p]rovision of [l]aw * * *] fees charged by the Drug Enforcement Administration under its Diversion Control Program shall be set at a level that ensures the recovery of the full costs of operating the various aspects of that program''. Congress specified that the amount ''required to be refunded'' to DEA from the Diversion Control Fee Account for fiscal year 1994 and thereafter ''shall be refunded in accordance with estimates made in the budget request of the Attorney General for those fiscal years''.

For fiscal year 1993, in order to provide the opportunity to establish and implement a new fee structure to meet the legislative requirement, Congress appropriated funds, as it had in past years, for the DCP from the general fund of the U.S. Treasury, less $12 million. The $12 million was to be funded through increased CSA registration fees established as a result of the creation of the Diversion Control Fee Account in 1993. Congress further directed in the Appropriations Act that ''[a]ny proposed changes in the amounts designated in said budget requests shall only be made after notification to the Committees on Appropriations of the House of Representatives and the Senate fifteen days in advance''.

The fiscal year 1997 resources for the DCP, as authorized by Congress, include 598 full-time employees charged with the responsibility for overseeing the activities of one of the largest pharmaceutical industries in the world to ensure controlled substances are manufactured, imported, exported, distributed, and dispensed for legitimate medical and scientific reasons.

These resources includes a staff of Diversion Investigators, Special Agents, Administrative Law Judges, program analysts, pharmacologists, chemists, information systems specialists, registration assistants, examiners, and management and support staff assigned to field offices across the country and assigned to DEA Headquarters. Overhead and program expenses include salaries and employee benefits (retirement, health and life insurance); travel; rent and utilities; equipment and supplies, including vehicles, computers, communications, furniture, etc.

In the overall Budget process, the estimated cost per full time employee is based on a module which includes salary and overhead items. Modular costs are part of the specific Congressionally approved positions, as they are with the positions within the rest of the DEA Budget. For example, when Congress authorized 588 positions for the DCP in 1994, included therein are the modular costs of maintaining those positions (such as rent, equipment, per diem and travel, background investigation costs, etc.)

There are separate DEA activities which support the DCP, but are covered elsewhere in the DEA Salaries and Expenses Budget and are therefore not supported by CSA Registration Fees. Examples of this include: Support provided by the Attorneys in DEA's Office of Chief Counsel Diversion/Regulatory Section; laboratory Services support; DEA Automated Data Processing systems support (except ARCOS and CSA); Office of Training staff, DEA Management and Administrative support; Office of Congressional and Public Affairs; Intelligence Support and Diversion Investigators assigned overseas.

Resources not initially identified in the 1993 Federal Register establishing the fee (57 FR 60,148 and 58 FR 15,272) which have been subsequently approved and funded through CSA registration fees as part of the above discussed DCP components include: (1) Congressional approval in FY 1994 for 11 Special Agents to enforce the Anabolic Steroid Control Act; (2) Transfer of 7 positions and associated costs previously provided for in the DEA Salaries and Expenses Budget for operation of the ARCOS and CSA data systems—these systems exist at DEA solely to support the DCP; (3) Authorization to establish a National Forensic Laboratory Information System (as discussed above); (4) Authorization to expand assistance and cooperation with state and local law enforcement with the establishment of Tactical Diversion Squads (as discussed above).

While DEA's budget is formulated, reviewed, and approved on an annual basis, the majority of DEA registrations, from which the fees to fund DCP activities are derived, are issued for a three year term. Further, the registrant population is not evenly distributed across the three year registration cycle; current figures indicate approximately 320,103 renewals will be received for October 1996 to September 1997, 305,200 renewals for October 1997 to September 1998, and 290,698 for October 1998 to September 1999. Thus, attempting to calculate the fee on an annual basis would preclude a uniform application of the costs of the DCP for each year across either the entire registrant population or the registrants that would renew in each of the individual years. Either a return to a one year registration term for all registrants or a multi-year fee schedule would be necessary.

Rather than establish an annual registration, which would impose an enormous burden on both the registrants and DEA, a fee schedule which averages income over three years was adopted. Use of the three year fee schedule allows for (1) uniform application of fees necessary to cover the costs of the DCP across the entire registrant population, (2) accommodation of such factors as inflation and an uneven number of registration renewals in each of the individual years, and (3) minimizing the administrative burden associated with frequent adjustment to the fee schedule. Use of a multi-year cycle does, however, require that estimated fee collection and funding authorization figures be used in calculating the fees.

During the transition to the Diversion Fee Account (DFA) system in FY 93, funding was provided from the general fund in the United States Treasury to cover the period leading up to the implementation date of the DFA. Because the rule implementing the Diversion Fee Account system became effective two months early, a $7 million surplus resulted. Additional surplus funds have accrued as a result of DEA estimates of the costs of the program, as reflected in the Congressional Budget Authorization, that were greater than the actual expenses, in part due to hiring constraints within DEA that resulted in a diversion investigator vacancy rate of between 50 and 70 positions from 1993 to present; and DEA estimates of fee income that were less than the actual income. As a result, the DFA surplus was 45 million dollars as of September, 1996.

While some surplus in the DFA is necessary to cover the variations in the fees collected each year and the need for some carry-over funds from one fiscal year to the next, the current surplus exceeds the amounts necessary to insure the fiscal continuity of the DCP. However, the surplus will delay the need for any fee increases for a number of years; based on out-year projections for collections and appropriations, the surplus will begin to be drawn down in FY 98 and will be exhausted by FY 2001.

Conclusion

In sum, DEA is mandated to maintain a multi-faceted endeavor encompassing scientific, cooperative, regulatory, criminal, and international programs to prevent the diversion of controlled substances to illicit uses. The DCP has been authorized and has served for the past 25 years as an effective vehicle for carrying out these mandates. Creation of the Diversion Control Fee Account in 1993 altered the funding mechanism of the program, but not its duties, objectives, or priorities.

The Acting Deputy Administrator of the Drug Enforcement Administration hereby certifies that this rule will not have a significant economic impact upon entities whose interests must be considered under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The majority of DEA registrants are practitioners, pharmacies, and hospital/ clinics, for whom the annual impact of the fee increase is $50.00 per registrant. Further, the total annual impact of the fee increase for the entire registrant population is less than $50 million. However, consistent with the principles of the Regulatory Flexibility Act, DEA gave consideration to alternative approaches to the fee schedule.

Since 1971, the CSA has permitted the Attorney General to collect fees relating to the registration and control of the manufacture, distribution, import, export and dispensing of controlled substances (21 U.S.C. 821 and 958). DEA and its predecessor agency have collected such fees pursuant to a schedule based upon the five basic activities cited in the law. That fee schedule was proposed for public comment as part of the regulations to implement the CSA which were finalized in 1971. The ration of fees was: A distributor's fee is 50% of the manufacturer's fee and a dispenser's fee is 16–20% of the distributor's fee. The fee ratios have remained consistent for the past 25 years and have not been the subject of any substantive comment or objection by the regulated industry.

The Federal Register notice proposing the new fee structure (57 FR 60148, December 18, 1992) specifically noted that this fee schedule was to be continued since the administrative structure to collect it was well established and operating efficiently. There were no practical or substantive alternative proposals submitted on the record regarding the fee structure. Individual interest groups questioned the possibility of alternative structures after the rule was finalized.

In reaching the decision to propose the existing fee ratio as the basis for establishing the new fees, several alternatives were discussed by DEA, including:

(1) Establish a fee based on volume of drugs handled by individual registrants. This was rejected as impractical on several grounds: (a) DEA has no way of determining the volume handled; (b) the volume changes due to a variety of market, health care, and competition issues, thus requiring frequent modification of individual fees; and (c) DEA would be unable to budget due to income fluctuations.

(2) Establish a fee based upon DEA work hours expended per class of registrant. This was rejected as impractical because: (a) Work hours vary from year to year based upon particular drug problems, identification of violative firms, political or mandated priorities, travel restrictions, and many other factors; (b) due to the degree of control established over the past years, less work hours are currently expended at the wholesale level than at the retail level; however indications of diversion at the wholesale level will always receive priority attention. Therefore, this measure would fluctuate year to year, causing an administrative burden on both the registrants and DEA due to frequent fee modifications.

(3) Establish a different fee for various types of practitioner activities (i.e., hospital, medical doctor, dentist, veterinarian, narcotic treatment program, teaching institution). Again , this was rejected as impractical because: (a) Many of the same issues in items 1 and 2 above apply equally; (b) a new administrative system to handle 8–10 registration categories, rather than five, would have to be created, with attendant costs of computer programming, staffing, form design, printing, inventory, etc.; and (c) an entirely new system of criteria would have to be developed to distinguish between categories (i.e., a general practice dentist may prescribe less than a general practice M.D., but an oral surgeon may prescribe more; a small rural hospital/clinic my utilize less controlled substances than an M.D. specialist in cancer treatment).

(4) Charge for Order Forms (DEA 222) used to order Schedule II drugs. This was impractical because: (a) A substantial number of registrants are not registered for Schedule II so an additional fee system would have to be used for registrants in Schedules III–V; and (b) order form volume is not reflective of activity, i.e., practitioners who prescribe rather than dispense do not use many order forms.

Therefore, although various options were considered, none offered a feasible alternative, each would require the establishment of complex, labor-intensive, expensive new programs (the cost of which would be borne by the registrants) with complicated fee schedules that would be difficult to understand and administer. The existing fee structure, which is operating efficiently and is well understood by the registrant population, remained the most suitable choice.

This document has been drafted and reviewed in accordance with Executive Order 12866. The Acting Deputy Administrator of the Drug Enforcement Administration has determined that this is not a significant action under the provisions of Executive Order 12866, section 3(f); accordingly this rule has not been reviewed by the Office of Management and Budget. This action involves the implementation of non-discretionary mandate under the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993 (Pub. L. 102–395), the annual impact of which is less than $100 million.

This action has been analyzed in accordance with the principles and criteria contained in E.O. 12612, and it has been determined that the rule has no implications which would warrant the preparation of a Federalism Assessment.

Dated: December 20, 1996.

James S. Milford,

Acting Deputy Administrator, Drug Enforcement Administration.

[FR Doc. 96–32953 Filed 12–27–96; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF STATE

Bureau of Political-Military Affairs

22 CFR Part 121

Amendment to the International Traffic In Arms Regulations

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule amends the International Traffic in Arms Regulations by removing from the U.S. Munitions List (USML), for transfer to the Department of Commerce's Commerce Control List (CCL), all cryptographic items except those specifically designed, developed, configured, adapted, or modified for military applications (including command, control and intelligence applications).

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Rose Biancaniello, Office of Defense Trade Controls, Department of State, Telephone (703) 812–2568 or FAX (703) 875–6647 ATTN: Regulatory Change, Cryptographic Items.

SUPPLEMENTARY INFORMATION: On October 1, 1996, the Administration announced a decision to transfer from the USML to the CCL all cryptographic items designated in USML Category XIII(b), except those specifically designed, developed, configured, adapted, or modified for military applications (including command, control and intelligence applications). New control procedures and regulations have been developed for the CCL that will provide for strong national security and foreign policy controls to all destinations and end users worldwide for these items. Enhanced interagency review of CCL licenses for these items has been established. This decision does not result in the decontrol of any of these items.

In order to ensure an orderly transition, the Department of Commerce is providing special authorization in a revision to the Export Administration Regulations being published in parallel with this amendment for U.S. persons to ship the remaining balances of outstanding USML licenses and to continue to carry-out overseas activities authorized by other approvals (e.g., distribution agreements), without applying for a new Department of Commerce license, through filing of Shippers' Export Declarations (SEDs) with District Directors of Customs and direct reporting to the Department of Commerce on previously authorized distribution activities. U.S. persons are advised to consult the Department of Commerce's EAR publication for details. Therefore, effective upon the date of this publication, all USML licenses and other approvals issued by the Department of State, in accordance with ITAR, for Category XIII(b) items being removed from the USML are no longer valid.

In carrying out the decision, Category XIII(b) of the USML is amended.

This amendment involves a foreign affairs function of the United States and, thus, is excluded from the procedures of Executive Order 12866 (68 FR 51735) and 9 U.S.C. 553 and 554. However, interested parties are invited to submit written comments to the Department of State, Office of Defense Trade Controls, ATTN: Regulatory Change, Cryptographic Items, Room 200, SA–6, Washington, DC 20520–0602.

List of Subjects in 22 CFR Part 121

Arms and Munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, Part 121, is amended as follows:

PART 121—THE UNITED STATES MUNITIONS LIST

1. The authority citation for Part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629 Arms Export Control Act, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797): E.O. 11958, 42 FR 4311; 22 U.S.C. 2658.

2. In § 121.1, Category XIII(b) is revised to read as follows:

§ 121.1 General. The United States Munitions List.

* * * * *

Category XIII—Auxiliary Military Equipment

* * * * *

(b) Military Information Security Systems and equipment, cryptographic devices, software, and components specifically designed or modified therefor (i.e., such items when specifically designed, developed, configured, adapted or modified for military applications (including command, control and intelligence applications)). This includes:

(1) Military cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components or software with the capability of maintaining secrecy or confidentiality of information or information systems, except cryptographic equipment and software as follows:

(i) Tracking, telemetry and control (TT&C) encryption/decryption when embedded in a commercial communications satellite identified in ECCN 9A004a of the Export Administration Regulations; embedded means that the device or system cannot feasibility be removed from the satellite and that it cannot be used for other purposes.

(2) Military cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components of software which have the capability of generating spreading or hopping codes for spread spectrum systems or equipment.

(3) Military cryptanalytic systems, equipment, assemblies, modules, integrated circuits, components or software.

(4) Military systems, equipment, assemblies, modules, integrated circuits, components or software providing certified or certifiable multi-level security or user isolation exceeding class B2 of the Trusted Computer System Evaluation Criteria (TCSEC) and software to certify such systems, equipment or software.

(5) Ancillary equipment specifically designed or modified for paragraphs (b) (1), (2), (3), and (4) of this category.

* * * * *

Dated: December 23, 1996.

Lynn E. Davis,

Under Secretary of State for Arms Control and International Security Affairs.

[FR Doc. 96–33010 Filed 12–26–96; 8:45 am]

BILLING CODE 4710–25–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8702]

RIN 1545–AT42

Certain Transfers of Domestic Stock or Securities by U.S. Persons to Foreign Corporations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to certain transfers of stock or securities of domestic corporations by United States persons to foreign corporations pursuant to the corporate organization, reorganization, or liquidation provisions of the Internal Revenue Code. These final regulations modify the rules contained in the temporary regulations to reflect certain taxpayer comments received in response to those temporary regulations. This

action is necessary to provide the public with guidance to comply with the Tax Reform Act of 1984.

DATES: These regulations are effective January 29, 1997. For dates of applicability of these regulations, see § 1.367(a)–3(c)(11).

FOR FURTHER INFORMATION CONTACT: Philip L. Tretiak at (202) 622–3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1478. Responses to these collections of information are required in order for U.S. shareholders that transfer stock or securities in section 367(a) exchanges to qualify for an exception to the general rule of taxation under section 367(a)(1).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The estimated one-time burden per respondent: 10 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On May 16, 1986, temporary and proposed regulations under sections 367 (a) and (d) and section 6038B were published in the Federal Register (51 FR 17936). These regulations were published to provide the public with guidance necessary to comply with changes made to the Internal Revenue Code by the Tax Reform Act of 1984. The IRS and the Treasury Department later issued Notice 87–85 (1987–2 C.B. 395), which set forth substantial changes to the 1986 regulations, effective with respect to transfers occurring after December 16, 1987. A further notice of proposed rulemaking, containing rules under section 367(a), as well as under section 367(b), was published in the Federal Register on August 26, 1991 (56 FR 41993). The 1991 proposed section 367(a) regulations were generally based upon the positions announced in Notice 87–85, but the regulations made certain modifications to Notice 87–85, particularly with respect to transfers of stock or securities of foreign corporations. Subsequently, the IRS and the Treasury Department issued Notice 94–46 (1994–1 C.B. 356), announcing modifications to the positions set forth in Notice 87–85 (and the 1991 proposed regulations) with respect to transfers of stock or securities of domestic corporations occurring after April 17, 1994.

Most recently, temporary and proposed regulations were published in the Federal Register on December 26, 1995 (60 FR 66739 and 66771). The temporary regulations, which are generally effective for transfers occurring after April 17, 1994, but cease to be effective when the final regulations take effect, generally incorporated the positions announced in Notice 94–46, with certain modifications. These final regulations generally follow the rules set forth in the temporary regulations, with changes as described below.

Explanation of Provisions

Section 367(a)(1) generally treats a transfer of property (including stock or securities) by a U.S. person to a foreign corporation in connection with an exchange described in section 332, 351, 354, 356 or 361 as a taxable exchange unless the transfer qualifies for an exception to this general rule.

Rules that address transfers of stock or securities of domestic corporations are contained in the final regulations described herein. Rules that address transfers of stock or securities of foreign corporations under section 367(a) are contained in Notice 87–85.

The final regulations retain the general rules set forth in the temporary regulations, which provide that a U.S. person that exchanges stock or securities in a U.S. target company (UST) for stock of a foreign corporation (the transferee foreign corporation (or TFC)) in an exchange described in section 367(a) will qualify for nonrecognition treatment if certain reporting requirements are satisfied and each of the following conditions is met:

(i) U.S. transferors must receive no more than 50 percent of the voting power and value of the stock of the TFC in the transfer (*i.e.*, the 50-percent ownership threshold is not exceeded);

(ii) U.S. officers, directors and 5-percent or greater shareholders of the U.S. target must not own, in the aggregate, more than 50 percent of the voting power and value of the TFC immediately after the transfer (*i.e.*, the control group case does not apply);

(iii) The U.S. person (exchanging U.S. shareholder) either must not be a 5-percent transferee shareholder immediately after the transfer or, if the U.S. person is a 5-percent transferee shareholder, must enter into a 5-year gain recognition agreement (GRA) with respect to the UST stock or securities it exchanged. (Without such GRA, the transfer by the 5-percent transferee shareholder will not qualify for nonrecognition treatment; however, transfer by other U.S. transferors not subject to the GRA requirement may qualify if all other requirements are met.); and

(iv) The active trade or business requirement must be satisfied.

If one or more of the foregoing requirements is not satisfied, the transfer by the U.S. person of stock or securities of a domestic corporation in exchange for stock of a TFC is taxable under section 367(a).

In response to suggestions from commentators, however, the final regulations make a number of modifications to the temporary regulations, principally in two areas: (i) the treatment of transfers of ‘‘other property’’ in the context of the 50-percent ownership threshold requirement, and (ii) the active trade or business requirement.

Transfers of ‘‘Other Property’’

Under the temporary regulations, if U.S. transferors receive more than 50 percent of the stock (by vote or value) of the TFC, the 50-percent ownership threshold is exceeded and the transfer is taxable under section 367(a)(1). The temporary regulations define a ‘‘U.S. transferor’’ as a U.S. person who transfers (directly, indirectly or constructively) stock or securities of the U.S. target company or ‘‘other property’’ for stock of the TFC in an exchange described in section 367. Persons who transfer U.S. target company stock or other property are presumed to be U.S. persons.

The inclusion of ‘‘other property’’ in the class of tainted transferred property was designed to prevent the avoidance of the 50-percent ownership threshold through ‘‘stuffing’’ transactions. For example, assume that FC, a foreign corporation, and UST, an unrelated U.S. corporation, seek to combine their operations in a new foreign joint venture company (JV). The shareholders of each company will transfer their respective stock interests in UST and FC to JV in a transaction that would qualify as a section 351 exchange unless the transaction was taxable under section 367(a)(1). Assume that FC has all foreign shareholders. The value of the stock of UST is 550x; the value of the stock of FC is 450x. Because UST is more valuable than FC, UST's shareholders would receive more than 50 percent of JV's stock. Consequently, even if the transaction would otherwise qualify for an exception to the general rule of taxation under section 367(a)(1), the transaction would be taxable because the 50-percent ownership threshold would be exceeded. If, however, a U.S. person (X) contributed at least 100x in cash (or property) to JV, JV would not issue more than 50 percent of its stock to the UST shareholders, and, therefore, the 50-percent ownership threshold would not be exceeded. The temporary regulations, however, treat X as a U.S. transferor, so that the 50-percent ownership threshold would be exceeded in this case.

Commentators have pointed out that the term ''other property'' raises issues in the joint venture context that are broader than the ''stuffing'' example described above. Because the term ''other property'' is broad enough to include stock of a foreign company, the transfer of UST stock could be taxable under section 367(a)(1) even if UST were less valuable than the foreign ''target'' company (i.e., in cases where U.S. transferors would receive less than 50 percent of the stock of the joint venture company/TFC). Assume similar facts as in the earlier example, except that FC is widely-held and the shareholders of UST receive 40 percent of the stock of JV, while the shareholders of FC receive the remaining 60 percent. No cash or any other property is transferred to the JV. In such case, if the stock of FC constitutes ''other property,'' UST shareholders would not qualify for an exception to section 367(a)(1) if they were unable to prove that the U.S. shareholders of FC, if any, received no more than 10 percent of the stock of JV in the exchange.

Although the IRS and the Treasury Department remain concerned with ''stuffing'' transactions, the final regulations consider the active trade or business test to be the primary safeguard for preventing tax-motivated transactions from qualifying for an exception under these section 367(a) regulations. In particular, because the active trade or business test addresses ''stuffing'' transactions that occur within the 36-month period prior to the acquisition, the final regulations eliminate consideration of transfers of other property with regard to the 50-percent ownership threshold. Thus, any TFC stock received by U.S. persons in exchange for transfers of other property will not be taken into account in determining whether the 50-percent ownership threshold is exceeded.

Active Trade or Business Test: In General

The final regulations modify the ''active trade or business'' requirement that must be satisfied for a U.S. transferor to qualify for an exception to the general rule of taxability under section 367(a)(1).

Under the requirement contained in the temporary regulations, no exception under section 367(a)(1) is available unless (i) the TFC or an affiliate was engaged in an active trade or business for the entire 36-month period prior to the exchange (the 36-month test), and (ii) such business was substantial in relation to the business of the U.S. target company (the substantiality test). For this purpose, an affiliate is generally defined by reference to the rules in section 1504(a) (without the exclusion of foreign corporations).

The active trade or business test under the final regulations includes (i) a modified 36-month test, (ii) a new anti-avoidance rule requiring that the transaction not be undertaken with an intention that the TFC cease its active trade or business, and (iii) a modified substantiality test. The final regulations make a number of other modifications and clarifications to the active trade or business test. For example, the final regulations permit the TFC to consider only an 80-percent owned foreign subsidiary (referred to as a ''qualified subsidiary''), and not an affiliate, to satisfy the active trade or business test on its behalf.

Active Trade or Business Test: 36-Month Test and Intent Test

Under the 36-month test contained in the temporary regulations, the TFC or an affiliate is required to be engaged in an active trade or business for the entire 36 months immediately preceding the date of the transfer. Under the final regulations, this test can be satisfied by acquired businesses that have a 36-month operating history, unless they are acquired with the principal purpose of satisfying the active trade or business test.

In addition to the 36-month test, the active trade or business test in the final regulations contains a requirement that the transaction not be undertaken with an intention that the TFC cease its active business. The IRS and the Treasury Department believe that if a TFC with a 36-month active business history does not intend to maintain such business, but is only used as a vehicle to acquire the UST, an ''inversion'' transaction rather than a synergy of two businesses has been effected.

Under the temporary regulations, there is uncertainty as to whether an affiliate of a newly-formed TFC can satisfy the active trade or business test on behalf of the TFC for the (36-month) period prior to the exchange. Subject to a stuffing rule, the final regulations clarify that, for purposes of determining whether a TFC satisfies the 36-month test, the TFC may take into account an active business of a company that is a qualified subsidiary immediately after the transaction, even if such company was not a qualified subsidiary for all or part of the 36 months prior to the transaction. Thus, for example, if the TFC is a new foreign joint venture company, it will not be disqualified from satisfying the active trade or business test solely because its qualifying active trade or business was engaged in by a qualified subsidiary whose stock is received in the exchange.

Under the temporary regulations, it is unclear whether a newly-formed joint venture TFC could satisfy the active trade or business test if, in the transaction, it received both stock of a UST (from U.S. transferors) and an active trade or business (*i.e.*, a foreign branch) that had been operating for at least 36 months prior to the exchange (from foreign transferors). This uncertainty arose because the active trade or business test in the temporary regulations required that either the TFC or an affiliate satisfy the 36-month requirement. Although the temporary regulations did not intend to establish a preference for transfers of stock (*i.e.*, affiliates) vis-a-vis assets, the temporary regulations did not expressly provide that a TFC could utilize a newly-transferred foreign branch to satisfy the TFC's active trade or business requirement.

The final regulations clarify that, subject to a stuffing rule, the TFC may satisfy the active trade or business test if it receives in the exchange foreign assets that constituted an active trade or business during such 36-month period.

Active Trade or Business Test: Qualified Subsidiaries

The final regulations permit a TFC to take into account only qualified subsidiaries, rather than affiliates, to satisfy the active trade or business test.

This aspect of the active trade or business test has been narrowed because the IRS and the Treasury Department do not believe that a TFC should satisfy the active trade or business exception merely because its parent company (or an affiliate of the parent company) is engaged in an active trade or business.

For example, assume that foreign parent (FP), which is engaged in an active business outside the United States (either directly or through a subsidiary), forms a foreign subsidiary (FS) and contributes cash to FS. Shareholders of a U.S. target company (UST) then transfer all of the stock of UST in exchange for 20 percent of the stock of FS in a transaction described in sections 368(a)(1)(B) and 367(a). If FS is permitted to satisfy the active trade or business test by taking into account FP's business, UST has effectively ''gone offshore'' in an inversion transaction. Because the shareholders of UST receive stock of FS (which is the TFC), and not FP, such shareholders will have no interest in FP's active business. In contrast, if the shareholders received stock of FP in an exchange described in section 367(a), such persons would participate in FP's active business, and the active trade or business test under the final regulations would be satisfied.

Active Trade or Business Test: Partnership Interests

The temporary regulations did not address whether the TFC could satisfy the active trade or business requirement by taking into account an interest in a partnership engaged in an active trade or business.

The final regulations permit a TFC (or a qualified subsidiary) to take into account the active trade or business engaged in outside the United States by any qualified partnership as there defined.

Active Trade or Business Test: Substantiality Test

Under the temporary regulations, the second prong of the active trade or business requirement is the substantiality test. The active trade or business of the TFC is required to be ''substantial'' vis-a-vis the active trade or business of the UST, but the temporary regulations do not define substantiality.

The final regulations modify the substantiality requirement. Under the final regulations, the substantiality test no longer compares the active trade or business of the TFC vis-a-vis the UST. Instead, it requires that the entire value of the TFC be at least equal to the entire value of the UST at the time of the transaction. However, for this purpose, the value of the TFC may include the value of assets (including stock) acquired within the 36-month period prior to the transaction only if (i) such assets were acquired in the ordinary course of business, or (ii) such assets (or their proceeds) do not produce and are not held for the production of passive income (as defined under section 1296(b)), and were not acquired with the principal purpose of satisfying the active trade or business test. A special rule applies if the asset acquired by the TFC in the 36-month period prior to the exchange is stock of a qualified subsidiary or qualified partnership engaged in an active trade or business. In such case, the value of the stock or partnership interest may be taken into account, but must be reduced in accordance with the principles described above.

When formulating the substantiality test under the final regulations, the IRS and the Treasury Department considered and rejected other alternatives considered to be more complex and burdensome for taxpayers. For example, a comparison of the active business of the TFC vis-a-vis the active business of the UST for the 36-month period prior to the acquisition, taking into account the property, payroll and sales of the two companies, was considered and rejected.

Indirect and Constructive Transfers

One commentator suggested that the IRS clarify the definition of ''U.S. Transferor'' contained in the temporary regulations, which refers to a U.S. person who transfers ''directly, indirectly or constructively'' UST stock or other property. The IRS and the Treasury Department believe that the reference to ''direct, indirect and constructive'' transfers may have been unclear and, thus, the final regulations delete such reference. Such technical modification does not modify the substantive law in which indirect and constructive transfers may be treated as transfers subject to section 367(a)(1) (see § 1.367(a)–1T(c)(2) with respect to the ''indirect'' stock transfer rules; constructive transfers include, but are not limited to, section 367(a) transfers that result from section 304 transactions and section 367(a) transfers that result from a change in classification of an entity from a foreign partnership to a foreign corporation).

GRA Term

Under the temporary regulations, a 5-percent transferee shareholder is required to file a GRA. The duration is 5 years if all U.S. transferors own less than 50 percent of the total voting power and total value of the TFC stock immediately after the transfer. The duration of the GRA is 10 years if the U.S. transferors own 50 percent or more of the TFC stock immediately after the transaction, or if the 5-percent transferee shareholder is unable to prove that all U.S. transferors own less than 50 percent of the total voting power and total value of the TFC immediately after the transfer. Thus, in determining whether a 5- or 10-year GRA is appropriate, the temporary regulations take into account cross-ownership (*i.e.*, consideration of stock owned independently of the transaction) by all U.S. transferors, and contain a presumption that a 10-year GRA is required.

For example, assume that UST shareholders receive 30 percent of the stock of the TFC in a nonrecognition transaction that qualifies for an exception under section 367(a). Assume further that one UST shareholder, X, a U.S. person, transfers stock of UST in the section 367(a) exchange and owns 5 percent of the TFC after the transaction. Under the temporary regulations, X is required to file a 10-year GRA unless X can prove that all U.S. transferors in the aggregate own less than 50 percent of the voting power and value of the TFC immediately after the transfer (taking into account the 30 percent received in the transaction by U.S. target shareholders plus any other stock that such persons may own independently of the transaction). If the companies are publicly traded or widely held, it is burdensome and may be impractical for X to rebut the presumption that U.S. transferors own 50 percent or more of the TFC stock.

In response to comments received and in the interest of simplification, the final regulations provide that any 5-percent transferee shareholder that is required to file a GRA upon the transfer of domestic stock or securities is required to file a 5-year GRA; 10-year GRAs will no longer be required in the case of 5-percent transferee shareholders who transfer domestic stock or securities.

Other Areas in Which Comments Were Received

After careful consideration by the IRS and the Treasury Department, the positions set forth in the temporary regulations were generally not modified in response to certain comments other than those described above. For example, the final regulations did not modify: (i) The amount of stock U.S. transferors could receive without exceeding the ownership threshold (*i.e.*, not more than 50 percent), (ii) testing the 50-percent ownership threshold at the time of the exchange, and (iii) the presumption that all shareholders of the U.S. target company are U.S. persons.

PLR Option in Limited Instances

The final regulations provide that, in limited instances, the IRS may consider issuing private letter rulings to taxpayers that (i) satisfy all of the requirements contained in these regulations, with the exception of the active trade or business test, or (ii) make a good faith effort, but are unable to establish non-adverse applicability of the ownership attribution rules. The IRS and the Treasury Department are aware that the active trade or business test is mechanical in nature and, thus, in limited instances, a taxpayer may demonstrate an ongoing and substantial active trade or business even though it fails to meet the test set forth in the final regulations. However, in no event will the IRS rule on the issue of whether a TFC acquired an active business with the principal purpose of satisfying the 36-month test and/or the substantiality test.

Other Matters

The IRS and the Treasury Department expect to issue additional final regulations under section 367(a) to address the transfer of stock or securities of foreign corporations and other matters contained in the 1991 proposed regulations not addressed herein. Until the 1991 proposed regulations are finalized, the positions originally announced in Notice 87–85 will continue to govern the availability of section 367(a) exceptions for transfers of stock or securities of foreign corporations. See § 1.367(a)–3(d).

Special Analyses

It has been determined that this regulation is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby certified that this regulation does not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the number of U.S. target companies that are acquired by foreign corporations in nonrecognition transactions subject to section 367(a), and thus are subject to collection of information, is estimated to be only 100 per year. Moreover, because these regulations will primarily affect large shareholders and U.S. multinational corporations with foreign operations, it is estimated that very few of the 100 transactions will involve small entities. Thus, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the 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 Philip L. Tretiak of the Office of Associate Chief Counsel (International), within the Office of Chief Counsel, IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.367(a)–3 is added to read as follows:

§ 1.367(a)–3 Treatment of transfers of stock or securities to foreign corporations.

(a) *In general.* This section provides rules concerning the transfer of stock or securities by a U.S. person to a foreign corporation in an exchange described in section 367(a). In general, a transfer of stock or securities by a U.S. person to a foreign corporation that is described in sections 351, 354 (pursuant to a reorganization described in section 368(a)(1)(B)) or section 361 (a) or (b) is subject to section 367(a)(1) and, therefore, is treated as a taxable exchange, unless one of the exceptions set forth in paragraph (c) or (d) of this section or § 1.367(a)–3T(b) applies. For additional rules relating to an exchange involving a foreign corporation in connection with which there is a transfer of stock, see section 367(b) and the regulations under that section. For additional rules regarding a transfer of stock or securities in an exchange described in section 361 (a) or (b), see section 367(a)(5) and any regulations under that section.

(b) [Reserved] For further guidance, see § 1.367(a)–3T(b).

(c) *Transfers by U.S. persons of stock or securities of domestic corporations to foreign corporations*—(1) *In general.* Except as provided in section 367(a)(5), a transfer of stock or securities of a domestic corporation by a U.S. person to a foreign corporation that would otherwise be subject to section 367(a)(1) under paragraph (a) of this section shall not be subject to section 367(a)(1) if the domestic corporation the stock or securities of which are transferred (referred to as the U.S. target company) complies with the reporting requirements in paragraph (c)(6) of this section and if each of the following four conditions is met:

(i) Fifty percent or less of both the total voting power and the total value of the stock of the transferee foreign corporation is received in the transaction, in the aggregate, by U.S. transferors (*i.e.,* the amount of stock received does not exceed the 50-percent ownership threshold).

(ii) Fifty percent or less of each of the total voting power and the total value of the stock of the transferee foreign corporation is owned, in the aggregate, immediately after the transfer by U.S. persons that are either officers or directors of the U.S. target company or that are five-percent target shareholders (as defined in paragraph (c)(5)(iii) of this section) (*i.e.,* there is no control group). For purposes of this paragraph (c)(1)(ii), any stock of the transferee foreign corporation owned by U.S. persons immediately after the transfer will be taken into account, whether or not it was received in the exchange for stock or securities of the U.S. target company.

(iii) Either—

(A) The U.S. person is not a five-percent transferee shareholder (as defined in paragraph (c)(5)(ii) of this section); or

(B) The U.S. person is a five-percent transferee shareholder and enters into a five-year agreement to recognize gain with respect to the U.S. target company stock or securities it exchanged in the form provided in § 1.367(a)–3T(g); and

(iv) The active trade or business test (as defined in paragraph (c)(3) of this section) is satisfied.

(2) *Ownership presumption.* For purposes of paragraph (c)(1) of this section, persons who transfer stock or securities of the U.S. target company in exchange for stock of the transferee foreign corporation are presumed to be U.S. persons. This presumption may be rebutted in accordance with paragraph (c)(7) of this section.

(3) *Active trade or business test*—(i) *In general.* The tests of this paragraph (c)(3), collectively referred to as the

active trade or business test, are satisfied if:

(A) The transferee foreign corporation or any qualified subsidiary (as defined in paragraph (c)(5)(vii) of this section) or any qualified partnership (as defined in paragraph (c)(5)(viii) of this section) is engaged in an active trade or business outside the United States, within the meaning of § 1.367(a)–2T(b) (2) and (3), for the entire 36-month period immediately before the transfer;

(B) At the time of the transfer, neither the transferors nor the transferee foreign corporation (and, if applicable, the qualified subsidiary or qualified partnership engaged in the active trade or business) have an intention to substantially dispose of or discontinue such trade or business; and

(C) The substantiality test (as defined in paragraph (c)(3)(iii) of this section) is satisfied.

(ii) *Special rules.* For purposes of paragraphs (c)(3)(i) (A) and (B) of this section, the following special rules apply:

(A) The transferee foreign corporation, a qualified subsidiary, or a qualified partnership will be considered to be engaged in an active trade or business for the entire 36-month period preceding the exchange if it acquires at the time of, or any time prior to, the exchange a trade or business that has been active throughout the entire 36-month period preceding the exchange. This special rule shall not apply, however, if the acquired active trade or business assets were owned by the U.S. target company or any affiliate (within the meaning of section 1504(a) but excluding the exceptions contained in section 1504(b) and substituting ''50 percent'' for ''80 percent'' where it appears therein) at any time during the 36-month period prior to the acquisition. Nor will this special rule apply if the principal purpose of such acquisition is to satisfy the active trade or business test.

(B) An active trade or business does not include the making or managing of investments for the account of the transferee foreign corporation or any affiliate (within the meaning of section 1504(a) but excluding the exceptions contained in section 1504(b) and substituting ''50 percent'' for ''80 percent'' where it appears therein). (This paragraph (c)(3)(ii)(B) shall not create any inference as to the scope of § 1.367(a)–2T(b) (2) and (3) for other purposes.)

(iii) *Substantiality test*—(A) *General rule.* A transferee foreign corporation will be deemed to satisfy the substantiality test if, at the time of the transfer, the fair market value of the transferee foreign corporation is at least equal to the fair market value of the U.S. target company.

(B) *Special rules.* (*1*) For purposes of paragraph (c)(3)(iii)(A) of this section, the value of the transferee foreign corporation shall include assets acquired outside the ordinary course of business by the transferee foreign corporation within the 36-month period preceding the exchange only if either—

(*i*) Both—

(*A*) At the time of the exchange, such assets or, as applicable, the proceeds thereof, do not produce, and are not held for the production of, passive income as defined in section 1296(b); and

(*B*) Such assets are not acquired for the principal purpose of satisfying the substantiality test; or

(*ii*) Such assets consist of the stock of a qualified subsidiary or an interest in a qualified partnership. See paragraph (c)(3)(iii)(B)(*2*) of this section.

(*2*) For purposes of paragraph (c)(3)(iii)(A) of this section, the value of the transferee foreign corporation shall not include the value of the stock of any qualified subsidiary or the value of any interest in a qualified partnership, held directly or indirectly, to the extent that such value is attributable to assets acquired by such qualified subsidiary or partnership outside the ordinary course of business and within the 36-month period preceding the exchange unless those assets satisfy the requirements in paragraph (c)(3)(iii)(B)(*1*) of this section.

(*3*) For purposes of paragraph (c)(3)(iii)(A) of this section, the value of the transferee foreign corporation shall not include the value of assets received within the 36-month period prior to the acquisition, notwithstanding the special rule in paragraph (c)(3)(iii)(B)(*1*) of this section, if such assets were owned by the U.S. target company or an affiliate (within the meaning of section 1504(a) but without the exceptions under section 1504(b) and substituting ''50 percent'' for ''80 percent'' where it appears therein) at any time during the 36-month period prior to the transaction.

(4) *Special rules*—(i) *Treatment of partnerships.* For purposes of this paragraph (c), if a partnership (whether domestic or foreign) owns stock or securities in the U.S. target company or the transferee foreign corporation, or transfers stock or securities in an exchange described in section 367(a), each partner in the partnership, and not the partnership itself, is treated as owning and as having transferred, or as owning, a proportionate share of the stock or securities. See § 1.367(a)–1T(c)(3).

(ii) *Treatment of options.* For purposes of this paragraph (c), one or more options (or an interest similar to an option) will be treated as exercised and thus will be counted as stock for purposes of determining whether the 50-percent threshold is exceeded or whether a control group exists if a principal purpose of the issuance or the acquisition of the option (or other interest) was the avoidance of the general rule contained in section 367(a)(1).

(iii) *U.S. target has a vestigial ownership interest in transferee foreign corporation.* In cases where, immediately after the transfer, the U.S. target company owns, directly or indirectly (applying the attribution rules of sections 267(c) (1) and (5)), stock of the transferee foreign corporation, that stock will not in any way be taken into account (and, thus, will not be treated as outstanding) in determining whether the 50-percent threshold under paragraph (c)(1)(i) of this section is exceeded or whether a control group under paragraph (c)(1)(ii) of this section exists.

(iv) *Attribution rule.* Except as otherwise provided in this section, the rules of section 318, as modified by the rules of section 958(b) shall apply for purposes of determining the ownership or receipt of stock, securities or other property under this paragraph (c).

(5) *Definitions*—(i) *Ownership statement.* An ownership statement is a statement, signed under penalties of perjury, stating—

(A) The identity and taxpayer identification number, if any, of the person making the statement;

(B) That the person making the statement is not a U.S. person (as defined in paragraph (c)(5)(iv) of this section);

(C) That the person making the statement either—

(*1*) Owns less than 1 percent of the total voting power and total value of a U.S. target company the stock of which is described in Rule 13d–1(d) of Regulation 13D (17 CFR 240.13d–1(d)) (or any rule or regulation to generally the same effect) promulgated by the Securities and Exchange Commission under the Securities and Exchange Act of 1934 (15 USC 78m), and such person did not acquire the stock with a principal purpose to enable the U.S. transferors to satisfy the requirement contained in paragraph (c)(1)(i) of this section; or

(*2*) Is not related to any U.S. person to whom the stock or securities owned by the person making the statement are attributable under the rules of section 958(b), and did not acquire the stock with a principal purpose to enable the U.S. transferors to satisfy the requirement contained in paragraph (c)(1)(i) of this section;

(D) The citizenship, permanent residence, home address, and U.S. address, if any, of the person making the statement; and

(E) The ownership such person has (by voting power and by value) in the U.S. target company prior to the exchange and the amount of stock of the transferee foreign corporation (by voting power and value) received by such person in the exchange.

(ii) *Five-percent transferee shareholder.* A five-percent transferee shareholder is a person that owns at least five percent of either the total voting power or the total value of the stock of the transferee foreign corporation immediately after the transfer described in section 367(a)(1). For special rules involving cases in which stock is held by a partnership, see paragraph (c)(4)(i) of this section.

(iii) *Five-percent target shareholder and certain other 5-percent shareholders.* A five-percent target shareholder is a person that owns at least five percent of either the total voting power or the total value of the stock of the U.S. target company immediately prior to the transfer described in section 367(a)(1). If the stock of the U.S. target company (or any company through which stock of the U.S. target company is owned indirectly or constructively) is described in Rule 13d–1(d) of Regulation 13D (17 CFR 240.13d–1(d)) (or any rule or regulation to generally the same effect), promulgated by the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 USC 78m), then, in the absence of actual knowledge to the contrary, the existence or absence of filings of Schedule 13–D or 13–G (or any similar schedules) may be relied upon for purposes of identifying five-percent target shareholders (or a five-percent shareholder of a corporation which itself is a five-percent shareholder of the U.S. target company). For special rules involving cases in which U.S. target company stock is held by a partnership, see paragraph (c)(4)(i) of this section.

(iv) *U.S. Person.* For purposes of this section, a U.S. person is defined by reference to § 1.367(a)–1T(d)(1). For application of the rules of this section to stock or securities owned or transferred by a partnership that is a U.S. person, however, see paragraph (c)(4)(i) of this section.

(v) *U.S. Transferor.* A U.S. transferor is a U.S. person (as defined in paragraph (c)(5)(iv) of this section) that transfers stock or securities of one or more U.S. target companies in exchange for stock of the transferee foreign corporation in an exchange described in section 367.

(vi) *Transferee foreign corporation.* A transferee foreign corporation is the foreign corporation whose stock is received in the exchange by U.S. persons.

(vii) *Qualified Subsidiary.* A qualified subsidiary is a foreign corporation whose stock is at least 80-percent owned (by total voting power and total value), directly or indirectly, by the transferee foreign corporation. However, a corporation will not be treated as a qualified subsidiary if it was affiliated with the U.S. target company (within the meaning of section 1504(a) but without the exceptions under section 1504(b) and substituting ''50 percent'' for ''80 percent'' where it appears therein) at any time during the 36-month period prior to the transfer. Nor will a corporation be treated as a qualified subsidiary if it was acquired by the transferee foreign corporation at any time during the 36-month period prior to the transfer for the principal purpose of satisfying the active trade or business test, including the substantiality test.

(viii) *Qualified partnership.* (A) Except as provided in paragraph (c)(5)(viii)(B) or (C) of this section, a qualified partnership is a partnership in which the transferee foreign corporation—

(*1*) Has active and substantial management functions as a partner with regard to the partnership business; or

(*2*) Has an interest representing a 25 percent or greater interest in the partnership's capital and profits.

(B) A partnership is not a qualified partnership if the U.S. target company or any affiliate of the U.S. target company (within the meaning of section 1504(a) but without the exceptions under section 1504(b) and substituting ''50 percent'' for ''80 percent'' where it appears therein) held a 5 percent or greater interest in the partnership's capital and profits at any time during the 36-month period prior to the transfer.

(C) A partnership is not a qualified partnership if the transferee foreign corporation's interest was acquired by that corporation at any time during the 36-month period prior to the transfer for the principal purpose of satisfying the active trade or business test, including the substantiality test.

(6) *Reporting requirements of U.S. target company.* (i) In order for a U.S. person that transfers stock or securities of a domestic corporation to qualify for the exception provided by this paragraph (c) to the general rule under section 367(a)(1), in cases where 10 percent or more of the total voting power or the total value of the stock of the U.S. target company is transferred by U.S. persons in the transaction, the U.S. target company must comply with the reporting requirements contained in this paragraph (c)(6). The U.S. target company must attach to its timely filed U.S. income tax return for the taxable year in which the transfer occurs a statement titled ''Section 367(a)—Reporting of Cross-Border Transfer Under Reg. § 1.367(a)–3(c)(6),'' signed under penalties of perjury by an officer of the corporation to the best of the officer's knowledge and belief, disclosing the following information—

(A) A description of the transaction in which a U.S. person or persons transferred stock or securities in the U.S. target company to the transferee foreign corporation in a transfer otherwise subject to section 367(a)(1);

(B) The amount (specified as to the percentage of the total voting power and the total value) of stock of the transferee foreign corporation received in the transaction, in the aggregate, by persons who transferred stock or securities of the U.S. target company. For additional information that may be required to rebut the ownership presumption of paragraph (c)(2) of this section in cases where more than 50 percent of either the total voting power or the total value of the stock of the transferee foreign corporation is received in the transaction, in the aggregate, by persons who transferred stock or securities of the U.S. target company, see paragraph (c)(7) of this section;

(C) The amount (if any) of transferee foreign corporation stock owned directly or indirectly (applying the attribution rules of sections 267(c) (1) and (5)) immediately after the exchange by the U.S. target company;

(D) A statement that there is no control group within the meaning of paragraph (c)(1)(ii) of this section;

(E) A list of U.S. persons who are officers, directors or five-percent target shareholders and the percentage of the total voting power and the total value of the stock of the transferee foreign corporation owned by such persons both immediately before and immediately after the transaction; and

(F) A statement that includes the following—

(*1*) A statement that the active trade or business test described in paragraph (c)(3) of this section is satisfied by the transferee foreign corporation and a description of such business;

(*2*) A statement that on the day of the transaction, there was no intent on the part of the transferee foreign corporation (or its qualified subsidiary, if relevant) or the transferors of the transferee foreign corporation (or qualified subsidiary, if relevant) to substantially discontinue its active trade or business; and

(*3*) A statement that the substantiality test described in paragraph (c)(3)(iii) of this section is satisfied, and documentation that such test is satisfied, including the value of the transferee foreign corporation and the value of the U.S. target company on the day of the transfer, and either one of the following—

(*i*) A statement demonstrating that the value of the transferee foreign corporation 36 months prior to the acquisition, plus the value of any assets described in paragraph (c)(3)(iii)(B) of this section (including stock) acquired by the transferee foreign corporation within the 36-month period, less the amount of any liabilities acquired during that period, exceeds the value of the U.S. target company on the acquisition date; or

(*ii*) A statement demonstrating that the value of the transferee foreign corporation on the date of the acquisition, reduced by the value of any assets not described in paragraph (c)(3)(iii)(B) of this section (including stock) acquired by the transferee foreign corporation within the 36-month period, exceeds the value of the U.S. target company on the date of the acquisition.

(ii) For purposes of this paragraph (c)(6), an income tax return will be considered timely filed if such return is filed, together with the statement required by this paragraph (c)(6), on or before the last date for filing a Federal income tax return (taking into account any extensions of time therefor) for the taxable year in which the transfer occurs. If a return is not timely filed within the meaning of this paragraph (c)(6), the District Director may make a determination, based on all facts and circumstances, that the taxpayer had reasonable cause for its failure to file a timely filed return and, if such a determination is made, the requirement contained in this paragraph (c)(6) shall be waived.

(7) *Ownership statements.* To rebut the ownership presumption of paragraph (c)(2) of this section, the U.S. target company must obtain ownership statements (described in paragraph (c)(5)(i) of this section) from a sufficient number of persons that transfer U.S. target company stock or securities in the transaction that are not U.S. persons to demonstrate that the 50-percent threshold of paragraph (c)(1)(i) of this section is not exceeded. In addition, the U.S. target company must attach to its timely filed U.S. income tax return (as described in paragraph (c)(6)(ii) of this section) for the taxable year in which the transfer occurs a statement, titled ''Section 367(a)—Compilation of Ownership Statements Under Reg. § 1.367(a)–3(c),'' signed under penalties of perjury by an officer of the corporation, disclosing the following information:

(i) The amount (specified as to the percentage of the total voting power and the total value) of stock of the transferee foreign corporation received, in the aggregate, by U.S. transferors;

(ii) The amount (specified as to the percentage of total voting power and total value) of stock of the transferee foreign corporation received, in the aggregate, by foreign persons that filed ownership statements;

(iii) A summary of the information tabulated from the ownership statements, including—

(A) The names of the persons that filed ownership statements stating that they are not U.S. persons;

(B) The countries of residence and citizenship of such persons; and

(C) Each of such person's ownership (by voting power and by value) in the U.S. target company prior to the exchange and the amount of stock of the transferee foreign corporation (by voting power and value) received by such persons in the exchange.

(8) *Certain transfers in connection with performance of services.* Section 367(a)(1) shall not apply to a domestic corporation's transfer of its own stock or securities in connection with the performance of services, if the transfer is considered to be to a foreign corporation solely by reason of § 1.83–6(d)(1).

(9) *Private letter ruling option.* The Internal Revenue Service may, in limited circumstances, issue a private letter ruling to permit the taxpayer to qualify for an exception to the general rule under section 367(a)(1) if—

(i) A taxpayer is unable to satisfy all of the requirements of paragraph (c)(3) of this section relating to the active trade or business test of paragraph (c)(1)(iv) of this section, but such taxpayer meets all of the other requirements contained in paragraphs (c)(1)(i) through (c)(1)(iii) of this section, and such taxpayer is substantially in compliance with the rules set forth in paragraph (c)(3) of this section; or

(ii) A taxpayer is unable to satisfy any requirement of paragraph (c)(1) of this section due to the application of paragraph (c)(4)(iv) of this section. Notwithstanding the preceding sentence, in no event will the Internal Revenue Service rule on the issue of whether the principal purpose of an acquisition was to satisfy the active trade or business test, including the substantiality test.

(10) *Examples.* This paragraph (c) may be illustrated by the following examples:

Example 1. Ownership presumption. (i) FC, a foreign corporation, issues 51 percent of its stock to the shareholders of S, a domestic corporation, in exchange for their S stock, in a transaction described in section 367(a)(1).

(ii) Under paragraph (c)(2) of this section, all shareholders of S who receive stock of FC in the exchange are presumed to be U.S. persons. Unless this ownership presumption is rebutted, the condition set forth in paragraph (c)(1)(i) of this section will not be satisfied, and the exception in paragraph (c)(1) of this section will not be available. As a result, all U.S. persons that transferred S stock will recognize gain on the exchange. To rebut the ownership presumption, S must comply with the reporting requirements contained in paragraph (c)(6) of this section, obtaining ownership statements (described in paragraph (c)(5)(i) of this section) from a sufficient number of non-U.S. persons who received FC stock in the exchange to demonstrate that the amount of FC stock received by U.S. persons in the exchange does not exceed 50 percent.

Example 2. Filing of Gain Recognition Agreement. (i) The facts are the same as in *Example 1,* except that FC issues only 40 percent of its stock to the shareholders of S in the exchange. FC satisfies the active trade or business test of paragraph (c)(1)(iv) of this section. A, a U.S. person, owns 10 percent of S's stock immediately before the transfer. All other shareholders of S own less than five percent of its stock. None of S's officers or directors owns any stock in FC immediately after the transfer. A will own 15 percent of the stock of FC immediately after the transfer, 4 percent received in the exchange, and the balance being stock in FC that A owned prior to and independent of the transaction. No S shareholder besides A owns five percent or more of FC immediately after the transfer. The reporting requirements under paragraph (c)(6) of this section are satisfied.

(ii) The condition set forth in paragraph (c)(1)(i) of this section is satisfied because, even after application of the presumption in paragraph (c)(2) of this section, U.S. transferors could not receive more than 50 percent of FC's stock in the transaction. There is no control group because five-percent target shareholders and officers and directors of S do not, in the aggregate, own more than 50 percent of the stock of FC immediately after the transfer (A, the sole five-percent target shareholder, owns 15 percent of the stock of FC immediately after the transfer, and no officers or directors of S own any stock of FC immediately after the transfer). Therefore, the condition set forth in paragraph (c)(1)(ii) of this section is satisfied. The facts assume that the condition set forth in paragraph (c)(1)(iv) of this section is satisfied. Thus, U.S. persons that are not five-percent transferee shareholders will not recognize gain on the exchange of S shares for FC shares. A, a five-percent transferee shareholder, will not be required to include in income any gain realized on the exchange in the year of the transfer if he files a 5-year gain recognition agreement (GRA) and complies with section 6038B.

Example 3. Control Group. (i) The facts are the same as in *Example 2,* except that B, another U.S. person, is a 5-percent target shareholder, owning 25 percent of S's stock immediately before the transfer. B owns 40 percent of the stock of FC immediately after the transfer, 10 percent received in the exchange, and the balance being stock in FC that B owned prior to and independent of the transaction.

(ii) A control group exists because A and B, each a five-percent target shareholder within the meaning of paragraph (c)(5)(iii) of this section, together own more than 50 percent of FC immediately after the transfer (counting both stock received in the exchange and stock owned prior to and independent of the exchange). As a result, the condition set forth in paragraph (c)(1)(ii) of this section is not satisfied, and all U.S. persons (not merely A and B) who transferred S stock will recognize gain on the exchange.

Example 4. Partnerships. (i) The facts are the same as in *Example 3,* except that B is a partnership (domestic or foreign) that has five equal partners, only two of whom, X and Y, are U.S. persons. Under paragraph (c)(4)(i) of this section, X and Y are treated as the owners and transferors of 5 percent each of the S stock owned and transferred by B and as owners of 8 percent each of the FC stock owned by B immediately after the transfer. U.S. persons that are five-percent target shareholders thus own a total of 31 percent of the stock of FC immediately after the transfer (A's 15 percent, plus X's 8 percent, plus Y's 8 percent).

(ii) Because no control group exists, the condition in paragraph (c)(1)(ii) of this section is satisfied. The conditions in paragraphs (c)(1)(i) and (iv) of this section also are satisfied. Thus, U.S. persons that are not five-percent transferee shareholders will not recognize gain on the exchange of S shares for FC shares. A, X, and Y, each a five-percent transferee shareholder, will not be required to include in income in the year of the transfer any gain realized on the exchange if they file 5-year GRAs and comply with section 6038B.

(11) *Effective date.* This paragraph (c) applies to transfers occurring after January 29, 1997. However, taxpayers may elect to apply this section in its entirety to all transfers occurring after April 17, 1994, provided that the statute of limitations of the affected tax year or years is open.

(d) *Transfers of stock or securities of foreign corporations.* For guidance, see Notice 87–85 (1987–2 C.B. 395). See § 601.601(d)(2) of this chapter.

(e) through (h) [Reserved]. For further guidance, see § 1.367(a)–3T(e) through (h).

Par. 3. In § 1.367(a)–3T, paragraphs (a), (c) and (d) are revised to read as follows:

§ 1.367(a)–3T Treatment of transfers of stock or securities to foreign corporations (temporary).

(a) [Reserved]. For further information, see § 1.367(a)–3(a).

* * * * *

(c) and (d) [Reserved]. For further information, see § 1.367(a)–3(c) and (d).

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 4. The authority for citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. Section 602.101, paragraph (c) is amended by revising the entry for 1.367(a)–3T and adding an entry to the table in numerical order to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(c) * * *

CFR part or section where identified and described	Current OMB control No.
* * * *	*
1.367(a)–3	1545–0026 1545–1478
1.367(a)–3T	1545–0026
* * * *	*

Margaret Milner Richardson,

Commissioner of Internal Revenue.

Approved: December 11, 1996.

Donald C. Lubick,

Assistant Secretary of the Treasury.

[FR Doc. 96–32375 Filed 12–27–96; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

Office of the Secretary

29 CFR Parts 1 and 5

Procedures for Predetermination of Wage Rates (29 CFR Part 1); Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction and to Certain Nonconstruction Contracts (29 CFR Part 5)

AGENCY: Wage and Hour Division, Employment Standards Administration, Office of the Secretary, Labor.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule the continued suspension of the regulations previously issued under the Davis-Bacon and Related Acts at 29 CFR 1.7(d), 29 CFR 5.2(n)(4), and 29 CFR 5.5(a)(1)(ii) and suspended at 58 FR 58954 (Nov. 5, 1993), while the Department conducts additional rulemaking proceedings to determine whether further amendments should be made to those regulations. These regulations govern the employment of ''semi-skilled helpers'' on federally-financed and federally-assisted construction contracts subject to the prevailing wage standards of the Davis-Bacon and Related Acts (DBRA).

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: William W. Gross, Director, Office of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3028, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone (202) 219–8353. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This rule does not contain any new information collection requirements and does not modify any existing requirements. Thus, the rule contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1995.

II. Background

On May 28, 1982, the Department published revised final regulations, 29 CFR Part 1, Procedures for Predetermination of Wage Rates, and 29 CFR Part 5, Subpart A—Davis-Bacon and Related Acts Provisions and Procedures (47 FR 23644 and 23658, respectively), which, among other things, would have allowed contractors to use semi-skilled helpers on Davis-Bacon projects at wages lower than those paid to skilled journeymen, wherever the helper classification, as defined in the regulations, was ''identifiable'' in the area. These rules represented a reversal of a longstanding Department of Labor practice by allowing some overlap between the duties of helpers and the duties of journeymen and laborers. To protect against possible abuse, a provision was include limiting the number of helpers which could be used on a covered project to a maximum of two helpers for every three journeymen. *See* 29 CFR 1.7(d), 29 CFR 5.2(n)(4), 29 CFR 5.5(a)(1)(ii)(A), and 29 CFR 5.5(a)(4)(iv) (1982).

As a result of a lawsuit brought by the Building and Construction Trades Department, AFL–CIO, and a number of individual unions, implementation of the regulations was enjoined. *Building and Construction Trades Department, AFL–CIO, et al.* v. *Donovan, et al.*, 553 F. Supp. 352 (D.D.C. 1982). The U.S. Courts of Appeals for the District of Columbia issued a decision upholding the Department's authority to allow increased use of helpers and approving the regulatory definition of a helper's duties, but struck down the provision for issuing a helper wage rate where helpers were ''identifiable,'' thereby requiring a modification to the regulations to provide that a helper classification be ''prevailing'' in the area before it may be used. *Building and Construction Trades Department, AFL–CIO, et al.*, v. *Donovan, et al.*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

Following a new round of notice-and-comment rulemaking, DOL published a final rule in the Federal Register (54 FR 4234) on January 27, 1989, to add the requirement that the use of a particular helper classification must prevail in an area in order to be recognized, and to define the circumstances in which the use of helpers would be deemed to prevail. (54 FR 4234). Following the Court's lifting of the injunction by Order dated September 24, 1990, the Department published a Federal Register notice on December 4, 1990, implementing the helper regulations effective February 4, 1991 (55 FR 50148).

In April 1991, Congress passed the Dire Emergency Supplemental Appropriations Act of 1991, Public Law 102–27 (105 Stat. 130), which was signed into law on April 10, 1991. Section 303 of Public Law 102–27 (105 Stat. 152) prohibited the Department of Labor from spending any funds to implement or administer the helper regulations. In support of the prohibition, Chairman Ford of the House Education and Labor Committee stated that ''Congress should insist that the administration recognize that authorizing legislation is the only appropriate vehicle for dealing with fundamental changes in the operation of the Davis-Bacon Act.'' In compliance with the Congressional directive, the Department did not implement or administer the helper regulations for the remainder of fiscal year 1991.

After fiscal year 1991 concluded and subsequent continuing resolutions expired, a new appropriations act was passed which did not include a ban restricting the implementation of the helper regulations. The Department issued All Agency Memorandum No. 161 on January 29, 1992, instructing the contracting agencies to include the helper contract clauses in contracts for which bids were solicited or negotiations were concluded after that date.

During the course of the ongoing litigation in this matter, the U.S. Court of Appeals for the District of Columbia (by decision dated April 21, 1992) upheld the rule defining the circumstances in which helpers would be found to prevail and the remaining helper provisions, but invalidated the provision of the regulations that prescribe a maximum ratio governing the use of helpers (*Building and Construction Trades Department, AFL–CIO* v. *Martin*, 961 F.2d 269 (D.C. Cir. 1992)). To comply with this ruling, on June 26, 1992, the Department issued a Federal Register notice removing the ratio provision at 29 CFR 5.5(a)(4)(iv) from the Code of Federal Regulations. (57 FR 28776).

Subsequently, Section 103 of the 1994 Department of Labor Appropriations Act, Public Law 102–112, prohibited the Department of Labor from expending funds to implement or administer the helper regulations during fiscal year 1994. Accordingly, on November 5, 1993, the Department published a Federal Register notice (58 FR 58954) suspending the helper regulations and reinstituting the Department's prior policy regarding the use of helpers. The 1995 Department of Labor Appropriations Act again barred the Department form expending funds to implement the helper regulations (Section 102, Public Law 103–333); this prohibition extended midway through fiscal 1996 through several continuing resolutions. There was no such prohibition in the Department of Labor's Appropriations Act for the remainder of fiscal 1996, Public Law 104–134, signed into law by President Clinton on April 26, 1996, of for fiscal 1997.

On August 2, 1996, the Department published in the Federal Register (61 FR 40366) a proposal to continue the suspension of the helper regulations previously issued while the Department conducts additional rulemaking proceedings to determine whether further amendments should be made to those regulations. Public comments were invited for 30 days.

In response to this proposal, the Department received forty-seven comments, including submissions by the Associate Builders and Contractors, Inc. (ABC), the Associated General Contractors of America (AGC), the National Association of Home Builders (NAHB), the Coalition to Repeal the Davis-Bacon Act (CRDBA),the National Alliance for Fair Contracting, the American Subcontractors Association, the American Society of Civil Engineers (ASCE), the Building and Construction Trades Department, AFL–CIO (BCTD), the Sheet Metal Workers' International Association, and the Laborers' International Union of North America (LIUNA), individual contractors, local chapters of unions and industry associations, and individuals.

Summary of Comments and Discussion

Among the many comments received by the Department, relatively few directly addressed the issue of whether the Department should continue the suspension of the helper regulations temporarily while it engages in rulemaking on possible amendments to those regulations. The bulk of the comments focused on the merits of flaws of the substance of the underlying helper regulations themselves, or on the factors that led the Department to consider amending the regulations.

The issue addressed by the proposal, however, is not whether the Secretary should or should not repeal or amend the helper regulations for the reasons set forth in the NPRM. Those are issues that will be fully explored in an upcoming notice of proposed rulemaking proceeding concerning the substantive aspects of the helper regulations. However, because the Secretary's decision to seek public comments on whether the helper regulations should continue to be suspended pending the outcome of the substantive rulemaking proceedings is obviously intertwined with his conclusion that the helper regulations need to be reexamined, we discuss below both categories of comments, beginning with those that address the proposed temporary suspension.

Comments Concerning the Proposed Temporary Continuation of the Suspension

The Department expressed its concern in the NPRM that implementing the regulations immediately, during the pendency of rulemaking to consider amending the regulations, could create disruption and uncertainty for both the federal contracting community and the federal agencies. In light of the length of time it would take to fully implement the regulations so that helpers could actually be used on federal construction, and given that shortly after the regulations would be come effective the regulations could change, the Department requested specific comment on whether continuing the suspension during rulemaking would be advisable.

Three comments were received that directly addressed this issue. The BCTD agreed with the Department, stating that the ''proposed rule is the most prudent and responsible action under the circumstances'' to ''avoid the disruption and uncertainty that implementation of the current 'helper' regulations would cause during the short period of time that it will take to complete formal rulemaking.''

On the other hand, the AGC disagreed that implementation would be short-term or would create unwarranted disruption. It also disagreed with the Department as to how long it would actually take to implement the regulations if the suspension were lifted immediately. The AGC noted that when the ratio provision was withdrawn by the Department in June 1992, the General Services Administration published a rule amending the FAR and DFAR in September 1992. The AGC claims that since those amendments have been suspended, not withdrawn, ''there is no reason to believe that delays, if any, would be more than minimal.'' The AGC also stated that ''there is no reason to believe that additional 'substantive rulemaking' will be completed, and implementation initiated, within one year.''

The ABC in its comments did not directly address this issue, but rather asserted:

> While engaging in this predetermined rulemaking, the agency thinks it will take too long (60 days) to implement the existing regulations and that this will disrupt public bidding practices. (In other words, the government should not be allowed to save money in its construction projects, or to recognize prevailing practices, where the savings will not be of long duration.)

First, the Department believes that it would take substantially longer than 60 days to fully implement the helper regulations. This view is fully supported by the Department's past experience with the helper regulations. If the Department were to begin implementation of the suspended rule immediately, the rule itself would provide a 60-day effective date to allow affected parties time to come into compliance, and would apply only to contracts for which bids are advertised or negotiations concluded after that date. Bid solicitations to which the regulations will apply must be advertised for at least 30–60 days before a contract is awarded. Thus, following the effective date of the regulations there will be another 30 to 60 days before contracts potentially containing helper contract clauses could be signed.

Conforming changes in government procurement regulations (the ''FAR'' and ''DFAR'') and standard contract forms would also be needed, a process which has sometimes taken several months. Amendments to the FAR and DFAR following the Department's 1992 notice of implementation had sixty-day effective dates. As noted previously in the NPRM, when the Department implemented the helper rule in January 1992, conforming changes in the FAR and DFAR did not actually become effective until November 1992, approximately ten months after the Department issued its notice implementing the rule. The AGC correctly notes that these changes to the FAR and DFAR also included amendments necessitated by the Department's June 1992 final rule.

Furthermore, a contractor can use helpers in accordance with the helper regulations only if (1) the contract contains a wage determination with a helper classification and rate or (2) the contractor awarded the contract requests that a helper classification be added to the wage determination and the Department determines that the use of the helper classification is a prevailing practice in the area in which the work will be performed. The time necessary for the Department to perform wage determination and prevailing practice surveys would further lengthen the period before contractors could lawfully pay their workers at helper rates.

Furthermore, it continues to be the Department's intention to complete a substantive rulemaking action within approximately one year. Because of the substantial length of time it would take to implement the helper regulations, any saving that might be gained from implementation of the helper regulations during the rulemaking period would be minimal, particularly in light of the disruption and uncertainty which would be caused by implementing the rule while the Department is engaged in rulemaking.

In sum, the comments have provided no information which would change the Department's belief that the suspended regulation, if immediately implemented, ''would be effective for only a brief period, if at all, before the Department expects [to] complete substantive rulemaking proceedings'' and that ''repeated changes in the regulations within a short period of time would create unwarranted disruption in the contracting process of federal agencies'' and uncertainty in the contracting community as a whole.

Whether the proposal to continue the suspension meets the requirements of the Administrative Procedure Act (APA).

Many of the contractors which commented on the proposal expressed the view that the proposal violates the APA. The comments of the NAHB are illustrative. The NAHB stated that the Department is ''already refusing to enforce the current helper regulations, and the comment period has not yet ended,'' in violation of the APA requirement that agencies follow their own regulations, and may lawfully repeal or suspend those regulations only after the public has been given notice and allowed to comment. The NAHB also contended that the Department's ''decision to suspend the regulations is clearly an arbitrary and capricious one,'' because the Department has stated the need for additional substantive rulemaking on the helper regulation but has not yet proposed any changes.

The ABC also contended that the current rulemaking violates the APA and is arbitrary and capricious because there was no notice and comment on the continued suspension of the regulation while the Department engages in notice and comment rulemaking on whether to further continue the suspension during substantive rulemaking. In other words, ABC claimed that the failure to implement the rules while conducting rulemaking on whether to continue to suspend the rules violates the APA.

The BCTD commented that it does not believe the proposal violates the APA; rather, its view is that the proposal is necessary to satisfy the APA. The BCTD commented that one of the reasons it supports the proposed rule is that it believes it is necessary in order to avoid violating the APA. The BCTD expressed the view that the Department was not required to lift the suspension or begin notice and comment rulemaking immediately after the signing of the current Appropriations Act. On the other hand, the BCTD believes that the suspension could not continue indefinitely without the benefit of public notice and comment. The publication of the August 2, 1996, proposed rule for comment, however, alleviates that concern.

It is the Department's belief that the contention that the continued suspension of the helper regulations violates the APA arises from the faulty premise that the helper regulations are currently in effect, and therefore must be enforced until such time as they are amended or repealed after appropriate notice and comment proceedings. However, the helper regulations are not now in effect, and have not been in effect at any time during the past three years. The helper regulations were properly suspended by notice published in the Federal Register on November 5, 1993, in response to the enactment of the prohibition on expending funds to implement the regulations which was contained in the Department's 1994 Appropriations Act. While the Department's current Appropriations Act does not contain such a prohibition, that Act did not have the effect of lifting the suspension. Because the suspension of the helper regulation had been effected through rulemaking action in the Federal Register, action by the Department in the Federal Register was necessary to lift the suspension. Thus, the proposed rule does not suspend the helper regulations; they were already lawfully suspended.

Furthermore, even if the Secretary's continuation of the suspension were construed as a postponement of the (as yet unestablished) effective date of the helper regulations to allow time for notice and comment, it is the view of the Department that the APA permits the Department to seek comments before a final determination concerning implementation of the rule is made. It is the Department's view that delay for the sole purpose of seeking public comments accords with both the language and underlying objectives of the APA—particularly where the public has never had an opportunity to comment on the rule in its present form (without a ratio provision) and over fourteen years have passed since the Department first issued the rule.

It is also the Department's view that it has not acted arbitrarily and capriciously in undertaking the current rulemaking. The purpose of the proposed rule is to solicit public comment ''concerning whether or not to continue the suspension of the helper regulation while further action is being taken with respect to possibly amending the rule.'' 61 FR 40367. The Department has not decided to repeal the helper regulations; nor has the Department made a final decision to amend the regulations. The Department has, however, concluded that the basis and effect of the semi-skilled helper regulations should be reexamined.

The Department believes that the reasons set forth in the NPRM provide a reasonable basis for the decision to seek public comments before making any decision concerning implementation of the rule. Implementation of the regulation, on a short-term basis during the pendency of the substantive rulemaking procedure, would affect relatively few contracts, and yet could potentially create substantial disruption and uncertainty in the federal procurement process. Consequently, the Department believes it was entirely appropriate and consistent with the objectives of the APA to seek comments from affected parties before deciding how to proceed.[1]

Comments Concerning the Reasons for the Department's Decision To Initiate Rulemaking Proceedings Proposing Further Amendments to the Suspended Helper Rule

Many of the comments received addressed the reasons given by the Department for initiating substantive rulemaking concerning the helper rule. The specific question posed by the current proposed rule is whether to continue the suspension of the helper regulation while the Department further considers such substantive issues and what, if any, amendments it should propose to address them. The time for full consideration of substantive issues is after the Department has published a proposal that would further amend the helper rule and the public has had the opportunity to comment on that proposal. But given that most of the comments received addressed the Department's substantive concerns with the helper regulations, and that the need to address those concerns is what led the Department to propose the continued suspension of the regulations, it is appropriate to summarize and discuss those comments here.

The Department explained in the NPRM that it has decided to reexamine the helpers regulations to consider whether further amendment is warranted. Data gathered during the brief period during which the helper regulation was effective suggest that the use of helpers may not be as widespread as initially thought. The Department is also preparing an updated economic impact analysis based in part on data sources not previously available. As a result of the Department's experience in attempting to develop enforcement guidelines and the removal of the ratio requirement from the regulation, the Department is very concerned that administration of the helper regulation, and the policing of potential abuse of the helper classification, may be more difficult than initially anticipated. Finally, the Department stated that it is concerned about the potential impact of the regulation on formal apprenticeship and training programs.

Use of helpers may not be as widespread as initially thought.

The belief that use of helpers was widespread was a key assumption underlying the Department's development of the helper regulation. Many of the contractors and contractors' associations submitting comments questioned the Department's stated concern that the use of helpers might not be as widespread as it had initially assumed, and its reliance upon prevailing wage survey results when the helper regulation was in effect as the basis for that statement. The ABC, relying upon its assertion that helpers are utilized extensively in the open-shop sector, also points to BLS statistics showing a flat or slightly declining level of unionization during the period 1989–1992 to question the legitimacy of the Department's concern.

In the proposed rule published in August 1987, the Secretary projected that helpers would be determined to be prevailing in two-thirds to 100 percent of all craft classifications. 52 FR 31369. This was amended by the statement (without quantification) in the final rule that this would be reduced somewhat to the extent that collectively bargained rates were recognized as prevailing and did not provide for use of a helper classification. 54 FR 4242.

The Secretary's actual experience with the regulation presented a starkly different picture. In contrast to the estimate published in 1987 that helpers would prevail in at least two-thirds of all craft classifications, the Secretary found that use of helpers prevailed with respect to only 69, or 3.9 percent, of the 1763 classifications included in the 78 prevailing wage surveys completed during the period the rule was in effect.[2] These numbers are even lower if one looks only at the nonunion sector—where it had been assumed in the past that helpers would almost always be found to prevail. Of the 69 helper classifications found to prevail, 21 were prevailing based on the practice of union contractors.[3]

Furthermore, the Secretary found that use of helpers was not the prevailing practice in *any* classifications in 43 of the 78 surveys conducted, covering 229 of 328 counties surveyed.[4] These

[1] The question of the proposed rule's adequacy under the APA is currently before the U.S. District Court for the District of Columbia in the matter of *Associated Builders and Contractors, Inc., et al.* v. *Reich,* Civil Action No. 96–1490 CRR. The views of both the Department and the ABC are discussed in greater length in the pleadings filed in the case.

[2] Not included in the 69 helper classifications are instances where the number of helpers actually used or the number of contractors using helpers was insufficient to determine a prevailing rate.

[3] Fifteen of the 21 union help classifications were elevator constructor helpers—a classification historically recognized nationwide in the union sector of the elevator constructor trade.

[4] Note that the survey results have been re-checked and the numbers revised slightly since publication of the proposed rule. Compare 61 FR 40367. Both the ABC and the AGC questioned the results obtained in the 78 surveys, citing a 1996 GAO report on the Davis Bacon wage determination

surveys included 2 surveys in which the schedule reflected entirely collectively bargained rates, 10 surveys in which the schedule reflected entirely open shop rates, and 66 mixed schedules, 51 of which reflected 50 percent or more open shop rates. In 13 of the 35 surveys where a helper classification was issued, the only helper classification found to prevail was a union helper. A total of only 48 open shop helper classifications were found to prevail. Thus open shop helper classifications were found to prevail in only 20 of 78 surveys conducted, covering only 52 of 328 counties surveyed.

ABC in its comments attempts to dismiss this data as ''statistically insignificant.'' However, the extraordinary divergences between the actual data and the projection used as a basis for adopting the helper regulations clearly support the Secretary's conclusion that ''the basis and effect of the semi-skilled helper regulations should be reexamined.'' 61 FR 40367. Moreover, ABC's reference to statistics that show a decline in unionization fails to explain the dramatic discrepancy between the Secretary's project in the 1987 proposed rule and the data compiled from actual wage surveys during 1992 and 1993.

Data not previously available when the helper regulations were originally proposed and promulgated also show a lower use of helpers than was originally believed and, therefore, support the Secretary's determination that the helper regulations require further examination. For example, Bureau of Labor Statistics (''BLS'') tabulations from the 1995 Current Population Survey (''CPS'') show that helpers comprise only 1.3 percent of the total construction employment. Employment data from the Occupational Employment Statistics (''OES'') program, which have formed the basis for earlier analyses of helper employment, show that helpers comprise 9.4 percent of the total construction workforce—higher than the CPS data but a much lower incidence than the Department's economic impact analysis in 1987 and 1989 would suggest. However, the OES figure is based on a helper definition which appears to correspond to what is commonly considered to be laborer's or tenders' work and does not appear to envision that helpers use tools of the trade—an important component of the definition in the suspended regulation.

Potential Cost Savings

The potential cost savings to be realized from implementation of the helper regulation was cited by many of the commenters who opposed the temporary continuation of the suspension. Many claimed that implementation of the helper regulation could save the government up to $600 million a year, based on the Department's earlier economic impact analysis.

LIUNA expressed its view that implementation of the helper rule would not significantly reduce the cost of federal and federally-assisted construction projects. They believe the cost estimates developed in the course of rulemaking on the helper regulations were overly simplistic, failing to account for the productivity costs of replacing higher wage, skilled workers with lower wage, less skilled workers. Another commenter stated the view that semi-skilled workers increase project costs due to increased safety violations and worker's compensation claims, and lower productivity.

The data discussed above indicate that helpers may be found to prevail at a much lower rate than previously assumed. The Department is preparing a preliminary regulatory impact analysis which will discuss the Department's updated estimate of costs and benefits relating to the proposed regulation in preparation, and will include projected savings if the suspended helper rule were implemented. This analysis will be published for notice and comment with the proposed rule.

Potential for Abuse

Both the ABC and the AGC challenged the Department's concern that the helper regulation may create an unwarranted potential for abuse of the helper classification to justify payment of wages which are less than the prevailing wage in the area. The AGC does not believe there is any more potential for abuse with respect to the helpers regulation than there is with respect to the Department's procedures for identifying other classifications, calculating prevailing wages, or conforming classifications. The ABC stated that if helpers prevail in only a few areas, the position it ascribes to the Department, then it is not likely that there would be any significant amount of abuse.

The extent to which helpers prevail in particular areas does not bear on whether the use of helpers will be abused where they do prevail. Moreover, the issue of what, if any, changes need to be made to prevent potential abuse is one of the primary reasons the Department has decided to reexamine the helper rule. The Department notes that the helper classification as currently defined is unique in being based on subjective standards such as skill level and supervision, rather than an objective test of work performed. The Department is concerned that such a subjective standard may be more difficult to enforce.

Three commenters, all of whom supported the proposal to continue the suspension, expressed their concern that the definition of a helper contained in the regulation would lead to abuse and misclassification. One commenter submitted anecdotal evidence of intentional misclassification under a State wage determination law that allowed the use of helpers, and the two others believe it will be very difficult to enforce the regulation against contractors who would call the majority of their workforce helpers, including workers whose skill-levels qualify them as journeymen.

Both the ABC and the AGC reject the notion that the regulation is more difficult to administer without the ratio provision, and neither finds it relevant that the public never had the opportunity to comment on the possible impact on the regulation of eliminating the ratio. LIUNA on the other hand believes the regulation without such a ratio is significantly different from what was originally proposed, and believes that the failure to submit the regulation without the ratio for public comment renders it legally deficient.

The elimination of the ratio cap provisions from the helper regulation, under which there could be no more than two helpers for every three journeymen, is one of the primary reasons the Department is concerned that the regulations may be more difficult to enforce than anticipated, and more subject to abuse. As the proposed rules published in 1981, 1987 and 1996 uniformly reflect, this ratio provision was intended specifically to limit the potential for abuse of the helper classification. 46 FR 41456 (Aug. 14, 1981); 52 FR 31366 (Aug. 1987); 61 FR 40367 (Aug. 2, 1996). The D.C. Circuit echoed the Secretary's concern with potential abuse of the helper regulations in its 1983 decision when the Court observed that ''[t]he change may mean that some unscrupulous contractors will find it easier to shift what the prevailing practice denominates journeyman work

process. GAO/HEHS–96–130, May 1996. It is inappropriate to draw conclusions concerning the accuracy of survey results based on the GAO report. The report did not examine or verify the accuracy of wage determination data, survey response rates, or calculation of prevailing wages. It focused on the policies and procedures utilized to prevent the use of inaccurate data, and proposed changes to strengthen those policies and procedures.

onto helpers * * * .'' 712 F.2d at 629. The Court, like the Secretary, concluded that the numeric ratio ''increase[s] the likelihood that gross violation will be caught, or at least that evasion will not get too far out of line * * * .'' *Id.* at 630. While the D.C. Circuit invalidated the specific ratio selected by the Secretary in its 1992 decision, nothing in that opinion suggests that a ratio is not an important element of the regulation, nor does it purport to preclude the Secretary from adopting such a measure designed to curb the potential for abuse so long as the Secretary adequately explains his actions. *See Building & Construction Trades Dept.*, 961 F.2d at 276–277.

The regulation was modified as a result of the 1992 court decision, to eliminate the numerical ratio of helpers to journeymen. Although that ratio was one of the principal protections against abuse of the new helper definition, the public never had an opportunity to comment on whether other changes to the regulation, or an alternative ratio, was appropriate in light of the elimination of the ratio provision.

In the course of attempting to develop enforcement guidelines for the regulations while they were in effect, it became apparent that the helper definition may be more difficult to administer and enforce than anticipated, and more difficult to administer than other aspects of the wage determination structure. Because a helper as defined in the suspended regulation is the only classification with duties that are specifically intended to overlap with the duties performed by other classifications, the Department believed that the ratio cap was a necessary buffer against potential contractor abuse and misclassification. The Department is concerned that the elimination of the ratio provision may greatly increase the possibility that misclassifications will go unchecked. The Department therefore continues to be concerned that the suspended regulation as written should be reexamined through notice and comment rulemaking.

Effect on Apprenticeship and Training

Several of those who supported the proposed continuation of the suspension believe that the helper regulation would have a negative impact on formal apprenticeship and training programs. They claim that the ability to pay apprentices a wage lower than that paid to journeymen is a significant incentive for contractors to participate in formal training programs. They also claim that the availability of lower paid helpers would cause contractors to withdraw from such programs and would threaten private funding for apprenticeship and training. They believe that this poses a threat both to the industry, which would face shortages of skilled, trained labor, and to the individual workers who would find themselves in dead-end, low skilled jobs without adequate opportunity to increase their skills. Both the ABC and the AGC, however, believe such concerns are unfounded, and both observe that the Department provided no new evidence on this topic in the proposal.

The contractors who wrote to oppose the suspension proposal did not directly address the impact the helper regulation would have on apprenticeship and training. But some of them did describe how they use helpers, suggesting that they view helpers not as a separate and distinct classification but as an entry-level position in which workers acquire skills to move up to the journey level, much like an apprentice. These commenters endorsed the helper regulations (and opposed their continued suspension, even temporarily) because they allow workers to gain experience; promote training of unskilled workers; provide the semi-skilled with an opportunity to gain experience; and provide the unskilled with a first step to higher paying jobs.

Some of these commenters, however, described helpers in a way that is not incompatible with apprenticeship programs. One company noted that it is not practical to enroll abundant numbers of semi-skilled workers in apprenticeship training programs. Another viewed the helper position as a pre-apprentice opportunity for unskilled workers to acquire the skills necessary to enter an apprenticeship program.

These comments taken together confirm the Department's view that the potential impact of the helper regulation on apprenticeship programs is not fully understood, and should be revisited through further rulemaking.

Additional Comments

A large number of those opposed to the proposed rule also raised two additional issues. First, commenters stated that contractors that use helpers would be more able to compete for federal construction contracts if the helper regulation were implemented immediately. Second, commenters contend that women and minorities are more likely to be employed as helpers; therefore immediate implementation of the helper regulations would increase employment opportunities for those groups. LIUNA, on the other hand, stated that women and minorities are more likely to be employed as laborers and therefore would be harmed by implementation of the helper regulation.

LIUNA also stated its view that the Department's position on the impact of the helper regulation on other occupational classifications shifted without explanation during the prior rulemaking on the suspended regulation. LIUNA notes that throughout the rulemaking the Department had assumed that helpers would replace laborers as well as journeymen, but significantly changed its position in the 1989 final rule, in which it assumed that helpers would replace only journeymen. They also cite developments within the industry that have rendered obsolete the understanding of laborers as unskilled workers, making it more difficult to use skill-level as a basis for distinguishing between laborers and helpers. Thus, it is LIUNA's view that the impact of the helper regulations upon laborers should be reexamined before the regulations are implemented.

That certain contractors, who utilize ''helpers'' as that term is defined in the suspended regulations, may benefit from implementation of the helper regulations, does not negate either the need to reexamine the practicality and enforceability of such regulations or the advisability of continuing the suspension of these regulations during such reexamination. Moreover, the disagreement among the commenters as to the degree and nature of the potential effect of the helper regulations upon the employment of women and minorities, as well as the employment of laborers, provides even additional support for the Secretary's decision to further reexamine the helper regulations through additional rulemaking.

Conclusion

For the foregoing reasons and after consideration of all of the comments submitted in response to the proposed rule published on August 2, 1996, in the Federal Register (61 FR 40366), the helper regulations previously issued under the Davis-Bacon and Related Acts at 29 CFR 1.7(d), 29 CFR 5.2(n)(4) and 29 CFR 5.5(a)(1)(ii) and suspended at 58 FR 58954 (Nov. 5, 1993), are suspended until the Department either (1) issues a final rule amending (and superseding) the suspended helper regulations; or (2) determines that no further rulemaking is appropriate, and issues a final rule reinstating the suspended regulations. The Department expects these proceedings to be completed within approximately one year.

V. Administrative Procedure Act

The APA at 5 U.S.C. 553(d)(3) requires that the effective date for a regulation be not less than 30 days from the date of publication unless there is ''good cause'' shown for an earlier date. This rule does not require affected persons to take any actions to prepare for its implementation. Furthermore, a delay in the effective date could cause confusion among the affected public as to whether the previously suspended rule is in effect in the meantime. Therefore the Department finds good cause to have this rule effective immediately.

VI. Executive Order 12866; § 202 of the Unfunded Mandates Reform Act of 1995

As stated in the notice of proposed rulemaking, the Department is treating this rule as a ''significant regulatory action'' within the meaning of sec. 3(f)(2) of Executive Order 12866 because the alternative to the proposed rule—lifting of the suspension and implementing the helper regulations while rulemaking is ongoing—could possibly interfere with actions planned or taken by other government agencies.

The AGC contends that the proposal for further rulemaking is inconsistent with Executive Order No. 12866, Section 202 of the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Fairness Act and the Regulatory Flexibility Act. The AGC claims that the concerns expressed by the Department in the proposed rule regarding implementation of the helper regulations are ''vague'' and not ''supported by reliable data.'' Relying upon the Department's own previous cost analysis conducted in 1987 and published along with the final rule at 54 FR 4242 (1989), the AGC claims that ''the Department's contention that no cost would be incurred by continuing the suspension of the helper regulations is simply not true,'' and that failure to implement the helper regulations will ''cost the federal government, taxpayers and the construction industry hundreds of millions of dollars.'' Finally, the AGC asserts that ''the Department's proposal is a 'major rule' and requires both an economic and regulatory flexibility analysis in full compliance with Executive Order No. 12866 and the Small Business Regulatory Enforcement Fairness Act.''

The AGC's comments address potential savings of implementation of the helper regulations, rather than the impact of continuing the suspension. As noted above, the Department is preparing a preliminary regulatory impact analysis which will discuss the Department's estimate of the costs and benefits of the proposed rule in preparation, including any savings that might be realized from implementation of the helper regulations as they now stand. This analysis will be published for notice and comment concomitant with the Department's regulatory proposals concerning the employment of helpers on Davis-Bacon projects.

As discussed above, the Congressional action of lifting the prohibition against implementing the regulation did not itself reinstate the suspended regulation, and a notice or other rulemaking action by the Department was necessary to lift the suspension on the helper regulation. It is the Department's view, therefore, that the suspension has continued in effect since October 1993, and that the suspension continues in effect today. This rule, which continues the previously existing suspension, merely preserves the status quo. Therefore the Department concludes that there will be no cost savings from the continuation of the suspension of the helper regulations that has been in effect since November 1993 during the substantive rulemaking proceedings.

Moreover, as discussed above, a substantial period of time is required before the regulations would be implemented by their incorporation into contracts, and the Department's experience in the period in 1992 and 1993 when the suspended regulation was in effect was that relatively few surveys were completed in which helpers were found to prevail. Thus, any potential savings that would be lost from a failure to implement the helper regulations during the rulemaking period would be minimal.

Accordingly, the Department has concluded that this rule, which continues the suspension of the helper rule and therefore is a continuation of the status quo, will not have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy or a sector of the economy.

Because this rule will not have a significant economic impact, no economic analysis is required. For the same reason, this rule does not constitute a ''major rule'' within the meaning of § 804(2) of the Small Business Regulatory Enforcement Fairness Act.

VII. Regulatory Flexibility Act

The AGC contends that the Department's conclusion that the proposed continuation of the suspension ''will have no significant impact on small entities is also contradicted by its 1987 estimate. * * *''

Again, the AGC's comments address the potential savings of implementation of the helper regulations, rather than the costs or savings of continuing the suspension. This regulation is merely a continuation of the status quo. Therefore the Department has determined that the rule does not have a significant economic impact on a substantial number of small entities.

Furthermore, the Department has determined that if the current suspension were lifted and the helper regulation implemented, there would not be a significant economic impact on a substantial number of small entities during the interim period prior to completion of rulemaking action on the helper regulations—expected to be completed within a year. Because of the lag times in agency procedures to amend their regulations and incorporate the contract clauses, and the relatively small number of helper classifications which the Department found prevailing in its surveys in 1992 and 1993, it is unlikely that a substantial number of small entities would have the opportunity to use helper classifications during the period before the rulemaking is completed. Accordingly, the rule is not expected to have a ''significant economic impact on a substantial number of small entities'' within the meaning of the Regulatory Flexibility Act, and the Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Thus, a regulatory flexibility analysis is not required.

VIII. Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

Signed at Washington, D.C., this 23rd day of December 1996.

Gene Karp,

Deputy Assistant Secretary for Employment Standards.

[FR Doc. 96–33054 Filed 12–27–96; 8:45 am]

BILLING CODE 4510–27–M

---

29 CFR Part 4

RIN 1215–AA78

Service Contract Act; Labor Standards for Federal Service Contracts

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule a new methodology for establishing minimum health and

welfare benefits requirements under the McNamara-O'Hara Service Contract Act (SCA). In this document, the Department of Labor (DOL or the Department) also issues a variance, pursuant to Section 4(b) of the Act, to reflect the Department's practice of issuing prevailing fringe benefit determinations on a nationwide basis, rather than separately for classes of employees and localities. This document also contains other minor, clarifying modifications that conform the regulations to a 1985 court decision, a 1983 treaty, a 1996 intergovernmental compact, and more recent amendments to the Fair Labor Standards Act (FLSA) minimum wage provisions.

EFFECTIVE DATE: June 1, 1997.

FOR FURTHER INFORMATION CONTACT: William Gross, Director, Division of Wage Determinations, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue, NW, Washington, DC 20210; telephone (202) 219–8353. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This rule does not contain any new or added reporting or recordkeeping requirements subject to the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The existing information collection requirements contained in Regulations, 29 CFR Part 4, were previously approved by the Office of Management and Budget under OMB control number 1215–0150. The general Fair Labor Standards Act (FLSA) recordkeeping requirements which are restated in Part 4 were approved by the Office of Management and Budget under OMB control number 1215–0017.

II. Background

The McNamara-O'Hara Service Contract Act of 1965 (SCA) requires that the Department determine locally-prevailing wages and fringe benefits for the various classes of service employees performing contract work subject to the SCA. Federal service contracts over $2,500 (if the predecessor contract was not subject to a collective bargaining agreement) are required to contain wage determinations issued by DOL that specify the minimum monetary wages and fringe benefits that must be paid to the various classes of workers who perform work on the service contract, based upon rates determined by DOL to be prevailing in the locality where the work is to be performed. However, because fringe benefit data are not generally available on an occupation-specific or on a locality basis, DOL has issued fringe benefit determinations for health and welfare based on nationwide data ever since SCA was enacted.[1]

The Service Employees International Union (SEIU) sued DOL in March 1991 in the United States District Court for the District of Columbia over the longstanding administrative practice, since 1976, of issuing two nationwide rates for health and welfare fringe benefits, and for failure to periodically update SCA health and welfare fringe benefit levels which, at that time, had not been updated since 1986 (*SEIU* v. *Martin,* CA No. 91–0605 (JFP) (D.D.C. April 1, 1992)). Following a remand to the Department for exhaustion of administrative remedies, the DOL's Board of Service Contract Appeals remanded the matter to the Wage and Hour Division to consider alternative methodologies for implementing the statutory objectives. Accordingly, the Administrator of the Wage and Hour Division, by Notice of Proposed Rulemaking (NPRM) published in the Federal Register on May 2, 1996 (61 FR 19770), proposed for public comment various alternative methodologies based on data from the U.S. Bureau of Labor Statistics, Employment Cost Index (ECI). Due to the time constraints, it was not feasible to publish the required regulatory impact analysis for comment with the proposed rule.

The Department thereafter developed information on the occupational mix of service employees engaged in the performance of SCA-covered contracts. Based on data collected by the Federal Procurement Data System for Fiscal Year 1994, the Department conducted a survey which provided specific information on service contract employment by occupation within SIC industry classifications. By Notice published in the Federal Register on October 25, 1996 (61 FR 55239), the Department published its preliminary regulatory impact analysis containing estimates of the economic impact of the various proposed alternatives.

In an action filed by the SEIU in the U.S. District Court for the District of Columbia, the court set a deadline for publication of this final rule of December 24, 1996. *SEIU* v. *Reich,* CA No. 91-–0605 (August 27, 1996).

In response to the proposed rulemaking, the Department received 80 comments. This included comments from seven Federal agencies: Department of the Army, Department of the Navy, Department of the Air Force, Defense Commissary Agency, U.S. Postal Service, Environmental Protection Agency (EPA), and National Aeronautics and Space Administration (NASA). Comments were received from six union organizations: Service Employees International Union (SEIU), the American Federation of Labor-Congress of Industrial Organizations (AFL–CIO), the International Union of Operating Engineers, the Laborers' International Union of North America (LIUNA), District No. 5—ITPE, NMU/MEBA (AFL–CIO), and the International Association of Bridge, Structural and Ornamental Iron Workers. The Contract Services Association of America (CSA), which according to its comment represents more than 240 companies that provide technical and support services to 37 Federal agencies, provided detailed comments, and thirty-three of its member contractors separately submitted comments concurring with CSA's position. Several major government service contractors, including Johnson Controls, Lockheed Martin, Raytheon Aerospace, Aspen Systems Corporation, and Kay and Associates, Inc., also provided comments. In addition, the law firm of Hogg, Allen, Norton & Blue, which stated that it represents a large number of service contractors throughout the country, commented on the Department's proposal.

Thirteen firms which employ or provide employment services to disabled workers under the NISH program and the Javitz-Wagner-O'Day Act (JWOD) submitted comments. The National Star Route Mail Contractor's Association and six mail hauling firms also filed comments. Fringe Insurance Benefits, Inc., which markets and provides services to the Contractors and Employees Retirement Trust Fund and several health plans designed specifically for prevailing wage employees, provided its comments. ACIL, which represents firms performing scientific testing and engineering services, also commented on the Department's proposal.

III. Comments and Analysis of Alternatives

Summary of Comments

A majority of the commenters favored Alternative I, which would provide for a single fringe benefit rate based on ECI all-industry data. The CSA supported the Alternative I methodology, and thirty-three of its member contractors concurred separately with CSA's position. Both the Department of the Army and the Department of the Navy

[1] For a complete description of the history and content of the current methodology, see the *Background* section of the Notice of proposed rulemaking published at 61 FR 19770 (May 2, 1996).

preferred Alternative I. Alternative I was also supported by Lockheed Martin and Kay and Associates, Inc. (KAI).

Little support was offered by the commenters for Alternatives II, III or IV, including the variations of these alternatives. The Defense Commissary Agency and four firms which employ disabled workers supported Alternative II–A, which would provide separate benefit levels for six major occupational groupings, primarily because it would be the least costly in their particular circumstances. None of the commenters favored Alternative II–B, which would provide a single fringe benefit rate based on the occupational mix of service employees engaged in the performance of SCA-covered contracts, or Alternative II–C, which would provide for two benefit levels based on combining occupational groupings into two categories. Alternative III, under which separate rates would apply to each of four geographic regions, was supported by only three commenters. Alternative IV, which would provide for a fringe benefit rate based on a percentage of wages paid was endorsed by Aspen Systems Corporation, which desired a high benefit package for its employees, and three firms which wanted a low benefit package.

The Air Force strongly supported Alternative V–A, which would continue the current methodology of applying two benefit levels based on ECI size-of-establishment data. NASA, EPA, and the U.S. Postal Service, and 3 other organizations also supported this alternative. Three commenters supported Alternative V–B, a variation of the current methodology in that it would be applied by the size, rather than nature, of the contract and the lower benefit level would be based on ‘‘total benefit’’ rather than ‘‘insurance only’’ ECI data.

The unions commenting favored none of the proposed alternatives, choosing instead to propose another alternative, which would preserve the two-tier benefit system, but would use a different methodology for calculating the lower ‘‘insurance’’ benefit rate. The unions proposed that this lower rate be based on all-industry insurance only data, rather than ‘‘size-of-establishment’’ insurance data, and that those firms not providing health insurance be eliminated from the data (*i.e.*, eliminating the ‘‘zeros’’). The unions also proposed including data on fringe benefits paid to public employees in the low level fringe benefit calculation.

Another alternative was also proposed by Fringe Insurance Benefits, Inc., under which the Department would issue a single level for health insurance which would be the same for all employees, and an additional amount for pension which would vary based upon wages or job classification.

More detailed discussion of the comments on each of the alternatives proposed follows:

Alternative I: Issue a single benefit level based upon ECI data for workers in private industry. The commenters who supported the Alternative I methodology did so generally for three basic reasons. First, they preferred its simplicity in establishing a uniform benefit rate for all employees and the consequent ease with which contractors could administer this rate and the government could verify SCA compliance. Commenters also believed that this methodology would eliminate the possibility of contractors manipulating employee classifications in order to obtain a competitive advantage, which might happen under some of the other proposed methodologies, thus ensuring a ‘‘level playing field for bidders.’’

Secondly, many commenters preferred Alternative I because it does not discriminate between classes of employees based on the kind of job they have or the location of their employment, and because it is easy for employees to understand and would result in fewer morale problems. KAI complained that because on some military installations the $2.56 ‘‘total benefit’’ package applies to some contracts while the $.90 ‘‘insurance’’ applies to others, it has lost highly qualified employees to a different company working at the same base location which paid the same wage but with the higher $2.56 benefit rate. According to KAI, its employees ‘‘never understand or accept why someone else on the same base receives $2.56 per hour in benefits in comparison to the $.90 they receive.’’ Vinnell Corporation echoed this concern, stating as follows:

We have long believed that the two tier fringe benefit rate methodology used for service contracts is discriminatory and creates a disparate impact on those individuals working on projects where the lower rate is applicable. One of Vinnell’s current service contracts is at a location where the higher fringe rate is applicable because the project was derived from an A–76 procurement action approximately 15 years ago. At that same location we have a second project where the lower fringe rate is applicable. We find it inconceivable that two carpenters, both working for Vinnell on different service contracts but at the same military installation and receiving the same wage rate should not also receive the same fringe benefit rate.

KAI was also concerned that a two-tiered system ‘‘results in added administrative costs and negates the cost savings associated with economies of scale.’’

Finally, many commenters preferred the Alternative I methodology because, as CSA stated in its comments, it produces a benefit rate which is ‘‘sufficient to allow all service contractors to purchase a good benefit package for employees that would cover a range of health and welfare benefits for all contract workers.’’ Many commenters expressed their belief that due to the continually rising cost of benefit packages, the current ‘‘insurance only’’ benefit rate of $.90 per hour is simply insufficient to purchase any meaningful benefit package, especially one that would include adequate health insurance. KAI offered the following concrete example:

In 1993, $.89 per hour of benefits allowed the contractor to provide a benefit package with 3 personal days, $10,000.00 of life insurance, profit sharing contribution, dental insurance, and medical insurance with a $250.00 deductible and supplemental accident insurance. The $.90 per hour of benefits in 1996 allows the contractor to provide a benefit package with 4 personal days, zero life insurance, profit sharing contribution, zero dental insurance, and a medical plan with a $350.00 deductible and no supplemental accident insurance.

Contractors favoring Alternative I also believe that the resulting increase in the benefit level for many of their employees would aid them in attracting and retaining qualified employees to work on service contracts with the Federal government.

Both the Department of the Army and the Department of the Navy supported the establishment of a single health and welfare benefit rate to be issued on all SCA wage determinations. The Army stated that it supports one flat rate ‘‘in the interests of simplicity and acquisition streamlining.’’ The Army preferred a ‘‘single rate’’ methodology because it believes that the standards currently used by DOL to apply the high benefit rate have no rational basis. The Army cited as an example the Department’s policy of applying the high rate to ‘‘OMB Circular A–76’’ contracts.[2] The Army stated that if DOL is to continue with a two-rate methodology, it must ‘‘publish clear understandable and fair guidance to explain when each rate is applied.’’

The Army appears to regard the $1.89 rate as acceptable since it ‘‘splits the

[2] OMB Circular A–76 actions are solicitations with potential for displacement of Federal civilian workers. The rationale behind applying the high benefit level to such contracts is that Federal workers whose jobs are being converted to the private sector should not suffer an abrupt decrease in their benefits.

difference between the 'low' and the 'high' fringe rate.'' However, the Army believes that ''it is important that the contracting agencies have the ability to challenge that one rate by industry. If rates are significantly lower for a particular industry, then DOL should deviate from the one rate and set a lower rate for that industry.''

The Navy similarly concludes that ''[t]he single rate is far more justifiable in terms of both contracting for services and compliance within established employer wage and benefit programs.'' The Navy also expressed belief that DOL has applied the current ''high'' health and welfare benefit level in an artificial manner. Like the Army, the Navy specifically mentioned the OMB Circular A–76 contracts involving displacement of Federal employees as an example of improper application of the high benefit rate. The Navy stated that once the high rate is applied to such a contract, it continues to apply indefinitely to follow-on contracts, and consequently, ''many service contracts contain the artificially high benefit level while the prevailing rates for those contracts are considerably lower.''

The Navy also stated that ''information available within the Federal Employees Health Benefits Program'' would provide a sound basis for establishing a single benefit rate. The Navy is concerned that implementation of the $1.89 rate would create a significant cost increase that might result in ''the federal contracting agencies' inability to continue funding certain services, or existing service levels, or [cause agencies] to reconsider decisions to contract out such services to the private sector,'' thus causing a reduction in the service contract workforces. The CSA also was concerned that ''[i]ncreased cost to government agencies could result in downsizing of contracts and layoffs of employees.''

On the other hand, the Department of the Air Force opposed the Alternative I methodology on the bases that the $1.89 ECI-based rate is too costly and not appropriate for any contractor, being ''too low for employees of large companies or with high-skilled workers and too high for employees of small companies or low-skilled employees.'' The Air Force, however, agreed with the Army and the Navy that ''[t]he current problems with the two rate system stem from the inconsistent application of the two fringe benefit levels resulting in confusion and frustration by Federal contracting agencies, contractors, and service contractors.'' The Air Force further stated that ''[t]he inflexibility, for example, in applying the 'high' fringe benefit rate to A–76 [Federal employee displacement] solicitations and then maintaining the high benefit level regardless of the type of continued circumstances of the contract has created the climate for complaints and attacks on the two level system.''

The Defense Commissary Agency believed that Alternative I would be cost-prohibitive for its contracting purposes since that agency normally uses ''service occupations'' that would be paid the ''low'' health and welfare benefit rate under the current methodology.

Another disadvantage to the Alternative I methodology, specifically mentioned by CSA, is that the all-industry ECI data upon which the Alternative I benefit rate would be based includes ''zeros''—that is data from companies that do not provide the benefit surveyed, thus resulting in a lower rate that does not accurately reflect the actual cost of such benefits. This concern was also reflected in the unions' alternative proposal for determining health and welfare benefit rates, which is separately discussed below.

Many commenters expressed concern that lowering the current high ''total benefit'' rate to the Alternative I single benefit rate would result in serious employee morale problems and disruption in benefits. Accordingly, as will be more fully discussed below, many commenters favored some type of ''grandfathering'' or ''phase-in'' mechanism to ameliorate the disruptive effects resulting from a change in the health and welfare benefit rate methodology.

The unions unanimously opposed the single rate methodology provided in Alternative I primarily because it would reduce existing benefits currently received by those service contract workers to which the higher level ''total benefits'' rate applies. They believed that Alternative I met their primary criterion of establishing a rate high enough to purchase health insurance coverage, but nonetheless found this alternative unacceptable because it would eliminate the existing ''total benefits'' rate. SEIU also opposed Alternative I for the specific reasons that it excludes public employee data and fails to give ''due consideration'' to Federal employee rates.

Alternative II–A: Issue a single benefit level for each of six major occupational groupings based on ECI data for all workers in each of these groupings in private industry. This alternative was favored by the Defense Commissary Agency and four firms which employ workers with disabilities pursuant to programs sponsored under the Javitz-Wagner-O'Day Act (JWOD), based primarily on their view that this alternative would be the least costly in their individual circumstances. The Defense Commissary Agency recommended use of Alternative II–A because the ''service occupations'' it normally uses ''really would justify only a rate of $.62 per hour.'' Eastern Carolina Vocational Center (ECVC), which operates a work center for disabled individuals, explained that Alternative II would be the best alternative for its operations based on cost reasons. While ECVC acknowledged that Alternative II–A may be the most expensive to the government as a whole, it would be the least costly where ECVC was concerned since its workers fall within the second lowest paid occupational group (handlers, equipment cleaners, helpers and laborers, which would receive fringe benefits of $1.24 per hour [based on 1995 ECI data] under this alternative).

Most of the commenters who opposed adoption of Alternative II–A believed that it would be too difficult to administer and enforce, and would result in ''additional costs to the contractor, and ultimately to the contracting agency, for personnel and systems to administer the program.'' The Air Force was concerned that the increase in the complexity of accounting resulting from this alternative would pose ''additional compliance difficulties for contractors and [Wage-Hour] investigators.''

Commenters also expressed concern that too much subjectivity would be inherent in the administration of this alternative. Both CSA and Aspen Systems Corporation specifically stated that utilization of this alternative could lead to gamesmanship involving manipulation of classifications by contractors during the competitive bidding process.

Many commenters expressed their belief that minimum fringe benefit rates differentiating among various groups of employees under Alternative II–A would not reflect the prevailing practice in the service contracting industry and would be unfair to employees in lower-paid occupations. CSA stated that a ''vast majority'' of its member companies ''provide the same level of benefits to all workers, except those workers who are covered under a Collective Bargaining Agreement or a prevailing wage law.'' The AFL–CIO also stated that employers generally provide the same rate of fringe benefits, particularly health insurance, to all employees working on the same contract. The AFL–CIO further stated that ‘‘a system based on occupational groupings that would provide different employees working for the same employer under the same contract with widely different fringe benefits simply could not be considered to be prevailing since such a system is rarely found among employers.’’

Several contractors stated that, especially on those contracts with a mix of labor categories, there could be a high potential for discrimination problems arising under the Internal Revenue Code in view of the large disparity between the various benefit rates. Several commenters were also concerned that having the various benefit levels under Alternative II–A would create serious labor and morale problems. In addressing this point, the AFL–CIO stated as follows:

> [Q]uality health insurance is needed by all service workers regardless of their occupational groupings. The cost of insurance is the same for the custodian as for the computer technician. Establishing different minimum fringe benefit levels based on occupational titles or groupings probably would lead to different levels of health care among service workers, creating basic problems in the workplace.

Finally, several commenters, including Fringe Insurance Benefits, Inc., opposed this alternative because the $.62 rate for ‘‘service occupation’’ employees would not be sufficient for such employees to obtain any meaningful health insurance.

Alternative II–B: Issue a single benefit rate adjusted to reflect the difference between the BLS ECI occupational universe and the actual mix of comparable occupations on SCA contracts. No commenters favored this alternative; Lockheed Martin was the only commenter to provide any favorable comments concerning this alternative.[3] Lockheed Martin believes that the benefit rate produced under this methodology would be less than the $1.89 rate produced under Alternative I and that it ‘‘would be more reflective of prevailing benefit levels of SCA type contracts.’’ Lockheed Martin also believed this alternative to be easy to administer.

Most commenters opposed Alternative II–B simply because they believed it to be too complicated. CSA believed that ‘‘the data required to effectively accomplish this may be too difficult to obtain and may have too much error to be effective.’’ Aspen Systems expressed concern that this alternative would be difficult for the government to implement, thus creating delay, and that it was unclear as to which agency would have the authority to set the single benefit rate. Several commenters, including the AFL–CIO and the Air Force, questioned the accuracy of the Department’s calculation of the occupational mix of service employees contained in the regulatory impact analysis, which formed the basis of the cost estimate for this alternative. The Air Force also believes this alternative to be the most inflationary of all those proposed.

Alternative II–C: Issue two benefit levels based on combining the occupational groupings. This alternative likewise garnered no support from any commenters. Many commenters had the same objections to this alternative that they had to Alternative II–A. The commenters generally complained that this alternative would be too complex administratively, and would be discriminatory against workers in certain types of occupations leading to employee morale problems. Aspen Systems believed that there would be too much subjectivity in determining under which of the two broad occupational groupings certain classifications would fall.

Alternative III: Issue a single rate for each of four geographic regions based on ECI data for all workers in private industry. This alternative was endorsed by Goodwill Industries, Inc. of Eastern Nebraska and Southwest Iowa, which stated that this alternative ‘‘would provide the least financial burden to the Federal Government and provide a significant increase in benefits to [its] employees,’’ and by the EPA, which believed this alternative to be ‘‘among the most prudent cost effective alternatives.’’[4]

Commenters which opposed this alternative stated that regional data is not an adequate substitute for locality data, especially since this methodology would not take into consideration fringe benefit differences within a particular region. One commenter noted that the District of Columbia and Mississippi would be located in the same region, yet the labor costs in these two regions are significantly different. Similarly, the AFL–CIO points out that prevailing rates in San Francisco, which is located in the Western region, are much more likely to be similar to the prevailing rates in Boston than to the prevailing rates in Boise, Idaho, which is also in the Western region. Commenters therefore questioned the usefulness of the geographic breakdown embodied in Alternative III.

Several commenters also pointed out that fringe benefits are provided to employees within a company on a similar basis without reference to geographic location and that benefit plans to which employers subscribe are not structured to take into account geographical differences. CSA and its member companies disliked Alternative III, finding it too difficult to administer because it would possibly require four separate benefit plans. They were also concerned that implementation of this alternative would necessitate major payroll, accounting and administrative changes, and would be especially problematic with regard to employees who work in more than one region. CSA was also concerned as to how contract bids would be evaluated in situations where place of performance of the service contract would be determined by the location of the successful bidder. Finally, CSA believed that this alternative ‘‘could cause non-compliance with IRS discrimination rules on pension plans.’’ Hogg, Allen, Norton & Blue was concerned that the establishment of a higher benefit for one geographic region than another might give rise to ‘‘control group issues under ERISA.’’

Alternative IV: Issue a single fringe benefit rate (as a percent of wages) based on the relationship between the ECI all-private industry ‘‘total benefit’’ rate and the ECI all-private industry average wage rate. This alternative was endorsed by Aspen Systems Corporation and three firms which employ workers with disabilities pursuant to programs sponsored under the JWOD. Aspen Systems believed that this alternative would provide positive incentive to employees ‘‘in the sense that the higher an employee’s hourly wage, the higher the employee’s fringe benefit rates.’’ Aspen Systems also stated that implementation of this methodology would aid firms in attracting and retaining employees in high level classifications, such as specialty and technical personnel. Aspen Systems did not view this alternative as being too burdensome from an administrative standpoint and recommended that the methodology be applied as a percentage of each individual employee’s wages rather than of an average based on all wages paid under a contract. The JWOD firms which favored this alternative appeared to do so because the percentage methodology when applied to the wage rates typically paid to their low-wage employees would serve to decrease their labor costs and enhance their competitiveness.

Many commenters believed that this alternative would not be

[3] Lockheed Martin supported Alternative I.

[4] EPA equally supported Alternative V–A.

administratively feasible. For example, Johnson Controls stated that many of its contracts are not staffed with administrative personnel who could adequately perform the requirements associated with this alternative. The Air Force was also specifically concerned that applying multiple fringe benefit rates on a contract would impose an excessive administrative burden on contractors, particularly small contractors such as those operating under the Small Business Administration's ''8a'' program and the ''NISH'' programs. The Air Force also believes that the complexity of accounting inherent in this alternative would pose added compliance difficulties for contractors and Wage-Hour investigators alike. Fringe Insurance Benefits, Inc. was concerned that use of this alternative would provide incentives for employers to intentionally misclassify employees.

Several commenters stated that a methodology providing for multiple fringe benefit rates would naturally lead to problems of inequity and morale in the workforce. CSA and the AFL–CIO both expressed concern that lower paid workers might not be able to obtain adequate health insurance under this alternative. Finally, Fringe Insurance Benefits, Inc., while pointing out that ''the cost of health has no relationship to wages,'' stated that this methodology is ''inconsistent with the traditional approach of providing all non-exempt employees with the same health benefit level.''

Alternative V–A: Issue two fringe benefit levels based on BLS ECI size-of-establishment data for all workers in private industry (Current methodology—applied based on nature of contract). The Air Force, NASA, EPA and the United States Postal Service specifically recommended this alternative. Moreover, several commenters, including Johnson Controls and Hogg, Allen, Norton & Blue, even though they did not choose this alternative, believe this to be the least disruptive alternative since it most closely approximates the present two-level methodology.

The Air Force believes this to be the least costly of all the alternatives proposed and that experience over the past twenty years shows that a methodology providing a two-tier system would best ''meet the needs of large or high-skill contractors and provide a representative rate for the small and low-skill contractors.'' The Air Force further believes that ''[t]he current problems with the two rate system stem from the inconsistent application of the two fringe benefit levels resulting in confusion and frustration by Federal contracting agencies, contractors, and service employees.'' The Air Force favored establishment of regulations that would ''place a high fringe benefit level only on large dollar contracts and contracts that require the use of a highly skilled workforce.''

The United States Postal Service preferred this alternative so that ''the current methods of calculating wages and benefits for highway transportation contract employees would be continued.'' The Postal Service's preference stems from its desire to preserve the status quo with respect to the Department's current policy of special treatment of the mail transportation industry.

The primary objections to this alternative are that the two levels are inconsistently and subjectively applied to contracts and that the insurance level is too low to provide adequate benefits and/or attract and retain qualified employees. SEIU points out that ''size-of-establishment'' data has no direct correlation to the population of establishments performing SCA contracts and the types of contracts to which the two benefit levels apply, *i.e.*, the size of the business has no relationship to the nature of the service contract or to the level of benefit applied under the current methodology. SEIU and the AFL–CIO both stated that the ''size-of-establishment'' approach for the lower ''insurance'' rate has been rejected by the Department's Board of Service Contract Appeals.

Alternative V–B: Issue two fringe benefit levels based on BLS ECI size-of-establishment data for all workers in private industry (variation of current methodology—applied by size/number of employees on contract; lower fringe benefit rate based on ''total benefit'' level). This alternative was favored only by CCAR Services, Inc., an employer of persons with disabilities, whose primary concern was that an increase in the cost of benefit packages would result in a reduction in the number of employees on government service contracts.

The Air Force opposed this alternative because of the problems attendant to its application. The Air Force notes that ECI fringe benefit data is based on the number of employees in the firm, whereas the suggested application would be based on the number of employees on the contract. The Air Force believes this illogical given that many large firms that would normally pay high fringe benefit rates have contracts that utilize only a small number of employees. CSA states that employees would be penalized for working on smaller contracts and that it would be difficult to attract and retain highly skilled workers on small contracts. Finally, Job Options, Inc. states this alternative would lead to a perception by employees of arbitrariness and unfairness since ''there is really no difference from the workers point of view whether or not he or she works for a large or small employer, the workers' needs are the same. Therefore, to either penalize or reward them based on the size of the employer seems unfair to employees.''

Other Alternatives

Unions' Proposal

The union commenters suggested an alternative methodology that would maintain the existing ''two-tier'' system, including the ''total benefits'' rate (currently at $2.56) utilizing the current methodology, but would provide a different methodology for determining only the lower ''insurance'' rate.[5] SEIU and the AFL–CIO both stated that the Department should continue to set the lower fringe benefit rate based on the cost that employers pay for insurance because BLS data shows that insurance is the only benefit which a majority of service workers receive. However, rather than using the ECI size-of-establishment data currently used to determine the ''insurance'' rate, the unions recommended using ECI all-industry data, but only after those establishments that reported no health insurance costs are factored out of the survey data, *i.e.*, after eliminating the ''zeros.'' The unions argued that inclusion of ''zeros'' as amounts paid for health insurance distorts the cost of health insurance paid by employers which actually provide health insurance, and therefore artificially deflates the prevailing fringe benefit rate. The AFL–CIO believes that its proposal would bring the ''insurance level'' cost within the range of $2.00.[6] As discussed below, the unions'' proposal also would include State, local and Federal data in the computation. They argue that inclusion of State and local data is appropriate because nothing in the Act suggests that prevailing rates are based only on private industry. They further suggest

[5] SEIU recommends that the ''Total Benefits'' rate should be ''frozen at $2.56 until such time as the ECI data for all benefits for establishments of 100 or more employees rises above the $2.56'' because the ECI data for 1995 and 1996 fell below this rate.

[6] Fringe benefit data with ''zeros'' excluded is not currently available from BLS. SEIU claims in its comments that BLS has informed them that ''establishments with zero health care benefits can be eliminated from the ECI data by some programming changes * * *''

that inclusion of Federal rates is appropriate because of the statutory provision for the Department to give ''due consideration'' to the rates paid Federal employees.

As an alternative, SEIU suggested that the ''insurance'' rate could be based on data derived from the Federal Employee Health Benefits Program (FEHBP). According to SEIU, the family coverage contribution rate under the FEHBP program was $1.65 in 1996, whereas a blend of single and family coverage rates as reflected in the actual cost per employee to the Federal government would amount to approximately $1.30 per hour. Apparently, SEIU would support either of these two rates as the basis for the ''insurance'' rate.

The Army believes that the unions' proposal to change the ''low'' rate methodology, but retain the methodology for computing the ''high'' rate as it now stands is a ''protectionist stance * * * that cannot be defended.'' The Army states that if DOL decides to continue with a two-rate methodology, the rationale for each rate must be the same. In other words, it would be illogical and inconsistent to determine the lower ''insurance'' rate based on all-industry data, while continuing to determine the higher ''total benefits'' rate based only on ''size-of-establishment'' data.

Insurance Plus Variable Rate

Fringe Insurance Benefits, Inc. (FIBI) recommended implementation of ''a prevailing rate for health insurance that is level and consistent for all employees on the contract and a pension rate that is based on either wages or job classification.'' Under this method, health care costs for each class of employee would be consistent, but other fringe benefits such as pension amount would vary by occupation or wage rate. FIBI suggested that this method would better conform to actual market place practices. Furthermore, FIBI suggested that the Department closely review the National Association of Insurance Commissioners' Small Employer Health Insurance Availability Model Act.

''Due Consideration'' and Inclusion of State and Local Data

Five organizations commented concerning the appropriate procedure for the Department to give due consideration to the wage and fringe benefits paid Federal employees, as required by the Act. Three unions and one contractor stated that due consideration should be given to the wage and fringe benefit rates being paid Federal employees in making SCA wage determinations. SEIU stated that due consideration was intended to narrow the disparity between the compensation received by Federal employees and service contract workers. SEIU's view is that Wage and Hour has made no attempt to determine the cost of Federal employees' fringe benefit in order to close the gap. The AFL–CIO contends that the Department cannot rationally maintain that it gives ''due consideration'' to Federal wage and fringe benefit rates, as required by the statute, when Federal workers are excluded from the data on which the SCA fringe benefit rates are based. LIUNA and Lockheed Martin concurred that in computing the insurance level, ECI insurance benefit costs from all civilian sectors, including government employees, should be used.

The unions strongly supported the inclusion of fringe benefits paid to all public employees, including State and local as well as Federal employees, in SCA fringe benefit rate determinations. According to SEIU, data on fringe benefits paid State and local government employees is readily available in that the ECI now publishes data on fringe benefits paid to ''civilian workers'' including both private and State and local workers combined. SEIU and the AFL–CIO also maintain that data on fringe benefits paid to Federal workers, which SEIU states is ''readily available'' from the Office of Personnel Management, should also be factored into the fringe benefit rates. SEIU states that fringe benefits received by State, local, and Federal workers ''tend to be higher than the fringe benefits paid in private industry'' and their exclusion artificially suppresses the rates currently published by the Department. The unions pointed out that neither the Act nor the regulations make a distinction between private and public service employees, and therefore, there is no basis for excluding public sector fringe benefit data.

In contrast, the Air Force states that if ECI fringe benefit data is to be used, State and local government fringe benefit data should be excluded. The Air Force states that not only are fringe benefits paid by these entities ordinarily above the levels provided by local private industry, but that a disproportionate number of these employees are represented by unions. These factors would tend to skew the data and results, just as would the inclusion of Federal government data. Furthermore, the CSA states that the benefit rate should be based on private industry data and does not believe that the Department should explore the cost and feasibility of expanding ECI to include fringe benefits of State and local workers.

''Grandfathering'' or ''Phase-In''

Nine organizations provided comments concerning the possibility of ''grandfathering'' and/or ''phasing-in'' any of the proposed alternative health and welfare benefit rate(s). CSA and its member contractors specifically recommend that the current ''total benefit'' level of $2.56 be ''grandfathered'' throughout the life of all existing contracts, including all options and extensions, and that all new contracts and recompetitions convert to the new health and welfare rate at the time of award. The Navy concurs that ''the revised benefit rate should be implemented only at the resolicitation of a contract, or the new solicitation of contract services.'' The Navy also states that ''[a]ny existing contract would continue with the same present benefit level through the end of that contract, regardless of options or extensions.'' The Navy did not specifically indicate whether its ''grandfathering'' scheme would apply only to the ''total benefit'' level or would also apply to the current ''insurance'' level of $.90 as well. The Army also agrees that ''implementation should occur when a contract is being resolicited or a new requirement is being awarded.'' The Army anticipates that this would allow implementation ''to occur over a period of one to four years, given the fact that most contracts are for a five year term.''

KIA, on the other hand, suggested that contracts subject to the $2.56 level be ''grandfathered to protect the current level until such time as the lower single level of $1.89 can catch up to it.'' Hogg, Allen, Norton & Blue also offered this suggestion. These commenters generally believe that this approach would protect incumbent employees against a reduction in their fringe benefits upon recompetition and would protect incumbent contractors against predatory pricing practices by non-incumbents at the time of recompetition. They believe that grandfathering the high benefit level until the new rate catches up, provided it is not cost-prohibitive for the agencies involved, would cause the least disruption for contractors and employees alike.

SEIU states that equity dictates that no employee's benefits should be cut back. In addition, LIUNA believes it appropriate for the Secretary of Labor to issue an exemption or variance for purposes of preserving the current high benefit rate. Another organization concurred, stating that because of the inevitable employee dissatisfaction resulting from a reduction in benefits, contracts should be grandfathered to protect the current level ''until any lower level H & W rate can catch up because failure to do so would negatively impact employee morale and retention.''

The AFL–CIO proposes a two-year phase-in approach for implementation of its recommended new ''insurance'' rate. The AFL–CIO recommended that implementation of the new ''insurance'' rate start with all contract anniversary dates after September 30, 1997, and that only one-half of the difference between the current rate and the new rates which would otherwise apply for fiscal year 1998 be implemented at that time. On the next anniversary date of the contract, the second half of the increase would be implemented.

The Air Force strongly opposes grandfathering the high fringe benefit level should a final rule be adopted to change to a methodology other than Alternative V–A. The Air Force objects to the Department artificially retaining higher fringe benefit rates, which they do not believe to be supported by the surveys. The Air Force recommends a ''phase-in'' period whereby the rate[s] would ''take effect only upon recompetition of each contract.'' The Air Force believes that, while a phase-in period would not reduce the eventual cost of the benefit increase, it would at least serve to ''reduce the immediate negative impact on employees facing layoffs.''

The Defense Commissary Agency recommends against a permanent grandfathering at the current rate because that agency believes that the current rates are already too high for the type of work for which it contracts. Instead, the Defense Commissary Agency recommends a phase-in period of two years, with half the reduction occurring the first year, and movement to the then-current rate the second year.

Analysis

Based on a careful review of the comments and further analysis of the various alternatives, the Department has concluded that Alternative I best accords with the Department's dual responsibilities to determine fringe benefits which prevail, and to select a methodology which is administrable and not unduly disruptive for employees, contractors, contracting agencies, and the Department. Currently there are no occupation-specific or locality-based fringe benefit data available. Furthermore, virtually all commenters opposed any alternative which would result in their having to pay different fringe benefits to different classes of workers or in different parts of the country. While recognizing that no methodology will satisfy all parties interested in the service contracting process, the Department believes that Alternative I represents a reasonable application of the statutory requirement to establish prevailing fringe benefit rates and best meets the concerns expressed by the commenters to the Department's proposal. (See also the discussion below concerning the Department's issuance of a variance under Section 4(b) of the Act.)

Pursuant to the Alternative I methodology, the applicable fringe benefit level would be based on employer costs per hour worked for all benefits—excluding holidays and vacations, which are separately determined, and excluding benefits otherwise required by law, such as social security, unemployment insurance, and workers' compensation payments—as reported annually by the BLS Employment Cost Index (ECI) study of employer costs for employee compensation in the private sector (i.e., all workers, all industries, all establishment sizes, and all occupations). Under this ''total benefits'' approach, the Department will issue a single nationwide health and welfare fringe benefit level applicable to all employees engaged in the performance of SCA-covered contracts, based on the average cost [7] for the following compensation components:

(1) sick and other leave (excluding vacation and holiday leave);

(2) insurance, consisting of life, health, and sickness and accident insurance plans;

(3) retirement and savings, consisting of pension and savings and thrift plans; and

(4) other benefits not otherwise required by law.

The Department chooses Alternative I because, as noted by many commenters, this determination method is simple to understand and to comply with, and relatively simple to administer and enforce. The Department also chooses Alternative I because it is consistent with the Department's general practice of using cross-industry data which is not differentiated by size-of-firm in determining prevailing wage rates. The Department has concluded that use of size-of-firm data should not be continued because the Department's application of the two benefit levels did not in fact correspond to the size of the employer, and because review of the survey conducted in preparation of the Department's impact analysis (61 FR 55239, October 25, 1996) led the Department to conclude that the low ''insurance'' level which was applied to most contracts was particularly inappropriate for the large numbers of white collar and skilled blue collar workers employed on Federal service contracts.

Furthermore, the Department prefers Alternative I over the current methodology (Alternative V–A) because it addresses concerns expressed by commenters that the current two-tier system has been inconsistently and subjectively applied. This approach is also preferable because it applies the same minimum hourly benefit level for all service employees and does not require any subjective judgments as to which benefit level to apply based on the type of contract or employee. Accordingly, adoption of Alternative I will largely avoid the potential for employee morale problems and perceptions of unfairness and inequity that are inherent in the current system and in those alternatives that would establish different rates for different occupations (Alternatives II–A, II–C, and IV).

The Department also notes that Alternative I provides a benefit level that is sufficient for service contract employees to obtain meaningful health insurance coverage and will allow service contractors to obtain and retain qualified employees. This is consistent with the Department's goals of encouraging employers to provide a high quality and high performance work place. In contrast, the current low insurance fringe benefit level, because it is based on only ''small'' employers and averages in those employers which provide no fringe benefits, has resulted in a fringe benefit level significantly lower than the level actually paid by employers in private industry.

Alternative I also is consistent with the desire of almost all commenters that health and welfare fringe benefit rates be based upon nationwide data. The Department agrees with those commenters which opposed the alternative (III) which would base rates on the four regional breakdowns because it does not take into account the potentially wider prevailing rate disparities *within* regions and because employers commented that they generally provide similar benefits to their employees regardless of location.

The Department has decided not to mix State and local government fringe benefit data with ECI private industry data in determining the fringe benefit

[7] The cost of the benefit components in the BLS ECI study is an average based on data from all employers in the survey, including those employers that do not provide the particular benefit. Averaging in these ''zeros'' gives consideration to the degree to which a benefit in fact is paid by employers.

level applicable under this methodology. The Department has concluded that the determination of the prevailing fringe benefit level should be based only on private industry data since this is the sector that competes for government contracts. Public employee benefit rates are not representative of the benefit levels paid by the universe of private firms that comprises SCA contractors. Rather, fringe benefit levels paid by State and local governments are substantially different than private industry, and consequently, inclusion of such data would inappropriately skew the fringe benefit determination.

The Department has also concluded that inclusion of Federal fringe benefit data is not feasible.[8] The Department has not been able to obtain usable cost data for Federal benefits other than health and life insurance. The pension system provides a defined benefit package for one group of employees[9] and a defined contribution system for others, with contributions which vary according to the level of contributions by employees. Pension and sick leave both vary with the pay of employees. Thus, it is apparent that data on fringe benefits paid to Federal employees would not readily mix with ECI private industry data. However, the Department has taken ''due consideration'' of the Federal benefit system in its selection of Alternative I, which utilizes ''total benefits'' data and will bring SCA fringe benefit levels more into line with Federal benefits.

The Department shares the view of many commenters that any change in the methodology should avoid the serious adverse effect of a substantial reduction in fringe benefits for those service employees currently employed on contracts subject to the ''total benefit'' level. We anticipate that employers paying the higher benefits in accordance with past determinations of the Department will face the Hobson's choice of cutting fringe benefits for their workers (possibly losing them to employers who are not Federal service contractors which pay higher fringe benefit packages) or becoming uncompetitive. Similarly, Federal agencies may lose the continuity of services provided by major contractors which may become uncompetitive, or by valuable employees who leave because of the reduction in their fringe benefits.

Accordingly, the Department has concluded that the current ''total benefit'' level should be grandfathered at the present rate ($2.56 per hour) until the single benefit provided by Alternative I (all-industry, all-occupation average) reaches or exceeds $2.56. This grandfathered rate will apply to all contracts which currently contain the high, ''total benefit'' level, and future solicitations for those contracts. The grandfathered rate will not apply to contracts for new services.

The Department also believes it is necessary to allow contracting agencies (which may have budgeted based upon existing fringe benefit levels) and contractors (which will likely need to develop new fringe benefit plans) a period of time in which to prepare for the change in minimum fringe benefit levels. Accordingly, the new methodology established by this final rule will apply only to wage determinations issued on or after June 1, 1997. This date was selected so that the new rate will apply to contracts solicited and options exercised for the fiscal year beginning October 1, 1997. For the same budgetary and planning reasons, the Department has also concluded that a four-year phase-in of the rate set by the new methodology would be appropriate. The Department believes that this approach is preferable to the alternative suggestion of applying the new rate only to new solicitations, and not to extensions and options on existing contracts, because it is more equitable. Furthermore, the Department is concerned about potentially serious problems in applying the proper fringe benefit determination because of difficulties in ascertaining whether the wage determination is needed for a new contract or exercise of an option.

As discussed above, most of the alternative methodologies proposed did not garner significant support from commenters, though they were fully considered by the Department in light of the rulemaking record.

The Department did not select Alternative II–A, which would set different rates for each of six occupational groups, because it would be much more difficult for contractors to administer and for Wage-Hour to enforce. The Department considered it significant that commenters stated that providing different levels of benefits according to occupation is contrary to the common practice of employers providing the same benefit program to most employees, and that it would be difficult for insurance carriers to accommodate. Commenters also agreed generally that having different benefit levels based upon occupation would create serious labor-management and morale problems. The Department also shares the concern expressed by several commenters about subjectivity inherent in this alternative and the possibility that some contractors might attempt to manipulate the classifications in order to obtain a competitive advantage.

Alternative II–B is similar to Alternative I in that it would provide a single benefit level for all employees and all contracts. However, no commenters responded favorably to this new concept for computing health and welfare fringe benefits, which would set the fringe benefit level based upon available information regarding the mix of occupations used on Federal service contracts. Under this alternative, fringe benefit rates would be determined based upon the survey the Department conducted last year which formed the basis for its impact analysis. Commenters generally expressed little confidence in the Department's efforts to determine the occupational mix on SCA-covered contracts.

The Department did not select Alternative II–C for many of the same reasons it declined to adopt Alternative II–A. Reducing the occupational groupings from six to two would decrease the frequency of having different levels paid to groups of employees on the same contract. However, where that situation arose, there still would be a distinct possibility of perceptions of discrimination and consequent employee morale problems. Moreover, determining the appropriate mixing and weighting of the various occupational group rates would be difficult.

The Department rejected Alternative III because the Department agrees with the many commenters expressing the belief that establishing benefit rates on a regional basis offers no significant advantage over using a nationwide rate. To the contrary, regional data does not reflect variations in labor costs and fringe benefit rates *within* a region, which, as the commenters pointed out, are often more substantial than variations among regions. Moreover, this option would be inconsistent with the reportedly common practice among employers, including service contractors, of providing similar fringe benefits to most employees nationwide, without regard to either occupation or geographic location. This alternative would be particularly problematic to those government service contractors which perform contracts for similar services at various facilities and installations throughout the country. It

[8] Inclusion of Federal benefits would likely have little impact in any event. For example, Federal health insurance would affect the insurance level by no more than a few cents per hour.

[9] The level of the defined benefit plan presumably is also affected by the fact that participating employees do not receive credit towards Social Security benefits for their period of Government service.

could also create serious administrative problems for service contractors whose contracts require performance in multiple locations that fall within different regions.

Alternative IV (benefits based on a fixed percentage of each employee's wages) was not chosen by the Department primarily because of the extreme difficulty that would be posed by its administrative requirements. Several commenters expressed serious concern that the additional administrative and recordkeeping requirements that would be associated with this alternative would simply be too burdensome, especially for smaller contractors. Although the Department is of the view that there is a correlation between wage levels and fringe benefits paid when viewed across the entire workforce, the Department recognizes that individual employers reportedly provide the same or similar benefit packages to most employees (especially insurance benefits), without regard to wage levels. Moreover, the Department agrees with the commenters that this alternative has the greatest potential for creating problems of inequity and morale in the workf orce. The Department also notes that under this alternative many lower paid workers simply would not receive adequate health insurance.

As discussed above, the Department decided against continuing the methodology proposed under Alternative V-A or the variation proposed under Alternative V-B primarily because of the lack of evidence justifying continued use of ECI ''size-of-establishment'' data, which has been difficult to defend before the Board of Service Contract Appeals, and commenter concerns regarding the manner in which the two rates have been applied and the resulting effects on the morale of the work force.

The Department also seriously considered the union proposal. The Department was concerned about the lack of opportunity for comment on this specific alternative. Furthermore, the Department believes that the union proposal, which would maintain the existing ''two-tier'' system, including the current method for determining the high ''total benefits'' rate, while providing a revised methodology for determining the lower ''insurance'' rate, would be difficult to support given that the two rates would be based on inconsistent methodologies. Under the union proposal, the high ''total benefit'' rate would continue to be set based on ECI ''size-of-establishment'' data for large firms (establishments with 100 or more employees). However, the Department's use of ''size-of-establishment'' data was successfully challenged in proceedings before the BSCA. Though the specific challenge was to the use of ECI ''size-of-establishment'' data as a basis for the low ''insurance'' rate, the Department believes that any legal shortcomings identified in that action would likely apply as well to the use of such data in establishing the ''total benefit'' level. Neither the comments nor the Department's own survey provided evidence to refute the Department's statement in its Notice of Proposed Rulemaking (61 FR 19773) that the major problem with the continued use of ''size-of-establishment'' data is that there is little evidence to show that the average benefit level for small firms corresponds best to benefits paid by private employers on contracts similar to most SCA contracts, or that the benefit level paid by large firms corresponds to the rates paid by employers on contracts to which the ''total benefit'' package has been applied under SCA. Thus, just as there is questionable justification for relying upon ''size-of-establishment'' data as the basis for the ''insurance'' rate, there is equally questionable basis for relying upon such data in setting the ''total benefit'' rate. Finally, the union proposal would continue to raise concerns about the potential for inconsistent and subjective application of the two levels.

The Department also rejected the alternative suggested by the FIBI. Like the union alternative, this alternative had not been offered for public comment. It has the distinct advantage of being consistent with many employers' reported practice of providing one insurance benefit package to their employees, while providing pension or other benefits at a level varying with wages. However, the Department is concerned that this proposal would be difficult and burdensome to administer, requiring detailed recordkeeping.

IV. Comments and Analysis of Other Fringe Benefit Issues

Variance Under Section 4(b) of the Act

Approximately ten organizations commented regarding the Department's proposal to issue a variance under Section 4(b) of the Act from the statutory requirement that the Secretary determine prevailing fringe benefits for the various classes of service employees in the locality.

Johnson Controls stated that using a single nationwide rate ''does not reflect the economic factors of the local geographic areas for the prevailing benefits from a competitive and comparability standpoint. Nationwide average data is skewed and does not reflect a valid depiction of benefits when compared with local geographic prevailing benefit data.'' However, Johnson Controls did not identify any source of locality-based fringe benefit data nor did it support the use of regional data as proposed in Alternative III. Rather, Johnson Controls opposed use of such regional data because it would not take into consideration ''the economic fringe benefit differences within the region.''

SEIU stated that the absence of available data that could be used to set the fringe benefit rates on a locality basis is universally recognized. SEIU therefore supported the Department's proposal that ''a variance be permitted to establish national fringe benefit rates on the grounds that there is no reliable locality data available which would permit the department to establish fringe benefit rates on a locality basis.'' The AFL-CIO believed that ''only a national 'insurance level' rate is practical and consistent with the SCA.'' The AFL-CIO favored nationwide rates not only because of the absence of reliable locality-based data, but also because many insurance plans operate on a national basis and Federal service contractors often operate in multiple locations.

District No. 5—ITPE, NMU/MEBA (AFL–CIO) stated that they strongly support the position of the AFL–CIO that the fringe benefit rates should be uniform throughout the nation. In addition, the CSA recommended that the Department continue to issue health and welfare benefits on a national level stating that employers typically provide similar benefits regardless of location. Most of CSA's member companies felt that the utilization of locality-based fringe benefit data for selected metropolitan areas is not a desirable practice. Further, they felt that the benefits derived from collecting the data on a locality basis would not be worth the considerable survey costs.

The Air Force also did not favor using locality-based fringe benefit data for certain metropolitan areas. In their opinion, the resulting disparity in fringe benefit rates for large metropolitan areas versus the remainder of the nation would be inequitable and discriminatory to those workers outside the metropolitan areas.

Pony Express stated that any plan should take into account the differences in pay and fringes by region or locality.

After review of the comments, the Department has concluded that it is appropriate to issue a variance from the statutory requirement in Section 2(a)(2) of the Act that the Secretary determine the fringe benefits to be prevailing for the ‘‘various classes of service employees’’ ‘‘in the locality.’’ Fringe benefit data simply are not available for specific classes of employees or localities. Furthermore, it is evident from the comments that there would be significant administrative burdens to employers in providing fringe benefit plans which vary by locality or by class of employee. Such a system would be contrary to the reportedly common practice by employers, as evidenced by the comments, of providing one fringe benefit package to most employees. Any other system would likely also result in significant morale problems among employees.

Therefore, the Department has determined that a variance is necessary and proper in the public interest. Furthermore, the Department has determined that in light of the reportedly common practice of employers providing the same fringe benefit plan to most employees, a variance to provide a uniform nationwide level of benefits would be in accord with the remedial purposes of the Act to protect prevailing labor standards.

Different Benefit Levels for Certain Industries

The National Star Route Mail Contractors' Association and their member organizations support the current method used by the Department for setting wage and fringe benefit rates for the mail hauling industry. The Department sets wage and fringe benefit rates for the mail hauling industry for four geographic regions based on a special survey by the U.S. Postal Service. Wage determinations applicable to this industry contain monetary amounts due for health and welfare and pension benefits.

In addition, both the Department of the Army and the Department of the Navy supported having variation in fringe benefit rates under certain circumstances. Specifically, the Army stated that if a national rate were the standard, it would be important that the contracting agencies have the ability to challenge that one rate by industry. Moreover, if rates are found to be significantly lower for a particular industry, then the DOL should deviate from that one rate and set a lower rate for that industry. The Department of the Navy supported having a single health and welfare benefit rate for all SCA wage determinations. At the same time, however, it suggested use of the Section 4(b) variance procedure to prevent impairment of the Government's business where the agency can show that the fringe benefit rate determined under these regulations ‘‘would prevent adequate contract competition.’’

After review of the comments, and in consideration of the limited circumstances where special wage rates and fringe benefit rates are currently issued for certain industries, the Department has determined that it is appropriate to allow variances to permit industry-specific fringe benefits in certain limited circumstances upon application of the contracting agency. Such variations from the single nationwide rate will be allowed only on a showing that the variation is necessary and proper in the public interest or to avoid the serious impairment of government business. This might be satisfied, for example, where an agency is unable to obtain contractors willing to bid on the services because the service will be performed at the contractor's facility by employees performing work for the Government and other customers, and as a result, paying the required SCA fringe benefits would cause undue disruption to the contractor's own work force and pay practices. In all cases, in order to obtain a variance, it will also be necessary for the contracting agency to provide comprehensive data from a valid survey demonstrating the prevailing fringe benefits for the specific industry (not broad ECI data), in order to demonstrate that the variance is in accordance with the remedial purpose of the Act to protect prevailing labor standards.

This variance procedure does not constitute an opportunity to request a separate fringe benefit package for every class of employee or industry, but rather will require a showing of special circumstances. As discussed, it is evident from the ECI that practices do in fact vary widely among industries and occupations. Such an industry-by-industry or occupation-by-occupation approach has already been rejected through the consideration of the various alternatives and the decision to issue fringe benefit determinations without regard to occupation and based on cross-industry data.

If the criteria for granting a variance are met, and industry-specific data are found to be adequate for establishing an alternative prevailing fringe benefit determination, the party presenting such data will be responsible for updating the data on a regular basis. If the data are not regularly updated, then future procurements will be subject to the standard cross-industry determination.

Significant support was received for continuing the special fringe benefit determination for the mail transportation industry. The regulation acknowledges the appropriateness of industry determinations under certain conditions; the specific merits of such an approach for the mail industry is not appropriately an issue for this rulemaking proceeding, but will receive the Department's prompt attention.

Average Cost

Approximately 15 organizations commented regarding the average cost issue. Under the Department's regulations at § 4.175, fringe benefit contributions (or cash payments in lieu thereof) must ordinarily be made with respect to each service employee in the amount specified on the wage determination for all hours worked on the contract up to 40 hours per week. However, the regulations at § 4.175(b) prescribe a different compliance rule where the wage determination specifically identifies the benefit as an ‘‘average cost.’’ Under the ‘‘average cost’’ fringe benefit determination, a contractor's contributions to a ‘‘bona fide’’ fringe benefit plan may vary among employees so long as total contributions for all hours worked (not just hours up to 40 in a workweek) by service employees on a particular contract average at least the specified amount per hour per service employee. In practice this average cost methodology is used only for the high ‘‘total benefits’’ fringe benefit rate.

CSA (and its 35 or so member organizations which filed comments in general support of CSA's comments) supported the average cost concept because of the flexibility it permits employers in the establishment of fringe benefit plans. Specifically, the CSA (and CSA member organizations which concurred with CSA's comments) stated that average cost is the preferred method because it allows companies to offer benefits in a comprehensive package that provides a variety of options. It allows for flexible benefit design for employees and helps service contractors to remain competitive. CSA stated that the average cost concept is the basis for the development of group insurance premiums, and that it allows for more efficiency in auditing. CSA believed that eliminating average cost would cause such an administrative burden on larger employers with self-insured medical plans that such an option would no longer be feasible. CSA also believed that the average cost concept allows small companies to obtain relief from administrative burdens by ‘‘outsourcing benefits administration and/or purchasing 'packaged service contract benefit plans.' ''

National Star Route Mail Contractors' Association and seven member organizations strongly oppose the use of an average cost concept. While acknowledging that some type of average cost concept ''may be advisable,'' National Star Route believes that any advantages would be outweighed by the significant administrative and bookkeeping difficulties inherent in such a system, especially in circumstances where ''an employee works on several contracts covered by different wage determinations.'' National Star Route was also concerned that use of average cost would result in substantial decreases in benefits for large numbers of service employees, would not guarantee equal benefits to all employees, and would create the possibility that some employees would not be provided with any benefits (*e.g.*, employees not working enough hours to become eligible for medical coverage). In short, National Star Route believes that ''[i]nstead of averaging, employees should be benefitted on their individual basis.''

National Star Route also believes that an averaging system would necessitate delay in some fringe benefit payments, since that averaging process would have to await the closing of the pay period. Finally, National Star Route expressed strong opposition to any methodology that would require its members to make fringe benefit payment for hours worked over 40. It stated that this would create such an increase in their overall labor costs that they might be rendered non-competitive against railroads, airlines and ''various transportation groups within the U.S. Postal Service itself,'' thus causing the trucking industry to lose its market share of mail transportation.

Other commenters opposed to the average cost concept stated that the unequal division of benefits would unfairly disadvantage single versus married employees and short-term versus long-term employees. Some commenters foresaw the possibility that ''a handful of very compensated employees could tilt the average high enough to meet the minimum average benefit with little or no contributions to the 'average' employee.''

The Air Force also opposed the average cost concept in conjunction with any of the proposed fringe benefit methodologies. The Air Force believes that average cost allows some workers to receive preferential compensation based on personal circumstances, and that some companies use average cost to ''exclude specific workers or to cause portions of their work force to suffer at the expense of more favored groups.'' The Air Force is of the opinion that it is more appropriate ''for workers with higher risks or with more costly health care plans to pay these costs individually and not cause other workers to pay disproportionate shares of earnings or benefits to subsidize others.'' The Air Force also recommends that regulations be adopted to limit the hourly fringe benefit contributions to the standard 40 hour work week since ''this is routinely done for both the private sector and government sector benefit plans.''

The Department has concerns as to whether it is appropriate to expand the average cost concept to the basic fringe benefit level to be established under Alterative I. The Department is concerned that this concept, which would involve a radical change for most contractors, did not receive sufficient attention in the comments to warrant further action at this time. The Department is also concerned about the inequities of averaging, which allows contractors to make arbitrary determinations to deny fringe benefits altogether to some workers or classes of workers. Currently this system, which may be difficult to understand and administer for small contractors, is utilized primarily by sophisticated major contractors. Furthermore, the average cost concept requires payments or contributions at the prescribed fringe benefit level with respect to all hours worked, including hours over 40. Therefore this method could increase the costs of some contracts where the employees work a significant amount of overtime.

On the other hand, the Department recognizes the advantages of allowing averaging across a workforce where a contractor has an elaborate fringe benefit system with variable costs based on factors such as choice of health benefit plans, and pension and sick leave contributions, and payments which vary based on wages. The Department is considering further rulemaking on this issue and would welcome additional comments, including comments on any revisions to the current averaging method which may be appropriate. If there is significant support, the Department will consider further rulemaking. In the meantime, the Department is making no change in the regulation at § 4.175(b).

V. Comments and Analysis of Other Issues

Time-Frame for Section 4(c) Substantial Variance Hearings

The SCA and the regulations provide a procedure to request a determination that collectively bargained wages and fringe benefit rates required to be paid pursuant to Section 4(c) of the Act are ''substantially at variance'' from prevailing local wages or fringe benefits. The Department requested comments on a proposal suggested by the National Performance Review (NPR) that the regulations be tightened to provide a 60-day time-frame for completion of substantial variance hearings.

Seven organizations commented concerning the Section 4(c) variance issue. SEIU, AFL–CIO, CSA, District No. 5—ITPE, NMU/MEBA (AFL–CIO), and the LIUNA strongly opposed the proposal to reduce the 60-day time limit to conduct the entire Section 4(c) hearing process. They believed that the proposed restricted time frame for the completion of substantial variance hearings is totally impractical and should, therefore, be rejected. In fact, they believe the current time-frame of 60 days from the issuance of an Order of Reference until the opening of the hearing to be too short; they recommended that if any changes in the time-frames were to be made, the deadline should be extended.

The unions stated that this ''fast track'' approach, suggested by the National Performance Review without input from workers and unions, ignores the practical difficulties of litigation. They point out that in most instances where the contracting agency requests a substantial variance hearing, ''the agency has enjoyed the benefit of months spent assembling the data that it will use to challenge the wage rates negotiated between the service contractor and the unions. The new time frame suggested essentially forces the service contractor or union to proceed to the substantial variance hearing without the time necessary to assemble the supportive evidence.''

The Army suggested that the time frame be expanded to within 90 to 120 days. They stated that the current system can take years and affords no relief to the agencies.

In contrast, the Air Force strongly supported any effort to reduce the amount of time in the substantial variance process. The Air Force stated that reducing the time-frames will force the parties to address the issues in a prompt manner, while simplifying the process, and stated that an unbiased third party should be able to look at the facts and determine if the data supports the existence of a substantial variance. They assert that the fact that the contractor must continue to pay the rates being challenged in the hearing makes it imperative that a timely and final decision be made. Finally, the Air Force recommended that regulations be implemented to stay the payment of rates that are being challenged until the final decision is made. In this regard, the Air Force stated as follows:

The current structure forces the contracting agency into paying the cost of the increased rate or rates until a decision is made. This leaves the contracting agency no way to recover funds paid on rates that are ultimately determined to be substantially at variance. If rates are deemed to be at variance, this results in legal victory without proper cost recovery. If the rates were temporarily frozen this would not result in a loss if the final determination was made that rates did not substantially vary. It would simply delay the payment long enough for that decision to be made and applied.

The regulations currently provide a period of only 85 days from the date of the Order of Reference to the Chief Administrative Law Judge to appoint an administrative law judge (ALJ) to conduct a hearing, to the date of the ALJ decision. It is believed that this time-frame, if followed, provides a sufficiently fast track for proceedings. In addition, the Department has initiated a procedure to alert affected parties (union, contractor and agency, as appropriate) when a request for a substantial variance proceeding is received, in order to allow additional preparation time.

Other Proposals

The Department also proposed certain minor, technical modifications necessitated by amendments to the FLSA, a 1985 court decision, a 1983 treaty, and a 1986 intergovernmental compact. The Department received no comments on these minor proposals and has decided to proceed with these proposed minor changes.

In order to conform to more recent amendments to the FLSA establishing a new minimum wage, § 4.2 is revised to delete the reference to now out-of-date minimum wage rates; likewise, the tip credit example in Section 4.6(q) is modified to delete the language in the proviso that is based on the minimum wage rates provided by the 1978 amendments to the FLSA.

The text of § 4.112, which was invalidated by the 1985 court decision in *AFL-CIO* v. *Donovan*, 757 F.2d 330 (D.C. Cir. 1985), is modified to reinstate the language of the previous regulations as they appeared in the July 1, 1983, edition of the CFR. Final regulations published on October 27, 1983 (48 FR 49736), among other things, established a new provision in 29 CFR 4.112 that would have excluded from the Act's coverage contracts under which only a minor or incidental portion of the services would be performed within the geographical limits of the United States as defined in the Act. The D.C. Circuit held that this new provision had been adopted in violation of the notice-and-comment requirements of the Administrative Procedure Act. Under the restored language, which conforms to the Department's practice in the administration of this provision since the 1985 decision, if a service contract is performed in part within and in part outside the United States, any portion performed in the United States is covered.

In addition, the restored regulatory language includes changes that were necessary to conform to more recent enactments pertaining to the geographic scope of the SCA. As indicated in § 4.112, the SCA covers contract services furnished ''in the United States,'' as that phrase is defined in Section 8(d) of the Act. The geographical area included within this definition was changed in the invalidated 1983 regulation to conform to the Treaty of Friendship Between the United States and the Republic of Kiribati, T.I.A.S. No. 10777, ratified June 21, 1983, by excluding Canton Island. The regulations are further amended to take into consideration changes necessitated by the 1986 Compact of Free Association between the United States and the Governments of Marshall Islands and the Federated States of Micronesia, set forth at 48 U.S.C. 1901 note, to exclude the Eniwetok Atoll, and the Kwajalein Atoll. In addition, pursuant to the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, set forth at 48 U.S.C. 1801 note, all laws not explicitly dealt with elsewhere in the Covenant which are applicable to Guam and are of general application to the States, are applicable to the Commonwealth of the Northern Mariana Islands (CNMI). Because the SCA is applicable to Guam, the regulation is amended to add the CNMI.

VI. Conclusion

For the foregoing reasons and after consideration of all of the comments submitted in response to the proposed rule published on May 2, 1996, in the Federal Register (61 FR 19770) and the preliminary regulatory impact analysis published in the Federal Register on October 25, 1996 (61 FR 55239), the Department is making the following changes in the regulations:

The Department has decided to issue a new § 4.52 [10] to set forth the methodology for determining future prevailing fringe benefit determinations. The Department is adopting the methodology provided in Alternative I as the appropriate methodology for establishing minimum health and welfare benefit rates under the SCA. Pursuant to this methodology, the fringe benefit rate will be based on nationwide ECI data for all employees in private industry, and will include all benefits (excluding holidays and vacation, ''benefits otherwise required by law'', and supplemental pay such as shift differentials, considered to be wages under SCA).

This methodology replaces the current methodology of issuing two benefit rates, ''insurance'' and ''total benefit,'' based on ECI size-of-establishment data, which have applied to SCA contracts on the basis of the nature of the contract. However, the Department has decided to ''grandfather'' the current ''total benefit'' rate at its present level ($2.56) until the rate determined in accordance with Alternative I equals or exceeds $2.56. This grandfathered rate will apply to those contracts which currently are subject to the ''total benefit'' level, and to future solicitations for such contracts; the grandfathered rate will not apply to solicitations for new services.

The regulations will also allow for a four-year ''phase-in'' period under which only one-quarter of the difference between the current ''insurance'' rate and the new all-industry rate will be implemented for wage determinations issued on or after June 1, 1997. One-third of the remainder of the increase would be implemented the following year, and one-half of the remainder the following year. Beginning June 1, 2000, the new methodology will be fully implemented.

The Department has also decided that it is necessary and proper in the public interest and in accordance with the remedial purposes of the Act to protect prevailing labor standards to issue a variance pursuant to Section 4(b) of the Act and § 4.123 of the regulations from the Act's provisions that require fringe benefit determinations be made for various classes of workers in the locality. Pursuant to this variance, the Department will issue a nationwide level of benefits applicable to all classes of employees. The Department has also

[10] Existing 4.52 and subsequent sections are renumbered accordingly.

provided a procedure to permit contracting agencies to request a variance to allow industry-specific fringe benefits in certain limited circumstances. Finally, the regulation will continue to recognize as prevailing those situations (ordinarily where the provisions of a collective bargaining agreement are found to prevail) where a single fringe benefit rate is paid with respect to a majority of the workers in an occupation in a locality.

VII. Executive Order 12866/Small Business Regulatory Enforcement Fairness Act

On the assumption that the change in methodology for determining prevailing fringe benefits would have an annual impact on the economy of $100 million or more, the Department prepared and sought comments on its preliminary regulatory impact analysis (61 FR 55239 (October 25, 1996)). As discussed below, the Department has now completed its final regulatory impact analysis and has concluded that this rule, after full implementation, will have an annual effect on the economy of $100 million or more. Therefore the Department has concluded that the rule is economically significant within the meaning of Executive Order 12866, and that the rule is a major rule within the meaning of Section 804(2) of the Small Business Regulatory Enforcement Fairness Act. However, the rule does not require an economic impact analysis under Section 202 of the Unfunded Mandates Reform Act of 1995 because it will not require State, local, or tribal government, or private sector expenditures, in excess of $100 million in any one year; rather, the costs of the increases in fringe benefits will be borne by the Federal government.

Discussion of Comments

Five commenters provided specific comments regarding the Wage and Hour Division's SCA Occupational Employment Survey and Impact Analysis: the AFL-CIO, the Contract Services Association, the Navy, the Air Force, and the Army. Their comments concerned six areas:

Survey Purpose: The Army and Navy were critical of the survey for being directed exclusively toward Federal contractors whose wages and benefits are already established by DOL's own wage determinations, not by the labor market of the locality where the services are performed. At the same time, the Navy contended that ''prevailing benefits are unattainable by any reasonable or affordable survey effort.'' The Air Force criticized the survey because it did not survey ''prevailing rates'' in the locality labor market.

These comments reflect a misunderstanding of the purpose of the survey. The survey only sought information on occupational employment under the SCA, along with the relevant wage determination issued for each contract. As stated in several communications with each Federal agency asked to participate in the survey, its purpose was to ''estimate the distribution of employment by occupation on contracts covered by the McNamara-O'Hara Service Contract Act.'' As noted in the preliminary impact analysis, wage data utilized in the analysis were from the Bureau of Labor Statistics, Employment Cost Index, not from the fringe benefits paid by these contractors or from the wage determinations used for these contracts.

Survey Procedures: The Army, Navy and Air Force were critical of the survey procedures. Specifically, the Navy contended that receipt of the survey material was the first notification contracting agencies received from DOL that such a survey was being conducted. The Navy also contended that the survey methodology had not been discussed or coordinated ahead of time with the contracting agencies. The Air Force claimed that the survey was developed without agency Labor Advisor input. The Army stated that there was not meaningful coordination and communication between DOL and the Army.

As summarized in the preliminary impact analysis, the then U.S. Army Labor Advisor fully participated in the work group that helped design the survey procedures and materials. Staff of the Office of Federal Procurement Policy also participated in this process, which was initiated in April 1995. In June 1995, the U.S. Air Force and General Services Administration Labor Advisors participated in pilot testing the survey process and materials, and were specifically requested to provide ideas for improvement. The initial survey mailing was to each Federal Procurement Agency's Federal Procurement Executive, in September 1995. In that transmittal from the Wage and Hour Administrator, top agency procurement officers were asked to ''designate a data collection coordinator to assume overall responsibility for your agency's role in this special study.'' Several of these designees were the agency Labor Advisor, or comparable agency staff. These coordinators were asked to ''contact each of the offices responsible for contracts selected for this survey * * * and ensure that data collection instructions are properly followed).'' Throughout the course of the survey, written and telephone contacts were maintained between the Wage and Hour Division and participating survey coordinators.

Survey Universe: The Contract Services Association, Navy, and Air Force had concerns regarding the reliability of the survey universe. The Contract Services Association and the Air Force stated that the universe under represents the actual population of covered FTEs, especially contracts under $25,000. At the same time, the Navy claimed that the universe overstated the number of contracts, by including procurements that actually were not covered by SCA.

The preliminary impact analysis acknowledges that the FPDS excludes certain segments of the contract universe. ''For example, it does not contain data from the U.S. Postal Service, Air Force/Army Exchange Service, and most contracts under $25,000. Therefore, since the impact analysis is based upon a sample drawn from the FPDS population, estimates made only represent the covered contracts included in the FPDS, and should not be considered as representing the universe of all covered contracts. For this reason, the focus of the Impact Analysis was on the relative differences among costs likely to be generated by each alternative listed.'' (61 FR 55246) As with many large surveys, it should be expected that some sampled units may be wrongly included because they should not have been included in the population. Therefore, the questionnaires returned with notation by the contracting offices indicating that the contract was not covered by SCA were excluded from the survey and were used to correct the population of SCA-covered contract obligations by SIC. These corrections were based upon an assumption by the Wage and Hour Division that those closest to contract administration are best informed regarding SCA coverage.

Survey Findings: Both the Air Force and the Navy contended that the survey overestimates the number of contracts assigned the current high ($2.56) health and welfare benefit level and underestimates the number assigned the low ($0.90) level. The Navy stated: ''If one were to accept the contention made in DOL's survey impact report, that the ''high'' health and welfare benefit level is paid on a large percentage of all service contracts, that conclusion would be due in part to DOL's own historical practice of applying that benefit level artificially.'' The Navy further stated that the majority of contract workers are paid at or near the low health and welfare benefit level, while an Air Force internal study concluded that 64 percent of FTEs are at the low level and 19 percent at the high.

In fact, the survey did *not* find a large number of *contracts* at the high health and welfare benefit level. Table 4 of the preliminary impact analysis clearly shows 80.7 percent of contracts at the low level, 14.3 percent at the high level, and 5.0 percent set by collective bargaining agreement pursuant to Section 4(c) of the Act. The survey did find 42.5 percent of FTEs at the high level, 34.1 percent at the low, and 23.4 percent under Section 4(c). Of course, there is no reason to believe that such ratios are necessarily the same for all agencies.

Survey Reliability: Four of the five commenting parties questioned survey reliability. The Contract Services Association, Air Force, and AFL–CIO expressed concern over the survey's ''7 percent'' response rate. In addition, the Contract Services Association and the Air Force questioned the size and representativeness of the sample. The AFL–CIO claimed that nonresponse to the survey was a source of systematic bias and error, resulting in population estimates not reflective of the SCA population.

As explained in the preliminary impact analysis, the survey usable response rate was 20.2 percent of the sample (not 7 percent). The sample, which was selected by contract value within industry group, represented 35 percent of the number of contracts in the population, and 63 percent of population contract value. Usable responses to the survey represented 7.2 percent of *population* contracts and 19 percent of contract value. At the same time, the apparent similarity to the FPDS data in the universe by industry appears to limit the potential for bias of the estimates obtained from the sample data. The process whereby FTE/contract value ratios (by occupational group within industry group), once established, were applied to the population (not the sample) to estimate FTE totals would also tend to limit the potential for bias caused by the low response rate.

Impact Analysis: The Air Force claimed that the survey underestimates the number of FTEs at the low health and welfare benefit level, and therefore that the impact analysis underestimates cost increases associated with the various alternatives. Based on its survey of Air Force contracts, the agency developed its own estimate of the cost of the current size-of-firm methodology ($612,202,240) and of the cost of Alternative I, based on increasing the low benefit to $1.89 ($970,503,040). The Air Force then compared its estimate of the cost of Alternative I to its calculation of the DOL estimates [11] ($720,462,080 and $961,800,320, respectively, according to the Air Force). Therefore, the Air Force concludes that a total annual cost increase of $358,300,800 would be incurred by accepting ''DOL's proposed single fringe benefit alternative of $1.89 per hour,'' and not the ''DOL estimate'' of $241,338,240.

Even assuming that the results of Air Force's survey of the number of contracts/employees subject to the two current fringe benefit rates could be generalized to other agencies, the Air Force analysis appears to be incorrect in four respects: (1) In doing its calculations of the DOL estimate, the Air Force seems to have mistakenly multiplied the low benefit health and welfare amount ($0.90) times the high benefit FTE total (117,200), and the high benefit amount ($2.56) times the low benefit FTE total (94,100). Therefore the Air Force underestimated the DOL current cost estimate by $79,741,585. (2) By underestimating current costs by almost $80 million, alternative cost increases were overestimated by a like amount. (3) The Air Force cost computations for Alternative I assumed the Department would continue to issue the high rate for contracts currently receiving that rate. Although comments were solicited on the issue of grandfathering the high rate, the Department's estimate was not based on this assumption. (4) The Air Force computations for combining the $2.56 with a $1.89 level appear to have understated costs by over $5 million.

Final Regulatory Impact Analysis

After review of the comments, the Department has concluded that there is no reason to change its estimates of the relative costs of the various alternatives projected, as set forth in the preliminary regulatory impact analysis.

The Department has now obtained 1996 ECI data, which shows that the all-private-industry, all-employee rate under Alternative I would increase from $1.89 (1995 data) to $1.91 (1996 data) per hour. The Department therefore has computed the cost of the alternative selected utilizing 1996 data, and based on the survey projection that 44.5 percent of covered employees (94,048 FTE) are employed on contracts currently subject to the low ($.90) benefit, and 55.5 percent (117,215 FTE) are employed on contracts currently subject to the high ($2.56) benefit:

1. The cost of prevailing fringe benefits determined in accordance with the current methodology:

Cost for employees receiving benefits of $.90 per hour: $.90 × 94,048 FTE × 2080 hrs. = $176,057,856

Cost for employees receiving benefits of $2.56 per hour: $2.56 × 117,215 FTE × 2080 hrs. = $624,146,432

Cost of current methodology: $176,057,856 + $624,146,432 = $800,204,288 ($3788 per FTE)

2. The first-year increase in the cost of the new methodology, i.e., the cost of increasing the fringe benefits for employees currently receiving $.90 per hour by $.25 per hour (one-fourth of the increase to $1.91): $.25 × 94,048 FTE × 2080 hrs. = $48,904,960 ($231 per FTE)

Thus the first-year increase in costs caused by the new methodology would be less than $50 million per year. In succeeding years it can be anticipated that the increase in fringe benefits costs for employees receiving the low rate may be somewhat higher than $.25 per hour as the cost of fringe benefits varies from year to year. However, it is anticipated that this increase will be more than offset by savings where contracts currently requiring fringe benefits of $2.56 are not succeeded by new contracts for substantially the same services; contracts for new services which would have received the $2.56 rate under the former procedures will receive the new ''all-industry, all-employee'' rate at the rate it is being phased in.

By the fourth year, if the $1.91 rate were to hold, the increased annual cost would be approximately: $1.01 × 94,048 FTE × 2080 hrs. = $197,576,038 ($935 per FTE)

The administrative burden, if any, of the various alternatives proposed is discussed in some detail in the preamble above. From the comments, it is evident that the alternative chosen is among the least burdensome of the various alternatives, since it does not involve paying different benefits to different workers on the same contract or in different regions of the country. However, during the period where both rates are issued, those contractors which have contracts subject to both rates (as is sometimes currently the case) will continue to have the burden of administering two benefit programs. In addition, the change in the fringe benefit rate will involve the administrative burden of contractors making changes in their fringe benefit plans to accommodate changed fringe

[11] The Department's proposed impact analysis as published in the Federal Register did not set forth a total cost for the various methodologies, but rather advised the public of the cost per FTE. Therefore the Air Force did its own calculations of the Department's estimated cost.

benefit rates, both during the transition period and as prevailing benefits change over time.

The Department has not been able to obtain data which would allow it to quantify the benefits to the affected workers and to society of providing workers prevailing fringe benefits, or to quantify any indirect effects on jobs, productivity, or the Federal deficit, and no such data was provided by commenters. A significant issue raised in the comments, as discussed above, is the concern that the current low ''insurance'' rate is not high enough to provide meaningful health insurance to employees. The Department believes, as stated by many commenters, that the rate established through the selected methodology will allow employers to provide meaningful health benefits, with the concomitant direct benefit to the employees and indirect benefit to society from a healthier work force, including reduced pressure on public health resources.

IX. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96–354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to prepare a final regulatory flexibility analysis that describes the anticipated impact of a rule on small entities. After review of the comments received and consideration of the various alternatives, the Department has prepared the following regulatory flexibility analysis regarding this rule:

(1) *The need for and objectives of the rule.*

SCA requires that the Department of Labor (DOL) determine locally-prevailing wages and fringe benefits for the various classes of service employees performing contract work subject to the SCA. Contracts over $2,500 (if the predecessor contract was not subject to a collective bargaining agreement) are required to contain wage determinations issued by DOL that specify the minimum monetary wages and fringe benefits that must be paid to the various classes of workers who perform work on the service contract, based upon rates determined by DOL to be prevailing in the locality where the work is to be performed. As discussed previously, fringe benefit data are not generally available on an occupation-specific or on a locality basis, which prompted DOL to issue fringe benefit determinations for health and welfare based on nationwide data ever since SCA was enacted.

The Service Employees International Union (SEIU) sued DOL in March 1991 in the United States District Court for the District of Columbia over the longstanding administrative practice, since 1976, of issuing two nationwide rates for health and welfare fringe benefits, and for failure to periodically update SCA health and welfare fringe benefit levels which, at that time, had not been updated since 1986 (SEIU v. Martin, CA No. 91–0605 (JFP) (D.D.C. April 1, 1992)). In this court challenge, the district court remanded the case to DOL for exhaustion of administrative remedies and final agency action, which led to the decisions of DOL's Board of Service Contract Appeals that remanded the matter to the Wage and Hour Division to consider alternative methodologies for implementing the statutory objectives (BSCA Case No. 92–01 (August 28, 1992) and Case No. 93–08 (September 23, 1993)). Based on the Board's decisions, the Department decided that the best process for developing a methodology to establish prevailing SCA fringe benefits consistent with statutory requirements would be to propose various alternatives through rulemaking. In the meantime, SEIU moved the district court to reopen its case against the Department. The district court dismissed the case without prejudice to SEIU's right to reopen for reconsideration upon a showing that DOL has not adopted a final rule in this matter by July 31, 1996 (*SEIU* v. *Reich*, CA No. 91–0605 (CRR) (D.D.C. January 19, 1996)).

On May 2, 1996, the Administrator of the Wage and Hour Division published a Notice in the Federal Register (61 FR 19770) proposing for public comment various alternative fringe benefit determination methodologies. As explained in the proposed rule, however, it was not feasible to publish a regulatory impact analysis for comment with the proposed rule. At the time the Department was completing the development of data on the occupational mix of service contract employees in order to provide a basis for the impact analysis. That analysis was completed and published for comment on October 25, 1996 (61 FR 55239). In the meantime, the Court set a deadline for publication of the final rule of December 24, 1996. *SEIU* v. *Reich,* CA No. 91–0605 (August 27, 1996).

(2) *Summary of significant issues raised by the public comments in response to the initial regulatory flexibility analysis.*

The Department received a number of comments regarding the economic impact analysis and the survey that was conducted to determine the occupational mix on Federal service contracts. Those comments are specifically addressed in the economic impact analysis section above. No comments were received on the initial regulatory flexibility analysis.

(3) *Number of small entities covered under the rule.*

The definition of ''small business'' varies considerably depending upon the policy issues and circumstances under review, the industry being studied, and the measures used. The Small Business Administration's Office of Advocacy generally uses employment data as a basis for size comparisons, with firms having fewer than 100 employees or fewer than 500 employees defined as small.[12]

Statistics published by the Internal Revenue Service indicate that in 1990, an estimated 20.4 million business tax returns were filed for 4.4 million corporations, 1.8 million partnerships, and 14.2 million sole proprietorships, most of which are ''small''—fewer than 7,000 would qualify as large businesses if an employment measure of 500 employees or less is used to define small and medium-sized businesses.[13]

Federal procurement data are compiled and reported by the Federal Procurement Data Center (FPDC) in the *Federal Procurement Data System Federal Procurement Report* (Washington, D.C.: U.S. Government Printing Office). The value of Federal contracts and volume of contract ''actions'' are currently reported individually to the FPDC for contract actions exceeding $25,000; actions of less than $25,000 are reported only in the aggregate. A contract ''action'' differs from an initial contract ''award'' because a single contract may involve more than one action—for example, a modification to an initial contract award is reported to the FPDC as a separate action and may involve the obligation or de-obligation of funds.

Small businesses were awarded $58.8 billion of the $184.2 billion spent by the Federal government on goods and services in Fiscal Year (FY) 1989, including $31.6 billion awarded directly to small firms and $27.2 billion awarded to small subcontractors by Federal

[12] The State of Small Business: A Report of the President Transmitted to the Congress (1991), together with The Annual Report on Small Business and Competition of the U.S. Small Business Administration (United States Government Printing Office, Washington, D.C., 1991), p. 19. A more detailed breakdown also used is: under 20 employees, very small; 20–99, small; 100–499, medium-sized; and over 500, large. In general, a business bidding on a government contract is regarded as small if it has fewer than 500 employees (see p. 221).

[13] U.S. Department of the Treasury, Internal Revenue Service, SO Bulletin (Spring 1990) Table 19; reprinted by SBA in The State of Small Business (1991), Id., p. 21.

prime contractors.[14] Small firms accounted for more than one-half (51.3 percent) of the value of contracts under $25,000, but only 14.1 percent of those over $25,000 in FY 1989.[15] Since FY 1979 when the FPDC first began reporting procurement data regularly, the share of Federal procurement dollars awarded to small firms has fluctuated between 14 and 16 percent over the entire period—for FY 1989 it was 14.1 percent overall.

Of the major product/service categories under which contract actions are reported to the FPDC, the ''other services'' category (which includes a variety of non-construction activities ranging from technical, sociological, administrative, and other professional services, to installation, maintenance, and repair of equipment) amounted to 28.9 percent of the total Federal prime contract actions reported individually in FY 1989. Small businesses were awarded $6.8 billion or 14.7 percent of the contract dollars awarded for services in FY 1989.[16]

This FPDS data on small business awards does not correlate precisely with the number of contract actions or contract dollars awarded that are subject to the SCA. However, the ''services'' category can be considered a reliable proxy for analyzing the universe of SCA-covered contracts reported to the FPDC that may be awarded to small businesses. Of a total 502,138 contract actions valued at $177.8 billion that were individually reported to the FPDC in FY 1992 (i.e., actions over $25,000 each), 82,957 contract actions, valued at $18.1 billion, were classified as subject to the SCA.[17] Of these awards, we estimate that $2.66 billion (14.7 percent) went to small businesses. These figures, however, do not include any portion of the contract actions not individually reported but reported in summary to the FPDC, which totaled 19.6 million contract actions valued at $22.02 billion.[18] Based upon the percentage of contract actions and contract dollars in the services category that were reported individually to FPDC as being subject to SCA, we estimate that an additional 2,905,696 actions, valued at $2.2 billion, of the actions reported in summary to the FPDC were subject to SCA. Of these awards, we estimate that $1.1 billion (50 percent) went to small businesses.

No current employment data are available by size of business that would relate to Federal contracts awarded subject to SCA. (The SBA measures employment change on a current basis for each small- or large-business-dominated industry using Bureau of Labor Statistics payroll data.[19])

(4) *Reporting, Recordkeeping and Other Compliance Requirements of the Rule.*

All SCA-covered contractors (including small businesses) are required to maintain records specified under 29 CFR Part 4 that demonstrate compliance with the statutory requirements to furnish equivalent fringe benefits or cash equivalents at not less than prevailing rates.

This final rule, which relates to the procedures to be followed by DOL for determining prevailing health and welfare fringe benefits to be paid to service employees working on Federal service contracts covered by SCA, contains no new reporting, recordkeeping, or other compliance requirements applicable to small businesses. Although some of the proposed alternatives likely would have involved additional recordkeeping obligations, the alternative selected does not require any additional recordkeeping. In fact, contractor comments regarding the ease of administration and compliance under this alternative were an important factor in selecting the alternative.

(5) *Description of the steps taken to minimize the significant economic impact on small entities consistent with the objectives of the Service Contract Act.*

As noted in the discussion of the various alternatives, the methodology selected (Alternative I) was clearly the alternative favored by most employers, many of which were small businesses. The factual, policy and legal reasons for selecting Alternative I and the reasons for rejecting the other alternatives are fully addressed in the discussion of the various alternatives. A key factor underlying the support of Alternative I by many employers, including many small entities, was the ease of administration and compliance under this alternative. In addition, this alternative was favored because it produces a benefit rate that is sufficient to allow all service contractors to purchase a reasonable benefit package for all contract workers. Under the current two-tier benefit structure, the low level benefit has been generally considered to be too low for employers to purchase even a minimal health and welfare package for their workers.

Proposed Alternatives II—IV were generally viewed by most commenters as being administratively difficult, especially for small employers. Notwithstanding the greater administrative burden, these alternatives were favored by some because they yielded a lower fringe benefit rate for many workers. For service contractors in general, however, these alternatives would have imposed significant administration and compliance difficulties.

List of Subjects in 29 CFR Part 4

Administrative practice and procedures, Employee benefit plans, Government contracts, Investigations, Labor, Law enforcement, Minimum wages, Penalties, Recordkeeping requirements, Reporting requirements, Wages.

Accordingly, for the reasons set out in the preamble, 29 CFR Part 4 is amended as set forth below:

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

1. The authority citation for Part 4 continues to read as follows:

Authority: 41 U.S.C. 351, et seq., 79 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358; 41 U.S.C. 38 and 39; 5 U.S.C. 301; and 108 Stat. 4101(c).

2. Section 4.2 of Subpart A is revised to read as follows:

§ 4.2 Payment of minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 under all service contracts.

Section 2(b)(1) of the Service Contract Act of 1965 provides in effect that, regardless of contract amount, no contractor or subcontractor performing work under any Federal contract the principal purpose of which is to furnish services through the use of service employees shall pay any employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

3. The introductory text of § 4.6(q) of Subpart A is revised to read as follows:

§ 4.6 Labor standard clauses for Federal service contracts exceeding $2,500.

* * * * *

(q) Where an employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips, the amount of tips received by the employee may be credited by the employer against the minimum wage required by Section 2(a)(1) or 2(b)(1) of the Act to the extent permitted by section 3(m) of the Fair

[14] The State of Small Business, *supra* at 220.

[15] Ibid.

[16] Id., pp. 223, 226 & 235–237.

[17] Federal Procurement Data System Standard Report, Fiscal Year 1992, Fourth Quarter, pp. 74–75.

[18] Id., p. 74.

[19] Id., p. 34.

Labor Standards Act and Regulations, 29 CFR Part 531. To utilize this proviso:

* * * * *

§§ 4.52 through 4.55 [Redesignated as §§ 4.53 through 4.56]

4. Sections 4.52 through 4.55 of Subpart B are redesignated as §§ 4.53 through 4.56 respectively.

5. A new § 4.52 is added to read as follows:

§ 4.52 Fringe benefit determinations.

(a) Wage determinations issued pursuant to the Service Contract Act ordinarily contain provisions for vacation and holiday benefits prevailing in the locality. In addition, wage determinations contain a prescribed minimum rate for all other benefits, such as insurance, pension, etc., which are not required as a matter of law (i.e., excluding Social Security, unemployment insurance, and workers' compensation payments and similar statutory benefits), based upon the sum of the benefits contained in the U.S. Bureau of Labor Statistics, Employment Cost Index (ECI), for all employees in private industry, nationwide (and excluding ECI components for supplemental pay, such as shift differential, which are considered wages rather than fringe benefits under SCA). Pursuant to Section 4(b) of the Act and § 4.123, the Secretary has determined that it is necessary and proper in the public interest, and in accord with remedial purposes of the Act to protect prevailing labor standards, to issue a variation from the Act's requirement that fringe benefits be determined for various classes of service employees in the locality.

(b) The minimum rate for all benefits (other than holidays and vacation) which are not legally required, as prescribed in paragraph (a) of this section, shall be phased in over a four-year period beginning June 1, 1997. The first year the rate will be $.90 per hour plus one-fourth of the difference between $.90 per hour and the rate prescribed in paragraph (a) of this section; the second year the rate will be increased by one-third of the difference between the rate set the first year and the rate prescribed; the third year the rate will be increased by one-half of the difference between the rate set in the second year and the rate prescribed; and the fourth year and thereafter the rate will be the rate prescribed in paragraph (a) of this section.

(c) Where it is determined pursuant to § 4.51(b) that a single fringe benefit rate is paid with respect to a majority of the workers in a class of service employees engaged in similar work in a locality, that rate will be determined to prevail notwithstanding the rate which would otherwise be prescribed pursuant to this section. Ordinarily, it will be found that a majority of workers receive fringe benefits at a single level where those workers are subject to a collective bargaining agreement whose provisions have been found to prevail in the locality.

(d) A significant number of contracts contain a prevailing fringe benefit rate of $2.56 per hour. Generally, these contracts are large base support contracts, contracts requiring competition from large corporations, contracts requiring highly technical services, and contracts solicited pursuant to A–76 procedures (displacement of Federal employees), as well as successor contracts thereto. The $2.56 benefit rate shall continue to be issued for all contracts containing the $2.56 benefit rate, as well as resolicitations and other successor contracts for substantially the same services, until the fringe benefit rate determined in accordance with paragraphs (a) and (b) of this section equals or exceeds $2.56 per hour.

(e) *Variance procedure.* (1) The Department will consider variations requested by contracting agencies pursuant to Section 4(b) of the Act and § 4.123, from the methodology described in paragraph (a) of this section for determining prevailing fringe benefit rates. This variation procedure will not be utilized to routinely permit separate fringe benefit packages for classes of employees and industries, but rather will be limited to the narrow circumstances set forth herein where special needs of contracting agencies require this procedure. Such variations will be considered where the agency demonstrates that because of the special circumstances of the particular industry, the variation is necessary and proper in the public interest or to avoid the serious impairment of government business. Such a demonstration might be made, for example, where an agency is unable to obtain contractors willing to bid on a contract because the service will be performed at the contractor's facility by employees performing work for the Government and other customers, and as a result, paying the required SCA fringe benefits would cause undue disruption to the contractor's own work force and pay practices.

(2) It will also be necessary for the agency to demonstrate that a variance is in accordance with the remedial purpose of the Act to protect prevailing labor standards, by providing comprehensive data from a valid survey demonstrating the prevailing fringe benefits for the specific industry. If the agency does not continue to provide current data in subsequent years, the variance will be withdrawn and the rate prescribed in paragraph (a) of this section will be issued for the contract.

6. Section 4.112 of Subpart C is revised to read as follows:

§ 4.112 Contracts to furnish services ''in the United States.''

(a) The Act and the provisions of this part apply to contract services furnished ''in the United States,'' including any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. The definition expressly excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country. Services to be performed exclusively on a vessel operating in international waters outside the geographic areas named in this paragraph would not be services furnished ''in the United States'' within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographical limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. However, if a service contract is to be performed in part within and in part outside these geographic limits, the stipulations required by § 4.6 or § 4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

Signed at Washington, D.C., on this 24th day of December, 1996.

Gene Karp,

Deputy Assistant Secretary for Employment Standards.

[FR Doc. 96–33222 Filed 12–26–96; 10:05 am]

BILLING CODE 4510–27–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 2

RIN 2900–AH00

Delegation of Subpoena Authority and Description of Means of Service

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule an interim rule amending the Department of Veterans Affairs (VA) regulations concerning authority of VA officials to issue subpoenas by revoking the delegation of authority to the Inspector General and subordinate officials and by adding a delegation of authority to the Under Secretary for Health and certain subordinate officials. The interim rule also amended the regulations by specifying the means of service for VA subpoenas. The intended effect of this rule is to make the Department's delegations of subpoena power consistent with legal authority and to ensure that VA has the means to obtain information necessary to determine whether individuals are entitled to income-based benefits.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Barry M. Tapp, Deputy Assistant General Counsel (023A), Office of the General Counsel, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington DC 20420, (202) 273–6334.

SUPPLEMENTARY INFORMATION: On August 10, 1995, VA published in the Federal Register (60 FR 40756) an interim rule as described in the *Summary* portion of this document. A 61-day comment period ended October 10, 1995, and no comments were received.

This final rule affirms the information in the interim rule document concerning the Regulatory Flexibility Act.

Accordingly, the interim rule amending 38 CFR part 2 which was published at 60 FR 40756 on August 10, 1995, is adopted as a final rule without change; except that the authority citation for the provisions in this final rule was changed in a document published in the Federal Register on May 7, 1996 (1 FR 20438), and this document leaves in place the new authority citation.

Approved: November 19, 1996.

Jesse Brown,

Secretary of Veterans Affairs.

[FR Doc. 96–33075 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

38 CFR Parts 3 and 14

RIN 2900–AI39

Miscellaneous Regulations

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations by removing an unnecessary provision that states all decisions will conform to the statutes and regulations of the Department of Veterans Affairs and to the precedent opinions of the General Counsel. The intended effect of this amendment is to eliminate unnecessary regulations. This document also makes clarifying changes to the regulations concerning criteria for determining need for aid and attendance, and to those dealing with the effect of written precedent opinions of the General Counsel.

EFFECTIVE DATE: This amendment is effective December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Steve Tomasek, Consultant, Procedures Staff, Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, telephone (202) 273-7256.

SUPPLEMENTARY INFORMATION: 38 CFR 3.101 states that all decisions of the Department of Veterans Affairs will conform to the statutes and regulations of the Department of Veterans Affairs and to the precedent opinions of the General Counsel. That an agency must comply with its governing statutes and its own regulations, which have the force and effect of law, is such a fundamental legal concept that a regulation specifically requiring such compliance is unnecessary.

38 CFR 14.507 indicates that General Counsel opinions designated as precedential will be considered binding on VA officials as legal interpretations of general applicability. This document revises 38 CFR 14.507(b) to more clearly state that precedent opinions are binding on VA officials and employees in subsequent matters involving a legal issue decided by the precedent opinion. Accordingly, there is no need to state separately in part 3 that VA decisions must conform to VA precedent opinions. For the foregoing reasons, this document amends VA adjudication regulations by removing section 3.101.

This document revises 38 CFR 14.507(b) by adding at the end thereof a sentence stating that an opinion designated as a precedent is binding on VA officials and employees in subsequent matters involving a legal issue decided in the precedent opinion, unless there has been a material change in a controlling statute or regulation or the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision. Also, a minor conforming change is made to 38 CFR 14.507(a). These changes merely clarify the provisions of the current regulation.

Currently, 38 CFR 14.507(b) authorizes the VA General Counsel to designate as a ''precedent opinion'' any General Counsel opinion having significance beyond the particular case or matter at issue in the opinion. The term ''precedent'' has a well-established legal meaning indicating an interpretation of law by a competent authority which is considered binding or persuasive in subsequent cases involving the same issue of law. Further, section 14.507(b) currently provides that General Counsel precedent opinions are subject to the provisions of 5 U.S.C. 552(a)(1), which requires Federal agencies to publish in the Federal Register, among other things, ''interpretations of general applicability formulated and adopted by the agency.'' Although section 14.507(b) presently indicates that General Counsel precedent opinions will be generally applicable and binding on VA employees and officials with respect to matters involving the same question of law, we believe it would be helpful to state the binding effect of precedent opinions in clearer terms.

This document also revises the heading of section 3.352 of the adjudication regulations. Currently the heading reads ''Criteria for permanent need for aid and attendance and 'permanently bedridden.' '' The heading is revised to read ''Criteria for determining need for aid and attendance and 'permanently bedridden.' '' The revised heading more accurately indicates that section 3.352 concerns entitlement to increased pension, compensation, or dependency and indemnity compensation based on an individual's need for the regular aid and attendance of another person without regard to whether or not such need is permanent.

Since this rulemaking merely removes an unnecessary nonsubstantive provision and makes clarifying changes, the Secretary finds under 5 U.S.C. 553(b) that prior notice and comment are unnecessary and that there is a basis for dispensing with a 30-day delay of the effective date.

The Secretary hereby certifies that these regulatory amendments would not have a significant impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612. The amendments would not directly affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

There are no applicable Catalog of Federal Domestic Assistance program numbers.

List of Subjects

38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans.

38 CFR Part 14

Administrative practice and procedure, Claims, Courts, Foreign relations, Government employees, Lawyers, Legal services, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Surety bonds, Trusts and trustees, Veterans.

Approved: December 9, 1996.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, 38 parts 3 and 14 are amended as set forth below:

PART 3—ADJUDICATION

Subpart A—Pension, Compensation, and Dependency and Indemnity Compensation

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

§ 3.101 [Removed]

2. Section 3.101 is removed.

3. The section heading of § 3.352 is revised to read as follows:

§ 3.352 Criteria for determining need for aid and attendance and ''permanently bedridden.''

PART 14—LEGAL SERVICES, GENERAL COUNSEL

4. The authority citation for part 14 continues to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 2671–2680; 38 U.S.C. 501(a), 5502, 5902–5905, unless otherwise noted.

§ 14.507 [Amended]

5. In § 14.507, the first sentence of paragraph (a) is amended by removing the words ''is a change'' and adding, in their place, the words ''has been a material change'', and paragraph (b) is amended by adding at the end thereof the words ''An opinion designated as a precedent opinion is binding on Department officials and employees in subsequent matters involving a legal issue decided in the precedent opinion, unless there has been a material change in a controlling statute or regulation or the opinion has been overruled or modified by a subsequent precedent opinion or judicial decision.''

[FR Doc. 96–33076 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

---

38 CFR Part 19

RIN 2900–AI59

Appeals Regulations: Notice of Board of Veterans' Appeals Decisions

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs' (VA) Appeals Regulations for appeals to the Board of Veterans' Appeals (Board) by removing provisions that do not conform to recent legislation.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Steven L. Keller, Chief Counsel, Board of Veterans' Appeals, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202–565–5978).

SUPPLEMENTARY INFORMATION: Section 509 of the Veterans' Benefits Improvements Act of 1996, Public Law 104–275, § 509, 110 Stat. 3322, 3344, amended 38 U.S.C. 7104(e) to permit the Board to mail copies of its decision to the claimant's representative or to use any other means of delivery likely to result in delivery within the same time as would be expected with mailing by first-class mail. 38 CFR 19.8 previously reflected the old provisions of 38 U.S.C. 7104(e) that permitted decision delivery only by mailing. This document removes from § 19.8 material on Board decision delivery that does not conform to the new legislation and makes nonsubstantive changes to the remaining material in § 19.8 concerning preservation of claimants' privacy interests in simultaneously contested claims.

This final rule concerns agency procedure or practice and, pursuant to 5 U.S.C. 553, is exempt from notice and comment requirements.

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This rule will affect VA beneficiaries and will not affect small businesses. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analyses requirement of sections 603 and 604.

List of Subjects in 38 CFR Part 19

Administrative practice and procedure, Claims, Veterans.

Approved: December 16, 1996.

Jesse Brown,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 19 is amended as set forth below:

PART 19—BOARD OF VETERANS' APPEALS: APPEALS REGULATIONS

1. The authority citation for part 19 continues to read as follows:

Authority: 38 U.S.C. 501(a).

2. Section 19.8 is revised to read as follows:

§ 19.8 Content of Board decision, remand, or order in simultaneously contested claims.

The content of the Board's decision, remand, or order in appeals involving a simultaneously contested claim will be limited to information that directly affects the issues involved in the contested claim. Appellate issues that do not involve all of the contesting parties will be addressed in one or more separate written decisions, remands, or orders that will be furnished only to the appellants concerned and their representatives, if any.

(Authority: 5 U.S.C. 552a(b), 38 U.S.C. 5701(a))

[FR Doc. 96–33077 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 12

RIN 1090–AA59

Administrative and Audit Requirements and Cost Principles for Assistance Programs

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: This final rule is in response to the ''Omnibus Consolidated Appropriations Act of 1997,'' and the ''Energy and Water Development Appropriations Act, 1997.'' Section 307(a) of Public Law 104–208 required

that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds they will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c; popularly known as the ''Buy American Act''). As it did for awards governed by this provision made since FY 1993, the Department continues to interpret this requirement to apply to assistance programs. Section 307(b)(1) of Public Law 104–208 again states that it is the sense of Congress that all equipment and products purchased with funds made available in the Act should be American-made. Likewise, the Department is again taking the position that Congressional intent is different for awards made by the Bureau of Reclamation. As such, only the provisions in the regulation addressing the sense of Congress (section 12.700 and the notice requirements (sections 12.710) will apply to awards made by the Bureau of Reclamation using appropriated funds for FY 1997.)

In addition, a minor correction is being made to a cite in the definition of ''domestic and product'' in Section 12.705.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Debra E. Sonderman, (Director, Procurement and Property Management Systems), (202) 208–3336.

SUPPLEMENTARY INFORMATION: On September 30, 1996, the Omnibus Consolidated Appropriations Act of 1997 (''the Act'') was signed into law Section 307(a) of the Act was entitled ''Compliance with Buy American Act.'' The section applied to funds appropriated or transferred pursuant to the Act for the purchase of any equipment or product that may be authorized to be purchased with financial assistance. Section 307(b)(1) expressed the ''sense of the Congress'' that entities receiving the assistance purchase only American-made equipment and products.

Section 307(b)(2) required that in providing the financial assistance under the Act, the Secretary shall provide to each recipient of the assistance a notice describing the requirement. As in prior years, no other specific guidance was given regarding the implementation of this requirement.

The Department is revising Subpart E of 43 CFR Part 12, to implement these requirements for awards made using appropriated funds for FY 1997. No specific guidance was provided by Congress, so the Department decided to continue its implementation of these requirements based upon the final rule published in the Federal Register on July 19, 1994 (59 FR 36713).

Because of the applicability of different appropriation acts and the fact that the requirements are different, the notice in subparagraph (b) of section 12.710 has been changed to account for the reference to language in Public Law 104–208. A separate notice included in subparagraph (c) of section 12.710 has been amended to account for the reference to language in Public Law 104–206 and its use only for awards made by the Bureau of Reclamation.

Finding of Good Cause for Waiver of Proposed Rulemaking and for Making Rule Effective upon Publication

In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is usually the practice of the Department to offer interested parties the opportunity to comment on proposed regulations. However, the Department waives notice and comment on these regulations under section 553(b)(B) of the Administrative Procedure Act (5 U.S.C. 553(b)(B)). This section provides that notice and comment for rulemaking is not required when the agency for good cause finds that notice and public procedures are impracticable, unnecessary, or contrary to the public interest.

The Department believes public comment on the revision of this regulation is unnecessary because the substance of these provisions is based on statutory requirements governing the award of assistance with appropriated funds for FY 1997, that the Department is unable to change.

The Administrative Procedure Act provides that rules be published at least 30 days prior to their effective date, except as otherwise provided by an agency on a finding of good cause (5 U.S.C. 553(d)(3)). In this case, because this requirement is a statutory condition of expenditure of appropriated funds in this fiscal year, the Department has determined that the rule must be effective upon publication.

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

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

The Department has determined that this rule will not have a significant economic impact on small entities since it is anticipated that no additional costs will be imposed on a substantial number of small entities as a result of the rule. This rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

Environmental Effects

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

List of Subjects in 43 CFR Part 12

Administrative practice and procedure, Contract programs, Cooperative agreements, Grant programs, Grants administration, Reporting and recordkeeping requirements.

Dated: December 4, 1996.

Bonnie R. Cohen,

Assistant Secretary—Policy, Management and Budget.

Title 43 of the Code of Federal Regulations, part 12 is amended as follows:

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

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

Authority: 5 U.S.C. 301; 31 U.S.C. 6101 note, 7501, 41 U.S.C. 252a, 701 *et seq;* sec. 501, Pub. L. 104–206, 110 Stat. 2984; sec. 307, Pub. L. 104–208, 110 Stat. 3009; E.O. 12549, 3 CFR, 1986 Comp., p. 189; E.O. 12674, 3 CFR, 1989 Comp., 215; E.O. 12689, 3 CFR, 1989 Comp., p. 235; E.O. 12731, 3 CFR, 1990 Comp., p. 306; OMB Circular A–102; OMB Circular A–110; OMB Circular A–128; and OMB Circular A–133.

2. Section 12.700 is revised to read as follows:

§ 12.700 Scope.

This subpart implements section 307 of the Omnibus Consolidated Appropriations Act of 1997 (Public Law 104–208, 110 Stat. 3009) and section 501 of the Energy and Water Development Appropriations Act, 1997 (Public Law 104–206, 110 Stat. 2984). For awards made under the authority of section 307(a) of Public Law 104–208, this subpart requires that no funds made available in the Act may be expended by an entity unless the entity agrees that in expending the funds the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. 10a–10c; popularly known as the ''Buy American Act''). It applies to procurement contracts under grants and cooperative agreements which provide for the purchase of equipment and products. Section 501 of Public Law 104–206, 110 Stat. 2984, only applies to awards made by the Bureau of Reclamation. In addition, for these awards, there is only a requirement that in providing financial assistance to, or entering into any contract with, any entity using funds made available in this Act, the Secretary, to the greatest extent practicable, will provide to the entity a notice describing a statement within the Act made by Congress. This statement concerns the sense of the Congress that to the greatest extent practicable, all equipment and products purchased with funds made available in the Act, should be American-made. Therefore, for Fiscal Year 1997 awards, only the requirements in Section 12.700 and 12.710 will apply to awards made by the Bureau of Reclamation.

3. Section 12.705 is amended by revising the fourth sentence included in the definition of domestic end product to read as follows:

§ 12.705 Definitions.

* * * * *

Domestic end product * * *

Components of foreign origin of the same class or kind for which determinations have been made in accordance with Section 12.710(d) (3) and (4) are treated as domestic. * * *

* * * * *

4. Paragraphs (a), (b), and (c) of Section 12.710 are revised to read as follows:

§ 12.710 Policy.

(a) In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available under Public Law 104–208, it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(b) In awarding financial assistance under Public Law 104–208, 110 Stat. 3009, bureaus and offices excluding the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

Notice: Pursuant to Sec. 307 of the Omnibus Consolidated Appropriations Act of 1997, Public Law 104–208, 110 Stat. 3009, please be advised of the following:

In the case of any equipment or product that may be authorized to be purchased with financial assistance provided using funds made available in this Act, it is the sense of the Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

(c) In awarding financial assistance using funds made available under Public Law 104–206, to the greatest extent practicable, the Bureau of Reclamation will provide to each recipient of the assistance the following notice:

Notice: Pursuant to Sec. 501 of the Energy and Water Development Appropriations Act, 1997, Public Law 104–206, 110 Stat. 2984, please be advised of the following:

It is the sense of the Congress, that to the greatest extent practicable, all equipment and products purchased with funds made available in this Act should be American-made.

* * * * *

[FR Doc. 96–33033 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–RF–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1313

[STB Ex Parte No. 541]

Railroad Contracts

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (Board) adopts revised regulations governing contracts under 49 U.S.C. 10709 that are entered into between one or more rail carriers and one or more purchasers of rail services for the transportation of agricultural products. The revised regulations reflect the reduced regulatory oversight of rail transportation contracts introduced by the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995) (ICCTA).

EFFECTIVE DATE: These rules are effective on January 29, 1997.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927–5660. (TDD for the hearing impaired: (202) 927–5721.)

SUPPLEMENTARY INFORMATION: In a notice of proposed rulemaking (NPR) served October 17, 1996 (61 FR 54144), the Board proposed revised regulations to reflect the reduced regulatory oversight of rail transportation contracts introduced by the ICCTA. The revised regulations were proposed by the Board after consideration of comments received from major shipper and carrier interests in response to an advance notice of proposed rulemaking served March 26, 1996 (61 FR 13147).

Comments in response to the NPR were received from the Association of American Railroads, the Kansas Grain and Feed Association, the Montana Wheat and Barley Committee (MWBC), and the National Grain and Feed Association. None of the commenters objects to the proposed regulations, and we will adopt them without substantive change.

While not objecting to the proposed regulations, *per se*, MWBC states that it is difficult and expensive for many small grain shippers to obtain timely information regarding contract summary filings, and that, in the past, many grain shippers have been unaware of contracts that might affect them until after the complaint period has passed. MWBC suggests that the Board institute a procedure to post the contract summaries filed each day on a ''world wide web internet page readily accessible to the grain shippers.''

The Board does not currently have the capability to disseminate information, either its own decisions or materials filed with it, over the Internet. We do, however, support improvements in the dissemination of information, and are in the process of developing capability to disseminate information electronically in the future. Nevertheless, we cannot at this time determine the feasibility of disseminating electronically materials filed with us, such as railroad contract summaries, and thus cannot grant MWBC's request at this time. However, we are certainly prepared to consider alternative requirements as they become feasible.

In the meantime, it is important to note that the filing requirements contained in the proposed regulations have been in effect for many years, and other shippers and shipper groups have apparently been able to meet their information needs under the existing filing requirements, as no commenter other than MWBC has raised the issue. We are aware of the existence of independent service providers (generally referred to as watching services) that monitor contract summary filings for their clients and advise them when filings of interest are made. MWBC might wish to investigate the feasibility of using such a service. [1] Additionally, MWBC can investigate the feasibility of obtaining the needed information directly from the rail carriers pursuant to the information availability requirements of § 1313.5(a)(2) of the proposed regulations.

Small Entities

The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. They merely eliminate obsolete

[1] MWBC states that mail delivery from Washington takes as long as 5 to 6 days, but the watching services advise us that they can and do send contract summaries to their clients by facsimile transmission.

provisions where regulatory oversight was eliminated, reflect certain other modest changes effected by the ICCTA, and largely continue existing contract disclosure requirements for agricultural products.

Environment

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 1313

Agricultural products, Contract summaries, Rail carriers, Transportation contracts.

Decided: December 17, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons and Commissioner Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, the Board revises part 1313 of title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1313—RAILROAD CONTRACTS FOR THE TRANSPORTATION OF AGRICULTURAL PRODUCTS

Sec.

Authority: 49 U.S.C. 721(a) and 10709.

§ 1313.1 Scope; definition of terms.

(a) This part addresses the provisions of 49 U.S.C. 10709 that require rail carriers to file with the Board a summary of each contract for the transportation of agricultural products (including grain, as defined in 7 U.S.C. 75 and products thereof) and that allow complaints to be filed with the Board regarding such contracts.

(b) The provisions of this part do not apply to any transportation that is exempted from the Board's contract regulation pursuant to an exemption issued under 49 U.S.C. 10502 or former 49 U.S.C. 10505 (repealed effective January 1, 1996).

(c) For purposes of this part, the term contract means an agreement, including any amendment thereto, entered into by one or more rail carriers and one or more purchasers of rail services to provide specified transportation of agricultural products (including grain, as defined in 7 U.S.C. 75 and products thereof) under specified rates and conditions. The term amendment includes contract modifications agreed to by the parties.

(d) An amended contract is treated as a new contract under this part. Remedies are revived and review is again available, upon complaint.

§ 1313.2 Contract summary filing requirement.

(a) Rail carriers subject to the jurisdiction of the Surface Transportation Board under 49 U.S.C. 10501 must promptly file with the Board a summary of each contract entered into for the transportation of agricultural products.

(b) Contract summaries not in compliance with this part may be rejected by the Board. If a contract summary is rejected, it will be considered as not filed, and the carrier must promptly file a corrected contract summary to replace the rejected summary.

§ 1313.3 Board review; contract disapproval.

(a) Board review. (1) No later than 30 days after a contract summary is filed, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in § 1313.9.

(2) If the Board begins a proceeding, it shall determine, within 30 days after the proceeding is commenced, whether the contract is in violation of 49 U.S.C. 10709.

(b) Contract disapproval. If the Board finds that the contract is in violation of 49 U.S.C. 10709, it will:

(1) Disapprove the contract; or

(2) Where the Board finds unreasonable discrimination, in accordance with 49 U.S.C. 10709(g)(2)(B)(i), order the contracting carrier(s) to provide to the complainant(s) rates and service substantially similar to those contained in the contract at issue, with such differences in terms and conditions as are justified by the evidence.

(c) *Applicable rates/charges if a contract is disapproved.* If the Board disapproves a contract (or contract amendment), the appropriate non-contract rates/charges (or the contract provisions otherwise in effect) will be applicable.

§ 1313.4 Filing procedures and formats for contract summaries.

(a) *Filing of Summaries.* (1) Two copies of each contract summary, containing the applicable information specified in §§ 1313.6, 1313.7, or 1313.8, as appropriate, must be filed with the Board as soon as possible, but no longer than 7 days after the date of the contract (or contract amendment).

(2) The outside envelope or wrapper containing one or more contract summaries must be prominently marked ''Rail Contract Summary'' and addressed to: Tariffs Branch, Surface Transportation Board, Washington, DC 20423.

(3) A transmittal letter identifying the submitted publication(s), and the name and telephone number of a contact person, must accompany each filing of one or more contract summaries. Each transmittal letter shall clearly indicate in the upper left-hand corner thereof:

(i) The assigned alpha code of the filing carrier;

(ii) The number of summaries transmitted;

(iii) The filing fee enclosed, the account number to be billed, or the credit card to be charged;

(iv) The transmittal number if the filer utilizes transmittal numbers; and

(v) If the filing fee is charged to a credit card, the information must include the credit card number and expiration date, and an authorized signature.

(b) *Contract summary title page.* The title page of each contract summary must contain only the following information:

(1) In the upper right corner, the contract summary number (see paragraph (c) of this section), followed by the amendment number if an amended contract summary.

(2) In the center of the page, the filing carrier's name, followed by the words ''CONTRACT SUMMARY'' or ''AMENDED CONTRACT SUMMARY'', as applicable, in large print.

(3) Date of contract and its effective date.

(4) In the center lower portion, the individual submitting the filing, and the name of the individual(s) for service of complaints (if not the same individual). If not otherwise noted, a complainant may rely on service to the individual submitting the filing.

(c) *Contract summary numbering system.* (1) The contract summary identification number must include the word ''STB,'' the standard carrier alphabetic code for the filing railroad (limited to four letters), the letter ''C,'' and a sequential number, with each separated by a hyphen. The following is an example: the 357th contract summary filed by the Conrail would have the following identification number: ''STB–CR–C–357.''

(2) At its option, the carrier may issue contract summaries with nonconsecutive numbers if it assigns blocks of numbers for specific uses. An index to the blocks of reserved numbers shall be filed with the Board.

(d) *Format requirements for contract summary information.* (1) The contract summary must enumerate and have each item required in §§ 1313.6, 1313.7 or 1313.8 of this part, as applicable, completed. When the item does not pertain to the contract, the term ''Not Applicable'' (''NA'') shall be used.

(2) Changes in prior contract summaries must be underscored and must be followed by the words ''addition,'' ''deletion,'' ''extension,'' ''cancellation,'' or other appropriate descriptive phrase in parentheses. If the change to the contract is only in confidential matter, a statement to that effect must be made in the amended contract summary and must indicate the particular feature to which the change applies (i.e., rate, special feature, etc.). If ''not applicable'' is permitted in the original summary under §§ 1313.6 through 1313.8 of this part, the amended summary may use ''not applicable'' with a notation that a change pertained only to confidential data.

(3) Amended contract summaries may not substitute phrases such as ''not applicable'' or ''no change'' where disclosure was required in the original contact summary (such as in the commodity description); amended contract summaries must set forth all required non-confidential terms in the contract, whether amended or not.

§ 1313.5 Contract and contract summary availability.

(a)(1) A contract summary filed under these rules shall be made available for public inspection in the Tariffs Branch of the Surface Transportation Board.

(2) A contract summary filed under these rules also shall be made available by the carrier(s) participating in the contract, upon reasonable request.

(b) Where not already required by § 1313.10(a)(5) of this part, the contract for which a summary is filed under these rules shall be provided immediately to the Board, upon request, for its use in carrying out its functions under the statute.

§ 1313.6 Contract summary for agricultural commodities.

(a) *Summary information.* The summary of a contract for the transportation of agricultural commodities must contain the following information:

(1) *Carrier names.* A list, alphabetically arranged, of the corporate names of all carriers that are parties to the contract, and their addresses for service of complaints.

(2) *Specific commodity.* The specific commodity or commodities to be transported under the contract. Vague commodity descriptions such as ''grain'' are not permitted, even if that is the commodity description in the contract.

(3) *Shipper identity.* The specific identity of the shipper party to the contract, as well as any other party or parties on whose behalf that shipper is acting (to the extent known).

(4) *Specific origins, destinations, transit points, and other shipper facilities.* (i) Each specific origin and destination point to and from which the contract applies. Vague descriptions such as ''various points in Kansas'' are not acceptable. Broad geographic descriptions such as ''all stations in Kansas'' are permitted only to the extent such terms are actually used in the contract and such origins and destinations are subject to specific identification by reference to available publications.

(ii) Each port involved.

(iii) Each transit point identified in the contract.

(iv) Each shipper facility affecting performance under the contract (if not included in the origin/destination points or transit points), to the extent identified in the contract or known to the contracting parties.

(5) *Contract duration.* (i) The date on which the contract has or will become applicable to the transportation services covered by the contract.

(ii) The termination date of the contract, and any terms for automatic extension or renewal of the contract.

(iii) Any provisions for optional extension.

(6) *Rail car data.* (i) Either the information in paragraph (a)(6)(A) of this section or the certified statement in paragraph (a)(6)(B) of this section as follows:

(A) The number of dedicated cars (or, at the carrier's option, car days), by major car type, to be used to fulfill the contract or contract options, including those that are:

(*1*) Available and owned by the carrier(s) listed in paragraph (a)(1) of this section;

(*2*) Available and leased by those carrier(s), with average number of bad-order cars identified; and

(*3*) (Optional) On order (for ownership or lease), along with delivery dates.

(B) A certified statement that:

(*1*) The shipper will furnish the rail cars used for the transportation provided under the contract, and that those rail cars will not be leased from the carrier; or

(*2*) The contract is restricted to services which do not entail car supply.

(ii) For contract summaries filed on or before September 30, 1998, a certified statement that the cumulative equipment total for all contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) does not exceed 40 percent of the capacity of carrier-owned and -leased cars by applicable car type.

(7) *Rates and charges.* (i) The specific base rates and/or charges that would apply without the contract.

(ii) A summary of any escalation provisions in the contract.

(8) *Volume.* All volume, car and/or train size requirements, as set forth in the contract, including:

(i) Movement type (single-car, multiple-car, unit-train).

(ii) Minimum and actual volume requirements under the contract, by applicable period(s) (annual, quarterly, etc.).

(iii) Volume breakpoints affecting the contract.

(9) *Special features.* The existence (but not the terms or amount) of any special features, such as transit-time commitments, credit terms, discounts, switching, special demurrage, guaranteed or minimum percentages, etc.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data on the cars used to fulfill the challenged contract. This additional data shall include (by major car type used to fulfill the contract):

(1) Total bad-car orders;

(2) Assigned car obligations; and

(3) Free-running cars.

§ 1313.7 Contract summary for grain products—involving a port.

(a) *Summary information.* The summary of a contract for the transportation of grain products that involves service to or from a port must contain the following information:

(1) *Carrier names.* A list, alphabetically arranged, of the corporate names of all carriers that are parties to

the contract, and their addresses for service of complaints.

(2) *Specific commodity.* The specific commodities to be transported under the contract. Broad commodity descriptions such as ''grain products'' are permitted only to the extent that is the commodity description in the contract.

(3) *Contract duration.* (i) The date on which the contract has or will become applicable to the transportation services covered by the contract.

(ii) The termination date of the contract, and any terms for automatic extension or renewal of the contract.

(4) *Rates and charges.* (i) The specific base rates and/or charges that would apply without the contract.

(ii) The existence (but not the terms or amount) of any escalation provisions.

(5) *Volumes.* The existence (but not the terms or amount) of any provisions regarding movement type (e.g. single-car, multiple-car, unit-train) or minimum volume requirements.

(6) *Special features.* The existence (but not the terms or amount) of special features such as transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms, discounts, etc.

(7) *Rail car data.* Either the information in paragraph (a)(7)(i) of this section or the certified statement in paragraph (a)(7)(ii) of this section as follows:

(i) The number of dedicated cars (or, at the carrier's option, car days), by major car type, to be used to fulfill the contract or contract options, including those that are:

(A) Available and owned by the carrier(s) listed in paragraph (a)(1) of this section;

(B) Available and leased by those carrier(s), with average number of bad-order cars identified; and

(C) (Optional) On order (for ownership or lease), along with delivery dates.

(ii) A certified statement that:

(A) The shipper will furnish the rail cars used for the transportation provided under the contract, and that those rail cars will not be leased from the carrier; or

(B) The contract is restricted to services which do not entail car supply.

(8) *Ports.* (i) The port(s) involved.

(ii) Either the mileages (rounded to the nearest 50 miles) between the port and each inland origin or destination, or the specific inland origin and destination points.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data on the cars used to fulfill the challenged contract. This additional data shall include (by major car type used to fulfill the contract):

(1) Total bad-car orders;

(2) Assigned car obligations; and

(3) Free-running cars.

§ 1313.8 Contract summary for grain products—not involving a port.

(a) *Summary information.* The summary of a contract for the transportation of grain products that does not involve service to or from a port must contain the information specified in § 1313.7, paragraphs (a)(1), (2), (3) and (7). It must also contain the information specified in § 1313.7(a)(6) if the contract contains such terms.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data specified in § 1313.7(b).

§ 1313.9 Grounds for complaints and contract review.

(a) A complaint may be filed against a contract covered by this part:

(1) By any shipper on the ground that such shipper individually will be harmed because the contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under 49 U.S.C. 11101;

(2) By a port on the ground that such port individually will be harmed because the contract will result in unreasonable discrimination against such port; and

(3) By a shipper of agricultural commodities on the ground that such shipper individually will be harmed because:

(i) The rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that such shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) The contract constitutes a destructive competitive practice.

(b) *Unreasonable discrimination*, for purposes of paragraph (a)(3)(i) of this section, has the same meaning as the term has under 49 U.S.C. 10741.

§ 1313.10 Procedures for complaints and discovery.

(a) *Complaints, discovery petitions, replies, and appeals*—(1) *Initial filing.* Complaints must be filed by the 18th day after the contract summary is filed. Any discovery petition must accompany the complaint.

(2) *Complaint.* A complaint must contain the correct, unabbreviated names and addresses of the complainant(s) and defendant(s). The complainant must set out the statutory provisions under which it has standing to file a complaint, and its reasons for requesting that the Board find the challenged contract unlawful.

(3) *Discovery petition.* A discovery petition must note on the front page ''Petition for Discovery of Rail Contract'' and note the contract (and any applicable amendment) number. It should provide the following information:

(i) *Standing—grounds.* The ground upon which the petitioner's complaint is based under § 1313.9.

(ii) *Standing—affected party.* Pertinent information regarding the petitioner's actual or potential participation in the relevant market, including:

(A) The nature and volume of petitioner's relevant business.

(B) The relevant commodities that petitioner ships or receives.

(C) Comparisons of the petitioner's commodities, locations of shipping facilities and serving carriers, actual or potential traffic patterns and serving carrier(s), with the traffic patterns and serving carrier(s) identified in the contract summary. State whether petitioner is a consignor or consignee.

(D) The petitioner's ability to ship the commodity in question at a time generally simultaneous with the challenged contract.

(E) The potential effect of the contract on the petitioner's relevant business.

(F) Any additional supporting information, including prior negotiations, if any.

(iii) *Relevance.* The relevance of the information sought to the petitioner's challenge to the contract.

(iv) *Nexus.* Where the complaint challenges a carrier's ability to perform its common carrier obligation, the nexus between the information sought and the common carrier obligation of the contracting carrier(s).

(4) *Service of pleadings.* The complainant must certify that 2 copies of the complaint, and discovery petition if filed, have been sent to the

contracting carrier(s) either by hand, express mail, or other overnight delivery service the same day as filed at the Board. The contracting carrier shall in turn serve the contracting shipper with a copy of the complaint and petition. Replies shall be served in the same manner on complainant/petitioner.

(5) *Submission of contract.* Immediately upon the filing of a complaint, the rail carrier filing the contract summary shall forward to the Board, by hand, express mail, or other overnight delivery service, the subject contract or amended contract.

(6) *Replies.* Replies to the complaint/petition are due within 5 days from the date of filing of the complaint/petition, and in no event later than noon on the 23rd day following filing of the contract summary.

(7) *Copies.* An original and 10 copies of complaints, petitions and replies must be filed with the Board in a package marked ''Confidential Rail Contract Material''.

(8) *Discovery appeals.* If action on a petition for discovery is taken under delegated authority, that action may be appealed to the Board, subject to the following:

(i) An appeal must be received within 2 days of the initial decision, but in no event later than the 28th day after the contract summary is filed.

(ii) The appeal must be marked ''Appeal of Delegated Authority Action Regarding Rail Contract Discovery''.

(iii) Telegraphic notice or its equivalent must be given to the opposing parties.

(iv) Replies to the appeal must be filed within one day after the appeal is filed.

(v) An original and 10 copies of appeals and replies must be filed with the Board.

(9) *Furnishing of information.* If discovery is granted, the carrier must furnish the required information to the petitioner by the 1st working day after the Board issues its decision.

(b) *Informal discovery.* (1) Prior to filing a petition for formal discovery under paragraph (a) of this section, a petitioner may request discovery from the carrier.

(2) The carrier must promptly grant or deny the request.

(3) Agreements between carriers and shippers for informal discovery are permitted under these rules.

(c) *Confidentiality.* If confidential contract data are filed with the Board in a pleading, the party filing these data should submit them as a separate package, clearly marked on the outside ''Confidential Material Subject to Protective Order.'' The order in paragraph (d) of this section applies to the parties specified in the order who receive confidential information through proceedings before the Board or through informal discovery.

(d) *Protective order.* Petitioner and carriers, and their duly authorized agents, shall limit to the contract complaint proceeding the use of contract information or other confidential commercial information which may be revealed in the contract, the complaint, reply, or in any other pleading relating to the contract. This restriction shall be a condition to release of any contract term to a petitioner/complainant and shall operate similarly on a carrier in possession of confidential information which may be contained in a complaint, petition for discovery, or request for informal disclosure. Any information pertaining to parties to the contract or subject to the contract (including consignors, consignees and carriers), or pertaining to the terms of the contract, or relating to the petitioner's/complainant's confidential commercial information, must be kept confidential. Neither the information nor the existence of the information shall be disclosed to third parties, except for: consultants or agents who agree, in writing, to be bound by this regulation; information which is publicly available; information which, after receipt, becomes publicly available through no fault of the party seeking to disclose the information after it has become publicly available, or is acquired from a third party free of any restriction as to its disclosure. The petitioner/complainant or carrier must take all necessary steps to assure that the information will be kept confidential by its employees and agents. No copies of the contract terms or other confidential information are to be retained by the parties not originally privy to the data subsequent to the termination of the proceeding.

(e) *Contract review proceeding.* If the Board institutes a proceeding to review the contract, the complainant's case-in-chief is due 9 days after the institution of the proceeding, but no later than 39 days after the filing of the contract summary. Replies are due 16 days after the institution of the proceeding, but no later than 46 days after the filing of the contract summary.

[FR Doc. 96–33152 Filed 12–27–96; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 960129019–6019–01; I.D. 110896C]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Correction to a closure.

SUMMARY: This document contains a correction to a closure (I.D. 110896C) which was published Friday, November 15, 1996 (61 FR 58491).

EFFECTIVE DATE: 1200 hours, Alaska local time (A.l.t.), November 9, 1996, until 2400 hours, A.l.t., December 31, 1996.

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

SUPPLEMENTARY INFORMATION:

Background

The closure that is the subject of this correction prohibited directed fishing for Pacific cod by vessels using trawl gear in the Bering Sea and Aleutian Islands Management Area.

Need for Correction

As published, the closure contained an incorrect effective date.

Correction of Publication

Accordingly, the publication on November 15, 1996, of the closure (I.D. 110896C), which was the subject of FR Doc. 96–29246, is corrected as follows:

On page 58491, in the third column, the **EFFECTIVE DATE** is corrected to read as follows:

EFFECTIVE DATE: 1200 hours, Alaska local time (A.l.t.), November 9, 1996, until 2400 hours, A.l.t., December 31, 1996.

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

Dated: December 23, 1996.

Gary Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 96–33179 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 61, No. 251
Monday, December 30, 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.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 96–083–1]

Importation of Cotton and Cotton Products

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: We are soliciting public comment on whether and how our regulations for importing cotton (including seed cotton, cottonseed, cotton lint and linters, cottonseed products, and cotton waste) and cotton covers into the United States need to be changed. In particular, we are seeking information, including technical data, concerning what mitigation measures are appropriate to ensure that cotton and cotton covers do not present a significant risk of introducing pink bollworm or other pests of cotton that either do not occur in the United States or are not widely distributed within the United States.

DATES: Consideration will be given only to comments received on or before March 31, 1997.

ADDRESSES: Please send an original and three copies of your comments to Docket No. 96–083–1, Regulatory Analysis and Development, PPD, APHIS, suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 96–083–1. Comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect comments are requested to call ahead on (202) 690–2817 to facilitate entry into the comment reading room.

FOR FURTHER INFORMATION CONTACT: Mr. James Petit de Mange, Staff Officer, Import-Export Team, PPQ, APHIS, 4700 River Road Unit 140, Riverdale, MD 20737–1236, (301) 734–6799.

SUPPLEMENTARY INFORMATION:

Background

The regulations for importing cotton (including seed cotton, cottonseed, cotton lint and linters, cottonseed products, and cotton waste) and cotton covers into the United States are contained in 7 CFR 319.8 through 319.8–27 (referred to below as the regulations). The regulations are intended to prevent imported cotton and cotton covers from introducing into this country pests of cotton that either do not occur in the United States or are not widely distributed within the United States.

We are reviewing the regulations, which have not been amended since 1962, to determine whether and how they should be updated.

Currently, § 319.8 of the regulations lists the following as regulated articles:

(1) Any parts or products of plants of the genus Gossypium, including seed cotton; cottonseed; cotton lint, linters, and other forms of cotton fiber (except yarn, thread, and cloth); cottonseed hulls, cake, meal, and other cottonseed products, except oil; waste; and any other unmanufactured parts of cotton plants; and

(2) Second-hand burlap and other fabrics, shredded or otherwise, that have been used for, or are the kinds ordinarily used for, containing cotton, grains and grain products, field seeds, agricultural roots, rhizomes, tubers, or other underground crops.

The regulations provide that regulated articles may not be imported or offered for entry into the United States, except as permitted by the regulations.

Under the regulations, cottonseed cake and cottonseed meal are eligible for entry if, upon inspection on arrival, the cottonseed cake or cottonseed meal is found free from contamination. Cottonseed cake or meal is considered to be contaminated if it contains cottonseed, or seed cotton or other material that may carry the pink bollworm, the golden nematode of potatoes, flag smut disease, or other injurious plant diseases or insect pests. Lint, linters, and waste are also eligible for entry without further restriction if an inspector can determine that they have been so processed by bleaching, dyeing, or other means as to have removed all cottonseed and destroyed all insect life. Unprocessed lint, linters, and waste (whether uncompressed, compressed, or compressed to high density) are generally not eligible for entry unless they are vacuum fumigated, or consigned to an approved mill or plant for processing, after arrival in the United States. Cotton covers, including bags, slit bags, and parts of bags, in most cases also must be vacuum fumigated or consigned to an approved mill or plant for processing.

There are special provisions in the regulations for cotton and cotton products imported into the United States from Mexico. Lint, linters, and waste from areas of Mexico not considered free of pink bollworm are eligible for entry if they are vacuum fumigated or consigned to an approved mill or plant for processing after arrival in the United States, or if they are moved into the generally infested pink bollworm regulated area of the United States. If moved into the generally infested pink bollworm regulated area of the United States, they are immediately subject to the regulations in 7 CFR 301.52 through 301.52–10, which are intended to prevent the spread of pink bollworm within the United States. We do not currently recognize any areas of Mexico as being free of pink bollworm; however, the regulations also provide that, contingent upon the West Coast of Mexico and Northwest Mexico being free from infestations of the pink bollworm and other plant pests of concern, certain regulated articles from those areas are eligible for entry subject to inspection upon arrival to determine that they are free from hazardous plant pest conditions.

Through this advance notice of proposed rulemaking, we are soliciting public comment on whether and how the regulations need to be changed. In particular, we are seeking information, including technical data, concerning what mitigation measures, or combinations of mitigation measures, are appropriate to ensure that imported cotton and cotton products do not present a significant risk of introducing into the United States pink bollworm or other pests of cotton that either do not occur in the United States or are not widely distributed within the United States. For example:

- Should cotton lint, linters, and waste be eligible for entry without further restriction if compressed to a density of 22 lbs. or greater per cubic foot?
- Should lint, linters, and waste produced by a saw gin with saw lint cleaners be eligible for entry without further restriction?
- Should we consider mitigation measures other than fumigation and acid-delinting for imported cottonseed?
- Should we allow the commercial importation of seed cotton? Why or why not? And if we should, under what conditions?
- Should cotton products generated from various types of processing, such as cottonseed hulls, empty bolls for decorative purposes, cotton comber noils, cotton gin motes, etc., be regulated? If so, which products should we regulate, what pests should we be concerned about, and how could the risk be mitigated? If not, why not?
- Should cottonseed imported for consignment to an oil press, feed lot, or other processing at an approved mill or plant be required to undergo fumigation at the port of entry? Why or why not?
- Very few vacuum fumigation facilities exist in the United States. As a result, the Animal and Plant Health Inspection Service has allowed cotton to be fumigated at normal atmospheric pressure. Are there other alternatives to vacuum fumigation, including alternatives to fumigation, that we should consider? Should we allow fumigation to be conducted prior to arrival in the United States? Why or why not? And if we should, under what conditions?
- Should we place restrictions on which ports cotton may be offered for entry into the United States? If cotton is allowed to move between ports in the United States prior to treatment or processing, what safeguards should be employed during transit?
- Should we restrict the importation of used cotton-picking equipment and used ginning equipment? If so, why and how?

We are interested in public comment on these questions and on any other issues related to the regulation of imported cotton, cotton products, and covers. We will use all the responses we receive to help us determine whether and how our regulations need to be changed.

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151-167, 450, 2803, and 2809; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.2(c).

Done in Washington, DC, this 19th day of December 1996.

Terry L. Medley,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 96–33127 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–34–P

Federal Crop Insurance Corporation

7 CFR Parts 401 and 457

RIN 0563–AB03

Hybrid Sorghum Seed Endorsement; and Common Crop Insurance Regulations, Hybrid Sorghum Seed Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes specific crop provisions for the insurance of hybrid sorghum seed. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured, include the current Hybrid Sorghum Seed Endorsement with the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effect of the current Hybrid Sorghum Seed Endorsement to the 1997 and prior crop years.

DATES: Written comments, data, and opinions on this proposed rule will be accepted until close of business February 28, 1997 and will be considered when the rule is to be made final. The comment period for information collections under the Paperwork Reduction Act of 1995 continues through February 28, 1997.

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

FOR FURTHER INFORMATION CONTACT: Ron Nesheim, Program Analyst, Research and Development Division, Product Development Branch, Federal Crop Insurance Corporation, at the Kansas City, MO, address listed above, telephone (816) 926-7730.

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866

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

Paperwork Reduction Act of 1995

The title of this information collection is ‘‘Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Hybrid Sorghum Seed Crop Insurance Provisions.’’ The information to be collected includes a crop insurance application and an acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies. Potential respondents to this information collection are producers of hybrid sorghum seed that are eligible for Federal crop insurance.

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

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

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

Comments regarding paperwork reduction should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

The Office of Management and Budget (OMB) is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after submission to OMB. Therefore, a comment to OMB is best assured of having full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulation.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order No. 12612

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

Regulatory Flexibility Act

This regulation will not have a significant impact on a substantial number of small entities. New provisions included in this rule will not impact small entities to a greater extent than large entities. Under the current regulations, a producer is required to complete an application and acreage report. If the crop is damaged or destroyed, the insured is required to give notice of loss and provide the necessary information to complete a claim for indemnity. The producer must also annually certify to the previous years production if adequate records are available to support the certification. The producer must maintain the production records to support the certified information for at least three years. This regulation does not alter those requirements. The amount of work required of the insurance companies delivering and servicing these policies will not increase significantly from the amount of work currently required. This rule does not have any greater or lesser impact on the producer. Therefore, this action is determined to be exempt from the provisions of the Regulatory Flexibility Act (5 U.S.C. 605), and no Regulatory Flexibility Analysis was prepared.

Federal Assistance Program

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

Executive Order No. 12372

This program is not subject to the provisions of Executive Order No. 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order No. 12778

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

Environmental Evaluation

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

National Performance Review

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

Background

FCIC proposes to add to the Common Crop Insurance Regulations (7 CFR part 457), a new section, 7 CFR 457.112, Hybrid Sorghum Seed Crop Insurance Provisions. The new provisions will be effective for the 1998 and succeeding crop years. These provisions will replace and supersede the current provisions for insuring hybrid sorghum seed found at 7 CFR 401.109 (Hybrid Sorghum Seed Endorsement). FCIC also proposes to amend 7 CFR 401.109 to limit its effect to the 1997 and prior crop years. FCIC will later publish a regulation to remove section 401.109 and reserve that section.

This rule makes minor editorial and format changes to improve the Hybrid Sorghum Seed Endorsement's compatibility with the Common Crop Insurance Policy. In addition, FCIC is proposing substantive changes in the provisions for insuring hybrid sorghum seed as follows:

1. Section 1—Add definitions for the terms ''adjusted yield,'' ''approved yield,'' ''bushel,'' ''certified seed test,'' ''county yield,'' ''FSA,'' ''field run,'' ''good farming practices,'' ''hybrid sorghum seed processor contract,'' ''insurable interest,'' ''interplanted,'' ''local market price,'' ''minimum guaranteed payment,'' ''non-seed amount,'' ''planted acreage,'' ''planting pattern,'' ''practical to replant,'' ''sample,'' ''seed amount,'' ''seed production,'' and ''written agreement'' for clarification.

2. Section 2—Unit division provisions are amended to include producer's reporting responsibilities to qualify for optional units. Also, clarifies that optional units are available if the hybrid sorghum seed processor contract specifies that it is a specific number of acres that are under contract and not a specified amount of production.

3. Section 4—Change the contract change date to November 30 in order to maintain an adequate time period between the contract change date and the revised cancellation date.

4. Section 5—Change the cancellation and termination dates to March 15. This change is necessary to standardize the cancellation and termination dates with the sales closing dates, which were changed to 30 days earlier for spring planted crops to comply with the requirements of the Federal Crop Insurance Reform Act of 1994.

5. Section 6—Require the producer to certify that a hybrid sorghum seed processor contract has been executed and certify the amount of any minimum guaranteed payment from the seed company. Certification of a hybrid seed processor contract on or before the acreage reporting date is needed to establish the insurability of the crop before a loss is likely and ensures a market for the crop. The producer must also certify any minimum guaranteed payment under the contract because a minimum guaranteed payment will affect insurance premium and the amount of indemnity.

6. Section 7(c)—Specify conditions under which a seed producer who is also a seed company can establish an insurable interest in the insured crop. There is an inherent conflict of interest when the producer is also the processor

who will provide the records of the producer. These conditions are needed to ensure the eligibility of the processor for crop insurance.

7. Section 8(c)—Clarify that any acreage damaged prior to the final planting date must be replanted unless it is not practical to replant.

8. Section 11(a)—Clarify the size of representative crop samples required when damage is discovered.

9. Section 14—Add provisions for providing insurance coverage by written agreement. FCIC has a long standing policy of permitting certain modifications of the insurance contract by written agreement for some policies. This amendment allows FCIC to tailor the policy to a specific insured in certain instances. The new section will cover application for, and duration of, written agreements.

List of Subjects in 7 CFR 401 and 457

Hybrid sorghum seed endorsement, Crop insurance, Hybrid sorghum seed.

Proposed Rule

Accordingly, for the reasons set forth in the preamble, the Federal Crop Insurance Corporation hereby proposes to amend 7 CFR parts 401 and 457 as follows:

PART 401—GENERAL CROP INSURANCE REGULATIONS—REGULATIONS FOR THE 1988 AND SUBSEQUENT CONTRACT YEARS

1. The authority citation for 7 CFR part 401 continues to read as follows:

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

2. Section 401.109 introductory paragraph is revised to read as follows:

§ 401.109 Hybrid sorghum seed endorsement

The provisions of the Hybrid Sorghum Seed Endorsement for the 1988 through 1997 crop years are as follows:

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS; REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS

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

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

4. Section 457.112 is added to read as follows:

§ 457.112 Hybrid Sorghum Seed Crop Insurance Provisions

The Hybrid Sorghum Seed Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

FCIC policies:

Department of Agriculture

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

Hybrid Sorghum Seed Crop Provisions

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

1. Definitions

Adjusted yield—The yield per acre that results from multiplying the approved yield by the coverage level percentage.

Amount of insurance per acre—The number of dollars determined by multiplying the county yield for the coverage level you select by the price election you select, and subtracting any minimum guaranteed payment. If the minimum guaranteed payment is stated in a unit of measure other than dollars, it will be converted to a dollar amount by multiplying the number of bushels guaranteed by the price election you selected.

Approved yield—The yield per acre that a specific type or variety is expected to produce determined from yield records provided by the seed company or other acceptable information.

Bushel—Fifty-six pounds avoirdupois of the insured crop.

Certified seed test—A warm germination test performed according to specifications of the ‘‘Rules for Testing Seeds’’ of the Association of Official Seed Analysts.

Commercial hybrid sorghum seed—The offspring produced by crossing a male and female parent plant, each having a different genetic character. This offspring is the product intended for use by an agricultural producer to produce a commercial field sorghum crop for grain or forage.

County yield—A yield contained in the Actuarial Table that is used to calculate your amount of insurance.

Days—Calendar days.

Dollar value per bushel—The value determined by dividing your amount of insurance for timely planted acreage by the adjusted yield.

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

Female parent plants—Sorghum plants that are grown for the purpose of producing commercial hybrid sorghum seed and have had their stamens removed.

Field run—Commercial hybrid sorghum seed production before it has been processed or screened.

Final planting date—The date contained in the Special Provisions for the insured crop by which the crop must initially be planted in order to be insured for the full amount of insurance per acre.

Good farming practices—The cultural practices generally in use in the county for the crop to make normal progress toward maturity and produce at least the yield used to determine the amount of insurance, or are required by the hybrid sorghum seed processor contract and recognized by the Cooperative State Research, Education, and Extension Service as compatible with agronomic and weather conditions in the county.

Harvest—Combining, threshing or picking of the female parent plants to obtain commercial hybrid sorghum seed.

Hybrid sorghum seed processor contract—A written agreement between the hybrid sorghum seed crop producer and a seed company containing, at a minimum:

(a) The producer’s promise to plant and grow male and female parent plants, and to deliver all commercial hybrid sorghum seed produced from such plants to the seed company;

(b) The seed company’s promise to purchase all the commercial hybrid sorghum seed produced by the producer; and

(c) Either a fixed price per unit of measure (bushels, hundredweight, etc.) of the commercial hybrid sorghum seed or a formula to determine the value of such seed. Any formula for establishing the value must be based on data provided by a public third party that establishes or provides pricing information to the general public, based on prices paid in the open market (*e.g.*, commodity futures exchanges) to be acceptable for the purpose of this policy.

Inadequate germination—Germination of less than 80 percent of the commercial hybrid sorghum seed as determined by using a certified seed test on clean seed.

Insurable interest—Your share of the financial loss that occurs in the event seed production is reduced by a cause of loss defined under this crop insurance contract.

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

Irrigated practice—A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed to produce at least the yield used to establish the irrigated amount of insurance on the irrigated acreage planted to the insured crop.

Late planted—Acreage planted to the insured crop during the late planting period.

Late planting period—The period that begins the day after the final planting date for the insured crop and ends 25 days after the final planting date.

Local market price—The cash price offered by buyers in the area for any production from the female parent plants that is not considered commercial hybrid sorghum seed under the terms of this policy.

Male parent plants—Sorghum plants grown for the purpose of pollinating female parent plants.

Minimum guaranteed payment—A minimum amount (usually stated in dollars or bushels) specified in your hybrid sorghum seed processor contract that will be paid or credited to you by the seed company regardless of the quantity of seed produced.

Non-seed amount—The dollar amount obtained by multiplying the number of bushels of non-seed production to count by the local market price determined on the earlier of the date the non-seed production is sold or the date of final inspection for the unit.

Planted acreage—Land in which seed has been placed by a machine appropriate for the insured crop and planting method, at the correct depth, into a seedbed that has been properly prepared for the planting method and production practice. The insured crop must be planted in rows wide enough to permit mechanical cultivation. Acreage planted in any other manner will not be insurable unless otherwise provided by the Special Provisions or by written agreement.

Planting pattern—The arrangement of the rows of the male and female parent plants in a field. An example of a planting pattern is four consecutive rows of female parent plants, two consecutive rows of male parent plants.

Practical to replant—In lieu of the definition of ''Practical to replant'' contained in section 1 of the Basic Provisions (§ 457.8), practical to replant is defined as our determination, after loss or damage to the insured crop, based on factors, including but not limited to moisture availability, condition of field, time to crop maturity, and marketing window, that replanting the insured crop will allow the crop to adequately pollinate and attain maturity prior to the calendar date for the end of the insurance period. It will not be considered practical to replant after the end of the late planting period unless replanting is generally occurring in the area. Determination of practical to replant will take into consideration the planting dates specified in the hybrid sorghum seed processor contract in accordance with section 8(c).

Prevented planting—Inability to plant:

(a) The female parent plant seed with proper equipment by:

(1) The final planting date designated in the Special Provisions for the insured crop in the county; or

(2) The end of the late planting period; or

(b) The male parent plant seed with proper equipment at a time sufficient to assure adequate pollination of the female parent plants in accordance with the production management practices of the seed company. You must have been unable to plant the female or male parent plant seed due to an insured cause of loss that has prevented the majority of producers in the surrounding area from planting the same crop.

Sample—For the purpose of the certified seed test, at least 3 pounds of field run sorghum seed for each type or variety of commercial hybrid sorghum seed grown on the unit.

Seed amount—The dollar amount obtained by multiplying the number of bushels of seed production to count for each type or variety of commercial hybrid sorghum seed grown on the unit by the applicable dollar value per bushel for that type or variety, and totaling the products of each type or variety.

Seed company—A corporation that possesses all licenses for marketing commercial hybrid sorghum seed required by the state in which it is domiciled or operates, and which possesses or has contracted facilities with enough storage and drying capacity to accept and process the insured crop within a reasonable amount of time after harvest.

Seed production—All seed produced by female parent plants with a germination rate of at least 80 percent, as determined by a certified seed test.

Timely planted—Planted on or before the final planting date designated in the Special Provisions for the insured crop in the county.

Type—Grain sorghum, forage sorghum, or sorghum sudan parent plants.

Variety—The name, number or code assigned to a specific genetic cross by the seed company or the Special Provisions for the insured crop in the county.

Written agreement—A written document that alters designated terms of this policy in accordance with section 14.

2. Unit Division

(a) Unless limited by the Special Provisions, a unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) may be divided into optional units only if, for each optional unit, you meet all the conditions of this section or if a written agreement to such division exists.

(b) Optional units are available if the hybrid sorghum seed processor contract specifies that it is a specific number of acres that are under contract and not a specified amount of production.

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

(d) All optional units you selected for the crop year must be identified on the acreage report for that crop year.

(e) The following requirements must be met for each optional unit:

(1) You must have records, which can be independently verified, of planted acreage and production for each optional unit for at least the last crop year used to determine your amount of insurance.

(2) You must plant the crop in a manner that results in a clear and discernable break in the planting pattern at the boundaries of each optional unit;

(3) You must have records of marketed production or measurement of stored production from each optional unit maintained in such a manner that permits us to verify the production from each optional unit, or the production from each unit must be kept separate until loss adjustment is completed by us; and

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

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

3. Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities

(a) In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), you may select only one price election for all the hybrid sorghum seed in the county insured under this policy unless the Special Provisions provide different price elections by type or variety, in which case you may elect one price election for each hybrid sorghum seed type or variety designated in the Special Provisions. The price elections you choose for each type or variety must have the same percentage relationship to the maximum price offered by us for each type or variety. For example, if you choose 100 percent of the maximum price election for one specific type or variety, you must also choose 100 percent of the maximum price election for all other types or varieties.

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

4. Contract Changes

In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date is November 30 preceding the cancellation date.

5. Cancellation and Termination Dates

In accordance with section 2 (Life of Policy, Cancellation, and Termination) of the Basic Provisions (§ 457.8), the cancellation and termination dates are March 15.

6. Report of Acreage

In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must:

(a) Report, by type and variety, the location and insurable acreage of the insured crop;

(b) Report any acreage that is uninsured, including that portion of the total acreage occupied by male parent plants; and

(c) Certify that you have a hybrid sorghum seed processor contract and, if applicable, report the amount of any minimum guaranteed payment.

7. Insured Crop

(a) In accordance with section 8 (Insured Crop) of the Basic Provisions (§ 457.8), the crop insured will be all the female parent plants in the county for which a premium rate is provided by the actuarial table:

(1) In which you have a share;

(2) That are grown under a hybrid sorghum seed processor contract executed before the acreage reporting date;

(3) That are planted for harvest as commercial hybrid sorghum seed in accordance with the requirements of the hybrid sorghum seed processor contract; and

(4) That are not (unless allowed by the Special Provisions or by written agreement):

(i) Planted with a mixture of female and male parent seed in the same row;

(ii) Planted for any purpose other than for commercial hybrid sorghum seed;

(iii) Interplanted with another crop; or

(iv) Planted into an established grass or legume.

(b) An instrument in the form of a ''lease'' under which you retain control of the acreage on which the insured crop is grown and that provides for delivery of the crop under substantially the same terms as a hybrid sorghum seed processor contract will be treated as a contract under which you have an insurable interest in the crop.

(c) A commercial hybrid sorghum seed producer who is also a commercial hybrid sorghum seed company may be able to establish an insurable interest if the following requirements are met:

(1) The seed company must be a corporation and have an insurable interest in the hybrid sorghum seed crop;

(2) The Board of Directors of the seed company must have instituted a corporate resolution that sets forth essentially the same terms as a hybrid sorghum seed processor contract. Such corporate resolution will be considered a contract under the terms of the hybrid sorghum seed crop insurance policy;

(3) Sales records for at least the previous years' seed production must be provided to confirm that the seed company has produced and sold seed. If such records are not available, the crop may only be insured under the Coarse Grains Crop Provisions; and

(4) Our inspection of the storage and drying facilities determines that they satisfy the requirements for a seed company.

8. Insurable Acreage

In addition to the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8), we will not insure any acreage:

(a) Planted and occupied exclusively by male parent plants;

(b) Not in compliance with the rotation requirements contained in the Special Provisions or, if applicable, required by the hybrid sorghum seed processor contract; or

(c) Of the insured crop damaged before the final planting date, to the extent that the remaining stand will not produce at least 90 percent of the adjusted yield, unless such acreage is replanted or we agree that it is not practical to replant. If we determine that it is practical to replant and the seed company will not extend the planting date stipulated in the hybrid sorghum seed processor contract, we will delete the affected acreage from your report of acreage, and that acreage will not be insured under these crop provisions.

9. Insurance Period

(a) In addition to the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), insurance attaches after:

(1) The female parent plant seed is completely planted in accordance with the hybrid sorghum seed processor contract and the production practices of the seed company, on or before the final planting date designated in the Hybrid Sorghum Seed Special Provisions, except as allowed in section 13(c); and

(2) The male parent plant seed is completely planted in accordance with production practices for the variety being produced.

(b) In accordance with the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), the calendar date for the end of the insurance period is the November 30 immediately following planting.

10. Causes of Loss

(a) In accordance with the provisions of section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), insurance is provided only against the following causes of loss that occur during the insurance period:

(1) Adverse weather conditions;

(2) Fire;

(3) Insects, but not damage due to insufficient or improper application of pest control measures;

(4) Plant disease, but not damage due to insufficient or improper application of disease control measures;

(5) Wildlife;

(6) Earthquake;

(7) Volcanic eruption; or

(8) Failure of the irrigation water supply, if caused by an insured peril that occurs during the insurance period.

(b) In addition to the causes of loss not insured against under section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), we will not insure against any loss of production due to:

(1) The use of unadapted, incompatible, or genetically deficient male or female parent plant seed;

(2) Frost or freeze after the date set by the Special Provisions;

(3) Failure to follow the requirements stated in the hybrid sorghum seed processor contract or production management practices of the seed company;

(4) Inadequate germination, even if it's the result of an insured cause of loss, unless you have provided adequate notice under section 11(b)(1) and the crop is inspected and the loss is appraised by us before harvest is completed; or

(5) Failure to plant the male parent plant seed at a time or in a manner sufficient to assure adequate pollination of the female parent plants, unless you are prevented from planting the male parent plant seed.

11. Duties in the Event of Damage or Loss

(a) In accordance with the requirements of section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8), the representative samples of the unharvested crop must be at least one complete planting pattern of the male and female parent plant rows and extend the entire length of each field in the unit. The samples must not be harvested or destroyed until the earlier of our inspection or 15 days after harvest of the balance of the unit is completed.

(b) In addition to your duties under section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8):

(1) You must give us notice of probable loss at least 15 days before the beginning of harvest if you anticipate inadequate germination on any unit; and

(2) You must provide a completed copy of your hybrid sorghum seed processor contract.

12. Settlement of Claim

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional unit, we will combine all optional units for which such production records were not provided; or

(2) For any basic unit, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for each unit.

(b) You will not receive an indemnity payment on a unit if the seed company refuses to provide us with records we require to determine the dollar value per bushel of production for each variety.

(c) In the event of loss or damage covered by this policy, we will settle your claim on any unit by:

(1) Multiplying the insured acreage by its respective amount of insurance per acre;

(2) Subtracting the total of the production to count for the seed amount and the non-seed amount from the result of section 12(c)(1); and

(3) Multiplying the result of section 12(c)(2) by your share.

(d) The total production (bushels) to count from all insurable acreage on the unit will include all seed and non-seed production as specified in section (e) through (g) below.

(e) Production to be counted as seed production will include:

(1) All appraised production as follows:

(i) Not less than the adjusted yield for acreage:

(A) That is abandoned;

(B) Put to another use without our consent;

(C) That is damaged solely by uninsured causes; or

(D) For which you fail to provide acceptable production records;

(ii) Production lost due to uninsured causes;

(iii) Mature unharvested production with a germination rate of at least 80 percent of the commercial hybrid sorghum seed as determined by a certified seed test. Any such production may be adjusted in accordance with section 12(g);

(iv) Immature appraised production;

(v) Potential production on insured acreage that you intend to put to another use or abandon, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end if you put the acreage to another use or abandon the crop. If agreement on the appraised amount of production is not reached:

(A) If you do not elect to continue to care for the crop, we may give you consent to put the acreage to another use if you agree to leave intact, and provide sufficient care for, representative samples of the crop in locations acceptable to us (The amount of production to count for such acreage will be based on the harvested production or appraisals from the samples at the time harvest should have occurred. If you do not leave the required samples intact, or fail to provide sufficient care for the samples, our appraisal made prior to giving you consent to put the acreage to another use will be used to determine the amount of production to count); or

(B) If you elect to continue to care for the crop, the amount of production to count for the acreage will be the harvested production, or our reappraisal if additional damage occurs and the crop is not harvested; and

(2) Harvested production that you deliver as commercial hybrid sorghum seed to the seed company stated in your hybrid sorghum seed processor contract, regardless of quality, unless the production has inadequate germination.

(f) Production to be counted as non-seed production will include all harvested or mature appraised production that does not qualify as seed production to count as specified in section 12(e). Any such production may be adjusted in accordance with section 12(g).

(g) For the purpose of determining the quantity of mature production:

(1) Commercial hybrid sorghum seed production will be:

(i) Increased 0.12 percent for each 0.1 percentage point of moisture below 13.0 percent; or

(ii) Decreased 0.12 percent for each 0.1 percentage point of moisture in excess of 13.0 percent.

(2) When records of commercial hybrid sorghum seed production provided by the seed company have been adjusted to a basis of 13.0 percent moisture and 56 pound avoirdupois bushels, section 12(g)(1) above will not apply to harvested production. In such cases, records of the seed company used for determining the next years approved yield will also be used to determine the amount of production to count: provided, such production records are calculated on the same basis as that used to determine the approved yield.

13. Late Planting and Prevented Planting

(a) In lieu of provisions contained in the Basic Provisions (§ 457.8) regarding acreage initially planted after the final planting date and the applicability of a

Late Planting Agreement Option, insurance will be provided for acreage planted to the insured crop during the late planting period (see section 13(c)), and acreage you were prevented from planting (see section 13(d)). These coverages provide reduced amounts of insurance. The premium amount for late planted acreage and eligible prevented planting acreage will be the same as that for timely planted acreage. If the amount of premium you are required to pay (gross premium less our subsidy) for late planted acreage or prevented planting acreage exceeds the liability on such acreage, coverage for those acres will not be provided, no premium will be due, and no indemnity will be paid for such acreage.

(b) You must provide written notice to us not later than the acreage reporting date if you were prevented from planting.

(c) Late Planting

(1) For hybrid sorghum seed acreage planted during the late planting period, the amount of insurance for each acre will be reduced for each day planted after the final planting date by:

(i) One percent per day for the 1st through the 10th day; and

(ii) Two percent per day for the 11th through the 25th day.

(2) In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report the dates the acreage is planted within the late planting period.

(3) If planting of hybrid sorghum seed continues after the final planting date, or you are prevented from planting during the late planting period, the acreage reporting date will be the later of:

(i) The acreage reporting date contained in the Special Provisions for the insured crop; or

(ii) Five days after the end of the late planting period.

(d) Prevented Planting (Including Planting After the Late Planting Period)

(1) If you were prevented from timely planting hybrid sorghum seed, you may elect:

(i) To plant hybrid sorghum seed during the late planting period. The amount of insurance for such acreage will be determined in accordance with section 13(c)(1);

(ii) Not to plant this acreage to any crop except a cover crop not for harvest. You may also elect to plant the insured crop after the late planting period. In either case, the amount of insurance for such acreage will be 50 percent of the amount of insurance for timely planted acres. For example, if your amount of insurance for timely planted acreage is $200 per acre, your prevented planting amount of insurance would be $100 per acre ($200 multiplied by 0.50). If you elect to plant the insured crop after the late planting period, production to count for such acreage will be determined in accordance with section 12; or

(iii) Not to plant the intended crop but plant a substitute crop for harvest, in which case:

(A) No prevented planting amount of insurance will be provided for such acreage if the substitute crop is planted on or before the 10th day following the final planting date for the insured crop; or

(B) An amount of insurance equal to 25 percent of the amount of insurance for timely planted acres will be provided for such acreage, if the substitute crop is planted after the 10th day following the final planting date for the insured crop. If you elected the Catastrophic Risk Protection Endorsement or excluded this coverage, and plant a substitute crop, no prevented planting coverage will be provided. For example, if your amount of insurance for timely planted acreage is $200 per acre, your prevented planting amount of insurance would be $50 per acre ($200 multiplied by 0.25). You may elect to exclude prevented planting coverage when a substitute crop is planted for harvest and receive a reduction in the applicable premium rate. If you wish to exclude this coverage, you must so indicate, on or before the sales closing date, on your application or on a form approved by us. Your election to exclude this coverage will remain in effect from year to year unless you notify us in writing on our form by the applicable sales closing date for the crop year for which you wish to include this coverage. All acreage of the crop insured under this policy will be subject to this exclusion.

(2) Amounts of insurance for timely, late, and prevented planting acreage within a unit will be combined to determine the amount of insurance for the unit. For example, assume you insure one unit in which you have a 100 percent share. The unit consists of 185 acres of the same type and variety of which 150 acres are occupied by the female parent plants. (The acreage occupied by the male parent plants (35 acres) is not insurable, and is not eligible for coverage under this section.) The unit consists of 150 acres, of which 50 acres were planted timely, 50 acres were planted 7 days after the final planting date (late planted), and 50 acres were not planted but are eligible for a prevented planting amount of insurance. The amount of insurance for the unit will be computed as follows:

(i) For the timely planted acreage, multiply the per acre amount of insurance for timely planted acreage by the 50 acres planted timely;

(ii) For the late planted acreage, multiply the per acre amount of insurance for timely planted acreage by 93 percent and multiply the result by the 50 acres planted late; and

(iii) For prevented planting acreage, multiply the per acre amount of insurance for timely planted acreage by:

(A) Fifty percent and multiply the result by the 50 acres you were prevented from planting, if the acreage is eligible for prevented planting coverage, and if the acreage is left idle for the crop year, or if a cover crop is planted not for harvest. Prevented planting compensation hereunder will not be denied because the cover crop is hayed or grazed; or

(B) Twenty-five percent and multiply the result by the 50 acres you were prevented from planting, if the acreage is eligible for prevented planting coverage, and if you elect to plant a substitute crop for harvest after the 10th day following the final planting date for the insured crop. (This paragraph (B) is not applicable, and prevented planting coverage is not available under these crop provisions, if you elected the Catastrophic Risk Protection Endorsement or you elected to exclude prevented planting coverage when a substitute crop is planted (see section 13(d)(1)(iii)).

Your premium will be based on the result of multiplying the per acre amount of insurance for timely planted acreage by the 150 acres in the unit.

(3) You must have the inputs available to plant and produce the intended crop with the expectation of at least producing the approved yield. Proof that these inputs were available may be required.

(4) In addition to the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), the insurance period for prevented planting coverage begins:

(i) On the sales closing date contained in the Special Provisions for the insured crop in the county for the crop year the application for insurance is accepted; or

(ii) For any subsequent crop year, on the sales closing date for the insured crop in the county for the previous crop year, provided continuous coverage has been in effect since that date. For example: If you make application and purchase insurance for hybrid sorghum seed for the 1998 crop year, prevented planting coverage will begin on the 1998 sales closing date for hybrid sorghum seed in the county. If the hybrid sorghum seed coverage remains in effect for the 1999 crop year (is not terminated or canceled during or after the 1998 crop year), prevented planting coverage for the 1999 crop year began on the 1998 sales closing date. Cancellation for the purpose of transferring the policy to a different insurance provider when there is no lapse in coverage will not be considered terminated or canceled coverage for the purpose of the preceding sentence.

(5) The acreage to which prevented planting coverage applies will not exceed the total eligible acreage on all FSA Farm Serial Numbers in which you have a share, adjusted for any reconstitution that may have occurred on or before the sales closing date. Eligible acreage for each FSA Farm Serial Number is determined as follows:

(i) If you participate in any program administered by the United States Department of Agriculture that limits the number of acres that may be planted for the crop year, the acreage eligible for prevented planting coverage will not exceed the total acreage permitted to be planted to the insured crop.

(ii) If you do not participate in any program administered by the United States Department of Agriculture that limits the number of acres that may be planted, and unless we agree in writing on or before the sales closing date, eligible acreage will not exceed the greater of:

(A) The number of acres planted to the hybrid sorghum seed on the FSA Farm Serial Number during the previous crop year; or

(B) One-hundred percent of the simple average of the number of acres planted to hybrid sorghum seed during the crop years that you certified to determine your yield.

(iii) Acreage intended to be planted under an irrigated practice will be limited to the number of acres for which you had adequate irrigation facilities prior to the insured cause of loss which prevented you from planting.

(iv) A prevented planting amount of insurance will not be provided for any acreage:

(A) That does not constitute at least 20 acres or 20 percent of the acreage in the unit, whichever is less (Acreage that is less than 20 acres or 20 percent of the acreage in the unit will be presumed to have been intended to be planted to the insured crop planted in the unit, unless you can show that you had the inputs available before the final planting date to plant and produce another insured crop on the acreage);

(B) For which the actuarial table does not designate a premium rate unless a written agreement designates such premium rate;

(C) Used for conservation purposes or intended to be left unplanted under any program administered by the United States Department of Agriculture;

(D) On which another crop is prevented from being planted, if you have already received a prevented planting indemnity, guarantee, or amount of insurance for the same acreage in the same crop year, unless you provide adequate records of acreage and production showing that the acreage was double-cropped in each of the last 4 years in which the insured crop was grown on the acreage;

(E) which the insured crop is prevented from being planted, if any other crop is planted and fails, or is planted and harvested, hayed or grazed on the same acreage in the same crop year, (other than a cover crop as specified in section (d)(2)(iii)(A) of this section, or a substitute crop allowed in section (d)(2)(iii)(B), unless you provide adequate records of acreage and production showing that the acreage was double-cropped in each of the last 4 years in which the insured crop was grown on the insured acreage;

(F) When coverage is provided under the Catastrophic Risk Protection Endorsement if you plant another crop for harvest on any acreage you were prevented from planting in the same crop year, even if you have a history of double-cropping. If you have a Catastrophic Risk Protection Endorsement and receive a prevented planting indemnity, guarantee, or amount of insurance for a crop and are prevented from planting another crop on the same acreage, you may only receive the prevented planting indemnity, guarantee, or amount of insurance for the crop on which the prevented planting indemnity, guarantee, or amount of insurance is received; or

(G) For which planting history or conservation plans indicate that the acreage would have remained fallow for crop rotation purposes.

(v) For the purpose of determining eligible acreage for prevented planting coverage, acreage for all units will be combined and be reduced by the number of hybrid sorghum seed acres timely planted and late planted. For example, assume you have 100 acres eligible for prevented planting coverage in which you have a 100 percent share. The acreage is located in a single FSA Farm Serial Number which you insure as two separate optional units consisting of 50 acres each. If you planted 60 acres of hybrid sorghum seed on one optional unit and 40 acres of hybrid sorghum seed on the second optional unit, your prevented planting eligible acreage would be reduced to zero (*i.e.*,100 acres eligible for prevented planting coverage minus 100 acres planted equals zero).

(6) In accordance with the provisions of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report by unit any insurable acreage that you were prevented from planting. This report must be submitted on or before the acreage reporting date. For the purpose of determining acreage eligible for a prevented planting amount of insurance, the total amount of prevented planting and planted acres cannot exceed the maximum number of acres eligible for prevented planting coverage. Any acreage you report in excess of the number of acres eligible for prevented planting coverage, or that exceeds the number of eligible acres physically located in a unit, will be deleted from your acreage report.

14. Written Agreement

Designated terms of this policy may be altered by written agreement in accordance with the following:

(a) You must apply in writing for each written agreement no later than the sales closing date, except as provided in section 14(e);

(b) The application for a written agreement must contain all variable terms of the contract between you and us that will be in effect if the written agreement is not approved;

(c) If approved, the written agreement will include all variable terms of the contract, including, but not limited to, crop type or variety, the guarantee, premium rate, and price election;

(d) Each written agreement will only be valid for one year (If the written agreement is not specifically renewed the following year, insurance coverage for subsequent crop years will be in accordance with the printed policy); and

(e) An application for a written agreement submitted after the sales closing date may be approved if, after a physical inspection of the acreage, it is determined that no loss has occurred and the crop is insurable in accordance with the policy and written agreement provisions.

Signed in Washington, D.C., on December 20, 1996.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 96–33069 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–FA–P

7 CFR Parts 401 and 457

General Crop Insurance Regulations, Fresh Market Tomato Minimum Value Option, and Fresh Market Tomato (Dollar Plan) Endorsement; and Common Crop Insurance Regulations, Fresh Market Tomato (Dollar Plan) Crop Insurance Provisions

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Proposed rule.

SUMMARY: The Federal Crop Insurance Corporation (FCIC) proposes specific crop provisions for the insurance of fresh market (dollar plan) tomatoes. The provisions will be used in conjunction with the Common Crop Insurance Policy Basic Provisions, which contain standard terms and conditions common to most crops. The intended effect of this action is to provide policy changes to better meet the needs of the insured, include the current Fresh Market Tomato (Dollar Plan) Endorsement and the Fresh Market Tomato Minimum Value Option with the Common Crop Insurance Policy for ease of use and consistency of terms, and to restrict the effect of the current Fresh Market Minimum Value Option and the Fresh Market Tomato (Dollar Plan) Endorsement to the 1997 and prior crop years.

DATES: Written comments, data and opinions on this proposed rule will be accepted until close of business January 29, 1997, and will be considered when the rule is to be made final. The comment period for information collections under the Paperwork Reduction Act of 1995 continues through February 25, 1997.

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

FOR FURTHER INFORMATION CONTACT: Linda Williams, Program Analyst, Research and Development Division, Product Development Branch, Federal Crop Insurance Corporation, at the Kansas City, MO, address listed above, telephone (816) 926-7730.

SUPPLEMENTARY INFORMATION:

Executive Order No. 12866

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

Paperwork Reduction Act of 1995

The title of this information collection is ‘‘Catastrophic Risk Protection Plan and Related Requirements including, Common Crop Insurance Regulations; Fresh Market Tomato (Dollar Plan) Crop Insurance Provisions.’’ The information to be collected includes a crop insurance application and an acreage report. Information collected from the application and acreage report is electronically submitted to FCIC by the reinsured companies. Potential respondents to this information collection are producers of fresh market tomatoes that are eligible for Federal crop insurance.

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

All information is reported annually. The reporting burden of this collection of information is estimated to average 16.9 minutes per response for each of the 3.6 responses from approximately 1,755,015 respondents. The total annual burden on the public for this information collection is 2,669,932 hours.

FCIC is requesting comments for the following: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms or information gathering technology.

Comments regarding paperwork reduction should be submitted to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

OMB is required to make a decision concerning the collections of information contained in these proposed regulations between 30 and 60 days after submission to OMB. Therefore, a comment to OMB is best assured of having full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed regulation.

Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule contains no Federal mandates (under the regulatory provisions of title II of the UMRA) for state, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order No. 12612

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

Regulatory Flexibility Act

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

Federal Assistance Program

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

Executive Order No. 12372

This program is not subject to the provisions of Executive Order No. 12372, which require intergovernmental consultation with state and local officials. See the Notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115, June 24, 1983.

Executive Order No. 12778

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

Environmental Evaluation

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

National Performance Review

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

Background

FCIC proposes to add to the Common Crop Insurance Regulations (7 CFR part 457), a new section, 7 CFR 457.139, Fresh Market Tomato (Dollar Plan) Crop Insurance Provisions. The new provisions will be effective for the 1998 and succeeding crop years. These provisions will replace and supersede the current provisions for insuring fresh market tomatoes (dollar plan) found at 7 CFR 401.137 (Fresh Market Tomato Minimum Value Option) and 7 CFR 401.139 (Fresh Market Tomato (Dollar Plan) Endorsement). FCIC also proposes to amend § 401.137 and § 401.139 to limit their effect to the 1997 and prior crop years. FCIC will later publish a regulation to remove and reserve § 401.137 and § 401.139.

This rule makes minor editorial and format changes to improve the Fresh Market Tomato Minimum Value Option and the Fresh Market Tomato (Dollar Plan) Endorsement's compatibility with the Common Crop Insurance Policy. In addition, FCIC is proposing substantive changes in the provisions for insuring fresh market tomatoes (dollar plan) as follows:

1. *Section 1*—Add definitions for the terms ''carton,'' ''days,'' ''FSA,'' ''good farming practices,'' ''interplanted,'' ''irrigated practice,'' ''planted acreage,'' ''practical to replant,'' ''row width,'' ''tropical depression,'' and ''written agreement'' for clarification.

Clarify the definition of crop year to specify that the crop year begins on the first day of the earliest planting period for fall-planted tomatoes and continues through the end of the insurance period for spring-planted tomatoes.

Clarify the definition of excess rain to specify that it is an amount of precipitation that is sufficient to directly damage the crop. Previous regulations defined excessive rain as a minimum of 10 inches of rain within a 24-hour period. This change will provide coverage for crop damage that occurs when a lesser amount of precipitation is received.

Change the definition of freeze to specify that freeze occurs when low air temperatures cause ice to form in the cells of the plant or its fruit to encompass conditions found in both frost and freeze.

Change the definition of harvest to clarify and remove the term marketable. Tomatoes picked from the vine are considered harvested whether marketable or not.

2. *Section 3(a)*—Clarify that an insured may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the tomatoes planted in the county insured under the policy.

3. *Section 3(b)*—Clarify that the amounts of insurance the insured chooses for each planting period and practice must have the same percentage relationship to the maximum amount of insurance offered by FCIC for each planting period and practice.

4. *Section 8(c)(4)*—Clarify that plum or cherry tomatoes are not insurable unless allowed by a written agreement. Previous regulations did not provide crop insurance coverage for plum or cherry tomatoes. This change will allow expansion of fresh market tomato crop insurance coverage into other areas.

5. *Section 9(b)(2)*—Allow an insured to elect not to replant damaged tomatoes that were initially planted within the fall or winter planting periods, provided the final planting date for the planting period has passed and damage occurs after 30 days of transplanting or after 60 days of direct seeding. With this election, the insured may collect an indemnity and that particular acreage will be uninsurable for the next planting period. The insured may also elect to replant such tomato acreage, collect a replanting payment under section 12, and maintain the initial planting period coverage. This change incorporates and standardizes procedures utilized in the fresh market vegetable crops.

6. *Section 10(f)(2)*—Change the calendar date for the end of the insurance period from 140 days to 125 days after the date of transplanting or replanting with transplants. This change incorporates the actual number of days for transplanted tomatoes to reach maturity and for the crop to be harvested.

7. *Section 11(a)(6)*—Tropical depression has replaced cyclone as an insured cause of loss. This change will standardize tropical depression as an insured cause of loss among fresh market vegetable crops.

8. *Section 14(b)(2)*—Modify claim for indemnity calculations by providing calculations for catastrophic risk protection coverage and for coverage other than catastrophic risk protection. This provision includes the use of the catastrophic risk protection price election equivalent to determine the total dollar of production to count for indemnity purposes. This change is necessary to assure that producers that are insured based on a dollar amount of insurance are indemnified comparable to producers that are insured based on an actual production history (APH) yield basis.

9. *Section 14(c)*—Remove the provision requiring that unharvested potential production in excess of 30 cartons after the second harvest for ground culture tomatoes (third harvest for staked tomatoes) be included in the value of appraised production to be counted. Consistent with other fresh market vegetable crops, this provision will be contained in the loss adjustment procedures.

10. *Section 14(c)(2)(iv)*—Require the insured to continue to care for acreage when the insured does not agree with the appraisal on that acreage. Production to count for such acreage will be determined using the harvested production if the crop is harvested, or our reappraisal if the crop is not harvested.

11. *Section 14(c)(3)*—Change the value to count for harvested production to the dollar amount obtained by subtracting the allowable cost from the price received (this resulting price must not be less than the minimum value shown in the Special Provisions), and multiplying this result by the number of cartons harvested. Current regulations allow the value of sold production to be

as low as zero. Also, clarify that harvested mature tomatoes that are damaged or defective due to insurable causes and are not marketable will not be counted as production. These changes are made to assure that the minimum value specified in the Special Provisions will be the lowest value considered for any marketable harvested production unless the insured selected the minimum value option.

12. *Section 15*—Add provisions for providing insurance coverage by written agreement. FCIC has a long standing policy of permitting certain modifications of the insurance contract by written agreement for some policies. This amendment allows FCIC to tailor the policy to a specific insured in certain instances. The new section will cover the procedures for and duration of written agreements.

13. *Section 16*—Permit the insured to select the minimum value option by electing Option I or Option II on the application. A separate form no longer will be required.

List of Subjects in 7 CFR Parts 401 and 457

Crop insurance, Fresh market tomatoes.

Proposed Rule

Accordingly, for the reasons set forth in the preamble, the Federal Crop Insurance Corporation hereby proposes to amend 7 CFR parts 401 and 457, as follows:

PART 401—GENERAL CROP INSURANCE REGULATIONS—REGULATIONS FOR THE 1988 AND SUBSEQUENT CONTRACT YEARS

1. The authority citation for 7 CFR part 401 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(p).

2. Section 401.137 introductory paragraph is revised to read as follows:

§ 401.137 Fresh market tomato minimum value option.

The provisions of the Fresh Market Tomato Minimum Value Option for the 1991 through the 1997 crop years are as follows:

* * * * *

3. Section 401.139 introductory paragraph is revised to read as follows:

§ 401.139 Fresh market tomato (dollar plan) endorsement.

The provisions of the Fresh Market Tomato Crop Insurance Endorsement for the 1991 through the 1997 crop years are as follows:

* * * * *

PART 457—COMMON CROP INSURANCE REGULATIONS; REGULATIONS FOR THE 1994 AND SUBSEQUENT CONTRACT YEARS

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

Authority: 7 U.S.C. 1506(l), 1506(p).

5. 7 CFR part 457 is amended by adding a new § 457.139 to read as follows:

§ 457.139 Fresh Market Tomato (Dollar Plan) Crop Insurance Provisions.

The Fresh Market Tomato (Dollar Plan) Crop Insurance Provisions for the 1998 and succeeding crop years are as follows:

FCIC policies:

United States Department of Agriculture

Federal Crop Insurance Corporation

Reinsured policies:

(Appropriate title for insurance provider)

Both FCIC and reinsured policies:

Fresh Market Tomato (Dollar Plan) Crop Provisions

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

1. Definitions

Acre—43,560 square feet of land when row widths do not exceed six feet, or if row widths exceed six feet, the land area on which at least 7,260 linear feet of rows are planted.

Carton—Twenty-five (25) pounds of the insured crop.

Crop year—In lieu of the definition of ‘‘crop year’’ contained in section 1 (Definitions) of the Basic Provisions (§ 457.8), crop year is a period of time that begins on the first day of the earliest planting period for fall-planted tomatoes and continues through the last day of the insurance period for spring-planted tomatoes. The crop year is designated by the calendar year in which spring-planted tomatoes are harvested.

Days—Calendar days.

Direct marketing—Sale of the insured crop directly to consumers without the intervention of an intermediary such as a wholesaler, retailer, packer, processor, shipper or buyer. Examples of direct marketing include selling through an on-farm or roadside stand, farmer's market, and permitting the general public to enter the field for the purpose of picking all or a portion of the crop.

Excess rain—An amount of precipitation sufficient to directly damage the crop.

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

Freeze—The formation of ice in the cells of the plant or its fruit, caused by low air temperatures.

Good farming practices—The cultural practices generally in use in the county for the crop to make normal progress toward maturity and are those recognized by the Cooperative State Research, Education, and Extension Service as compatible with agronomic and weather conditions in the county.

Harvest—The picking of tomatoes on the unit.

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

Irrigated practice—A method of producing a crop by which water is artificially applied during the growing season by appropriate systems and at the proper times, with the intention of providing the quantity of water needed for the insured crop to make normal progress toward maturity.

Mature green tomato—A tomato that:

(1) Has a glossy waxy skin that cannot be torn by scraping;

(2) Has well-formed, jelly-like substance in the locules;

(3) Has seeds that are sufficiently hard so as to be pushed aside and not cut by a sharp knife in slicing; and

(4) Shows no red color.

Plant stand—The number of live plants per acre prior to the occurrence of an insurable cause of loss.

Planted acreage—Land in which, for each planting period, transplants or seed have been placed manually or by a machine appropriate for the insured crop and planting method, at the correct depth, into soil that has been properly prepared for the planting method and production practice. For each planting period, tomatoes must initially be planted in rows. Acreage planted in any other manner will not be insurable unless otherwise provided by the Special Provisions or by written agreement.

Planting period—The period of time designated in the Actuarial Table in which the tomatoes must be planted to be considered fall, winter or spring-planted tomatoes.

Potential production—The number of cartons of mature green or ripe tomatoes with a classification size of 6 x 7 (2-8⁄32 inch minimum diameter) or larger, that the tomato plants will or would have produced per acre by the end of the insurance period, assuming normal growing conditions and practices.

Practical to replant—In lieu of the definition of ''Practical to replant'' contained in section 1 of the Basic Provisions (§ 457.8), practical to replant is defined as our determination, after loss or damage to the insured crop, based on factors, including but not limited to moisture availability, condition of the field, marketing windows, and time to crop maturity, that replanting to the insured crop will allow the crop to attain maturity prior to the calendar date for the end of the insurance period (inability to obtain plants or seed will not be considered when determining if it is practical to replant).

Replanting—Performing the cultural practices necessary to replace the tomato seed or transplants and then replacing the tomato seed or transplants in the insured acreage with the expectation of growing a successful crop.

Ripe tomato—A tomato that has a definite break in color from green to tannish-yellow, pink or red.

Row width—The widest distance from the center of one row of plants to the center of an adjacent row of plants.

Tropical depression—A system identified by the U.S. Weather Service as a tropical depression, and for the period of time so designated, including tropical storms, gales, and hurricanes.

Written agreement—A written document that alters designated terms of this policy in accordance with section 15.

2. Unit Division

(a) A unit as defined in section 1 (Definitions) of the Basic Provisions (§ 457.8), (basic unit) will be divided by planting period.

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

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

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

(e) The following requirements must be met for each optional unit:

(1) You must have records, which can be independently verified, of planted acreage and production for each optional unit for at least the last crop year in which the insured crop was planted;

(2) You must plant the crop in a manner that results in a clear and discernable break in the planting pattern at the boundaries of each optional unit;

(3) You must have records of marketed production or measurement of stored production from each optional unit maintained in such a manner that permits us to verify the production from each optional unit, or the production from each unit must be kept separate until loss adjustment is completed by us; and

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

3. Amounts of Insurance and Production Stages

(a) In addition to the requirements of section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), you may select only one coverage level (and the corresponding amount of insurance designated in the Actuarial Table for the applicable planting period and practice) for all the tomatoes in the county insured under this policy.

(b) The amount of insurance you choose for each planting period and practice must have the same percentage relationship to the maximum price offered by us for each planting period and practice. For example, if you choose 100 percent of the maximum amount of insurance for a specific planting period and practice, you must also choose 100 percent of the maximum amount of insurance for all other planting periods and practices.

(c) The amount of insurance available under the catastrophic risk protection plan of insurance will be specified in the Actuarial Table.

(d) The production reporting requirements contained in section 3 (Insurance Guarantees, Coverage Levels, and Prices for Determining Indemnities) of the Basic Provisions (§ 457.8), do not apply to fresh market dollar plan tomatoes.

(e) The amounts of insurance per acre are progressive by stages as follows:

Stage	Percent of amount of insurance per acre that you selected	Length of time if direct seeded	Length of time if transplanted
1	50	From planting through the 59th day after planting	From planting through the 29th day after planting.
2	75	From the 60th day after planting until the beginning of stage 3.	From the 30th day after planting until the beginning of stage 3.
3	90	From the 90th day after planting until the beginning of the final stage.	From the 60th day after planting until the beginning of the final stage.
Final	100	Begins the earlier of 105 days after planting, or the beginning of harvest.	Begins the earlier of 75 days after planting, or the beginning of harvest.

(f) Any acreage of tomatoes damaged in the first, second, or third stage to the extent that the majority of producers in the area would not normally further care for it, will be deemed to have been destroyed. The indemnity payable for such acreage will be based on the stage the plants had achieved when the damage occurred.

4. Contract Changes

In accordance with section 4 (Contract Changes) of the Basic Provisions (§ 457.8), the contract change date is April 30 preceding the cancellation date.

5. Cancellation and Termination Dates

In accordance with section 2 (Life of Policy, Cancellation, and Termination) of the Basic Provisions (§ 457.8), the cancellation and termination dates are July 31.

6. Report of Acreage

In addition to the requirements of section 6 (Report of Acreage) of the Basic Provisions (§ 457.8), you must report on or before the acreage reporting date contained in the Special Provisions for each planting period:

(a) All the acreage of tomatoes in the county insured under this policy in which you have a share; and

(b) The row width.

7. Annual Premium

In lieu of the premium amount determinations contained in section 7 (Annual Premium) of the Basic Provisions (§ 457.8), the annual premium amount for each cultural practice (e.g. fall direct seeded irrigated) is determined by multiplying the final stage amount of insurance per acre by the premium rate for the cultural practice as established in the Actuarial Table, by the insured acreage, by your share at the time coverage begins, and by any applicable premium adjustment factors contained in the Actuarial Table.

8. Insured Crop

In accordance with section 8 (Insured Crop) of the Basic Provisions (§ 457.8), the crop insured will be all the tomatoes in the county for which a premium rate is provided by the Actuarial Table:

(a) In which you have a share;

(b) That are:

(1) Planted to be harvested and sold as fresh market tomatoes;

(2) Planted within the planting periods designated in the Actuarial Table;

(3) Grown under an irrigated practice;

(4) Grown on acreage covered by plastic mulch except where the Special Provisions allows otherwise;

(5) Grown by a person who in at least one of the three previous crop years:

(i) Grew tomatoes for commercial sale; or

(ii) Participated in managing a fresh market tomato farming operation;

(c) That are not:

(1) Interplanted with another crop;

(2) Planted into an established grass or legume;

(3) Grown for direct marketing; or

(4) Plum or cherry type tomatoes, unless allowed by written agreement.

9. Insurable Acreage.

(a) In lieu of the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8), that prohibit insurance attaching if a crop has not been planted in at least one of the three previous crop years, we will insure newly cleared land or former pasture land planted to fresh market tomatoes.

(b) In addition to the provisions of section 9 (Insurable Acreage) of the Basic Provisions (§ 457.8):

(1) You must replant any acreage of tomatoes damaged during the planting period in which initial planting took place whenever less than 50 percent of the plant stand remains: and

(i) It is practical to replant;

(ii) If, at the time the crop was damaged, the final day of the planting period has not passed; and

(iii) The damage occurs within 30 days of transplanting or 60 days of direct seeding.

(2) Whenever tomatoes initially are planted during the fall or winter planting periods and the conditions specified in sections 9(b)(1) (ii) and (iii) are not satisfied, you may elect:

(i) To replant such acreage and collect any replant payment due as specified in section 12. The initial planting period coverage will continue for such replanted acreage.

(ii) Not to replant such acreage and receive an indemnity based on the stage of growth the plants had attained at the time of damage. However, such an election will result in the acreage being uninsurable in the subsequent planting period.

(3) We will not insure any acreage which, in the preceding planting period was planted to tomatoes (except as allowed in sections 9(b) (1) and (2)), peppers, eggplants, or tobacco unless the soil has been fumigated or otherwise properly treated.

10. Insurance Period

In lieu of the provisions of section 11 (Insurance Period) of the Basic Provisions (§ 457.8), coverage begins on each unit or part of a unit the later of the date we accept your application, or when the tomatoes are planted in each planting period. Coverage ends at the earliest of:

(a) Total destruction of the tomatoes on the unit;

(b) Abandonment of the tomatoes on the unit;

(c) The date harvest should have started on the unit on any acreage which will not be harvested;

(d) Final adjustment of a loss on the unit;

(e) Final harvest; or

(f) The calendar date for the end of the insurance period as follows:

(1) 140 days after the date of direct seeding or replanting with seed; and

(2) 125 days after the date of transplanting or replanting with transplants.

11. Causes of Loss

(a) In accordance with the provisions of section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), insurance is provided only against the following causes of loss that occur during the insurance period:

(1) Excess rain;

(2) Fire;

(3) Freeze;

(4) Hail;

(5) Tornado;

(6) Tropical depression; or

(7) Failure of the irrigation water supply, if caused by an insured cause of loss that occurs during the insurance period.

(b) In addition to the causes of loss excluded in section 12 (Causes of Loss) of the Basic Provisions (§ 457.8), we will not insure against any loss of production due to:

(1) Disease;

(2) Insect infestation; or

(3) Failure to market the tomatoes, unless such failure is due to actual physical damage caused by an insured cause of loss that occurs during the insurance period.

12. Replanting Payments

(a) In accordance with section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), a replanting payment is allowed if, due to an insured cause of loss, more than 50 percent of the plant stand will not produce tomatoes and it is practical to replant.

(b) The maximum amount of the replanting payment per acre will be the result obtained by multiplying $175.00 by your insured share.

(c) In lieu of the provisions contained in section 13 (Replanting Payment) of the Basic Provisions (§ 457.8), limiting a replanting payment to one each crop year, only one replanting payment will be made for acreage planted during each planting period within the crop year.

13. Duties in the Event of Damage or Loss

In addition to the requirements contained in section 14 (Duties in the Event of Damage or Loss) of the Basic Provisions (§ 457.8), if you intend to claim an indemnity on any unit you must also give us notice not later than 72 hours after the earliest of:

(a) The time you discontinue harvest of any acreage on the unit;

(b) The date harvest normally would start if any acreage on the unit will not be harvested; or

(c) The calendar date for the end of the insurance period.

14. Settlement of Claim

(a) We will determine your loss on a unit basis. In the event you are unable to provide separate acceptable production records:

(1) For any optional unit, we will combine all optional units for which such production records were not provided; or

(2) For any basic unit, we will allocate any commingled production to such units in proportion to our liability on the harvested acreage for each unit.

(b) In the event of loss or damage covered by this policy, we will settle your claim by:

(1) Multiplying the insured acreage in each stage by the amount of insurance per acre for the final stage;

(2) Multiplying each result in section 14(b)(1) by the percentage for the applicable stage (see section 3(e));

(3) Total the results of section 14(b)(2);

(4) Subtracting either of the following values from the result of section 14(b)(3):

(i) For other than catastrophic risk protection coverage, the total value of production to be counted (see section 14(c)); or

(ii) For catastrophic risk protection coverage, the result of multiplying the total value of production to be counted (see section 14(c)) by:

(A) Sixty percent for the 1998 crop year; or

(B) Fifty-five percent for 1999 and subsequent crop years; and

(3) Multiplying the result of section 14(b)(4) by your share.

(c) The total value of production to count from all insurable acreage on the unit will include:

(1) Not less than the amount of insurance per acre for the stage for any acreage:

(i) That is abandoned;

(ii) Put to another use without our consent;

(iii) That is damaged solely by uninsured causes; or

(iv) For which you fail to provide acceptable production records;

(2) The value of the following appraised production will not be less than the dollar amount obtained by multiplying the number of cartons of appraised tomatoes times the minimum value per carton shown in the Special Provisions for the planting period:

(i) Potential production on any acreage that has not been harvested the second time for ground-culture tomatoes (the third time for staked tomatoes);

(ii) Unharvested mature green tomatoes (unharvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production to count);

(iii) Production lost due to uninsured causes; and

(iv) Potential production on insured acreage that you intend to put to another use or abandon, if you and we agree on the appraised amount of production. Upon such agreement, the insurance period for that acreage will end when you put the acreage to another use or abandon the crop. If agreement on the appraised amount of production is not reached:

(A) We may require you to continue to care for the crop so that a subsequent appraisal may be made or the crop harvested to determine actual production (If we require you to continue to care for the crop and you do not do so, the original appraisal will be used); or

(B) You may elect to continue to care for the crop, in which case the amount of production to count for the acreage will be the harvested production, or our reappraisal if the crop is not harvested.

(3) The total value of all harvested production from the insurable acreage will be the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each carton of tomatoes (this result may not be less than the minimum value shown in the Special Provisions for any carton of tomatoes), and multiplying this result by the number of cartons of tomatoes harvested. Harvested production that is damaged or defective due to insurable causes and is not marketable, will not be counted as production to count.

15. Written Agreements

Designated terms of this policy may be altered by written agreement in accordance with the following:

(a) You must apply in writing for each written agreement no later than the sales closing date, except as provided in section 15(e);

(b) The application for a written agreement must contain all variable terms of the contract between you and us that will be in effect if the written agreement is not approved;

(c) If approved, the written agreement will include all variable terms of the contract, including, but not limited to, crop type or variety, and premium rate;

(d) Each written agreement will only be valid for one year (If the written agreement is not specifically renewed the following year, insurance coverage for subsequent crop years will be in accordance with the printed policy); and

(e) An application for a written agreement submitted after the sales closing date may be approved if, after a physical inspection of the acreage, it is determined that no loss has occurred and the crop is insurable in accordance with the policy and written agreement provisions.

16. Minimum Value Option

(a) The provisions of this option are continuous and will be attached to and made a part of your insurance policy, if:

(1) You elect *either* Option I *or* Option II of the Minimum Value Option on your application, or on a form approved by us, on or before the sales closing date for the initial crop year in which you wish to insure fresh market tomatoes (dollar plan) under this option, and pay the additional premium indicated in the Actuarial Table for this optional coverage; and

(2) You have not elected coverage under the Catastrophic Risk Protection Endorsement.

(b) In lieu of the provisions contained in section 14(c)(3), the total value of harvested production will be determined as follows:

If you selected Option I of the Minimum Value Option, the total value of harvested production will be as follows:

(i) For sold production, the dollar amount obtained by subtracting the allowable cost contained in the Special Provisions from the price received for each carton of tomatoes (this result may not be less than $2.00 for any carton of tomatoes), and multiplying this result by the number of cartons of tomatoes sold; and

(ii) For marketable production that is not sold, the dollar amount obtained by multiplying the number of cartons of such tomatoes on the unit by the minimum value shown in the Special Provisions for the planting period (harvested production that is damaged or defective due to insurable causes and is not marketable will not be counted as production).

(2) If you selected Option II of the Minimum Value Option, the total value of harvested production will be as provided in section 16(b)(1), except that the dollar amount specified in section (16)(b)(1)(i) may not be less than zero.

(c) This option may be canceled by either you or us for any succeeding crop year by giving written notice on or before the cancellation date preceding the crop year for which the cancellation of this option is to be effective.

Signed in Washington, D.C. on December 20, 1996.

Kenneth D. Ackerman,

Manager, Federal Crop Insurance Corporation.

[FR Doc. 96–33066 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–FA–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 35

[Docket No. PRM–35–14]

IsoStent, Inc.; Withdrawal of Petition for Rulemaking

AGENCY: Nuclear Regulatory Commission.

ACTION: Petition for rulemaking: Withdrawal.

SUMMARY: The Nuclear Regulatory Commission (NRC) is withdrawing, at the petitioner's request, a petition for rulemaking (PRM–35–14) filed by IsoStent, Inc. By a letter dated May 9, 1996, the petitioner requested that the NRC amend its regulations by adding a new section to address permanently implanted intraluminal stents, including phosphorus-32 and strontium-89 radioisotope stents. The petitioner also requested that the NRC add a new section to specify training and experience requirements for qualified physicians responsible for placing radioisotope stents in patients. The NRC published a Federal Register notice on June 27, 1996 (61 FR 33388) announcing receipt of the petition. Recently, in another letter dated October 24, 1996, the petitioner requested that the petition be withdrawn based on public comments received by the NRC on this petition, and other information.

ADDRESSES: A copy of the petitioner's letter requesting the withdrawal of the petition is available for public inspection, or copying for a fee, at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

Single copies of the petitioner's letter may be obtained free of charge by writing to the Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

FOR FURTHER INFORMATION CONTACT: Michael T. Lesar, Chief, Rules Review Section, Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Telephone: 301–415–7163 or Toll Free: 800–368–5642, or E-mail MTL@NRC.GOV.

Dated at Rockville, Maryland, this 23rd day of December 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Secretary of the Commission.

[FR Doc. 96–33149 Filed 12–27–96; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL ELECTION COMMISSION

11 CFR Part 104

[Notice 1996—21]

Recordkeeping and Reporting by Political Committee: Best Efforts

AGENCY: Federal Election Commission.

ACTION: Extension of comment period.

SUMMARY: On October 9, 1996, the Federal Election Commission published a Notice of Proposed Rulemaking requesting comments on proposed changes to its regulations requiring treasurers of political committees to exercise best efforts to obtain and report the complete identification of each individual who contributes more than $200 per calendar year. The Commission has decided to extend the comment period until January 31, 1997.

DATES: Comments must be received on or before January 31, 1997.

ADDRESSES: Comments must be made in writing and addressed to: Ms. Susan E. Propper, Assistant General Counsel, 999 E Street, N.W., Washington, D.C. 20463.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, or Ms. Rosemary C. Smith, Senior Attorney, at (202) 219–3690 or toll free (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission has initiated a rulemaking to determine what changes should be made to its regulations at 11 CFR 104.7(b) (1) and (3) in light of the recent court decision in *Republican National Committee* v. *Federal Election Commission*, 76 F.3d 400 (D.C. Cir. 1996), *petition for cert. filed*, 65 U.S.L.W 3186 (U.S. Sept. 9, 1996) (No. 96–415). The Notice of Proposed Rulemaking indicated that the comment period ended on December 6, 1996. 61 F.R. 52901 (Oct. 9, 1996). The Commission received several comments and one request to extend the comment period. The Commission notes that those who were engaged in general election activity or who are engaged in concluding their 1996 election activities may not have found it possible to submit timely comments. Accordingly, the Commission has concluded that it would be appropriate to extend the comment period until January 31, 1997 to allow commenters sufficient time to prepare their comments and suggestions.

Dated: December 24, 1996.

Lee Ann Elliott,

Chairman, Federal Election Commission.

[FR Doc. 96–33138 Filed 12–27–96; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 202

[Regulation B; Docket No. R–0876]

Equal Credit Opportunity

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Withdrawal of proposed rule.

SUMMARY: The Board is withdrawing a proposed amendment to Regulation B (Equal Credit Opportunity) that would have eliminated the general prohibition on collecting data relating to an applicant's sex, race, color, religion, and national origin.

DATES: This proposed rule is withdrawn December 24, 1996.

FOR FURTHER INFORMATION CONTACT: Jane Jensen Gell, Sheilah Goodman or Natalie Taylor, Staff Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for the hearing impaired *only*, Dorothea Thompson, Telecommunications Device for the Deaf, at (202) 452–3544.

SUPPLEMENTARY INFORMATION:

I. Background

The Equal Credit Opportunity Act (ECOA) makes it unlawful for creditors to discriminate in any aspect of a credit transaction on the basis of sex, race, color, religion, national origin, marital status, age (provided the applicant has the capacity to contract), because all or part of an applicant's income derives from any public assistance, or because an applicant has in good faith exercised any right under the Consumer Credit Protection Act. The ECOA, which is implemented by the Board's Regulation B, is generally silent regarding what information a creditor may collect from an applicant. Regulation B prohibits creditors from asking for or otherwise noting an applicant's sex, race, color, and national origin, except in connection with home mortgage loans. The regulation also prohibits creditors from collecting information concerning an applicant's religion.

On April 26, 1995, the Board published for public comment a proposed amendment that would eliminate these prohibitions; the proposed amendment would have allowed, but not required, creditors to collect these data for any credit products. (60 FR 20436.) Creditors that collected these data would not have been required to report or disclose them to the public. The Board proposed that if a creditor requested this information and the applicant chose not to provide it, the creditor would have been prohibited from collecting the information through visual observation or other means. The regulation would have continued to bar creditors from considering this information in a credit decision.

II. Comments Received

Approximately 250 comment letters were received. Nearly 70 percent of them opposed the Board's proposal; the majority of these comments were from creditors and their trade associations. These commenters generally expressed concern that the amendment would lead to mandatory data collection and result in substantially increased costs and burden. In addition, these commenters raised concerns about the quality of the data that would be obtained, given that supplying the information would be voluntary and not all applicants would choose to provide it.

Of the 30 percent of commenters that supported the Board's proposal, approximately half were creditors and half were community representatives. Both groups believed that the data would allow creditors to better identify underserved groups and design programs that would address unmet credit needs. Creditors who supported the proposal believed that it would reduce compliance burden (by allowing them to streamline training and use one application form for multiple credit products, for example). These creditors also stated that having the data would give them the ability to evaluate their compliance with fair lending laws.

III. Discussion

In 1977, when the Board chose to prohibit creditors from collecting these data, the policy choice was seen as a way to discourage discrimination: If creditors did not have these data, they could not use them to discriminate. In addition, the prohibition was intended to emphasize that factors unrelated to creditworthiness such as sex or race should not be part of the credit decision.

The fundamental question raised by the proposal is whether the rule prohibiting data collection furthers the ECOA's goal of preventing discrimination in credit transactions. The comments, while helpful, tended to focus on practical issues (such as data quality) rather than how best to ensure fair lending. Ultimately, there is no easy way to measure the extent to which discrimination occurs in credit transactions, nor the effect the rule has had on the incidence of discrimination. It is impossible to know precisely how, if at all, lifting the prohibition and making these data available would affect creditors' actions. On the one hand, it is likely that the prohibition has helped to prevent discrimination in at least some credit transactions. On the other hand, creditors have collected data in connection with mortgage loan applications for nearly twenty years, and there is no indication from this experience that data collection increases the potential for discrimination.

In the past the Congress has expressed interest in this issue, at least with respect to data collection for small business loans. Given this history, and the significant policy issues involved in any decision to remove the prohibition, the Board believes that this is an issue more appropriate for the Congress to consider. Consequently, the Board is withdrawing the proposed amendment pending further congressional guidance.

IV. Regulatory Flexibility Analysis

The Board's Office of the Secretary has determined that no analysis is needed since the proposal is being withdrawn.

By order of the Board of Governors of the Federal Reserve System, December 23, 1996.

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–33088 Filed 12–27–96; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD08–96–058]

33 CFR Part 117

Notice of Public Meeting; Bordeaux Railroad Bridge, West Nashville, TN

AGENCY: Coast Guard, DOT.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Coast Guard announces a forthcoming public meeting for the presentation of views concerning the hazard to navigation and use of the Bordeaux Railroad Bridge between West Nashville, Tennessee, and Buena Vista Springs, Tennessee.

DATE: The meeting will be held at 9 a.m., January 8, 1997.

ADDRESSES: The meeting will be held in Room A–761 at the Federal Courthouse, 801 Broadway (Broadway and 8th Street), Nashville, Tennessee.

(b) Written comments may be submitted to the docket. Comments will be available for examination or copying from 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays, at the office of the Director, Western River Operations, Bridge Branch, 1222 Spruce Street, St. Louis, Missouri 63103–2832.

FOR FURTHER INFORMATION CONTACT: Mr. Roger Wiebusch, (314) 539–3900, extension 378.

SUPPLEMENTARY INFORMATION: As a result of the Coast Guard Authorization Act of 1991 (P.L. 102–241, dated December 19, 1991) the Bordeaux Railroad Bridge was declared to be unreasonably obstructive to navigation. Information available to the Coast Guard indicates that the bridge has not been used for rail traffic since December 1991. Based on this information, the structure no longer appears to meet the definition of a bridge and may require removal from the water. All interested parties shall have full opportunity to be heard and to present their views as to whether removal of this bridge is needed, giving due consideration to the necessities of free and unobstructed water navigation.

Any person who wishes, may appear and be heard at this public meeting. Persons planning to appear and be heard are requested to notify the Director, Western Rivers Operations, Bridge Branch, 1222 Spruce Street, St. Louis, Missouri 63103–2832, Telephone: 314–539–3900 extension 378, any time prior to the meeting and indicate the amount of time required. Depending upon the number of scheduled statements, it may be necessary to limit the amount of time allocated to each person. Any limitations of time allocated will be announced at the beginning of the meeting. Written statements and exhibits may be submitted in place of, or in addition to, oral statements and will be made a part of the public docket. Such written statements and exhibits may be delivered at the meeting or mailed to the Director, Western Rivers Operations, Bridge Branch. Transcripts of the meeting will be made available for purchase upon request.

Authority: 33 U.S.C. 513; 49 CFR 1.46(c)(3).

Dated: December 13, 1996.

T.W. Josiah,

Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.

[FR Doc. 96–33191 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–14–M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 223

Disposal of National Forest Timber; Cancellation of Timber Sale Contracts

RIN 0596–AB21

AGENCY: Forest Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the existing rules on cancellation of timber sale contracts, permits, and other such instruments authorizing the sale or harvest of timber or other forest products to clarify when, why, and by whom contracts may be cancelled, to remove redundant provisions, and to provide a new formula for compensation when the government must cancel timber sale contracts. This proposed rule also would limit financial liability of the United States on certain contracts, remove cancellation limits applicable to the length of the contract term, and define the contractual terms ‘‘purchaser’’, ‘‘modification’’, ‘‘partial cancellation’’, and ‘‘cancellation’’. The proposed rule would also require that all sales are to be laid out in identifiable units. These changes are necessary because the Forest Service is unable to continue bearing most of the financial risk and burden of contract cancellation arising from compliance with increasingly complex and rigorously enforced environmental laws and regulations. This proposed rule would reasonably reallocate risk between the Government and private parties, thereby protecting the U.S. taxpayer from unreasonable and excessive financial damages arising from cancellation of timber sale contracts and other such instruments.

DATES: Comments must be received in writing by February 13, 1997.

ADDRESSES: Send written comments to Director, Timber Management Staff (2400), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090.

The public may inspect comments received on this proposed rule in the Office of the Director, Wing 3NW, Auditors Building, 201 14th Street, SW, Washington, DC 20250. Parities wishing to view comments are encouraged to call ahead (202–205–0893) to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Rex Baumback, Timber Management Staff, (202) 205–0855.

SUPPLEMENTARY INFORMATION: The rules at Title 36, Code of Federal Regulations (CFR), part 223 govern the sale of National Forest System timber. Section 223.30 provides that each timber sale contract will be consistent with plans, environmental standards, and other management requirements. Section 223.30 sets forth specific management requirements for timber sales contracts in addition to general compliance with environmental standards and resource management plans, for example, fire protection and suppression, minimizing increases in erosion, regeneration of timber, and so forth. Sections 223.40 and 223.116 set out the current bases for cancellation of timber sale contracts by either the Government or the purchaser and prescribe the amount of damages, if any, in the event of cancellation.

Section 223.40 requires that timber sale contracts, permits, and other such instruments with terms longer than 2 years provide for cancellation when necessary to prevent serious environmental damage or when they are significantly inconsistent with land management plans adopted or revised in accordance with section 6 of the Forest and Rangeland Renewable Resources Act of 1974, as amended (16 U.S.C. 1601, *et seq.*) and 36 CFR part 219—Planning.

Section 223.116 provides that timber sale contracts and permits may be cancelled based on specifically listed conditions. This section also authorizes the Chief of the Forest Service to cancel contracts and places limitations on the re-delegation of cancellation authority to Regional Foresters.

Background

Under existing regulations, purchasers may request cancellation of contracts if, as a result of catastrophic damage caused by forces beyond the control of the purchaser, the value of the remaining timber is materially diminished. The Government may cancel contracts under any of the following conditions: (1) By mutual agreement with the purchaser when such action is to the advantage of the United States or not prejudicial to its interests; (2) for purchaser’s violation of contract terms; (3) for purchaser’s conviction of violation of criminal statutes or for violation of civil standards, orders, permits, or other regulations, issued by a Federal agency, State agency, or political subdivision thereof, for the protection of environmental quality, on National Forest System land, unless compliance with such laws or regulations would preclude performance of other contractual requirements; and (4) upon determination by the Chief of the Forest Service that operations under the contract would result in serious environmental degradation or resource damage.

Unlike government-wide rules governing procurement contracts, the existing cancellation regulation places an inappropriate amount of the financial liability on the Forest Service when the agency must, for reasons of public policy or statutory direction, cancel a timber sale contract or permit. In an effort to address this issue, the agency published a proposed rule to revise its rules on cancellation of timber sale contracts, permits, and other such instruments in the Federal Register on August 31, 1990, at 55 FR 35683–35686. No public comment was received as a result of this publication. After subsequent review of the cancellation regulation, the agency identified additional changes that are needed but that were not included in the proposed rule. Therefore, the agency is publishing a new proposed rule and inviting public comments.

The need for the revised contract cancellation procedures and expanded use of identifiable units for all forest product sales arises from the changing circumstances over the last two decades surrounding forest product sales and the increasing likelihood that a forest product sales may have to be changed in order to comply with the law. Consequently, the Federal manager must have contractual flexibility in order to maintain compliance with the law within reasonable economic limits.

Under the existing regulation when a sale is cancelled, the Forest Service pays a purchaser’s out-of-pocket costs for a purchaser’s operations up to the date of cancellation. The Forest Service also compensates the purchaser for the presumptive increased cost of acquiring comparable timber to replace the timber lost through cancellation, without regard to whether the purchaser actually purchases replacement timber. By holding inventory in a rising market, a purchaser generally earns a profit under the existing rules. In a falling market, the current rule shields the purchaser from loss that otherwise would be incurred if the contract had not been cancelled by the Forest Service.

Given the inability of the Forest Service to predict or control the need to adjust management practices to respond to environmental statutes or other requirements, it is no longer appropriate for the Forest Service to guarantee purchasers a replacement supply of timber or to assure them a margin of profit in the event of cancellation. Moreover, this policy is very costly to the taxpayer. For example, in addition to paying out-of-pocket expenses, the Forest Service has already had to pay approximately $9 million to cover purchaser's replacement timber costs that resulted primarily from contract cancellations or partial contract cancellations in Arizona and New Mexico to protect the Mexican spotted owl and northern goshawk. There is also $57 million in unresolved lawsuits and contract claims related to contract cancellation. Further, this amount of potential liability does not include potential damages that may result from cancellation of the 77 timber sales involved in the *Silver* v. *Thomas* (CIV–94–1610–PHX–CAM) injunction in Arizona and New Mexico or the Section 318 timber sales that are the subject of the Rescissions Act and related litigation in Oregon and Washington.

By statute, the agency is required to pay from available appropriations any timber contract claim that arises from a dispute with a purchaser (41 U.S.C. 612(c)). Because cancellation costs come out of the agency's current budget, providing for lost profits adversely affects all Forest Service operations, including other timber operations and non-timber programs. If timber is to be sold, neither the Forest Service nor the taxpayer can justify assuming risks of this magnitude. The benefits and burdens must be shared by all users, purchasers and the general public alike. Furthermore, as a practical matter, the agency is not appropriated enough funds to provide for replacement compensation for all the timber sales that may need to be cancelled, in whole or in part, in order to comply with environmental laws. Accordingly, although cancellation of contracts by the Forest Service remains in the public interest, the Forest Service has concluded that it is no longer in the public interest for the agency to bear more than out-of-pocket expenses in these instances, nor is it fiscally feasible, given the increasing uncertainty surrounding National Forest System timber sales.

This uncertainty is caused by several factors. Developing case law on environmental and related statutes and regulations, such as the Endangered Species Act, the Clean Water Act, and the Clean Air Act, in conjunction with increasing amounts of new information on the environmental effects and resource impacts of various activities on National Forest System land has led to constantly changing and more rigorous management requirements. The uncertainty surrounding timber sales is compounded by a growing competition and public concern for the National Forests' limited resources. For example, the Forest Service may be forced to cancel or substantially modify existing timber sale contracts and permits if the Fish and Wildlife Service, an agency of the Department of the Interior, lists an animal or plant species as a threatened species under the Endangered Species Act. Specifically, in response to the listing of the red-cockaded woodpecker as an endangered species under the Endangered Species Act in 1973 and subsequent discovery of new information in 1989, the Forest Service was required to reevaluate its management practices throughout the woodpecker's range on National Forests in the South. This re-evaluation resulted in modification and cancellation of several existing timber sale contracts.

In addition, the Forest Service has recently been judicially compelled to cancel or modify additional timber sale contracts in order to protect the Mexican spotted owl and marbled murrelet, which are both listed as a threatened species under the Endangered Species Act. This has also happened with the northern spotted owl. Further, there are proposals that the Fish and Wildlife Service list the goshawk, other owl species, and some species of Pacific salmon under the Endangered Species Act.

Modification or cancellation of existing legal contractual obligations is not limited, however, to efforts to comply with the Endangered Species Act. In one case, the activities of a private landowner upstream from a National Forest resulted in stream sediment loading to such a level that sale activities on adjoining National Forest land would have violated the Clean Water Act. As a result, the Forest Service had to alter its timber harvesting plans for the area adjacent to that stream. If timber sales had been under contract within the area adjacent to that stream, contract cancellation and payment of compensation to the purchaser would have been required to avoid violations of the Clean Water Act.

The Forest Service takes every precaution before authorizing a particular activity on National Forest System lands to ensure that its authorization conforms with existing laws and with existing conditions on the ground at the time of the authorization. However, when deciding to go forward with such projects, the Forest Service must plan for potential intervening events and circumstances. Given the increasing pressures on forest resources from a variety of sources, it is essential that Forest Service officials have flexibility to adjust management activities on National Forest System lands and associated contractual arrangements without incurring enormous financial liability. Reasonable limits to the Government's exposure to financial liability and burden of risk in the event of such adjustments are imperative to protect the public's financial interests. Without reasonable limits to such exposure, spiraling costs to the Forest Service could seriously reduce future timber sale offerings.

Provisions of the Proposed Rule

Section 223.30

To accomplish the needed changes, the agency proposes to revise 36 CFR 223.30 to include a new paragraph (g) which would provide that all timber sale contracts, permits, and other such instruments authorizing the sale or harvest of timber or other forest products must identify subdivision(s), payment unit(s), cutting unit(s), clearcutting unit(s), understory harvest unit(s), individual tree marked area(s), or harvest unit(s) within a designated sale area boundary. Under this revision, the District Ranger or other Forest Service official responsible for sale layout would be required to consider, among others, the following factors when determining whether or not the sale area is to be divided into more than one unit: Type of forest product; type of sale; acreage; volume; topography; density of product within the area; value of the sale; and management needs. Sales that are divided into two or more harvest units are divisible.

This provision would extend the harvest unit layout concept that is now used only in timber sale contracts using FS Form 2400–6 to all other contract forms, permits, and other such instruments authorizing the sale or harvest of timber or other forest products. Under this provision, all timber sale instruments which may reasonably be divided into two or more units would be treated similarly for purposes of modification, partial cancellation, or cancellation. This revision would add uniformity to the timber administration process and also extend the application of damage limiting provisions to all forest product sale instruments.

To accommodate this new paragraph (g), existing paragraphs (g) and (h) would be designated as paragraphs (h) and (i) respectively.

Section 223.40

Section 223.40 would be revised to require that all contracts, permits, and other such instruments authorizing the harvest of trees or other forest products provide for cancellation. The current requirement that only contracts two years in length or longer contain a provision for cancellation would be removed. No current basis supports a different standard of liability for short term contract than for contracts with terms of two (2) or more years.

This proposed revision would also eliminate potential confusion in the use of the terms ''cancellation'' and ''termination.'' This proposed rule would define these terms as synonymous when used in timber sale contracts, permits, or other such instruments. The proposed rule would also revise the title of § 223.40 to read ''Cancellation procedures.'' Further, the proposed revision would restructure § 223.40 to include the provisions currently found in § 223.116, thus incorporating all of the requirements relating to cancellation of contracts, permits, and other such instruments into one section and, thereby eliminating the redundancy and confusion of having two separate sections on cancellation. Section 223.116 would be removed in its entirety.

The proposed rule would also substantially revise the existing provisions of § 223.40 and § 223.116. First, a new paragraph (a) would define ''purchaser'' for purposes of this section as a holder of a National Forest System timber sale contract, permit, or other such instrument authorizing the sale and harvest of forest products. The new paragraph (a) of the proposed rule would also define the terms ''partial cancellation'' of a timber sale contract. This definition is included in response to a recent court decision, *Stone Forest Industries* v. *United States*, 973 F.2d 1548 (Fed. Cir. 1992), in which the court found that the timber sale contract was not divisible. ''Partial cancellation'' would be defined as the elimination of one or more, but not all, of the identifiable harvest units from a timber sale contract and is based upon the divisibility of the timber sale contract into units. Thus, this regulation would incorporate the concept of divisibility, which would be adopted in 36 CFR 223.30, and, thereby, would eliminate any ambiguity regarding the ability of the Forest Service to partially cancel a contract. Partial cancellation would afford the Forest Service flexibility in today's uncertain climate by allowing as much of a timber sale to be harvested as is legally allowable while avoiding a breach of contract as a whole.

Additionlly, the terms ''modification'' and ''cancellation'' would be defined to eliminate any confusion that might arise as to their meaning in relation to partial cancellation and use in executing timber sale contract changes. Modification would be defined as the elimination of a portion but not all of a harvest unit or units. The timber sale contract provides for rate redetermination in the event of unilateral modification. Cancellation is defined as the cancellation or termination of contract requirement(s) for removal of the remaining timber or other forest products from all of the identifiable harvest units under the timber sale contract, permit, or other timber sale instrument.

Mutual modifications and cancellations as provided in the current regulation at 36 CFR 223.112 and 36 CFR 223.116(2) would also be provided for in this proposed regulation at 223.40(c)(2). Compensation for a mutually agreed upon contract change would be provided for in the mutual agreement between the parties. Mutual agreements between the Forest Service and a purchaser can only be made if the agreement is to the advantage of the United States or not prejudicial to its interests.

Proposed paragraph (b) is a revision and expansion of provisions presently in 36 CFR 223.40 and 36 CFR 223.116 and would limit to the Chief the authority to cancel a timber sale contract, permit, or other such instrument based upon a determination by the Chief that continued operations under such contracts will result in the violation of a statute or regulation or will unreasonably conflict with management of other forest resources. Proposed paragraph (b)(1) would authorize the cancellation or partial cancellation of a timber sale by the Chief before operations result in a situation where a Federal statute or regulation would be violated, thereby giving the Forest Service the authority to pro-actively manage and avoid environmental crises. Causes for cancellation or partial cancellation under proposed paragraph (b)(1) would include, for example, the need to prevent inconsistencies with approved land and resource management plans adopted pursuant to 36 CFR part 219; damage to cultural resources; and unacceptable adverse impacts to Federally-listed threatened or endangered species. Proposed paragraph (b)(2) would provide for the cancellation or partial cancellation of a timber sale contract, permit, or other such instrument by the Chief, upon determination by the Chief that operation of the sale may unreasonably conflict with the management of other forest resources. For example, (b)(2) would provide for cancellation or partial cancellation in order to prevent unreasonable conflict with sensitive species listed by Regional Foresters pursuant to the Forest Service Mutual Chapter 2670 or published in the Federal Register.

Paragraph (c) of proposed § 223.40 would set forth the conditions under which a contract, permit, or other such instrument for removal of National Forest System timber or other forest products may be cancelled. Existing paragraphs (a)(1)–(a)(3) of § 223.116 would become paragraphs (c)(1), (c)(2), and (c)(3) of § 223.40 and remain substantially the same. Both paragraphs (b) and (c) of revised § 223.40 would require the cancellation decisions to be based upon an administrative record.

Paragraph (c)(1) would provide for cancellation by the Government in the event of a material breach of continued violation of the terms of the contract, permit, or other such instrument. This is consistent with the principle of law that failure to perform a material element of the contract constitutes a breach and merits cancellation of the contract. It also establishes that continued, intentional violation of the contract which prevents timely performance may merit cancellation of the contract.

Paragraph (c)(2) would slightly revise text now in § 223.116(a)(2) by adding the phrases, ''for reasons other than those listed in this section,'' and would provide that a contract may be cancelled in whole or in part by mutual agreement upon application of the purchaser or at the request of the Government with consent of the purchaser. The proposed paragraph (c)(2) would limit mutual cancellation or partial cancellation to cases in which it is determined to be in the best interests of the United States.

Paragraph (c)(3) would incorporate and revise existing § 223.116(a)(3) and provide that, upon application of the purchaser or upon notice by the Forest Service, the contract may be cancelled in whole or in part if the value of the timber remaining to be cut is diminished materially because of catastrophic damage caused by forces beyond the control of the purchaser or the Forest Service. This proposed provision would change the current rule by also authorizing the Forest Service to cancel a contract in the event of catastrophic damage. Since the very nature of damage resulting from a catastrophe can adversely affect the Government to the same extent as the purchaser, logic and equity demand that the Government should have the ability to cancel in whole or in part the contract, permit, or other such instrument under these circumstances.

Paragraphs (c)(4) and (c)(5) would incorporate and revise existing § 223.116(a)(4). The two causes for cancellation that are presently combined in paragraph (a)(4) would be divided into separate paragraphs to clarify and distinguish between the judicial and administrative causes that may result in cancellation. Paragraph (c)(4) would clarify that contracts, permits, or other such instruments authorizing the harvesting of trees or other forest products may be cancelled upon any conviction of a purchaser for violation of a Federal or State criminal statute, when such violation is in any way connected with obtaining, attempting to obtain, selling, trading, or processing public timber, or obtaining, attempting to obtain, or performing a public contract or subcontract.

Paragraph (c)(5) would permit cancellation of timber sale contracts, permits, or other such instruments authorizing the harvesting of trees or other forest products upon the conviction of the purchaser for a violation of civil standards, orders, permits, or other regulations written for the protection of the environment.

Cancellation under paragraphs (c)(4) or (c)(5) would be an administrative action intended to ensure that the Government does business only with reasonable parties, that is, parties who possess a satisfactory record of integrity and business ethics.

A new proposed paragraph (c)(6) would provide the authority to cancel or partially cancel a contract, permit, or other such instrument authorizing the harvesting of trees or other forest products as a result of a court order or court approved settlement agreement. This proposed paragraph also would permit cancellation even though a sale contract, permit, or other such instrument is not specifically named in an order or settlement agreement if the Forest Service determines that the order or settlement agreement would be applicable to the conditions existing on the area governed by the contract, permit, or other such instrument. This paragraph is necessary for the Government to properly and efficiently respond to litigation over National Forest management and competing resource uses and would remove any ambiguity or potential misinterpretation over the agency's cancellation authority in light of court orders or court approved settlements.

Paragraph (d) of the proposed rule would provide that any timber sale contract, permit, or any other such instrument for the sale or harvest of timber or forest products containing individually identifiable harvest units may be partially cancelled without the Forest Service incurring liability for the entire contract. Paragraph (d) would also provide that when a timber sale is partially cancelled, a duty to perform the remaining portion of the contract continues with the purchaser, in most cases.

The present method for determining reasonable compensation to the purchaser is described at §§ 223.40 and 223.116(a)(5). Proposed 223.40(e) would provide the basis for determining compensation, if any, in the event a contract is cancelled for any reason. Proposed paragraph (e)(1)(i) provides that limited compensation, in the form of out-of-pocket expenses, would be provided when contracts, permits, or other such instruments are cancelled or partially cancelled pursuant to paragraphs (b)(1), (b)(2), or (c)(6), except where the Forest Service finds the purchaser contributed to the reason(s) for cancellation. These provisions allow the Government to cancel or partially cancel contracts, permits, or other such instruments in order to, among other things, comply with a court order, federal statute or regulation, or avoid adverse conflicts with other environmental resources. Out-of-pocket expenses are a fair way of allocating part of the risk associated with these cancellations or partial cancellations. Proposed paragraph (e)(1) would limit out-of-pocket expense to unrecovered costs actually paid out and arising from acquiring and performing the contract, and would expressly exclude attorney's fees, unrealized or lost profits, replacement cost of timber, or any other anticipatory losses by the purchaser.

Proposed paragraph (e)(1)(i) provides an exception to the payment of out-of-pocket expenses in situations where fairness dictates that the purchaser absorb their own expenses. Specifically, the exception excludes compensation in situations where the purchaser contributes to the cancellation reason(s) such as the violation of a statute. In most cases, such a situation would be treated as a breach or as another cancellation reason included under proposed paragraph (e)(1)(ii). Consequently, the (e)(1)(i) exception to the payment of out-of-pocket expenses is intended to apply only where no other cancellation reason is applicable. This exception would also exclude compensation in situations where either the purchaser or both the purchaser and the Government may be responsible for the cancellation reason(s).

Proposed paragraph (e)(1)(ii) would provide that no compensation would be given for cancellations or partial cancellations pursuant to paragraphs (c)(1), (3), (4), or (5). Compensation would be inappropriate for contracts, permits, or other such instruments cancelled pursuant to paragraphs (c)(1), (4), or (5) because the cancellation would be the result of a purchaser's failure to satisfactorily perform a contract, permit, or other such instrument or the result of a purchaser's failure to comply with appropriate law, orders, rules, regulations, or standards. It would also be unreasonable for the Government to compensate such a purchaser for unrecovered costs when the cancellation results from a purchaser's own bad faith acts.

Furthermore, compensation for a cancellation or partial cancellation involving a catastrophe pursuant to proposed paragraph (c)(3) would also be inappropriate. The purchaser has the option under the terms of a timber sale contract for a contract modification and rate redetermination as well as the option to request that a contract be cancelled. If it is in the purchaser's best interest to request a cancellation, the Government should not be obligated to do more than cancel the contract, permit, or other such instrument and accept the return of damaged and/or devalued timber. Likewise, if the Government elects to cancel or partially cancel a contract as a result of a catastrophic event, equitable treatment of both parties to the contract would dictate there be no compensation given.

Cancellations or partial cancellations pursuant to proposed paragraph (c)(2) would be the result of a request for cancellation or partial cancellations originating from either the purchaser or the Government and would require the consent and agreement of the other party. The agreement reached between the parties may or may not include a financial settlement as part of the terms of the agreement. Proposed paragraph (e)(2) permits but does not require compensation for the purchaser. To require compensation for the purchaser would unfairly restrict the bargaining position of the Government when a contract, permit, or other such instrument is cancelled or partially cancelled by written mutual agreement.

Section 223.116

The procedure that has been in place for determining the value of comparable replacement timber, based on timber sold within the past 6 months on the same National Forest (§ 223.40 and

§ 223.116 (a)(5)), is often difficult and not workable. This method fails to provide the necessary flexibility to deal with different circumstances faced in individual timber sale cancellations or partial cancellations. Additionally, comparable replacement timber is becoming increasingly expensive and exposes the Forest Service and the taxpayer to excessive liability. Further, there is no assurance that there will be comparable sales sold within the 6 months prior to the cancellation or partial cancellation. Therefore, the proposal does not retain the current procedures.

Finally, paragraph (b) of § 223.116 would be replaced because it is redundant. The Secretary of Agriculture has delegated full authority to the Chief to administer the National Forest System timber sale program (7 CFR 2.42). The Chief delegates his authorities to lower level officials or reserves authority through the Forest Service Manual except as otherwise noted in the regulations at part 223.

Environmental Impact

This proposed rule would establish uniform criteria to be considered when a timber sale contract, permit, or other such instrument authorizing the sale or harvest of timber or other forest products must be cancelled or partially cancelled. Section 31.1b–2 of the Forest Service Handbook 1909.15 (57 FR 43180; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ‘‘rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.’’ Paragraph d of Section 31.1b further excludes ‘‘proposing changes in contract terms and conditions or terms and conditions of special use authorizations.’’ The agency’s preliminary assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Controlling Paperwork Burdens on the Public

This rule does not require any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) and implementing regulations at 5 CFR part 1320 do not apply.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630. It has been determined that the proposed rule does not pose a risk of a taking of Constitutionally-protected private property because these proposed regulations apply to the discretionary use of Federally owned land.

Unfunded Mandates Reform

Pursuant to Title II of this Unfunded Mandates Reform Act of 1995, which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on State, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Regulatory Impact

This proposed rule was reviewed under USDA procedures and determined to be a significant rule under Executive Order 12866 on Regulatory Planning and Review because of the expected strong public interest in the proposed rule. Accordingly, this proposed rule is subject to OMB review under Executive Order 12866. However, this proposed rule will not have an annual effect of $100 million or more on the economy, or substantially increase prices or costs for consumers, individual industries, Federal, State or local governments, or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. This proposed rule will not limit the amount of National Forest System timber to be offered for sale or restrict competition for such timber. Rather, this proposed rule would remove the unreasonable degree of financial risk currently borne by the Federal Government in the event of timber sale contract cancellation and thus limit the Federal financial liability to reasonable risks.

In addition, this proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by that act.

Civil Justice Reform Act

This proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. If this proposed rule were adopted, (1) all State and local laws and regulations that are in conflict with this proposed rule or which would impede its full implementation would be preempted; (2) the proposed rule may be given retroactive effect on existing contracts that contain limiting compensation provisions; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

List of Subjects in 36 CFR Part 223

Exports, Government contracts, National forests, Reporting requirements, and Timber sales.

Therefore, for the reasons set forth in the preamble, part 223 of chapter II of title 36 of the Code of Federal Regulations is proposed to be amended as follows:

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

1. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 98 Stat. 2213, 16 U.S.C. 618, unless otherwise noted.

Subpart B—Timber Sale Contracts

2. Amend § 223.30 by redesignating paragraphs (g) and (h) as paragraphs (h) and (i) respectively and adding new paragraph (g) to read as follows:

§ 223.30 Consistency with plans, environmental standards, and other management requirements.

* * * * *

(g) Identification and designation of individually separable subdivision(s), payment unit(s), cutting unit(s), clearcutting unit(s), understory harvest unit(s), overstory harvest unit(s), individual tree marked area(s), or harvest unit(s) within a designated sale area boundary. Whenever reasonably feasible, the District Ranger or other Forest Service official responsible for sale layout shall divide the sale or permit area into two or more units, thereby making the contract divisible.

* * * * *

3. Revise § 223.40 to read as follows:

§ 223.40 Cancellation procedures.

Timber sale contracts, permits, and other such instruments authorizing the harvesting of trees or other forest products, shall provide for cancellation of partial cancellation for the reasons specified in paragraph (b) and (c) of this section. For the purposes of this section, the terms ''cancellation'' and ''termination'' as used in this section and in timber sale contracts, permits, and other such instruments are synonymous and may be used interchangeably.

(a) *Definitions.* The following definitions apply to the provisions of this section.

(1) *Purchaser* means, for the purpose of this section, any holder of a National Forest System timber sale contract, permit, or other such instrument authorizing the harvest of timber or other forest products.

(2) *Partial Cancellation* means the elimination of one or more, but not all, of the identifiable harvest units from a timber sale contract, permit, or other such instrument.

(3) *Modification* means the elimination of a portion of, but not all of, an identifiable harvest unit or units from a timber sale contract, permit, or other such instrument.

(4) *Cancellation* means the termination of contract requirement(s) for the removal of the remaining timber or other forest products from all of the identifiable harvest units of a timber sale contract, permit, or other such instrument.

(b) *Cancellation actions reserved to the Chief.* Based upon review of the administrative record, the Chief of the Forest Service shall cancel or partially cancel any timber sale contract, permit, and other such instrument authorizing the sale and harvest of trees or other forest products upon a determination that one or both of the following:

(1) Continued operation of the timber sale contract, permit, or other such instrument will result in the violation of a Federal statute or regulation; and/or

(2) Continued operation of the timber sale contract, permit, or other such instrument will unreasonably conflict with the management of other forest resources.

(c) *Other cancellation actions.* Based upon review of the administrative record, the Chief of the Forest Service, or other Forest Service official to whom such authority is delegated, may cancel or partially cancel, timber sale contracts, permits, or other such instruments authorizing the sale and harvest of trees or other forest products for any of the following reasons:

(1) For material breach or continued violation of their terms.

(2) Upon application or with the consent of the purchaser, for reasons other than those listed in this section, when such action is of advantage to the United States or not prejudicial to its interests.

(3) Upon application of the purchaser or by notice of the Forest Service, when catastrophic damage caused by forces beyond the control of either the purchaser or the Forest Service materially diminishes the value of the timber remaining to be cut because of substantial damage to the timber itself or because of physical change in the sale area or access to the timber.

(4) For a conviction of a purchaser for violation of any Federal or State criminal statute, when such violation is in any way connected with obtaining, attempting to obtain, selling, trading, or processing public timber, or obtaining, attempting to obtain, or performing a public contract or subcontract.

(5) Upon final agency or judicial determination of a purchaser's violation of civil standards, orders, permits, or other regulations for the protection of environmental quality issued by a Federal agency, State agency, or political subdivision thereof, in the conduct of operations under such regulations on National Forest System land.

(6) To comply with a Federal court order or a court approved settlement agreement, regardless of whether the sale is named in such an order, upon determination by the Forest Service that the order applies to the conditions existing on the sale.

(d) *Partial Cancellation.* Any timber sale contract, permit, or other such instrument for the sale or harvest of timber or forest products that contains individually identifiable harvest units may be partially cancelled without the Forest Service incurring liability for breach of the entire contract. When a timber sale is partially cancelled, a purchaser retains the duty to perform the remaining portions of the contract, unless, based upon evidence provided by the purchaser, the Contracting Officer determines that it would be uneconomical for the purchaser to perform the remaining portion of the contract.

(e) *Compensation.* (1) In the event of cancellation or partial cancellation by the Government of a contract, permit, or other such instrument under paragraphs (b) and (c) of this section, compensation, if any, is to be determined as follows:

(i) If the cancellation or partial cancellation is made pursuant to paragraph (b)(1), (b)(2), or (c)(6) of this section, the purchaser may receive compensation for out-of-pocket expenses, except where the Forest Service finds the purchaser contributed to the reason(s) for cancellation. Out-of-pocket expenses include only unrecovered costs arising from acquiring and performing the contract prior to cancellation. Out-of-pocket expenses do not include attorney's fees, lost profits, replacement cost of timber, or any other anticipatory losses by the purchaser. All such expense claims must be submitted, along with supporting documentation, to the Contracting Officer, pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 605).

(ii) If the cancellation or partial cancellation is made pursuant to paragraphs (c)(1), (3), (4), or (5) of this section, the purchaser shall not receive any compensation.

(2) If the cancellation or partial cancellation by the government is made pursuant to paragraph (c)(2) of this section, compensation to either party will be determined subject to such terms as may be included in a written mutual agreement between the parties.

§ 223.116 [Removed]

4. Remove § 223.116 in its entirety.

Dated: May 3, 1996.

David G. Unger,

Associate Chief.

Editiorial Note: This document was received in the Office of the Federal Register on December 23, 1996.

[FR Doc. 96–32937 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–11–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–5671–7]

National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to delete the Carter Industrials site from the National Priorities List; request for comments.

SUMMARY: The United States Environmental Protection Agency (EPA) Region 5 announces its intent to delete the Carter Industrials Site from the National Priorities List (NPL) and requests public comment on this action. The NPL is codified as Appendix B of 40 CFR Part 300. It is part of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which U.S. EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended. This action is

being taken by U.S. EPA, because it has been determined that all responses under CERCLA have been implemented and U.S. EPA, in consultation with the State of Michigan, has determined that no further response is appropriate. Moreover, U.S. EPA and the State have determined that remedial activities conducted at the Site to date have been protective of public health, welfare, and the environment.

DATES: Comments concerning the proposed deletion of the Site from the NPL may be submitted on or before January 29, 1997.

ADDRESSES: Comments may be mailed to Rita Garner-Davis (SRJ) Associate Remedial Project Manager, Superfund Division, U.S. EPA, Region 5, 77 W. Jackson Blvd., Chicago, IL 60604. Comprehensive information on the site is available at U.S. EPA's Region 5 office and at the local information repository located at: Detroit Public Library, Main Library—Reference Department, 5201 Woodward Avenue, Detroit, Michigan. Requests for copies of documents should be directed to the Region 5 Docket Office. The address and phone number for the Regional Docket Officer is Jan Pfundheller (H–7J), U.S. EPA, Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, (312) 353–5821.

FOR FURTHER INFORMATION CONTACT: Rita Garner-Davis (SRJ) Associate Remedial Project Manager, Superfund Division, U.S. EPA, Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–2440 or Derrick Kimbrough (P–19J), Office of Public Affairs, U.S. EPA, Region 5, 77 W. Jackson Blvd., Chicago, IL 60604, (312) 886–9749.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The U.S. Environmental Protection Agency (EPA) Region 5 announces its intent to delete the Carter Industrials Site from the National Priorities List (NPL), which constitutes Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), and requests comments on the proposed deletion. The EPA identifies sites that appear to present a significant risk to public health, welfare or the environment, and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund Response Trust Fund (Fund). Pursuant to Section 300.425(e)(3) of the NCP, (40 CFR 300.425(e) (3)), any site deleted from the NPL remains eligible for Fund-financed remedial actions if the conditions at the site warrant such action.

The U.S. EPA will accept comments on this proposal for thirty (30) days after publication of this notice in the Federal Register.

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the history of this site and explains how the site meets the deletion criteria.

Deletion of sites from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Furthermore, deletion from the NPL does not in any way alter U.S. EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist in Agency management.

II. NPL Deletion Criteria

The NCP establishes the criteria the Agency uses to delete Sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making this determination, U.S. EPA will consider, in consultation with the State, whether any of the following criteria have been met:

(i) Responsible parties or other persons have implemented all appropriate response actions required; or

(ii) All appropriate Fund-financed responses under CERCLA have been implemented, and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

III. Deletion Procedures

Upon determination that at least one of the criteria described in 300.425(e) has been met, U.S. EPA may formally begin deletion procedures once the State has concurred. This Federal Register notice, and a concurrent notice in the local newspaper in the vicinity of the Site, announce the initiation of a 30-day comment period. The public is asked to comment on U.S. EPA's intention to delete the Site from the NPL. All critical documents needed to evaluate U.S. EPA's decision are included in the information repository and the deletion docket.

Upon completion of the public comment period, the U.S. EPA Regional Office will prepare a Responsiveness Summary responding to each significant comment and any significant new data submitted during the comment period. This document shall be included in the final deletion package. The public is welcome to contact the U.S. EPA Region 5 Office to obtain a copy of this responsiveness summary. If U.S. EPA ultimately determines the deletion from the NPL is appropriate, final notice of deletion will be published in the Federal Register and the final deletion package shall be placed in the local information depository.

IV. Basis for Intended Site Deletion

The basis for deleting the Carter Industrials Site from the NPL is that actions taken first by EPA and the State of Michigan and then by a group of responsible parties have cleaned up the Site, such that no further response actions are appropriate.

The Carter Industrials Site is located at 4690 Humboldt Street in Detroit, Michigan. The Site covers about 3.5 acres in a mixed residential and light industrial area near downtown. For many years it was used to store and salvage scrap metal, including oil-filled electrical equipment. During salvage operations, dielectric fluids containing PCBs were spilled onto the ground, contaminating site soils. Contaminated soil then spread into the surrounding area via run-off, wind-blown dust, and tracking of spilled materials and contaminated soil by vehicular traffic.

In May 1986, the Michigan Department of Natural Resources (MDNR) took soil samples at the Site, revealing high levels of PCB contamination. On June 4, 1986, MDNR referred the Site to the Emergency Response Program of the U.S. EPA (Region 5). On June 6, 1986, U.S. EPA began to remove PCB contamination from residential areas bordering the Site and to consolidate it on the Carter Industrials property. Contaminated soil was placed in piles which were then maintained so as to prevent any further exposure to PCBs while EPA considered options for a permanent remedy.

On March 31, 1989, EPA listed the Site on the NPL. On September 19, 1991, EPA issued a Record of Decision (ROD), selecting low-temperature thermal desorption as the remedy. The ROD called for a desorption unit to be constructed on-site through which contaminated soil would have been treated and contamination removed. Treated soil that did not meet stipulated cleanup levels was to have been placed in a landfill constructed on the Carter property. In September, 1992, 14 potentially responsible parties (''the Carter Group'') signed a consent decree under which they agreed to implement the remedy EPA selected.

On February 28, 1995, EPA amended the Record of Decision to change the remedy from the low-temperature thermal desorption of PCBs to off-site disposal. The major components of the amended remedy included: (1) Excavation of soil on the Carter Site and from designated properties in the neighborhood near the Site containing one part per million (ppm) or more PCBs. (2) Demolition of contaminated buildings on the Site. (3) Disposal of contaminated soil and debris at an approved permitted, off-site landfill. (4) Stabilization of material containing high concentrations of lead prior to disposal. (5) Air monitoring and dust suppression during remedial activities. (6) Removal of underground storage tanks and their contents from the Site in accordance with Michigan regulations. (7) Restoration of areas where demolition or excavation took place. (8) Maintenance of all existing site safety measures, including fence, security guards, operation and maintenance of surface water runoff collection and treatment system during remedial activities.

The Carter Group began implementation of the amended remedy on August 1, 1995, and completed work on June 21, 1996. Contaminated material from the Carter Site was shipped to the Model City Landfill in Model City, New York—an EPA-approved landfill with a permit to handle PCBs. In addition to completing the work required under the amended Record of Decision, the Carter Group also cleaned out sewer lines where PCB contamination from the Carter Site may have collected. This action ensured that sewer-line sludge containing PCBs would not be washed into the Detroit River, with resulting harm to human health or the environment.

EPA, with the concurrence of the State of Michigan, has determined that all appropriate responses under CERCLA at the Carter Industries Superfund Site have been completed, and no further CERCLA response is appropriate in order to provide protection of human health and the environment. Therefore, EPA proposes to delete the site from the NPL.

Dated: December 18, 1996.

David A. Ullrich,

Acting Regional Administrator, U.S. EPA, Region 5.

[FR Doc. 96–32975 Filed 12–27–96; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Chapter IV

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Chapter XXV

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Chapter I

Health Insurance Portability

AGENCY: Department of Health and Human Services, Health Care Financing Administration; Department of Labor, Pension and Welfare Benefits Administration; and Department of the Treasury, Office of Tax Policy and Internal Revenue Service (the Agencies).

ACTION: Solicitation of comments.

SUMMARY: The Agencies have received comments from the public on a number of issues arising under the portability, access, and renewability provisions of the Health Insurance Portability and Accountability Act of 1996. Further comments from the public are welcome.

DATES: The Agencies have requested that comments be submitted on or before February 3, 1997.

ADDRESSES: For convenience, written comments should be submitted with a signed original and 3 copies to the Health Care Financing Administration (HCFA) at the address specified below. HCFA will provide copies to each of the Agencies for their consideration. All comments will be available for public inspection and copying in their entirety.

Health Care Financing Administration, Department of Health and Human Services, Attention: BPD–886–N, P.O. Box 26688, Baltimore, Maryland 21207

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309–G, Hubert Humphrey Building, 200 Independence Avenue, SW., Washington, D.C. 20201, or

Room C5–09–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850

Alternatively, comments may be submitted electronically via the HCFA e-mail address at: iritf@fhcfa.gov. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code BPD–886–N. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in Room 309–G of the Department of Health and Human Services offices at 200 Independence Avenue, SW., Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (phone (202) 690–7890).

FOR FURTHER INFORMATION CONTACT: Suzanne Long, Health Care Financing Administration, at 410–786–0970 (not a toll-free number); Diane Pedulla, Department of Labor, Office of the Solicitor, Plan Benefits Security Division, at 202–219–4597 (not a toll-free number); or Russ Weinheimer, Internal Revenue Service, at 202–622–4695 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted on August 21, 1996 (Public Law 104–191). HIPAA amended the Public Health Service Act (PHSA), the Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code of 1986 (Code) to provide for, among other things, improved portability and continuity of health insurance coverage in the group and the individual insurance markets, including group health plan coverage provided in connection with employment. Health coverage is regulated in part by the Federal government, under the PHSA, ERISA, the Code, and other Federal provisions, and in part by the States.

The portability, access, and renewability provisions of HIPAA are set forth in Title XXVII of the PHSA, Part 7 of Subtitle B of Title I of ERISA, and Subtitle K of the Code (referred to below as the HIPAA portability provisions). The HIPAA portability provisions are designed to improve the availability and portability of health insurance coverage by limiting exclusions for preexisting conditions and providing credit for prior coverage, guaranteeing availability of health coverage for small employers, prohibiting discrimination against employees and dependents based on health status, and guaranteeing renewability of health coverage for employers and individuals. The HIPAA portability provisions also include rules for the group and individual insurance markets that guarantee access to individual coverage for people who lose their group coverage. These provisions also set forth requirements imposed on health insurance issuers.

Sections 101(g)(4), 102(c)(4), and 401(c)(4) of HIPAA provide that the Secretaries of Health and Human Services, Labor, and Treasury shall each issue, not later than April 1, 1997, such regulations as may be necessary to carry out these provisions. The Agencies have been working actively to develop these regulations.

Comments

Comments have been received from the public on a number of issues arising under the HIPAA portability provisions. The purpose of this announcement is to advise the public that further comments on all issues under the HIPAA portability provisions are welcome in order that comments may be taken into account, to the extent practicable, before April 1, 1997.

In particular, in response to questions already received, the Agencies are considering whether to include in the regulations a model certification that generally could be used to certify an individual's period of creditable coverage. Under sections 2701(e)(1) and 2743 of the PHSA, section 701(e)(1) of ERISA, and section 9801(e)(1) of the Code, a certification of creditable coverage is required to be provided on certain occasions, such as when an individual loses coverage. The model certification might include information identifying the parties involved, whether the individual has at least 18 months of coverage under the plan without a 63-day break, and, if not, the start and end dates of coverage periods (and any related waiting period), but not information about the particular benefits provided under the plan. (Under this approach, information about the particular benefits provided under a plan would have to be furnished only in the event that another plan or issuer, after receiving the model certification, requests additional information under section 2701(e)(2) of the PHSA, section 701(e)(2) of ERISA, and section 9801(e)(2) of the Code.) Comments are invited on whether a model certification of an individual's period of creditable coverage would be helpful.

Signed at Washington, DC this 24th day of December 1996.

Bruce Vladeck,

Administrator, Health Care Financing Administration, Department of Health and Human Services.

Robert J. Doyle,

Director, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, Department of Labor.

J. Mark Iwry,

Associate Chief Counsel, Office of Tax Policy, Department of the Treasury.

Sarah Hall Ingram,

Associate Chief Counsel, (Employee Benefits and Exempt Organizations), Internal Revenue Service, Department of the Treasury.

[FR Doc. 96–33293 Filed 12–27–96; 8:45 am]

BILLING CODE 4120–01–M; 4830–01–M; 4510–29–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 5 and 90

[ET Docket No. 96–256; FCC 96–475]

Revision of the Experimental Radio Service Regulations

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: By this *Notice of Proposed Rule Making* (Notice) the Commission proposes to revise the Experimental Radio Service (ERS) rules in order to promote technical innovation and new services by encouraging experiments; ensure that experimental licenses do not result in abuse of the Commission's processes; and reorganize the Part 5 regulatory structure, including eliminating unnecessary and burdensome experimental regulations. The proposed action should encourage experimentation, remove unnecessary regulatory burdens upon ERS applicants, and prohibit abuses of the ERS processes.

DATES: Comments must be filed on or before February 10, 1997, and reply comments February 28, 1997. Written comments by the public on the proposed and/or modified information collections are due February 10, 1997. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before February 28, 1997.

ADDRESSES: Comments and reply comments should be sent to the Office of Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, N.W. Washington, D.C. 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725—17th Street, N.W., Washington, D.C. 20503 or via the Internet to fain—t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: Thomas Derenge at (202) 418-2451 or Rodney Small at (202) 418-2452. Internet: tderenge@fcc.gov or rsmall@fcc.gov, Office of Engineering and Technology, Federal Communications Commission. For additional information concerning the information collections contained in this *Notice!* should contact Dorothy Conway at (202) 418-0217, or via the Internet at dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making,* ET Docket 96-256, FCC 96-475, adopted December 13, 1996, and released December 20, 1996. The item proposes to: permit longer license terms; permit blanket licensing of related multiple experiments by a single entity and of fixed and mobile stations that are part of the same experiment, and permit electronic filing of experimental applications; encourage student experiments by issuing licenses to schools, as well as to individual students, and by permitting use of additional frequencies; modify the rules regarding special temporary authorizations (STAs) to encourage temporary experimental demonstrations and experiments at trade shows, while limiting STAs to single short-term, non-renewable authorizations; limit the size and scope of each market study on a case-by-case basis, and immediately terminate any such study that the Commission determines to be in excess of this size and scope; and consolidate and reorganize the experimental rules structure.

This *Notice* contains proposed or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law No. 104–13. It has been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed or modified information collections contained in this proceeding.

The full text of this Commission decision, including the proposed rules appendix, 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., and also may be purchased from the Commission's duplication contractor, International Transcription Service, (202) 857-3800, 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

Summary of Notice

1. By this action, we propose to revise Part 5 of our rules, which governs the Experimental Radio Service (ERS). We take this action to promote technical innovation and new services by encouraging experiments; ensure that experimental licenses do not result in abuse of our processes; eliminate unnecessary and burdensome experimental regulations; and protect public safety frequencies.

2. Experimental licenses are currently granted for two years. We believe that it may be beneficial to certain segments of the communications industry—in particular companies which desire to conduct experiments that involve ongoing research and development to provide for a longer license period. We believe that permitting such entities to obtain long-term experimental licenses may encourage them to conduct long-term research and development. Long-term licenses will decrease the regulatory burden on our licensees and on our staff which processes renewal applications. Therefore, we request comment on the establishment of a new class of experimental license, with a five-year term, to support long-term operations. This additional option would give applicants the flexibility to apply for either a two-year or five-year license, depending on their needs. We request comment specifically on the appropriate length for such an extended license period. We also request comment on whether this new class of experimental license should be limited to certain parties, such as those involved in long-term product development, or whether any applicant should be permitted to apply for an extended license as long as it provides sufficient justification.

3. We propose to permit blanket licensing of related multiple experiments by a single entity and of fixed and mobile stations that are part of the same experiment. Currently, we require a separate application for fixed and mobile stations; and, under normal circumstances, separate licenses for each phase of an experimental program. However, many experimental projects involve a system containing several fixed stations or combinations of fixed and mobile stations, or involve at least loosely-related experiments. Requiring separate applications for the components of the experimental systems or the different experiments in these cases is a disincentive to the filing of applications and is burdensome to the public and to our staff.

4. We also propose to permit electronic filing of experimental applications. Our Part 5 rules currently do not accommodate electronic filing of experimental applications. Accordingly, we propose to create a new section to permit our Office of Engineering and Technology to accept electronic signatures. We request comment on this proposal and on further steps that would facilitate the electronic filing of experimental applications.

5. We also propose to encourage student experiments by issuing licenses to schools, as well as to individual students, and by permitting use of additional frequencies. We believe that if there is an ongoing experimental radio program at a school, students would be more likely to become involved than if they are required to apply for an individual license. We also propose to modify the frequency bands used for student authorizations. The 2483.5–2500 MHz band is part of the currently authorized 2450–2500 MHz band that is used for student experimental use, but the 2483.5–2500 MHz band is no longer normally assigned for experimental use of any kind because of the need to protect satellite allocations in that band. Therefore, we propose to delete the 2483.5–2500 MHz band from the set of frequencies designated for student authorizations, and replace it with two bands that will provide far greater bandwidth. Specifically, we propose to provide the new bands 2402–2450 MHz and 10.00–10.50 GHz for such use. We request comment on whether student experiments can be accommodated in the 2402–2450 MHz and 10.00–10.50 GHz bands without causing harmful interference to existing users. Additionally, we request comment on whether the 5725–5825 MHz band should be made available for student authorizations. The 5725–5825 MHz band would provide an additional option for student experimentation; however, we note that the band is currently under consideration for unlicensed National Information Infrastructure (U–NII) devices, which are intended to provide wireless wideband networking options to the public including schools, libraries, and health care facilities. If these U–NII devices achieve a high level of deployment in schools, there could eventually be a conflict between U–NII and student use of this band.

6. We also encourage special temporary authorizations (STAs) by making them independent of other experimental licenses and by expediting processing of STAs where circumstances warrant; Currently, our rules require that an applicant for an STA already have an experimental license prior to receiving an STA. However, it has been our experience that in many instances entities that have requirements for an STA do not have an experimental license and that the need for an STA is independent of the need for such a license. Accordingly, we believe that our current rules discourage some entities from obtaining STAs. Further, our current rules do not contemplate expedited processing of STA applications, even though in some circumstances the need for an STA may arise unexpectedly. Therefore, we propose to modify the rules to remove the requirement that an applicant have an experimental license before applying for an STA, and further propose to include a provision for preferential processing of STA applications in cases in which an applicant sets forth compelling reasons why such an authorization must be granted expeditiously.

7. Additionally, we propose to limit the size and scope of each market study on a case-by-case basis, and to immediately terminate any such study that we determine to be in excess of this size and scope. During the last several years, a number of parties have obtained experimental licenses in order to undertake market studies of new services. In 1983, when we last reviewed our experimental rules, we believed that limited market experiments would provide us with significant useful information about the viability of new products in the marketplace. While this has proven to be the case in a number of instances, in other instances our processes have been abused by companies attempting to establish commercial businesses under the guise of experimental licenses. We note that the purpose of limited market studies is to obtain information about the viability of new products in the marketplace, and not to circumvent our normal licensing processes. Accordingly, we propose that as a condition of granting such authorizations, licensees must limit the size and scope of each study. We shall determine the appropriate limits for market studies on a case-by-case basis and terminate any such study that exceeds these limits. An applicant desiring to perform a limited market study would be expected to submit a narrative describing in detail the proposed study and its objectives.

8. We further propose to limit STAs to single short-term, non-renewable authorizations. While STAs are granted for a period of no more than six months, some licensees have repeatedly sought to extend the same STA. This process has been wasteful of our resources. We realize that unforeseen delays can in some instances cause a planned short term experimental project to exceed six months, but we believe that some action is necessary in order to reduce the administrative and paperwork burden and to prevent abuse of our STA process. Accordingly, we propose to add language to our rules stating that in the absence of extenuating circumstances no extensions of STAs will be granted.

9. We also propose to eliminate the requirement that experimental licensees contact our Compliance and Information Bureau (CIB) before commencing operation. This notification requirement was intended to assist us in investigating any instances of reported interference. However, it has been our experience that experimental operations have rarely resulted in interference complaints. Further, improvements in our experimental license database have made it easier for our staff to identify the cause of any interference problem that may arise. Finally, in cases in which there is a reasonable chance of interference, we can place a condition on the license requiring that the licensee notify our Experimental Licensing Branch (ELB) prior to commencement of the operation. Accordingly, we believe that the existing notification requirements are unnecessary and propose to delete them. However, we request comment on this proposal and whether the removal of these requirements could result in the potential for increased interference from experimental operations.

10. We further propose to eliminate rules that specify that a construction permit be obtained in conjunction with an experimental license and that expiration dates of experimental licenses be distributed over the 12 calendar months. For a number of years, we have accepted a combined application for construction permit and license to operate an experimental station and have issued only one instrument of authority for the ERS. As a matter of administrative convenience and clarification, we propose to remove all references to obtaining a construction permit for experimental authorizations. Further, we propose to delete the rules that specify that the expiration dates of experimental licenses will be distributed over the twelve calendar months, in accordance with the alphabetical distribution of the names of the licensees. Our experience has been that the constant flow of applications results in an acceptable distribution of license applications, and for several years it has been our standard operating practice to issue a license for a two-year period from the date of grant and to act on any renewal requests upon expiration of this period. Implementation of a 5-year experimental license also will substantially facilitate the renewal process.

11. We also propose to add language to Part 5 to ensure that experiments avoid public safety frequencies and propose to consolidate and reorganize the rules. Specifically, we propose to transfer wildlife and ocean buoy tracking operations from Part 5 to Part 90, and solicit comment on transferring rules governing broadcasting experiments that are not directed toward improvement of the technical phases of operation and service of licensed broadcast stations from Part 74 to Part 5. Currently, Section 5.108 governs wildlife and ocean buoy tracking operations in the 40.66–40.70 MHz and 216–220 MHz bands for the tracking of, and telemetry of scientific data from, such operations. These operations were originally placed under Part 5 because there was no other appropriate rule section to accommodate them. Recently, however, the Commission has established the Location and Monitoring Service under Part 90, which provides for regular licensing of radio tracking functions. Additionally, the Commission recently established under Part 90 the Low Power Radio Service in the 216–217 MHz band that includes, among other things, tracking of stolen goods. Accordingly, we believe that wildlife and ocean buoy tracking operations would now be more appropriately governed as Part 90 services, and we so propose herein to recategorize them. However, we note that Part 90 has more specific eligibility requirements than Part 5. While we do not believe that transferring wildlife and ocean buoy tracking operations would create a situation where an entity qualified under Part 5 would be ineligible under Part 90, we request comment on this issue.

12. In addition, our Experimental License Branch has also received a number of applications for use of broadcast frequencies by experimental operations of a broadcast nature. Currently, such experiments are accommodated under our Auxiliary Broadcasting rules, Part 74, and not Part 5. We believe that a consolidation of all experimental rule subparts into Part 5 may be desirable to eliminate redundancy, any confusion created by having separate bodies of experimental rules, and to increase the efficiency of the Commission’s processes. Accordingly, we solicit comment on transferring Subpart A of Part 74—Experimental Broadcast Operations—to Part 5. We request comment on whether such a change is desirable and, if so, on whether Subpart A of Part 74 should be made a separate subpart of Part 5 or fully integrated with the proposed three subparts of Part 5.

Initial Regulatory Flexibility Analysis

13. As required by Section 603 of the Regulatory Flexibility Act,[1] the Commission has prepared an Initial Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (Notice) to ‘‘Amendment of Part 5 of the Commission’s Rules to Revise the Experimental Radio Service Regulations.’’ Written public comments are requested on the IRFA. Comments must be identified in response to the IRFA and must be filed by the deadlines for comments on the Notice provided in paragraph 26. The Secretary shall send a copy of this Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

14. *Need for and Objectives of the Proposed Rule.* We believe that the Experimental Radio Service (ERS) rules have become outdated and must change to keep pace with an evolving telecommunications industry. The competitive and rapidly developing telecommunications market has demonstrated the increased importance and the usefulness of the ERS. The ERS continues to be utilized to foster development of new service concepts and technologies that stimulate economic growth, create new jobs, and increase spectrum utilization and efficiency. The ERS rules were last updated in 1983 and contain obsolete practices and unnecessary regulations. We propose to modernize the ERS and improve the experimental licensing process by encouraging experiments and streamlining and updating Part 5 of the rules. Additionally, the proposals would eliminate outdated and cumbersome regulatory requirements and unnecessary paperwork.

15. *Legal Basis.* The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g) and 303(r) of the

[1] 5 U.S.C. § 603.

Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g) and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

16. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply.* For purposes of this Notice, the RFA defines a ''small business'' to be the same as a ''small business concern'' under the Small Business Act , 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[2] Under the SBA, a ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any individual criteria established by the Small Business Administration (SBA).[3]

17. The Commission has not developed a definition of small entities applicable to experimental licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. SBA has defined a small business for Standard Industrial Classification (SIC) category 4812 (Radiotelephone Communications) to be small entities when they have fewer than 1500 employees.[4]

18. The Commission processes approximately 1,000 applications a year for experimental radio operations. About half of these are renewals and the other half are for new licenses. The majority of experimental licenses are issued to companies such as Motorola and Department of Defense contractors such as Northrop, Lockheed and Martin Marietta. Businesses such as these may have as many as 200 licenses at one time. The majority of these applications, 70 percent, are from entities such as these. Given this fact, the remaining 30 percent of applications, we assume, for purposes of our evaluations in the IRFA, will be awarded to small entities, as that term is defined by the SBA.

19. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Our proposals are intended to decrease the regulatory burden on all experimental license applicants, including small entities. For example, we propose to permit applicants the option of applying for a five-year experimental license, in addition to maintaining the current two-year license. We anticipate that a longer term license would reduce the number of renewal applications, and thereby decrease the regulatory burden. We are also proposing to remove an unnecessary requirement that STA applicants hold experimental licenses, and are clarifying the STA rules. We are also proposing to replace existing Sections 5.55(a) and 5.55(b) of our rules with a single provision that would allow an applicant to apply for all of the stations in its experimental system, including fixed stations and associated mobile units, on one experimental license application; and similarly to modify Section 5.62 to permit the filing of only a single application for multiple experiments, when doing so would be appropriate for the proposed project. Additionally, this action proposes to increase the opportunities for students to obtain experimental authorizations, proposes to remove requirements that certain licensees notify the FCC's field offices prior to commencing operations, and proposes to eliminate obsolete rules. These changes should have a positive effect on small entities; however, we are unable to quantify all potential effects on such entities. We invite specific comments on this point by interested parties.

20. *Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives.* We believe that our proposed actions to revise our ERS rules will eliminate unnecessary and burdensome regulations for small entities. Section 303(g) of the Communications Act of 1934, as amended, charges the Commission with encouraging the larger and more effective use of radio in the public interest. We have considered the alternative of not making the proposed revisions; however, we believe that would not serve the public interest and would continue to place an unnecessary burden on licensees. We solicit comment on specific alternatives to the proposed rule changes listed in the Notice. Some or all of the proposals may be adopted or altered in future actions in this proceeding.

21. *Federal Rules That Duplicate, Overlap, or Conflict With the Proposed Rule:* None.

22. *Paperwork Reduction Act.* This *Notice* contains either a proposed or modified information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *Notice,* as required by the Paperwork Reduction Act of 1995, Public Law No. 104–13. Public and agency comments are due at the same time as other comments on the *Notice*; OMB comments are due February 28, 1997. Comments should address: (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.

OMB Approval Number: N/A.

Title: Amendment of Part 5 of the Commission's Rules to Revise the Experimental Radio Service Regulations.

Form No.: N/A.

Type of Review: New Collection.

Respondents: Individuals or households, Business or other for-profit, not-for-profit institutions, and State, Local or Tribal Government.

Number of Respondents: 428.

Estimated Time Per Response: 1 hour.

Total Annual Burden: 681 hours.

Needs and Uses: The Third Party requirements are made necessary by Sections 5.85(d), 5.85(e), and 5.93(b) of the Notice of Proposed Rule Making revising Part 5 of the Commission's Rules governing the Experimental Radio Service. They are as follows: (1) pursuant to Section 5.85(d), when applicants are using public safety frequencies to perform experiments of a public safety nature, the license may be conditioned to require coordination between the experimental licensee and appropriate frequency coordinator and/or all public safety licensees in its area of operation; (2) pursuant to Section 5.85(e), the Commission may, at its discretion, condition any experimental license or special temporary authority (STA) on the requirement that before commencing operation, the new licensee coordinate its proposed facility with other licensees that may receive interference as a result of the new licensee's operations; and (3) pursuant to Section 5.93(b), unless other stated in the instrument of authorization, licenses granted for the purpose of limited market studies requires the licensee to inform anyone participating in the experiment that the service or device is granted under an experimental authorization and is strictly temporary. In all cases, it is the responsibility of the licensee to coordinate with other users.

[2] See 5 U.S.C. § 601(3) (incorporating by reference the definition of ''small business concern'' in 5 U.S.C. § 632).

[3] 15 U.S.C. § 632.

[4] 13 C.F.R. § 121.201 Standard Industrial Classification (SIC) Code 4812.

Coordination is necessary to avoid harmful interference, and notification to participants of limited market studies is necessary to indicate that the experiment is temporary.

List of Subjects in

47 CFR Part 5

Radio.

47 CFR Part 90

Communications equipment, Radio.

Federal Communications Commission.

Shirley S. Suggs,

Chief, Publications Branch.

[FR Doc. 96–33144 Filed 12-27–96; 8:45 am]

BILLING CODE 6712–01–P

47 CFR Part 63

[IB Docket No. 96–261, FCC 96–484]

International Settlement Rates

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: On December 19, 1996, the Federal Communications Commission released a Notice of Proposed Rulemaking (''NPRM'') that proposes changes to the Commission's international settlement benchmark rates that will move settlement rates closer to the underlying costs of providing international termination services. The Commission believes that proposals made in the NPRM are necessary in light of the significant changes that have occurred in the global telecommunications market in recent years. The NPRM represents the next step in an ongoing effort by the Commission, many foreign governments, and multilateral organizations such as the International Telecommunications Union (''ITU'') and the Organization for Economic Cooperation and Development (''OECD'') to lower international telephone costs by reforming the international accounting rate system.

DATES: Comments are due on or before February 7, 1997, and reply comments are due on or before March 10, 1997.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Kathryn O'Brien, Attorney-Advisor, Policy and Facilities Branch, Telecommunications Division, International Bureau, (202) 418–1470.

SUPPLEMENTARY INFORMATION:

Summary of Notice of Proposed Rulemaking

1. On December 19, 1996, the Commission released a Notice of Proposed Rulemaking in the Matter of International Settlement Rates, IB Docket No. 96–261 (FCC 96–484) that proposes options for revising international settlement rate benchmarks that will move settlement rates closer to the underlying costs of providing international termination services. The NPRM seeks comment on several alternate methods for calculating benchmark rates in the absence of reliable data on the costs foreign carriers incur to terminate international traffic. The method proposed in the NPRM relies on the three network elements identified by the ITU to provide international service: international transmission facilities, international switching facilities, and national extension (domestic transport and termination). Benchmarks would be developed using foreign carriers' tariffed prices to calculate, on a country-by-country basis, a price for each of these three network elements. The prices for each network element would be aggregated to calculate a ''tariffed components price'' for each country.

2. The NPRM proposes three benchmark ranges, based on a country's level of economic development under the World Bank and ITU's classification scheme—high income countries (GNP per capita of $8,956 or more); upper middle and lower middle income countries ($726–8,955); and low income countries ($726 or less). The NPRM combines the two middle income categories because the proposed method of calculating benchmark rates would result in benchmarks that are almost identical. The proposed rule would base the upper end of the range for each development category on an average of the prices of the three network elements (or the tariffed components prices) for all countries in that category. This would result in upper ranges of approximately 15¢ for carriers in high income countries; 19¢ for carriers in upper middle and lower middle income countries; and 23¢ for carriers in low income countries. For the lower end of each development category's benchmark, the NPRM proposes using an estimate of the incremental cost per minute of terminating international traffic. The NPRM estimates that this cost would be between 6¢ to 9¢. The NPRM also asks for comment on other alternative methodologies for setting benchmark rates.

3. The NPRM recognizes the potential adjustment problems for foreign carriers that could result from an immediate shift to more cost-based settlement rates. The NPRM therefore proposes a transition schedule for negotiating settlement rates within the benchmark ranges based on countries' levels of economic development. The NPRM proposes a one year transition schedule for U.S. carriers negotiating with carriers in upper income countries; a two year schedule for middle income countries; and a four year schedule for low income countries. The NPRM proposes, though, to consider additional flexibility in the application of the benchmarks beyond this transition schedule for U.S. carriers serving low income and middle income countries that demonstrate an actual commitment to introducing competitive reforms. Under the proposed rule, the Commission would consider carrier-initiated requests for additional flexibility on a case-by-case basis.

4. The NPRM proposes to place conditions on various types of authorizations to provide U.S. international services in order to address potential competitive distortions in the U.S. market for international services that could result from above-cost settlement rates. The NPRM first proposes to condition a carrier's authorization to provide facilities-based service to an affiliated market on the foreign affiliate offering all U.S. international carriers a settlement rate within the benchmark range. Under the proposed rule, the Commission could, if it subsequently learned that the carrier's service offering has caused a distortion of competition on the route in question, require that settlement rates on that route be no more than the lower end of the benchmark range, or could revoke the authorization of the carrier to serve the affiliated market. Second, the NPRM proposes to grant all carriers' applications for resale of private lines to provide switched service on the condition that accounting rates on the route or routes in question are within the benchmark range. The proposed rule would allow the Commission, if it learned that competition on the route was being distorted, to order all authorized U.S. private line resale international carriers not to use their authorization to provide international private line resale services until settlement rates on that route are at the low end of the benchmark range. The NPRM also seeks comment on whether the benchmark conditions should be used in conjunction with the

Commission's effective competitive opportunities (''ECO'') test adopted in its *Foreign Carrier Entry Order,* should replace the ECO test, or whether the Commission should modify the ECO test in light of the benchmark conditions.

5. The NPRM seeks comment on several measures to support U.S. carriers' efforts to negotiate lower settlement rates and identifies additional, stronger measures that may be necessary to reduce settlement rates with foreign carriers that have strongly resisted such reductions. The NPRM also asks how the Commission should encourage U.S. carriers to reflect any reductions they receive in their settlement rates. Initial Regulatory Flexibility Analysis

6. Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1990, 5 U.S.C. §§ 601–612, the Commission's Initial Regulatory Flexibility Analysis with respect to the NPRM is as follows:

A. Reason for Action

The NPRM seeks comment on possible changes in the benchmark ranges applied to settlement rates for international message telephone service between U.S. facilities-based carriers and foreign carriers and related issues. The Commission believes that its benchmark rates should be revised to reflect recent technological improvements, their associated cost reductions, and the market structure changes occurring in the global telecommunications market. The Commission also believes these revisions are necessary to move settlement rates closer to the actual costs incurred by foreign carriers to terminate international traffic.

B. Objectives

The objective of this proceeding is to attain reform in the international accounting rate system and thereby help ensure lower international calling prices for consumers. In particular, this proceeding seeks to remove the primary obstacle to accounting rate reform—the anticompetitive effects of substantially above-cost settlement rates. The Commission would achieve this objective by revising its benchmark settlement rates so that they more closely resemble the underlying costs of providing international termination services.

C. Legal basis

The NPRM is adopted pursuant to Sections 1, 4(i), 201–205 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201–205, and 303(r).

D. Description, Potential Impact, and Number of Small Entities Affected

The Commission has not developed a definition of small entities applicable to international facilities-based common carriers. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (''SBA'') rules applicable to Communications Services, Not Elsewhere Classified. This definition provides that a small entity is expressed as one with $11.0 million or less in annual receipts. Based on preliminary 1995 data, at present there are 29 international facilities-based common carriers that qualify as small entities pursuant to the SBA's definition. The number of small international facilities-based common carriers has been growing significantly, and by the end of 1996 that number could increase to approximately 50. The revised benchmark rates would apply to all international facilities-based common carriers, including small entities, that enter into an operating agreement with a foreign carrier that provides for the payment of settlement rates. The Commission notes that the revised benchmark rates should result in lower settlement rates for carriers. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth findings in the Final Regulatory Flexibility Analysis. The Secretary shall send a copy of the NPRM to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. 601, *et seq.* (1981).

E. Reporting, Recordkeeping and Other Compliance Requirements

None.

F. Federal Rules Which Overlap, Duplicate or Conflict With the Commission's Proposal

None.

G. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent With Stated Ojectives

NPRM solicits comments on a variety of alternative methodologies for calculating benchmark settlement rates, but these have no impact on small entities. The NPRM also solicits comments on enforcement mechanisms that may be necessary to support U.S. carriers, including small entities, in their negotiations with foreign carriers. The Commission seeks comment on the impact of these alternatives on small entities.

H. Comments are Solicited

Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in the NPRM, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of the NPRM to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq.*

Ordering clauses

7. Accordingly, it is ordered that, pursuant to Sections 1, 4(i), 201–205, and 303(r) of the Communications Act of 1994, as amended, 47 U.S.C. §§ 151, 154(i), 201–205, and 303(r) a notice of proposed rulemaking is hereby adopted.

8. It is further ordered that the Secretary shall send a copy of this notice of proposed rulemaking, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1981).

List of Subjects in 47 CFR Part 43

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Shirley S. Suggs,

Chief, Publications Branch.

[FR Doc. 96–33142 Filed 12–27–96; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 61, No. 251
Monday, December 30, 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

Beaver Creek Salvage Timber Sale and Other Restoration Projects, Wallowa-Whitman National Forest, Union County, Oregon

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The USDA, Forest Service, will prepare an environmental impact statement (EIS) for a set of proposals to implement a salvage timber sale and several other related restoration and rehabilitation projects within the Beaver Creek Project Area. The EIS will tier to the 1990 Land and Resource Management Plan (Forest Plan) for the Wallowa-Whitman National Forest, which provides the overall management direction for the area. The Forest Service proposed action will be consistent with the Forest Plan.

The proposed projects are primarily located with the Beaver Creek Municipal Watershed in the Beaver Creek, West Fork Beaver Creek, and Beatty Creek drainages on the La Grande Ranger District, approximately 15 air miles south and west of La Grade, Oregon. The project area consists of 16,000 acres. The following activities are proposed: (1) Salvage of dead and down trees to reduce fuel loadings, harvest of other trees to improve stand health and vigor; (2) development of associated road systems; (3) construction of a reduced fuel corridor system; (4) exchange of a low quality stand of allocated old growth for another stand of high quality old growth; (5) completion of structure protection measures; (6) implementation of bank and instream water quality restoration practices in areas of known damage; and (7) re-intoduction of fire in a portions of the project area to reduce fuel loadings and enhance a ponderosa pine site.

The projects would be implemented from Fiscal Year 1998 into the year 2000. The agency invites written comments and suggestions on the scope of this project. In addition, the agency gives notice of this analysis so that interested and affected people are aware of how they may participate and contribute to the planning process and final decision.

DATES: Comments concerning the scope of the analysis should be received in writing by January 31, 1997.

ADDRESSES: Send written concerns and comments to Robert P. Rainville, District Ranger, La Grande Ranger District, 3502 Highway 30, La Grande, Oregon 97850.

FOR FURTHER INFORMATION CONTACT: Direct questions about the proposed action and EIS to Cindy Whitlock, Project Coordinator, 3502 Highway 30, La Grande, Oregon 97850, phone (541) 962–8501.

SUPPLEMENTARY INFORMATION: The purpose of the Forest Service proposal is to maintain, protect and enhance water quality within the project area through creation of a fuel reduction corridor network (18 miles of fuel reduction corridors), reduction of fuel loadings through salvage of the insect killed existing dead timber (5.0 million board feet (MMBF) from 892 acres), proactive management of other high priority stands to improve stand growth and vigor to meet long term desired ecosystem and management goals (1.0 MMBF from 299 acres), implementation of riparian restoration activities (5 miles of project area streams), and improvement of the old growth network within the area by replacing allocation of poor quality stands with ones of higher quality. The proposed action will be consistent with the Forest Plan, which provides goals, objectives, standards and guidelines of the various activities and land allocations on the forest.

The Forest Plan allocates the project area into four management areas (MAs): (MA1) Timber Production Emphasis, less than 1% (12 acres); (MA3A) Wildlife/Timber, 86% (14,000 acres-Big game summer range); MA3) wildlife/ Timber, 2% (309 acres); (MA15) Old Growth Preservation, 9% (1,400 acres). Private lands (320 acres) and also included within the project area boundary (2% of the area). Although excluded from Forest Service activities, project access and the condition of private lands will be considered during alternative development and when analyzing potential cumulative effects.

The Key issues identified to date include:

1. Wildlife Habitat—(short-term and long-term considerations, big game and non-game habitat needs, road construction and densities, and old growth effectiveness/availability).
2. Stand Health—(tree mortality, reduced tree stocking levels, progression to the desired future condition)
3. Water Quality/Riparian Health, Fisheries—(water quality, quantity, flow, temperature, and timing, and riparian vegetation condition).
4. Economics
5. Roadless Area Character

A range of project alternatives will be considered, including a no-action alternative. Based on the issues gathered through scoping, the action alternatives will vary in (1) the amount and location of acres considered for treatment, (2) the amount of road constructed for access, (3) the silvicultural and post-harvest treatments prescribed, (4) the number, type, and location of rehabilitation projects, and (5) the amount of time needed to move the area toward its Desired Future Condition.

Public participation will be especially important at several points during the analysis, beginning with the scoping process (40 CFR 1501.7). The Forest Service will be seeking information, comments, and assistance from Federal, State, local agencies, tribes and other individuals or organizations who may be interested in or affected by the proposed project. This input will be used in preparation of the draft EIS. Continued scoping and public participation efforts will be used by the interdisciplinary team to identify new issues, determine alternatives in response to the issues, and determine the level of analysis needed to disclose potential biological, physical, economic, and social impacts associated with this project. The scoping process includes:

1. Identification of potential issues.
2. Identification of issues to be analyzed in depth.
3. Elimination of insignificant issues or those which have been covered by a relevant previous environmental process.

4. Exploration of additional alternatives based on the issues identified during the scoping process.

5. Identification of potential environmental effects of the proposed action and alternatives (i.e. direct, indirect, and cumulative effects and connected actions).

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by August,1997. The EPA will publish a notice of availability of the draft EIS in the Federal Register. The comment period on the draft EIS will be 45 days from the date the EPA notice appears in the Federal Register. At that time, copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is important that those interested in the management of the Wallowa-Whitman National Forest participate at that time.

The Forest Service believes it is important to give reviewers notice, at this early stage, of several court rulings related to public participation in the environmental review process. First, reviewers of a draft EI must structure their participation in the environmental review of the proposal so that it is meaningful and alerts the 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 EIS stage but that are not raised until after completion of the final EIS 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 to the Forest Service at a time when it can meaningfully consider and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed actions, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or merits of the alternatives formulated and discussed in the statement. (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.)

The final EIS is scheduled for completion by January, 1998. In the final EIS, the Forest Service is required to respond to substantive comments received during the comment period for the draft EIS. Robert M. Richmond, Forest Supervisor of the Wallowa-Whitman National Forest, is the responsible official. He will decide which, if any, of the proposed project alternatives will be implemented. His decision and reason for the decisions will be documented in the Record of Decision. That decision will be subject to Forest Service appeal regulations (36 CFR Part 217).

Dated: December 19, 1996.

R.M. Richmond,

Forest Supervisor.

[FR Doc. 96–33192 Filed 12–27–96; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the procurement list.

SUMMARY: This action adds to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: January 29, 1997.

ADDRESS: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202-3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603-7740.

SUPPLEMENTARY INFORMATION: On September 20, November 1 and 8, 1996, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (61 F.R. 49435, 56511 and 57849) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities and services and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities and services proposed for addition to the Procurement List.

Accordingly, the following commodities and services are hereby added to the Procurement List:

Commodities

Pallet Base and Cover Assembly

8140–01–341–0916
8140–01–160–0231
8140–00–084–0377
8140–01–339–4789
8140–01–160–0230
8140–01–090–5793
8140–01–273–6043
8140–01–291–2524

Services

Janitorial/Custodial

U.S. Courthouse, 300 S. Fourth Street, Minneapolis, Minnesota

Switchboard Operation

Department of Veterans Affairs, New Jersey Health Care System, East Orange, New Jersey

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Louis R. Bartalot,

Associate Director for Facility Operations.

[FR Doc. 96–33122 Filed 12–27–96; 8:45 am]

BILLING CODE 6353–01–P

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

COMMENTS MUST BE RECEIVED ON OR BEFORE: January 29, 1997.

ADDRESS: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action will result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Commissary Shelf Stocking and Custodial
Fort Monroe, Virginia
NPA: Association for Retarded Citizens of the Peninsula, Inc., Hampton, Virginia.

Janitorial/Custodial
Richmond (Hunter Holmes McGuire) VAMC, Richmond, Virginia
NPA: Richmond Goodwill Industries, Inc., Richmond, Virginia.

Louis R. Bartalot,
Associate Director for Operations.

[FR Doc. 96–33123 Filed 12–27–96; 8:45 am]

BILLING CODE 6353–01–P

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to procurement list.

SUMMARY: The Committee has received proposals to add to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

COMMENTS MUST BE RECEIVED ON OR BEFORE: January 29, 1997.

ADDRESS: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodities and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities and services proposed for addition to the Procurement List.

Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following commodities and services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Commodities

Stake/Lath, Survey, Wood
5510–00–NSH–0044 thru -0097
(Requirements for the USDA Forest Service, Fort Jones, California)
NPA: Siskiyou Opportunity Center, Mt. Shasta, California.

Gloves, Patient Examining
6515–00–NIB–0053 (Small)
6515–00–NIB–0054 (Medium)
6515–00–NIB–0055 (Large)
(75% of the Government's requirement for gloves of this quality in 132 VA Hospitals (list available upon request))
NPA: Bosma Industries for the Blind, Inc. Indianapolis, Indiana.

Services

Grounds Maintenace
Mountain Home Air Force Base, Idaho
NPA: Trace, Inc., Eagle, Idaho.

Mailroom Operation
Department of Housing and Urban Development, Richmond, Virginia
NPA: Virginia Industries for the Blind, Richmond, Virginia.

Louis R. Bartalot,
Associate Director for Operations.

[FR Doc. 96–33124 Filed 12–27–96; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This collection has been submitted under the emergency PRA procedures.

Agency: Bureau of Export Administration.

Title: Commercial Encryption Items Transferred from the Department of State to the Department of Commerce.

OMB Control Number: n/a.

Form Number: n/a.

Type of Request: New collection—Emergency Review.

Burden: 7,720 Hours.

Number of Respondents: 3,000.

Avg. Hrs. Per Response: 1/2 to 40 hours.

Needs and Uses: On October 6, 1995, the administration announced liberalizations on export controls for encryption items. The administration's initiative will make it easier to use stronger encryption products, both at home and abroad, to protect their privacy, intellectual property and other valuable information. It will support the growth of electronic commerce, increase the security of the global information, and sustain the economic competitiveness of U.S. encryption product manufacturers during the transition to a key management infrastructure.

Affected Public: Individuals, businesses or other for-profit and not-for-profit institutions.

Frequency: On occasion.

Respondents's Obligation: Mandatory.

OMB Desk Officer: Victoria Baecher-Wassmer (202) 395–7340.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, Acting DOC Forms Clearance Officer, (202) 482–3272, U.S. Department of Commerce, room 5327, 14th and Constitution Avenue, NW, Washington, D.C. 20230.

Written comments and recommendations for the proposed information collection should be sent to Victoria Baecher-Wassmer, OMB Desk Officer, room 10201, New Executive Office Building, Washington, D.C. 20503.

Dated: December 20, 1996.

Linda Engelmeier,

Acting Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 96–33172 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–DT–P

Bureau of the Census

1997 Economic Censuses Classification Report

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 28, 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, D.C. 20230.

FOR FURTHER INFORMATION CONTACT: Requests for additional information of copies of the information collection instrument(s) and instructions should be directed to William Bostic, Bureau of the Census, Room 2641, Building 3, Washington, D.C. 20233–6100 and 301–457–2672 or E-mail at William.G.Bostic.Jr@Info.Census.Gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau is the preeminent collector of timely, relevant and quality data about the people and the economy of the United States. Economic data are the Census Bureau's primary program commitment during non-decennial census years. The economic census, conducted under authority of Title 13 U.S.C., is the primary source of facts about the structure and functioning of the Nation's economy and features unique industry and geographic detail. Economic census statistics serve as part of the framework for the national accounts and provide essential information for government, business, and the general public.

The 1997 Economic Census will cover virtually every sector of the U.S. economy. The Census Bureau will implement the new North American Industry Classification System (NAICS) in the 1997 Economic Census. The implementation of the NAICS as a replacement for the 1987 Standard Industrial Classification (SIC) system will require contacting businesses to collect classification information to update the 1997 Economic Census mailing lists.

Accurate and reliable industry and geographic codes are critical to the Bureau of Census statistical programs. New businesses are assigned industry classification by the Social Security Administration (SSA). However, many of these businesses in manufacturing and mining cannot be assigned detailed industry codes because insufficient information is provided on Internal Revenue Service (IRS) Form SS–4. In addition, many of these businesses when matched against the Bureau of Labor Statistics (BLS) classification system cannot be assigned a detailed classification code.

In order to provide detailed manufacturing and mining industry data reflecting NAICS for the 1997 Economic Censuses and the Standard Statistical Establishment List (SSEL), these partially coded businesses must be assigned detailed classification codes.

This data collection, Form NC–9926, is designed to obtain detailed classification information for the partially coded single-unit manufacturing and mining industries including changes from the SIC to NAICS and provide current information on physical locations for establishments below the mail cutoff.

The failure to collect this classification information will have an adverse effect on the quality and usefulness of economic statistics and severely hamper the Census Bureau's ability to implement NAICS in the 1997 Economic Censuses.

II. Method of Collection

The Census Bureau will select establishments to receive this survey from the Census Bureau's SSEL. The Census Bureau will mail the NC–9926 to single-unit manufacturing and mining establishments to obtain needed four-digit industry codes and subindustry detail for small establishments in selected four-digit industries in the apparel area, Major Groups 22 and 23. In addition, this form will be mailed to small manufacturing and mining establishments which could not be assigned a classification code when matched against the Bureau of Labor Statistics classification system. The NC–9926 will contain a list of 6-digit codes and descriptions. Respondents are to select the activity which best describes their business by checking the box next to the activity listed or describe their principal business activity if no box can be checked.

III. Data

OMB Number: Not Available.

Form Number: NC-9926.

Type of Review: Regular Review.

Affected Public: Small businesses or other small for profit organizations.

Estimated Number of Respondents: 105,000.

Estimated Total Per Response: 5 minutes.

Estimated Total Annual Burden Hours: 8,750.

Estimated Total Annual Cost: The cost to government for this survey is included in the total cost of the 1997 Economic Census, estimated to be $218 million.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 USC, Sections 131 and 224.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's 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 will also become a matter of public record.

Dated: December 19, 1996.

Linda Engelmeier,

Acting Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 96–33171 Filed 12–27–96; 8:45 a.m.]

BILLING CODE 3510–07–P

International Trade Administration

[A–201–805]

Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results of Antidumping Duty Administrative Review.

SUMMARY: In response to requests from two respondents, the Department of Commerce (''the Department'') is conducting an administrative review of the antidumping duty order on circular welded non-alloy steel pipe and tube from Mexico. This review covers two manufacturers and exporters of the subject merchandise. The period of review (''POR'') is November 1, 1994, through October 31, 1995.

We preliminarily determine that sales have been made below normal value (''NV''). If these preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs to assess antidumping duties equal to the difference between export price (''EP'') and NV.

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument: (1) a statement of the issue; and (2) a brief summary of the argument.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: John Drury, Charles Rast, Robin Gray or Linda Ludwig, Enforcement Group III—Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Room 7866, Washington, D.C. 20230; telephone (202) 482–0414 (Drury), (202) 482–5811 (Rast), (202) 482–0196 (Gray), or (202) 482–3833 (Ludwig).

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (''the Act'') by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations published in the Federal Register on May 11, 1995 (60 FR 25130).

Background

The Department published an antidumping duty order on circular welded non-alloy steel pipe and tube from Mexico on November 2, 1992 (57 FR 49453). The Department published a notice of ''Opportunity to Request an Administrative Review'' of the antidumping duty order for the 1994/95 review period on November 1, 1995 (60 FR 55541). On November 29, 1995, respondent Hylsa S.A. de C.V. (''Hylsa'') requested that the Department conduct an administrative review of the antidumping duty order on circular welded non-alloy steel pipe and tube from Mexico. On November 30, 1995, respondent Tuberia Nacional S.A. de C.V. (''TUNA'') requested that the Department conduct an administrative review of this order. We initiated this review on December 8, 1995. *See* 60 FR 44414 (September 15, 1995).

Under Section 751(a)(3)(A) of the Act, the Department may extend the deadline for completion of administrative reviews if it determines that it is not practicable to complete the review within the statutory time limit of 365 days. On July 19, 1996, the Department extended the time limits for preliminary and final results in this case. *See Extension of Time Limit for Antidumping Duty Administrative Reviews,* 61 FR 40603 (August 5, 1996).

The Department is conducting this administrative review in accordance with section 751 of the Act.

Scope of the Review

The review of ''circular welded non-alloy steel pipe and tube'' covers products of circular cross-section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, bevelled end, threaded, or threaded and coupled). Those pipes and tubes are generally known as standard pipe, though they may also be called structural or mechanical tubing in certain applications. Standard pipes and tubes are intended for the low pressure conveyance of water, steam, natural gas, air and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. Standard pipe may also be used for light load-bearing and mechanical applications, such as for fence tubing, and for protection of electrical wiring, such as conduit shells.

The scope is not limited to standard pipe and fence tubing, or those types of mechanical and structural pipe that are used in standard pipe applications. All carbon steel pipes and tubes within the physical description outlined above are included within the scope of this review, except line pipe, oil country tubular goods, boiler tubing, cold-drawn or cold-rolled mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished rigid conduit. In accordance with the Final Negative Determination of Scope Inquiry (56 FR 11608, March 21, 1996), pipe certified to the API 5L line pipe specification, or pipe certified to both the API 5L line pipe specifications and the less-stringent ASTM A–53 standard pipe specifications, which fall within the physical parameters as outlined above, and entered as line pipe of a kind used for oil and gas pipelines, are outside of the scope of the antidumping duty order.

Imports of these products are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.3010.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. These HTS item numbers are provided for convenience and customs purposes. The written descriptions remain dispositive.

The POR is November 1, 1994 through October 31, 1995. This review covers sales of circular welded non-alloy steel pipe and tube by Hylsa and TUNA.

Verification

As provided in section 782(i)(3) of the Act, we verified information provided by the respondents using standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and selection of original documentation containing relevant information. Our verification results are outlined in the public versions of the verification reports.

Transactions Reviewed

In accordance with section 751 of the Act, the Department is required to determine the EP and NV of each entry of subject merchandise during the relevant review period.

In determining NV, based on our review of the submissions by Hylsa, the Department determined that Hylsa need not report ''downstream'' sales in the home market, which constituted a small quantity of Hylsa's home market sales. *See Letter to Shearman & Sterling from the Department* (August 9, 1996), a copy of which, as well as copies of other letters and memoranda referred to in this notice, are available in Room B–099 of the Department's Central Records Unit. Thus, Hylsa did not report downstream sales in the home market. Hylsa's downstream home market sales are properly excluded from our determination of NV because they were not made in the usual commercial quantities, in the ordinary course of trade, nor at the same level of trade as the EP sales. *See* Section 773 (a)(1) (A) and (B) of the Act. TUNA, on the other hand, has reported its downstream sales, and in accordance with Section 773 of the Act these sales have been used in our determination of NV for this respondent.

Product Comparisons

In accordance with section 771(16) of the Act, we considered each circular welded non-alloy steel pipe and tube product produced by the respondents, covered by the descriptions in the ''Scope of the Review'' section of this notice, *supra,* and sold in the home market during the POR, to be a foreign like product for purposes of determining appropriate product comparisons to U.S. sales of circular welded non-alloy steel pipe and tube. For each of the products produced by the respondents within the scope of the A–201–805 order, we examined the categories of merchandise listed in Section 771 (16) of the Act for purposes of model matching. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed in Appendix VI of the Department's March 22, 1996, antidumping questionnaire. In making the product comparisons, we matched each foreign like product based on the physical characteristics reported by the respondent and verified by the Department. Where sales were made in the home market on a different weight basis from the U.S. market (e.g. theoretical versus actual weight), we converted all quantities to the same weight basis, using the conversion factors supplied by the respondents, before making our fair-value comparisons.

The Department's practice is to use a methodology which accounts for distortionary inflation in instances where such inflation existed during the period of review. *See* Preliminary Results of Antidumping Duty Administrative Review, Gray Portland Cement and Clinker from Mexico 61 FR 51676 (October 3, 1996); Final Determination of Sales at Less Than Fair Value, Certain Fresh Cut Flowers from Mexico 52 FR 6361 (March 3, 1987). In this case, consistent with our prior practice, we determined that distortionary inflation existed during the period of review. *See Letter to Shearman & Sterling from the Department* (August 9, 1996). In order to take into account the rate of inflation in Mexico during the POR, we compared each foreign like product to a product exported to the U.S. and sold in the same month. Where there were no sales of identical merchandise in the home market to compare to U.S. sales within the same month, we compared U.S. sales to the next most similar foreign like product (on the basis of the characteristics listed in Appendix VI of the Department's March 22, 1996, antidumping questionnaire) which was sold in the same month.

Fair-Value Comparisons

To determine whether sales of circular welded non-alloy steel pipe and tube by the respondents to the United States were made at less than fair value, we compared EP to NV, as described in the ''Export Price'' and ''Normal Value'' sections of this notice. In accordance with section 777A(d)(2), we compared individual U.S. transactions to monthly weighted average NVs.

Date of Sale

Depending on the channel of trade and on the date after which the key terms of sale could not be changed, we treated one of the following dates as the date of the sale: the date of the invoice or the date of shipment.

Export Price

We calculated the price of United States sales based on EP, in accordance with section 772(a) of the Act, when the subject merchandise was sold to unaffiliated purchasers in the United States prior to the date of importation.

For both respondents, we calculated EP based on packed prices to unaffiliated customers in the United States. Where appropriate, in accordance with Section 772 of the Act, we made deductions from the starting price for foreign inland freight, foreign brokerage and handling, international freight, insurance, U.S. inland freight, U.S. brokerage and handling, and U.S. Customs duties. For Hylsa, we disallowed certain rebates which were claimed. (See Analysis Memo to the File from John Drury and Charlie Rast, dated *December* 19, 1996.)

Normal Value

Based on a comparison of the aggregate quantity of home-market and U.S. sales, we determined that the quantity of the foreign like product sold in the exporting country was sufficient to permit a proper comparison with the sales of the subject merchandise to the United States, pursuant to section 773(a) of the Act. Therefore, in accordance with section 773(a)(1)(B)(i) of the Act, we based NV on the price at which the foreign like product was first sold for consumption in the home market, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade.

Where appropriate, in accordance with Section 773(a)(6)(A) of the Act, we deducted rebates, discounts, inland freight, inland insurance, and packing. Based on our verification of home-market sales responses, we made adjustments to NV, where appropriate, for differences in credit expenses (offset where applicable by interest income), and post-sale warehousing. We also made adjustments, where appropriate, for home-market indirect selling expenses to offset U.S. commissions in EP comparisons.

In comparisons to EP sales, we also increased NV by U.S. packing costs in accordance with section 773(a)(6)(A) of the Act. We made adjustments to NV for differences in cost attributable to differences in physical characteristics of the merchandise, pursuant to section 773(a)(6)(C)(ii) of the Act. In accordance with the Department's practice, we based NV on constructed value (''CV'') where, for the most similar product match, the difference in merchandise adjustment for any product comparison exceeded 20 percent.

Hylsa

Based on our analysis and verification of home-market sales responses, we are disallowing adjustments for additional inland freight and a steel supplier rebate. For additional inland freight, we attempted, through our analysis and conversations with company officials, to confirm the accuracy of the claimed adjustment. We determined at verification that the company may not have used its own calculation methodology correctly, since the numbers used in the calculation may not have accurately reflected actual inland freight. In addition, we do not believe that the allocation methodology is accurate. At verification, we found that additional inland freight may have been allocated to certain home market sales to which no freight charges should apply. *See* Memorandum Reporting Verification of Sections A–C Questionnaire Response Submitted by Hylsa.

For the steel supplier rebate, we disallowed the adjustment because we did not consider the acquisition of the coil from a division of Hylsa to be a purchase but, rather, considered it to be a cost input. Hylsa's Tubular Products division obtains coil from the Flat Products division. These are two divisions within the same corporate entity. Therefore, we have not treated the transfer of coil as a sale. Rather than use the claimed rebate in the calculation of EP, which would be appropiate if we treated the acquisition of the coil as a sale, we used the cost of the acquisition, which we verified, in the calculation of Cost of Production, in accordance with Section 773 (b)(3)(A). *See Offshore Jackets and Piles from Japan, 51 FR 11788* (April 7, 1986).

Differences in Levels of Trade

As set forth in section 773(a)(1)(B)(I) of the Act and in the Statement of Administrative Action which accompanied the passage of the URAA (H.R. Doc. No. 316, 103rd Cong., 2nd Sess. 829–831 (1994)) (''SAA'), to the extent practicable, the Department will calculate NV based on sales at the same level of trade as the U.S. sales. When the Department is unable to find sales in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at different levels of trade. *See also Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy,* 61 FR 30326 (June 14, 1996).

In accordance with section 773(a)(7)(A), if sales at different levels of trade are compared, the Department will adjust the NV to account for the difference in level of trade if two conditions are met. First, there must be differences between the actual selling functions performed by the seller at the level of trade of the U.S. sale and the level of trade of the normal-value sale. Second, the differences between the levels of trade must affect price comparability as evidenced by a pattern of consistent price differences between sales at the different levels of trade in the market in which NV is determined.

In order to determine that there is a difference in level of trade, the Department must find that two sales have been made at different phases of marketing, or the equivalent. Different phases of marketing necessarily involve differences in selling functions, but differences in selling functions (even substantial ones) are not alone sufficient to establish a difference in the level of trade. Similarly, seller and customer descriptions (such as ''distributor'' and ''wholesaler'') are useful in identifying different levels of trade, but are insufficient to establish that there is a difference in the level of trade.

In implementing these principles in this review, we obtained information about the selling activities of the producers/exporters associated with each phase or marketing, or the equivalent. We asked each respondent to establish a claimed LOTs based on these marketing activities and selling functions. In reviewing the selling functions reported by the respondents, we considered all types of selling activities that had been performed on both a qualitative and quantitative basis. To test the claimed LOTs, we analyzed the selling activities associated with the marketing phases which respondents reported. In applying this test, we expect that, if a party claims that LOTS are different for different groups of sales through different channels, the functions and activities of the seller should be either dissimilar or different for each channel. The Department does not only count activities, but weighs the overall function performed at each claimed level of trade. In determining whether separate LOTs existed in the home market, pursuant to section 773 (a)(1)(B)(i) of the Act, we considered the selling functions reflected in the starting price of the home market sales before any adjustment. Below is a summary of our findings:

A. Hylsa

In its questionnaire responses, Hylsa stated that there were no differences in its selling activities by customer categories within each market. In order to confirm independently the absence of separate levels of trade within or between the U.S. and home markets, we examined Hylsa's questionnaire responses for indications that Hylsa's functions as a seller differed qualitatively and quantitatively among customer categories. Where possible, we further examined whether each selling function was performed on a substantial portion of sales. *See Proposed Regulations*, 61 FR at 7348.

Hylsa sold to end-users in the U.S. market. In the home market, Hylsa sold to local distributors and end-users. Hylsa performed essentially the same selling functions at the same stage of distribution on sales to all its home-market customers, as well as to U.S. customers. Thus, our analysis of the questionnaire response leads us to conclude that sales within or between each market are not made at different levels of trade. Accordingly, we preliminarily find that all sales in the home market and the U.S. market were made at the same level of trade. Therefore, all price comparisons are at the same level of trade and an adjustment pursuant to section 773(a)(7)(A) is unnecessary.

B. TUNA

TUNA sells subject merchandise directly to the United States. In the home market, it either sells through Lamina y Placa (an affiliated company) to end users (Channel 1) or to affiliated distributors/resellers which are part of the Associates Division (Channel 2) *See Questionnaire Response for Section A* (April 19, 1996).

In its questionnaire responses, TUNA stated that its home-market sales through affiliated distributors (Channel 2) were at a different level of trade than its other home-market sales directly from Lamina y Placa (Channel 1) and U.S. sales. The respondent indicated that a greater number of selling functions are provided to these home market affiliated resellers than to either U.S. customers or unaffiliated end-users which purchase directly from Lamina y Placa in the home market.

In order to confirm independently the presence of separate levels of trade within or between the U.S. and home markets, we examined TUNA's questionnaire responses for indications of substantive differences in selling functions, and reviewed this issue during the sales verification in Mexico.

Where possible, we further examined whether each selling function was performed on a substantial portion of sales. *See Proposed Regulations,* 61 FR at 7348.

At verification, the company TUNA adequately supported its claim that the home market affiliated distributors perform selling functions which, on a qualitative and quantitative basis, are different from the functions performed on either TUNA's other home market sales (i.e. sales made through Lamina y Placa directly to unaffiliated end-users, or Channel 1) or respondent's sales to U.S. customers their U.S. sales. In general, we found that the customers which purchased subject merchandise through Channel 1 were larger than those who made purchases through Channel 2. In addition, sales made through Channel 2 involved added layers of expenses such as distribution (e.g. transportation and storage) and sales expenses (the cost of added sales personnel and other related expenses). Finally, Lamina y Placa provided services and additional selling functions to affiliates that it did not provide to non-affiliated customers. *See Verification Exhibit 48 and Supplemental Questionnaire Response Exhibit 5* (August 9, 1996).

Thus, our analysis of the questionnaire responses leads us to conclude that sales within the home market by Lamina y Placa to unaffiliated end-users, and sales by affiliated resellers to unaffiliated end-users, were at two different levels of trade. Sales to the United States were at the same LOT as sales by Lamina y Placa to unaffiliated end users. To the extent possible, we will compare sales made in the U.S. to sales made directly by Lamina y Placa to unaffiliated end users in the home market (Channel 1), which are at the same level of trade as the U.S. sales. To the extent that it is necessary to match U.S. sales to home market sales at a different level of trade (Channel 2), we will first compare home market sales at the two different levels of trade to determine if there was a pattern of price differences at the two levels of trade. If we determine that there is a pattern of price differences, for any U.S. sales that are matched to home market sales of a different level of trade, we will make a level of trade adjustment.

Cost-of-Production Analysis

Petitioners alleged, on July 23, 1996 (with respect to Hylsa), and July 9, 1996 (with respect to TUNA), that Hylsa and TUNA sold circular welded non-alloy steel pipes and tubes in the home market at prices below COP. Based on these allegations, in accordance with Section 773(b) of the Act, the Department determined, on August 26, 1996 (for Hylsa), and on August 9,1996 (for TUNA), that it had reasonable grounds to believe or suspect that Hylsa and TUNA had sold the subject merchandise in the home market at prices below the COP. See Letter to Shearman and Sterling and Decision Memorandum (August 26, 1996) and Letter to White and Case and Decision Memorandum (August 9, 1996). We therefore initiated cost investigations with regard to Hylsa and TUNA in order to determine whether the respondents made home-market sales during the POR at prices below their COP within the meaning of section 773(b) of the Act.

Before making any fair-value comparisons, we conducted the COP analysis described below.

A. Calculation of COP

We calculated the COP based on the sum of each respondent's cost of materials and fabrication for the foreign like product, plus amounts for home-market selling, general, and administrative expenses (''SG&A'), and packing costs in accordance with section 773(b)(3) of the Act.

Based on our verifications of the cost responses submitted by Hylsa and TUNA, we adjusted each company's reported COP to reflect certain adjustments to the cost of manufacturing and general and administrative expenses.

B. Test of Home-Market Prices

We used the respondent's weighted-average COP, as adjusted (see above), for the period November 1, 1994, through October 31, 1995. We compared the weighted-average COP figures to home-market sales of the foreign like product as required under section 773(b) of the Act. In determining whether to disregard home-market sales made at prices below the COP, we examined whether (1) within an extended period of time, such sales were made in substantial quantities, and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to the home-market prices (not including VAT), less any applicable movement charges, discounts, and rebates.

C. Results of COP Test

Pursuant to section 773(b)(2)(C), where less than 20 percent of respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POR were at prices less than the COP, we found that sales of that model were made in ''substantial quantities'' within an extended period of time, in accordance with sections 773(b)(2)(B) and (C) of the Act, and were not at prices which would permit recovery of all costs within an extended period of time, in accordance with section 773(b)(2)(B) of the Act. When we found that below-cost sales had been made in ''substantial quantities'' and were not at prices which would permit recovery of all costs within a reasonable period of time, we disregarded the below-cost sales in accordance with section 773(b)(1) of the Act. Where all sales of a specific product were at prices below the COP, we disregarded all sales of that product, and calculated NV based on CV.

D. Calculation of CV

In accordance with section 773(e) of the Act, we calculated CV based on the sum of respondents' cost of materials, fabrication, SG&A, U.S. packing costs, interest expenses, and profit. In accordance with sections 773(e)(2)(A), we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country. For selling expenses, we used the weighted-average home-market selling expenses. Based on our verification of the cost responses submitted by Hylsa and TUNA, we adjusted each company's reported CV to reflect adjustments to COM and G&A. We also made adjustments, where appropriate, for home-market indirect selling expenses to offset U.S. commissions in EP comparisons.

Reimbursement

In pre-verification comments, Petitioners requested that the Department examine the issue of reimbursement for both TUNA and Hysla. For TUNA, we preliminarly determine that there was no reimbursement based upon the verification of TUNA's U.S. affiliate. For Hylsa, the issue is moot since the sales in question were found to be without margins at this time.

Currency Conversion

For purposes of the preliminary results, we made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York. Section 773A(a) directs the

Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a ''fluctuation.'' In accordance with the Department's practice, we have determined that a fluctuation exists when the daily exchange rate differs from a benchmark by 2.25 percent. *See, e.g., Certain Stainless Steel Wire Rods from France: Preliminary Results of Antidumping Duty Administrative* Review (61 FR 8915, 8918—March 6, 1996). The benchmark is defined as the rolling average of rates for the past 40 business days. When we determined a fluctuation existed, we substituted the benchmark for the daily rate. However, for the preliminary results we have not determined that a fluctuation exists, and we have not substituted the benchmark for the daily rate.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margins exist:

Circular Welded Non-Alloy Steel Pipes and Tubes

Producer/Manufacturer/Exporter	Weighted-Average Margin (percent)
Hylsa	1.36
TUNA	1.77

Parties to this proceeding may request disclosure within five days of publication of this notice and any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first working day thereafter. Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 37 days after the date of publication of this notice. The Department will publish a notice of the final results of the administrative review, including its analysis of issues raised in any written comments or at a hearing, not later than 180 days after the date of publication of this notice.

Cash Deposit

The following deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of circular welded non-alloy steel pipe and tube from Mexico entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a) of the Tariff Act: (1) The cash deposit rate for each respondent will be the rate established in the final results of this administrative review; (2) exporters not covered in this review, but covered in the LTFV investigation, the cash deposit rate will continue to be the company-specific rate published from the LTFV investigation; (3) if the exporter is not a firm covered in this review, or the original LTFV, 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 32.62 percent, the ''all others'' rate made effective by the LTFV investigations. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice serves as a preliminary 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 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 20, 1996.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 96–33173 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–DS–P

[A–570–832]

Pure Magnesium From the People's Republic of China: Notice of Initiation of New Shipper Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of initiation of new shipper antidumping duty administrative review: pure magnesium from the People's Republic of China.

SUMMARY: The Department of Commerce (the Department) has received a request to conduct a new shipper administrative review of the antidumping duty order on pure magnesium from the People's Republic of China (PRC), which has a May anniversary date. In accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended, and 19 CFR 353.22(h)(1995) of our Interim Regulations, we are initiating this new shipper administrative review.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Thomas O. Barlow or Kris Campbell, Antidumping/Countervailing Duty Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Telephone: (202) 482–0410 or 482–4733, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department has received a timely request from Taiyuan Heavy Machinery Import and Export Corporation (Taiyuan), in accordance with section 751(a)(2)(B) of the Tariff Act of 1930, as amended, (the Act) and 19 CFR 353.22(h) of the Department's Interim Regulations (60 FR 25130, 25134 (May 11, 1995)) (Interim Regulations), for a new shipper administrative review of the antidumping duty order on pure magnesium from the PRC (60 FR 25691 (May 12, 1995)). Because the calendar month in which the anniversary of the date of publication of this order is May, the semi-annual anniversary months are May and November.

Initiation of New Shipper Administrative Review

In its request, Taiyuan certified that it did not export the subject merchandise to the United States during the period of investigation (POI) (April 1, 1993 through March 31, 1994) and that it is not affiliated with any exporter or producer who exported the subject merchandise to the United States during the POI. Accompanying its request, Taiyuan provided certifications which indicate the date the merchandise was first entered for consumption in the United States, that it is not affiliated with any other company, and that it did not under its current or a former name export the subject merchandise to the United States during the POI. Therefore, in accordance with section 751(a)(2)(B)(i) of the Act and 19 CFR 353.22(h) (1) and (6), we are initiating a new shipper review of the antidumping duty order on pure magnesium from the PRC.

Further, in its request Taiyuan certified that its export activities are not controlled by the government of the PRC or any other government entity. However, it is the Department's practice with non-market economies (NMEs) to require information regarding *de jure* and *de facto* government control over a company's export activities to establish its eligibility for an antidumping duty rate separate from the country-wide rate. Accordingly, we will issue a separate-rates questionnaire to Taiyuan and seek additional information from the government of the PRC, as appropriate. If the responses from Taiyuan and the government of the PRC adequately demonstrate that Taiyuan is not subject to *de jure* and *de facto* government control with respect to its exports of pure magnesium, the review will proceed. If, on the other hand, the responses do not demonstrate Taiyuan's eligibility for a separate rate, Taiyuan will be deemed to be affiliated with other companies that exported during the POI which did not establish their entitlement to a separate rate and we will terminate the new shipper review.

If this review proceeds normally, we will issue the preliminary results of this review not later than 180 days from the date on which this review is initiated and the final results within 90 days after issuance of the preliminary results, unless these time limits are extended in accordance with section 751(a)(2)(B)(iv) of the Act and section 353.22(h)(7)(ii) of the Interim Regulations.

Antidumping duty proceeding	Period to be reviewed
Pure Magnesium: People's Republic of China: A–570–832; Taiyuan Heavy Machinery Import and Export Corporation	12/01/95–11/30/96

We will instruct the U.S. Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the merchandise exported by the above listed company, in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 353.22(h)(4)(1995).

Interested parties must submit applications for disclosure under administrative protective order in accordance with section 353.34(b) of the Department's regulations (19 CFR 353.34(b)(1995)).

This initiation and this notice are in accordance with section 751(a)(2)(B) of the Act (19 U.S.C. 1675(a)(2)(B)) and section 353.22(h) of the Interim Regulations.

Dated: December 17, 1996.

Barbara R. Stafford,

Deputy Assistant Secretary, Antidumping/ Countervailing Duty Enforcement.

[FR Doc. 96–33176 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–DS–P

[A-588-703]

Certain Welded Carbon Steel Standard Pipes and Tubes From India; Extension of Time Limits of New Shippers Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limits of new shippers review.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the preliminary results in the new shippers review of the antidumping duty order on certain welded carbon steel standard pipes and tubes from India, covering the period May 1, 1995, through April 31, 1996, because the Department has concluded that the review is extraordinarily complicated.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Davina Hashmi, Office of Antidumping/ Countervailing Duty Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–5760.

SUPPLEMENTARY INFORMATION:

Background

The Department of Commerce has received requests to conduct a new shippers review of the antidumping duty order on certain welded carbon steel standard pipes and tubes from India. On June 27, 1996, the Department initiated this new shippers review covering the period May 1, 1995, through April 31, 1996, in accordance with 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act). The Department has initiated a sales-below-cost investigation of the respondents in this review. We would not be able to complete this sales-below-cost investigation and incorporate that analysis in the margin calculations for our preliminary results of review within the deadline contained in section 751(a)(2)(B)(iv) of the Act. For this reason, we conclude that this new shippers review is extraordinarily complicated (see Memorandum from Laurie Parkhill to Barbara R. Stafford, Recommendation to Extend New Shippers Review Schedule, December 19, 1996). Therefore, in accordance with section 751(a)(2)(B)(iv) of the Act, the Department is extending the time limit for completing the preliminary results of review until April 23, 1997.

This extension is in accordance with section 751(a)(2)(B)(iv) of the Act.

Dated: December 19, 1996.

Barbara R. Stafford,

Deputy Assistant Secretary of AD/CVD Enforcement.

[FR Doc. 96–33177 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–DS–P

[C-357-403, C-357-005]

Oil Country Tubular Goods From Argentina and Cold-Rolled Carbon Steel Flat Products From Argentina: Preliminary Results of Countervailing Duty Administrative Reviews/Intent To Terminate Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of countervailing duty administrative reviews; intent to terminate administrative reviews.

SUMMARY: The Department of Commerce (''the Department'') is conducting administrative reviews of the countervailing duty order on Oil Country Tubular Goods (OCTG) from Argentina for the periods 1992, 1993, and 1994, pursuant to section 751(a) of the Tariff Act of 1930, as amended (the ''Act'). Also pursuant to section 751(a), the Department is conducting reviews of the countervailing duty order on Cold-Rolled Carbon Steel Flat Products (Cold-Rolled Steel) from Argentina for the periods 1992 and 1993.

The Department is also conducting changed circumstances reviews of the orders on OCTG and Cold-Rolled Steel from Argentina pursuant to section 751(b) of the Act. *Initiation of Changed Circumstances Countervailing Duty Administrative Reviews: Leather from Argentina, Wool from Argentina, Oil Country Tubular Goods from Argentina, and Cold-Rolled Carbon Steel Flat Products from Argentina,* 61 FR 14553 (April 2, 1996) (*Changed Circumstances*

Reviews). These reviews are focused on the legal effect, if any, of Argentina's status as a ''country under the Agreement,'' within the meaning of 19 U.S.C. §1303(a)(1) (1988; repealed 1994), as of September 20, 1991, on the countervailing duty orders covering leather, wool, OCTG, and Cold-Rolled Steel.

Because the administrative reviews cover periods after September 20, 1991, we have had to consider in these administrative reviews a question which is also at issue in the changed circumstances reviews—that is, whether the Department has the authority to assess countervailing duties on unliquidated entries of subject merchandise occurring after Argentina became a ''country under the Agreement'' and before January 1, 1995, the date that Argentina became a ''Subsidies Agreement country'' within the meaning of section 701(b) of the Act.

The Department preliminarily determines that it lacks the authority to assess countervailing duties on entries of OCTG and Cold-Rolled Steel from Argentina made on or after September 20, 1991 and on or before December 31, 1994. As a result, we intend to terminate the pending administrative reviews of the countervailing duty order on OCTG covering 1992, 1993, and 1994, as well as the pending administrative reviews of the countervailing duty order on Cold-Rolled Steel covering 1992 and 1993. The question of the Department's authority to assess duties on unliquidated entries of the subject merchandise made on or after January 1, 1995 under these orders (and whether to revoke these orders) remains to be determined in the context of the ongoing changed circumstances reviews.

If the final results of these administrative reviews remain the same as these preliminary results, we will instruct the U.S. Customs Service to liquidate all entries of OCTG and Cold-Rolled Steel subject to these administrative reviews without regard to countervailing duties as detailed in the *Preliminary Results of Reviews* section of this notice. Suspension of liquidation will continue at a cash deposit rate of zero for OCTG, as indicated in the section below entitled *Suspension of Liquidation.* Interested parties are invited to comment on these preliminary results. (*See Public Comment* section of this notice.)

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Dana Mermelstein or Megan Waters, Office 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 November 27, 1984, the Department published in the Federal Register (49 FR 46564) the countervailing duty order on OCTG from Argentina. The countervailing duty order on Cold-Rolled Steel from Argentina was published in the Federal Register (49 FR 18006) on April 26, 1984.

On November 1, 1995, November 10, 1994, and November 3, 1993, the Department published its annual notice of ''Opportunity to Request Administrative Review'' (60 FR 55540, 59 FR 56034, and 58 FR 58682) regarding the OCTG countervailing duty order. We received timely requests for each of these administrative reviews and we initiated the reviews pursuant to section 751(a) of the Act. The review of OCTG covering the period January 1 through December 31, 1994, was initiated on December 15, 1995 (60 FR 64413). The review of OCTG covering the period January 1 through December 31, 1993, was initiated on December 15, 1994 (59 FR 64650). The review of OCTG covering the period January 1 through December 31, 1992, was initiated on December 17, 1993 (58 FR 65964).

On April 7, 1994 and April 9, 1993, the Department published its annual notice of ''Opportunity to Request Administrative Review'' (59 FR 16615 and 58 FR 18374) regarding the countervailing duty order on Cold-Rolled Steel from Argentina. We received timely requests for each of these administrative reviews and we initiated the reviews pursuant to section 751(a) of the Act. The review of Cold-Rolled Steel covering the period January 1 through December 31, 1993, was initiated on May 12, 1994 (59 FR 24683). The review of Cold-Rolled Steel covering the period January 1 through December 31, 1992, was initiated on May 27, 1993 (58 FR 30767).

The Ceramica Decision

On September 6, 1995, the Court of Appeals for the Federal Circuit (CAFC) held, in a case involving imports of dutiable ceramic tile, that Mexico became a ''country under the Agreement'' within the meaning of 19 U.S.C. §1303(a)(1) (1988; repealed 1994) on the date that it signed its ''Understanding'' with the United States ''Regarding Subsidies and Countervailing Duties'' (''Mexican MOU''). *Ceramica Regiomontana* v. *United States,* 64 F.3d 1579, 1583 (Fed. Cir. 1995) (*Ceramica*). According to the court, language in the agreement which suggested a later date (*i.e.,* only for pending and new investigations) was ''trumped'' by the statute. *Id.*

Once Mexico became a country under the Agreement, the court declared, the Department could not assess countervailing duties on tile from that country under former section 303(a)(1) of the Act. 64 F.3d at 1582. ''After Mexico became a 'country under the Agreement,' the only provision under which ITA could continue to impose countervailing duties was section 1671.'' *Id.*

One of the prerequisites to the assessment of countervailing duties under 19 U.S.C. 1671 (1988) is an affirmative injury determination. *See also Id.* at §1671e. However, at the time the countervailing duty order on ceramic tile was issued, the requirement of an affirmative injury determination under U.S. law was not applicable. Therefore, the court looked to see whether the statute contained any means by which the order on tile could receive an injury test. Specifically, the court looked at section 104(b) of the Trade Agreements Act of 1979, Public Law N. 96–39 (July 20, 1979) (1979 Act).

Section 104(b) was designed to provide an injury test for certain countervailing duty orders issued under former section 303 prior to the effective date of the 1979 Act (which established Title VII and, in particular, section 701 of the Act). However, in order to induce other countries to accede to the 1979 Subsidies Code (or substantially equivalent agreements), the window of opportunity was intentionally limited. In order to qualify (i) the exporting nation had to be a country under the Agreement (*e.g.,* a signatory of the Subsidies Code) by January 1, 1980, (ii) the order had to be in existence on January 1, 1980 (*i.e.,* the effective date of Title VII), and (iii) the exporting country (or in some instances its exporters) had to request the injury test on or before January 2, 1983.

The countervailing duty order on ceramic tile from Mexico was issued in 1982 and Mexico did not become a country under the Agreement until April 23, 1985. Therefore, the court held that, in the absence of an injury test and the statutory means to provide one, the Department could not assess countervailing duties on ceramic tile and ordered the Department to revoke the order effective April 23, 1985. *Ceramica,* 64 F.3d at 1583.

The Argentine Memorandum of Understanding

The effective date of the Understanding Between the United States of America and the Republic of Argentina Regarding Subsidies and Countervailing Duties (Argentine MOU), under which Argentina attained the status of a ''country under the Agreement,'' was September 20, 1991. Therefore, in consideration of the *Ceramica* decision, on April 2, 1996, the Department initiated changed circumstances reviews of the orders on Leather, Wool, OCTG and Cold-Rolled Steel from Argentina. *Changed Circumstances Reviews,* 61 FR at 14553. The Department initiated these reviews to determine whether Argentina's status as a ''country under the Agreement'' affects its authority to assess countervailing duties on unliquidated entries of subject merchandise occurring after September 20, 1991. As part of this inquiry, the Department will determine whether the requests for injury investigations received by the U.S. International Trade Commission under section 753(a) of the Act in connection with the countervailing duty orders covering Leather, Wool, and OCTG from Argentina have any bearing on the Department's authority to assess duties on entries occurring on or after January 1, 1995.

Scope of the Reviews

OCTG from Argentina.

Imports covered by this order include shipments of Argentine oil country tubular goods. Oil country tubular goods include hollow steel products of circular cross-section intended for use in the drilling of oil or gas and oil well casing, tubing and drill pipe or carbon or alloy steel, whether welded or seamless, manufactured to either American Petroleum Institute (API) or proprietary specifications. The scope covers both finished and unfinished OCTG. The products covered in this review are provided for under item numbers of the *Harmonized Tariff Schedule* (HTS): 7304.20.20, 7304.20.40, 7304.20.50, 7304.20.60, 7304.20.80, 7304.39.00, 7304.51.50, 7304.20.70, 7304.59.60, 7304.59.80, 7304.90.70, 7305.20.40, 7305.20.60, 7305.20.80, 7305.31.40, 7305.31.60, 7305.39.10, 7305.39.50, 7305.90.10, 7305.90.50, 7306.20.20, 7306.20.30, 7306.20.40, 7306.20.60, 7306.20.80, 7306.30.50, 7306.50.50, 7306.60.70, 7306.90.10. The HTS subheadings are provided for convenience and Customs purposes. The written description remains dispositive.

Cold-Rolled Steel from Argentina. Imports covered by this order include shipments of Argentine cold-rolled carbon steel flat products, whether or not corrugated or crimped; whether or not painted or varnished and whether or not pickled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal; over 12 inches in width and under 0.1875 inches in thickness whether or not in coils; as currently provided for under the following item numbers of the HTS: 7209.11.00, 7209.12.00, 7209.13.00, 7209.14.00, 7209.21.00, 7209.22.00, 7209.23.00, 7209.24.00, 7209.31.00, 7209.32.00, 7209.33.00, 7209.34.00, 7209.41.00, 7209.42.00, 7209.43.00, 7209.44.00, 7209.90.00, 7210.70.00, 7211.30.50, 7211.41.70, 7211.49.50, 7211.90.00, 7212.40.50. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

Preliminary Results of Reviews / Intent To Terminate Administrative Reviews

Unliquidated entries of subject merchandise which occurred on or after September 20, 1991 and on or before December 31, 1994, involve the same set of pertinent facts as the Department faced in connection with the countervailing duty order on ceramic tile from Mexico.

First, at the time the countervailing duty orders on Mexico and Argentina were issued, the requirement of an affirmative injury determination under U.S. law was not applicable. Second, both countries concluded similar agreements with the United States which resulted in their becoming ''countries under the Agreement'' within the meaning of former section 303(a)(1) of the Act. Third, at the time Mexico and Argentina qualified as countries under the Agreement, the assessment of countervailing duties on subsequent entries of dutiable merchandise became dependent upon a finding of subsidization and injury in accordance with section 701 of the Act. Fourth, none of the transition rules in the statute can be applied to the subject entries. Specifically, section 104 of the 1979 Act only applies to countervailing duty orders issued before January 1, 1980. Also, there is a question, at issue in the changed circumstances reviews, whether section 753 of the Act applies to these orders. In all events, however, it is clear that section 753 does not apply to entries occurring on or before December 31, 1994.

Therefore, we preliminarily determine that the Department cannot assess duties on entries made on or after September 20, 1991 and on or before December 31, 1994. If these preliminary results are made final, the Department will terminate these administrative reviews. However, we intend to complete the pending 1991 administrative reviews of these two orders in order to determine the appropriate countervailing duty assessment rate for those 1991 entries made prior to September 20, 1991. The question of the Department's authority to assess duties on unliquidated entries of OCTG made on or after January 1, 1995 remains to be determined in the context of the ongoing changed circumstances reviews.

Suspension of Liquidation

The suspension of liquidation for entries of Cold-Rolled Steel and OCTG from Argentina made on or after January 1, 1991 and before September 20, 1991 will continue pending the completion of the 1991 administrative reviews. The suspension of liquidation for entries of OCTG from Argentina made on or after January 1, 1995 will continue, at the cash deposit rate of zero. Because the countervailing duty order on Cold-Rolled Steel was revoked effective January 1, 1995 (60 FR 40568), the Department instructed Customs to discontinue the suspension of liquidation for entries made on or after that date.

Public Comment

Interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. We request that parties limit arguments in the case briefs to the issue of whether the Department has the authority to assess countervailing duties on shipments of OCTG and Cold-Rolled Steel from Argentina entered on or after September 20, 1991 and on or before December 31, 1994. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Parties who submit argument in this proceeding are requested to submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument. Any hearing, if requested, will be held seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 C.F.R. §355.38.

The Department will publish the final results of these administrative reviews, including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

These administrative reviews and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)).

Dated: December 20, 1996.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 96–33175 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–DS–P

National Institute of Standards and Technology

[Docket No. 961121324–6364–02]

RIN 0693–ZA14

Announcement of Availability of Funding for Focused Program Competitions—Advanced Technology Program (ATP)

AGENCY: National Institute of Standards and Technology, Technology Administration, Commerce.

ACTION: Notice.

SUMMARY: The Technology Administration's National Institute of Standards and Technology (NIST) announces the availability of funding for two Focused Program competitions under the Advanced Technology Program (ATP) for fiscal year 1997, targeted on specific technology areas. The two Focused Program competitions being held are: (1) Motor Vehicle Manufacturing Technology (97–02) and (2) Information Infrastructure for Healthcare (97–03). This notice provides general information for these Focused Program competitions.

DATES: Proposal due dates and other specific instructions will be published in the Commerce Business Daily (CBD) at the time the competitions are announced. Dates, times, and locations of Proposers' Conferences held for interested parties considering applying for funding will also be announced in the CBD.

ADDRESSES: Information on the ATP may be obtained from the following address: National Institute of Standards and Technology, Advanced Technology Program, Administration Building (Bldg. 101), Room A407, Quince Orchard & Clopper Roads, Gaithersburg, MD 20899–0001.

Additionally, information on the ATP is available on the Internet through the World Wide Web (WWW) at http://www.atp.nist.gov.

FOR FURTHER INFORMATION CONTACT: Requests for ATP information, application materials, and/or to have your name added to the ATP mailing list for future mailings may also be made by:

(a) Calling the ATP toll-free ''hotline'' number at 1–800–ATP–FUND or 1–800–287–3863. You will have the option of hearing recorded messages regarding the status of the ATP or speaking to one of our customer representatives who will take your name and address. If our representatives are all busy when you call, leave a message after the tone. To ensure that the information is entered correctly, please speak distinctly and slowly and spell the words that might cause confusion. Leave your phone number as well as your name and address;

(b) Sending a facsimile (fax) to 301–926–9524 or 301–590–3053; or

(c) Sending electronic mail to atp@nist.gov. Include your name, full mailing address, and phone number.

SUPPLEMENTARY INFORMATION:

Background

The statutory authority for the ATP is Section 5131 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418, 15 U.S.C. 278n), as modified by Public Law 102–245. The ATP implementing regulations are published at 15 CFR Part 295. The Catalog of Federal Domestic Assistance (CFDA) number and program title for the ATP are 11.612, Advanced Technology Program (ATP).

The ATP is a rigorously competitive cost-sharing program designed to assist United States industry/businesses pursue high-risk, enabling technologies with significant commercial/economic potential. The ATP provides multi-year funding to single companies and to industry-led joint ventures to pursue research and development (R&D) projects with high-payoff potential for the nation. The ATP accelerates enabling technologies that, because they are risky, are unlikely to be developed in time to compete in rapidly changing world markets without such a partnership between industry and the Federal government. The ATP challenges industry to take on projects characterized by high technical risk but commensurately high potential payoff to the nation. Proposers must provide credible arguments as to the project feasibility.

The funding instrument used in ATP awards is a ''cooperative agreement.'' Through the cooperative agreement, the ATP fosters a government-industry partnership to accomplish a public purpose of support or stimulation. NIST plays a substantial role in these awards by providing technical assistance and monitoring the technical work and business progress.

Funding Availability

An estimated $10 million to $15 million in first year funding is available for each of the two Focused Program Competitions. The ATP reserves the right to utilize for any competition more or less funding than the amounts stated above. The actual number of proposals funded will depend on the quality of the proposals received and the amount of funding requested in the highest ranked proposals. Outyear funding beyond the first year is contingent on the approval of future Congressional appropriations and satisfactory project performance.

Eligibility Requirements, Selection Criteria, and Proposal Review Process

The eligibility requirements, selection criteria, and the proposal review process are discussed in detail in the ATP implementing regulations published at 15 CFR Part 295.

Funding Amounts, Award Period and Cost Sharing (Matching) Requirements

(a) Single companies can receive up to $2 million of ATP funds for up to 3 years. Single companies do not have to provide matching funds, but they are reimbursed for direct costs only. Single companies are responsible for securing funding for all overhead/indirect costs.

(b) Joint ventures can receive a minority share of the total project costs for up to 5 years. Joint ventures must cost-share (matching funds) more than 50 percent of the total project costs (direct plus indirect costs) for each quarter that the ATP funds the project. Subcontractors funded under an ATP cooperative agreement may not contribute towards the matching-fund requirement.

Application Forms and Proposal Preparation Kit

A new November 1996 version of the ATP Proposal Preparation Kit is available upon request from the ATP at the address and phone numbers noted in this notice. Note that the ATP mailed the Kit to all those individuals whose names are currently on the ATP mailing list. The Kit contains proposal cover sheets, other required forms, background material, and instructions for submission of proposals. All proposals must be prepared in accordance with the instructions in the Kit.

Submission of Revised Proposals

An applicant may submit a full proposal that is a revised version of a full proposal submitted to a previous ATP competition. NIST will examine such proposals to determine whether substantial revisions have been made. Where the revisions are determined not to be substantial, NIST reserves the right to score and rank, or where appropriate, to reject, such proposals based on reviews of the previously submitted proposal.

Other Requirements

(a) Federal Policies and Procedures. Recipients and subrecipients are subject to all Federal laws and Federal and Department of Commerce policies, regulations, and procedures applicable to Federal financial assistance awards as identified in the cooperative agreement award.

(b) Past Performance. Unsatisfactory performance under prior Federal awards may result in a proposal not being considered for funding.

(c) Pre-award Activities. If applicants incur any costs prior to an award being made, they do solely at their own risk of not being reimbursed by the Government. Only written authorization from the NIST Grants Officer will obligate NIST to cover pre-award costs.

(d) No Obligation for Future Funding. If a proposal is selected for funding, NIST has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of NIST.

(e) Delinquent Federal Debts. No award of Federal funds shall be made to an applicant or recipient who has an outstanding delinquent Federal debt until either the delinquent account is paid in full, a negotiated repayment schedule is established and at least one payment is received, or other arrangements satisfactory to NIST are made.

(f) Name Check Review. All for-profit and non-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.

(g) Primary Applicant Certification. All primary applicants (including all joint venture participants) must submit a completed form CD–511, ''Certifications Regarding Debarment, Suspension, and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying,'' and the following explanation is hereby provided:

(1) *Nonprocurement Debarment and Suspension.* Prospective participants, as defined at 15 CFR part 26, section 105 are subject to 15 CFR part 26, ''Nonprocurement Debarment and Suspension'' and the related section of the certification form prescribed above applies;

(2) *Drug-Free Workplace.* Grantees (as defined at 15 CFR part 605) are subject to 15 CFR 26, subpart F, ''Governmentwide Requirements for Drug-Free Workplace (Grants)'' and the related section of the certification form prescribed above applies;

(3) *Anti-Lobbying.* Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 USC 1352, ''Limitations 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; and,

(4) *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.

(h) Lower Tier Certification. Recipients shall require applicants/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 Form SF–LLL, ''Disclosure of Lobbying Activities.'' Although the CD–512 is intended for the use of primary recipients and should not be transmitted to NIST, the SF–LLL submitted by any tier recipient or subrecipient should be forwarded in accordance with the instructions contained in the award document.

(i) False Statements. A false statement on any application for funding under ATP may be 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.

(j) Intergovernmental Review. The ATP does not involve the mandatory payment of any matching funds from state or local government and does not affect directly any state or local government. Accordingly, the Department of Commerce has determined that Executive Order 12372, ''Intergovernmental Review of Federal Programs'' is not applicable to this program.

(k) American-Made Equipment and Products. Applicants are hereby notified that they are encouraged, to the greatest extent practicable, to purchase American-made equipment and products with the funding provided under this program in accordance with Congressional intent.

(l) Paperwork Reduction Act. This notice contains collection of information requirements subject to the Paperwork Reduction Act (PRA) which have been approved by the Office of Management and Budget (OMB Control No. 0693–0009). 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 No.

Dated: December 23, 1996.

Samuel Kramer,

Associate Director.

[FR Doc. 96–33133 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–13–P

[Docket No. 961030302–6302–01]

RIN 0693–ZA12

Physics Laboratory 1997 Summer Undergraduate Research Fellowships (SURF)—Partnerships in Atomic, Molecular and Optical (AMO) Physics

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: Through Summer Undergraduate Research Fellowship, the program ''SURFing the Physics, Lab: A Partnership for AMO Physics'' will provide an opportunity for the Physics Laboratory of the National Institute of Standards and Technology and the National Science Foundation to join in partnership with American colleges and universities, to encourage outstanding physics students to pursue scientific careers. This program will function by exposing students to the world class atomic, molecular, optical and radiation physicists and facilities in the NIST Physics Laboratory, and by strengthening undergraduate AMO physics curricula by forming the basis of ongoing collaborations. The NIST

program director will work with physics department chairs and directors of multi-disciplinary centers of excellence to identify outstanding undergraduates (including graduating seniors) who would benefit from off-campus summer research in an honors academy environment. We recommend a group of two candidates plus one alternate to be nominated by each institution, although larger or smaller groups will be given equal consideration. The selected group of about twenty-give (25) students will spend approximately twelve (12) weeks at the Physics Laboratory's Gaitherburgh, MD campus, working one-on-one with NIST staff physicists actively engaged in projects that combine the quest for fundamental knowledge and direct applications to problems of national importance. The 12-week stipend for the summer of 1997 will be $3600. Students and NIST research advisors will be paired, based on the student's background and interests, in the spring. This allows for adequate dialog between the student, the student's physics professors and the NIST advisor. It also ensures that the student arrives at NIST ready to contribute, and prepares the student's physics professor for follow-up in the fall. Good overlap of research interest will facilitate collaborations between NIST and the participating academic partners. The students will live in a nearby furnished apartment complex and participate in the many NIST seminars and in a weekly SURFing the Physics Lab Summer Seminar Series. The students will all present a research seminar at NIST and be encouraged to participate in a local or national scientific conference during the following academic year. Given the significant lack of diversity in the present physics work force, we encourage students from under-represented groups to apply. Costs for this program (stipend, travel and housing) will be shared by NIST, NSF and the participating schools.

DATES: Proposals must be received no later than the close of business February 14, 1997.

ADDRESSES: Applicants must submit one signed original plus two (2) copies of the proposal along with the Grant Application, Standard Form 424 (Rev. 4/92) to: Physics Laboratory, Attn: Dr. Paul D. Lett, National Institute of Standards and Technology, Building 221, Room A–167, Gaithersburg, MD 20899–0001.

FOR FURTHER INFORMATION CONTACT: Dr. Paul D. Lett, (301) 975–6559.

SUPPLEMENTARY INFORMATION:

Catalog of Federal Domestic Assistance Name and Number

Measurement and Engineering Research and Standards; 11.609

Authority

The Act of March 3, 1901, as amended (15 U.S.C. 278g–l) authorizes the National Institute of Standards and Technology to expend up to 1 per centum of the funds appropriated for activities of NIST in any fiscal year, as the Director deems appropriate, for financial assistance awards in the form of cooperative agreements to students at institutions of higher learning within the United States. These students must show promise as present or future contributors to the missions of NIST. Cooperative Agreements are awarded to assure continued growth and progress of science and engineering in the United States, including the encouragement of women and minority students to continue their professional development.

Program Description

The objective of this partnership is to build a mutually beneficial relationship between the student, the institution of higher learning, and NIST. This is the fourth year of a program partially funded by the NSF Physics Division as a Research Experience for Undergraduates Site (REU). Between 20 and 50% of the associated student stipends, travel and housing will be provided in cost sharing by the individual participating institutions.

NIST is one of the nation's premiere institutions for the physical sciences and, as the lead agency for technology transfer, is providing a strong interface between government, industry, and academia; on-site researchers at NIST come from a broad range of colleges and industries. Owing to its unique mission to support the U.S. economy by working with industry, NIST embodies a special science culture, developed from a large and well-equipped research staff that enthusiastically blends programs that address the immediate needs of industry with longer-term research that anticipates future needs. This synergy occurs in few other places and enables the Physics Laboratory to offer unique research and training opportunities for undergraduates, providing them a research-rich environment and exposure to state of the art equipment, as well as to scientists at work and to professional contacts that represent future employment possibilities.

Attending to the long term needs of many U.S. high-technology industries, NIST's Physics Laboratory conducts basic research in the areas of quantum, electron, optical, atomic, molecular, and radiation physics. This is complemented by applied research devoted to overcoming barriers to the next technological revolution, in which individual atoms and molecules will serve as the fundamental building blocks of electronic and optical devices. To achieve these goals, staff develop and utilize highly specialized equipment, such as polarized electron microscopes, scanning tunneling microscopes, lasers, and x-ray and synchrotron radiation sources. Research projects can be theoretical or experimental, and will range in focus from quantum electrodynamics, through trapping atoms and choreographing molecular collisions, to ionizing radiation. SURF students will work one-on-one with our nation's top physical scientists both from NIST and from some of our nation's leading, high tech industries. It is anticipated that successful SURF students will move from a position of reliance on guidance from their research advisors to one of research independence during the twelve-week period. One goal of this partnership is to provide opportunities for our nation's next generation of scientists and engineers to engage in world-class scientific research at NIST, especially in ground-breaking areas of emerging technologies. This carries with it the hope of motivating these individuals to pursue a Ph.D. in physics and to consider research careers. SURFing the Physics Lab will attempt to forge partnerships with NSF and with post-secondary institutions that demonstrate strong, hands-on undergraduate science curricula, especially those with a demonstrated commitment to the education of women, minorities and students with disabilities. This program will be open to all U.S. citizens interested in AMO physics.

Eligibility

Colleges and universities with degree granting programs in areas of AMO physics.

Funding Availability

The NIST Physics Laboratory will commit approximately $45,000 to support cooperative agreements under this program. The NIST Physics Laboratory's REU Program is anticipating renewal of funding by the NSF at a level between $50,000 and $70,000 per year. The anticipated direct and indirect cost for stipends, travel and housing and conference attendance for up to twenty-five students is about

$150,000. The actual number of awards made under this announcement will depend on the level of cost sharing by our academic partners. The issuance of awards is contingent upon the availability of funding.

Proposal Review Process

All proposals will be reviewed by a panel of three NIST scientists appointed by the Program Director. Proposals should include the following:

(A) Student Information:

(1) official transcript for each student nominated with a recommended G.P.A. of 3.0 or better;

(2) a personal statement from each student and statement of commitment to participate in the 1997 SURF program, including a description of the student's prioritized research interests;

(3) a resume for each student; and

(4) two letters of recommendation for each student. All references to student include the proposed alternate.

(B) Information About the Applicant Institution:

(1) description of the applicant's education and research philosophy, faculty interests, on-campus research program(s) and opportunities, and overlapping research interests of NIST and the institution; and

(2) a statement addressing issues of academic credit and commitment to cost sharing.

Application Kit

An application kit, containing all required application forms and certifications is available by calling Marilyn King at (301) 975–3200. An application kit includes the following:

SF 424 (Rev 4/92)—Application for Federal assistance
SF 424A (Rev 4/92)—Budget information—Non-Construction Programs
SF 424B (Rev 4/92)—Assurances—Non-Construction Programs
CD 511 (7/91)—Certification regarding debarment, suspension, and other responsibility matters; drug-free workplace requirements and lobbying
CD 512 (7/91)—Certification regarding debarment, suspension, ineligibility and voluntary exclusions—lower tier covered transactions and lobbying
SF-LLL Disclosure of lobbying activities

Evaluation Criteria

Evaluation of Student's Academic Ability and Commitment to Program Goals (35%): Includes, but is not limited to, evaluation of the following: Completed course work; expressed research interest; prior research experience; grade point average in courses relevant to program; career plans; honors and activities.

Evaluation of Applicant Institution's Commitment to Program Goals (35%): Includes, but is not limited to, evaluation of the following: Institution's focus on AMO physics; overlap between research interests of the institution and NIST; emphasis on undergraduate hands-on research; undergraduate participation in research conferences/programs; on-campus research facilities; past participation by students/institution in such programs; and commitment to educate women/minorities, and persons with disabilities. Evaluation of Applicant Institution's Cost Sharing (30%): In the spirit of a true partnership, successful applicants will be encouraged to contribute matching funds. A suggested level of participation would be to directly cover student travel (one round trip by common carrier) and housing costs (approximately $1500); a higher level of participation, such as partial payment of the student's stipend, stated intent to support the participating students at a research conference, and/or awarding of academic credit, will be given extra merit in the evaluation process.

Award decisions shall be based upon total evaluation score.

Award Period

The 1997 Physics Laboratory SURFing Partnership is anticipated to run between May 27 through August 15, 1997; adjustments may be made to accommodate specific academic schedules (e.g., a limited number of 10-week cooperative agreements).

Paperwork Reduction Act

The Standard Form 424 and other Standard Forms in the application kit are subject to the requirements of the Paperwork Reduction Act and have been approved by OMB under Control Nos. 0348–0043, 0348–0044, 0348–0040, and 0348–0046.

Additional Requirements

Primary Application 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,'' and the following explanations must be provided:

1. Nonprocurement debarment and suspension. Prospective participants (as defined at 15 CFR Part 26, Section 105) are subject to 15 CFR Part 26, ''Nonprocurement Debarment and Suspension'' and the related section of the certification form prescribed above applies;

2. Drug-free workplace. Grantees (as defined at 15 CFR Part 26, Section 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;

3. Anti-lobbying. Persons (as defined at 15 CFR Part 28, Section 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.

4. Anti-lobbying disclosure. 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.

5. Lower-tier certifications. Recipients shall require applicants/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 NIST. SF–LLL submitted by any tier recipient or subrecipient should be submitted to NIST in accordance with the instructions contained in the award document.

Preaward Activities

Applicants who incur any costs prior to an award being made do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that may have been provided, there is no obligation on the part of NIST to cover preaward costs.

No Obligation for Future Funding

If an application is accepted for funding, DOC has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of NIST.

Past Performance

Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

False Statements

A false statement on an application 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.

Delinquent Federal Debts

No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either:

1. The delinquent account is paid in full,

2. A negotiated repayment schedule is established and at least one payment is received, or

3. Other arrangements satisfactory to DoC are made.

Indirect Costs

The total dollar amount of the indirect costs proposed in an application under this program must not exceed the indirect cost rate negotiated and approved by a cognizant Federal agency prior to the proposed direct cost dollar amount in the application whichever is less.

Purchase of American-made Equipment and Products

Applicants are hereby notified that they are encouraged, to the greatest practicable extent, to purchase American-made equipment and products with funding provided under this program.

Federal Policies and Procedures

Recipients and subrecipients under the Physics Laboratory Program shall be subject to all Federal laws and Federal and Departmental regulations, policies, and procedures applicable to financial assistance awards. The SURF program does not directly affect any state or local government. Applicants are reminded of the applicability of Executive Order 12372, ''Intergovernmental Review of Federal Programs.''

Executive Order Statement

This funding notice was determined to be ''not significant'' for purses of Executive Order 12866.

Dated: December 18, 1996.

Samuel Kramer

Associate Director.

[FR Doc. 96–33134 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–13–M

Announcement of Meeting of National Conference on Weights and Measures

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the Interim Meeting of the National Conference on Weights and Measures will be held January 12 through 16, 1997, at the Doubletree Hotel, Rockville, MD. The meeting is open to the public.

The National Conference on Weights and Measures is an organization of weights and measures enforcement officials of the States, counties, and cities of the United States, and private sector representatives. The interim meeting of the conference, as well as the annual meeting to be held next July (a notice will be published in the Federal Register prior to such meeting), brings together enforcement officials, other government officials, and representatives of business, industry, trade associations, and consumer organizations to discuss subjects that relate to the field of weights and measures technology and administration.

Pursuant to section 2(5) of its Organic Act (15 U.S.C. 272(5)), the National Institute of Standards and Technology acts as a sponsor of the National Conference on Weights and Measures in order to promote uniformity among the States in the complex of laws, regulations, methods, and testing equipment that comprises regulatory control by the States of commercial weighing and measuring.

DATES: The meeting will be held January 12–16, 1997.

LOCATION OF MEETING: Doubletree Hotel, Rockville, MD.

FOR FURTHER INFORMATION CONTACT: Dr. Gilbert Ugiansky, Executive Secretary, National Conference on Weights and Measures, P.O. Box 4025, Gaithersburg, Maryland 20885. Telephone: (301) 975–4005.

Dated: December 18, 1996.

Samuel Kramer,

Associate Director.

[FR Doc. 96–33135 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–13–M

Evaluation of Coastal Zone Management Programs and National Estuarine Research Reserve

AGENCY: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice of intent to evaluate.

SUMMARY: The NOAA Office of Ocean and Coastal Resource Management (OCRM) announces its intent to evaluate the performance of the Alabama, American Samoa and Louisiana Coastal Zone Management Programs and the Apalachicola (FL) National Estuarine Research Reserve Program.

These evaluations will be conducted pursuant to section 312 and 315 of the Coastal Zone Management Act of 1972 (CZMA), as amended. The CZMA requires a continuing review of the performance of states with respect to coastal program implementation and reserve management. Evaluation of Coastal Zone Management Programs and National Estuarine Research Reserves requires findings concerning the extent to which a state has met the national objectives, adhered to its coastal program document or reserve Management Plan approved by the Secretary of Commerce, and adhered to the terms of financial assistance awards funded under the CZMA. The evaluations will include a site visit, consideration of public comments, and consultations with interested Federal, State, and local agencies and members of the public. Public meetings are held as part of the site visits.

Notice is hereby given of the dates of the site visits for the listed evaluations, and the dates, local times, and locations of public meetings during the site visits.

The Alabama Coastal Zone Management Program site visit will be from February 3–7, 1997. A public meeting will be on Wednesday, February 5, 1997, at 6:00 p.m., in the International Trade Center, 250 Water Street, Mobile, Alabama.

The Apalachicola National Estuarine Research Reserve in Florida, site visit will be from February 10–14, 1997. A public meeting will be held on Wednesday, February 12, 1997, at 7:00 p.m., at the Apalachicola NERR Headquarters, 261 7th Street, Apalachicola, Florida.

The American Samoa Coastal Zone Management Program site visit will be from February 24–28, 1997. A public meeting will be on Wednesday, February 26, 1997, at 4:30 p.m., at the Rainmaker Hotel, Tapa Room.

The Louisiana Coastal Zone Management Program site visit will be from February 24–28, 1997. A public meeting will be on Wednesday, February 26, 1997, at 7:00 p.m., at the State Lands and Natural Resources Building, Mineral Board Hearing Room, 625 North Fourth Street, Baton Rouge, Louisiana.

The States will issue notice of the public meeting(s) in a local newspaper(s) at least 45 days prior to the public meeting(s), and will issue other timely notices as appropriate.

Copies of the State's most recent performance reports, as well as OCRM's notifications and supplemental request letters to the States, are available upon request from OCRM. Written comments from interested parties regarding these Programs are encouraged and will be accepted until 15 days after the public meeting. Please direct written comments to Vickie A. Allin, Chief, Policy Coordination Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910. When the evaluation is completed, OCRM will place a notice in the Federal Register announcing the availability of the Final Evaluation Findings.

FOR FURTHER INFORMATION CONTACT: Vickie A. Allin, Chief, Policy Coordination Division, Office of Ocean and Coastal Resource Management, NOS/NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, (301) 713–3090, ext. 126.

Federal Domestic Assistance Catalog 11.419. Coastal Zone Management Program Administration.

Dated: December 20, 1996.

Dr. David L. Evans,

Acting Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 96–33086 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–08–M

National Oceanic and Atmospheric Administration

[I.D. 121996C]

North Pacific Fishery Management Council; Committee Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Northwest Crab Industry Advisory Committee (PNCIAC), will meet on January 6, 1997, in Seattle, WA.

DATES: The meeting will be held on January 6, 1997, from 9:00 a.m. to 1:00 p.m.

ADDRESSES: The meeting will be held at Leif Erickson Lodge Hall, 2245 NW 57th Street, Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252; telephone: 907–271–2809.

FOR FURTHER INFORMATION CONTACT: Arni Thomson, Alaska Crab Coalition; telephone: 206–547–7560.

SUPPLEMENTARY INFORMATION: The PNCIAC's agenda includes the following:

1. Alaska Department of Fish and Game proposal for a cost recovery funded observer program.
2. Emergency petition for revised pot limits in the Bristol Bay red king crab fishery.
3. Proposal to reduce the minimum size limit of Bristol Bay red king crab to 6 inches.
4. Other related crab management issues.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Arni Thomson, Alaska Crab Coalition, 206–547–7560, at least 5 working days prior to the meeting date.

Dated: December 23, 1996.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 96–33180 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 122096A]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council will hold a public meeting.

DATES: The meeting will be held on January 9, 1997, beginning at 9:00 a.m. and will run until business for the day is concluded. The meeting will reconvene on January 10, 1997, at 8:00 a.m. and will run until business for the day is concluded.

ADDRESSES: The meeting will be held at the Red Lion Downtown Portland, 1401 SW Lincoln, Portland, OR 97201, in the Multnomah Falls Room.

Council address: Pacific Fishery Management Council, 2130 SW Fifth Avenue, Suite 224, Portland, OR 97201.

FOR FURTHER INFORMATION CONTACT: Lawrence D. Six, Executive Director; telephone: (503) 326–6352.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to develop options for long term management of the limited entry fixed gear sablefish fishery.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Eric Greene at (503) 326–6352 at least 5 days prior to the meeting date.

Dated: December 23, 1996.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 96–33181 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 122396D]

Endangered Species; Permits

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

ACTION: Receipt of an application for modification 1 to scientific research permit 991 (P599) and issuance of an amendment of enhancement permit 747 (P45H).

SUMMARY: Notice is hereby given that the California Department of Water Resources in Sacramento, CA (CDWR) has applied in due form for modification 1 to scientific research permit 991 and that an amendment of enhancement permit 747 was issued to the U.S. Fish and Wildlife Service in Sacramento, CA (FWS) authorizing takes of an endangered species.

DATES: Written comments or requests for a public hearing on the modification application must be received on or before January 29, 1997.

ADDRESSES: The application and related documents are available for review in the following offices, by appointment:

Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3226 (301–713–1401); and

Director, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213 (310–980–4016).

Written comments or requests for a public hearing should be submitted to the Chief, Endangered Species Division, Office of Protected Resources.

SUPPLEMENTARY INFORMATION: CDWR requests modification 1 to permit 991, and the amendment of permit 747 was issued, under the authority of section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing ESA-listed fish and wildlife permits (50 CFR parts 217–227).

For modification 1 to permit 991, CDWR (P599) requests an additional annual take of juvenile, endangered, Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*) associated with a new scientific research study. CDWR proposes a fisheries study of the Yolo Bypass, a floodplain adjacent to the Sacramento River where large numbers of salmon are trapped when high flows recede. The objectives of the study include estimation of the number of juvenile salmon diverted to, and successfully emigrating from, the Bypass; identification of habitats in the Bypass used for salmon rearing; estimation of the number of salmon trapped in the Yolo Bypass after floodwaters recede; and measurement of salmon growth and feeding in the Bypass versus the Sacramento River. Study results will be used to provide recommendations for ecosystem restoration options, to identify actions to minimize adverse effects to juvenile salmon, and to make habitat restoration efforts as harmless to fish as possible. ESA-listed fish will be captured in the Yolo Bypass, handled, and released in the mainstem Sacramento River. A percentage of associated indirect mortalities is also requested. Modification 1 is requested for the duration of the permit. Permit 991 expires on June 30, 1999.

On November 27, 1996, NMFS amended FWS's enhancement permit 747 (P45H) extending the expiration date of the permit. Permit 747 was issued to FWS on August 8, 1991 and was due to expire on November 30, 1996. Permit 747 authorizes annual takes of adult and juvenile, endangered, Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*) associated with an artificial propagation program at FWS's Coleman National Fish Hatchery and a captive broodstock program. In October, 1996, FWS applied for a new permit (P45W) to replace permit 747 (61 FR 53899, October 16, 1996). However, due to the time required to process the new permit request, permit 747 would have expired before the new permit could be issued. To avoid a lapse in FWS's endangered species take authorization, permit 747 was amended to expire on January 31, 1997.

Those individuals requesting a hearing on the permit modification request should set out the specific reasons why a hearing would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the above application summary are those of the applicant and do not necessarily reflect the views of NMFS.

Dated: December 23, 1996.

Barbara Schroeder,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 96–33178 Filed 12–27–96; 8:45 am]

BILLING CODE 3510–22–F

COMMODITY FUTURES TRADING COMMISSION

Proposed Amendments to the Price Limit and Trading Halt Provisions in Domestic Stock Index Futures Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of proposed amendments to the price limit and trading halt provisions in domestic stock index futures contracts listed on the Chicago Mercantile Exchange, Kansas City Board of Trade, and New York Futures Exchange.

SUMMARY: The Chicago Mercantile Exchange (CME), Kansas City Board of Trade (KCBT), and New York Futures Exchange (NYFE) have submitted proposals to modify existing ''circuit breaker'' and related price limit provisions in those exchanges' domestic stock index futures contracts. The Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposals for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATES: Comments must be received on or before January 14, 1997.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418–5521 or by electronic mail to secretary@cftc.gov. Reference should be made to the proposed amendments to circuit breaker and price limit provisions in domestic stock index futures contracts.

FOR FURTHER INFORMATION CONTACT: Please contact Steve Sherrod of the Division of Economic Analysis, Commodity Futures Trading Commission, 1155 21st Street NW, Washington, DC 20581, telephone 202–418–5277. Facsimile number: (202) 418–5527. Electronic mail: ssherrod@cftc.gov.

SUPPLEMENTARY INFORMATION: The CME, KCBT, and NYFE have proposed changes to each of the opening, intermediate, and overall daily price limits, including the circuit breaker trigger levels, for their domestic stock index futures contracts.[1] The submissions were made in response to a proposal from the New York Stock Exchange (NYSE) to raise the levels of its ''circuit breaker'' trading halt triggers. Specifically, the NYSE proposes to increase the trigger for a one-half hour trading halt to 350 points in the Dow Jones Industrial Average (DJIA)[2] from 250 DJIA points and to increase the trigger for a one hour trading halt to 550 points in the DJIA from 400 DJIA points. That proposal is currently under review by the Securities and Exchange Commission (SEC). Notice of that proposal was given in the Federal Register on December 19, 1996 (61 FR 67087).

The proposed amendments to the S&P 500 futures contract (the most actively traded domestic stock index futures contract) are shown in Table 1 below. The proposed amendments to other domestic stock index futures contracts generally are comparable to those in the S&P 500 futures contract.

TABLE 1.—CURRENT AND PROPOSED CME S&P 500 PRICE LIMIT SCHEDULE

Price limit	Current level	Proposed level
Opening	+/− 5	+/− 7
Initial Decline	− 12	− 15
Second Decline	− 20	− 30
First Circuit Breaker	− 30	− 45
Second Circuit Breaker	− 50	− 70
Daily Price Limit	+/− 70	− 90
Globex After Hours Session	+/− 12	+/− 15

For comparison purposes, Tables 2 and 3 below show the current and proposed price limit provisions in the S&P 500 futures contract and the approximate DJIA equivalents for those limits that correspond to the levels that

[1] The affected CME contracts are the CME Standard & Poor's 500 Stock Price Index (S&P 500), the S&P MidCap 400 Stock Price Index, the S&P 500/BARRA Growth Index, the S&P 500/BARRA Value Index, the Russell 2000 Stock Price Index, the Major Market Index, and the Nasdaq 100 Index. The affected KCBT contracts are the Value Line Index and the Mini Value Line Index. The affected NYFE contracts are the NYSE Composite Index and the PSE Technology Index.

[2] ''Dow Jones Industrial Average'' is a service mark of the Dow Jones Corporation.

trigger the one-half hour and one-hour trading halts on the NYSE. The tables show ''approximate DJIA equivalents'' as a range of levels for each such circuit breaker. In that regard, recently, the level of the DJIA has been about eight and one-half times higher than the level of the S&P 500. Therefore, the lower number in each range was calculated by multiplying the level of the S&P 500 circuit breaker price limit by eight, while the higher number in each range was calculated by multiplying the level of the S&P 500 circuit breaker price limit by nine.

TABLE 2.—CURRENT CME AND NYSE CIRCUIT BREAKER PROVISIONS

CME S&P 500		NYSE trading halt level (DJIA points)
Circuit breaker price limit	Approximate DJIA equivalents (points)	
30 points	240–270	250
50 points	400–450	400

TABLE 3.—PROPOSED CME AND NYSE CIRCUIT BREAKER PROVISIONS

CME S&P 500		NYSE trading halt level (DJIA points)
Circuit breaker price limit	Approximate DJIA equivalents points	
45 points	360–405	350
70 points	560–630	550

The Division requests comment on the proposed amendments. Copies of the proposed amendments will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 418–5097.

Other materials submitted by the CME, KCBT, and NYFE in support of the proposed amendments may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 C.F.R. Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 C.F.R. 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 C.F.R. 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed amendments, or with respect to other materials submitted by the CME, KCBT, and NYFE should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581 by the specified date.

Issued in Washington, DC, on December 23, 1996.

Blake Imel,

Acting Director.

[FR Doc. 96–33073 Filed 12–27–96; 8:45 am]

BILLING CODE 6351–01–P

Applications of the New York Cotton Exchange for Designation as a Contract Market in Futures and Options on the U.S. Dollar—South African Rand, Australian Dollar—U.S. Dollar, and New Zealand Dollar—U.S. Dollar Currency Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of availability of the terms and conditions of proposed commodity futures and option contracts.

SUMMARY: The New York Cotton Exchange (NYCE or Exchange) has applied for designation as a contract market in futures and options on three currency contracts; the U.S. Dollar—South African Rand, Australian Dollar—U.S. Dollar, and New Zealand Dollar—U.S. Dollar.

The Acting Director of the Division of Economic Analysis (Division) of the Commission, acting pursuant to the authority delegated by Commission Regulation 140.96, has determined that publication of the proposals for comment is in the public interest, will assist the Commission in considering the views of interested persons, and is consistent with the purposes of the Commodity Exchange Act.

DATES: Comments must be received on or before January 29, 1997.

ADDRESSES: Interested persons should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street NW, Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418-5521, or by electronic mail to secretary@cftc.gov. Reference should be made to the NYCE U.S. Dollar—South African Rand, Australian Dollar—U.S. Dollar, and New Zealand Dollar—U.S. Dollar futures and option contracts.

FOR FURTHER INFORMATION CONTACT: Please contact Stephen Sherrod of the Division of Economic Analysis, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street, Washington, DC, 20581, telephone 202–418–5277, Facsimile number: (202) 418–5527. Electronic mail: ssherrod@cftc.gov

SUPPLEMENTARY INFORMATION: Copies of the terms and conditions will be available for inspection at the Office of the Secretariat, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street Washington, D.C. 20581. Copies of the terms and conditions can be obtained through the Office of the Secretariat by mail at the above address or by phone at (202) 418–5100.

Other materials submitted by the NYCE in support of the applications for contract market designation may be available upon request pursuant to the Freedom of Information Act (5 U.S.C. 552) and the Commission's regulations thereunder (17 C.F.R. Part 145 (1987)), except to the extent they are entitled to confidential treatment as set forth in 17 C.F.R. 145.5 and 145.9. Requests for copies of such materials should be made to the FOI, Privacy and Sunshine Act Compliance Staff of the Office of the Secretariat at the Commission's headquarters in accordance with 17 C.F.R. 145.7 and 145.8.

Any person interested in submitting written data, views, or arguments on the proposed terms and conditions, or with respect to other materials submitted by the NYCE, should send such comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 21st Street, NW, Washington, DC 20581 by the specified date.

Issued in Washington, DC, on December 20, 1996.

Blake Imel,

Acting Director.

[FR Doc. 96–33074 Filed 12–27–96; 8:45 am]

BILLING CODE 6351–01–P

Sunshine Act Meeting

TIME AND DATE: 2:00 p.m., Tuesday, January 21, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. Lobby Level Hearing Room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Presentation by the National Futures Association on ongoing projects
Final rules on financial reporting cycle and debt-equity ration requirements
Quarterly Objectives
Update on Commission activities

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33233 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Friday, January 24, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Rule enforcement reviews.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33234 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 11:00 a.m., Friday, January 24, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33235 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Monday, January 27, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33236 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 10:30 a.m., Monday, January 27, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement Objectives.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33237 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 2:00 p.m., Monday, January 27, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Adjudicatory Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33238 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 11:00 a.m., Friday, January 31, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33239 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 11:00 a.m., Friday, January 3, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33240 Filed 12–26–96; 8:45 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 2:00 p.m., Monday, January 6, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Adjudicatory Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33241 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 11:00 p.m., Friday, January 10, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33242 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 2:00 p.m., Monday, January 13, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Adjudicatory Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33243 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

Sunshine Act Meeting

TIME AND DATE: 11:00 a.m., Friday, January 17, 1997.

PLACE: 1155 21st St., N.W., Washington, D.C. 9th Fl. Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance Matters.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 202–418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 96–33244 Filed 12–26–96; 11:14 am]

BILLING CODE 6351–01–M

CONSUMER PRODUCT COMMISSION

Sunshine Act Meeting

AGENCY: U.S. Consumer Product Safety Commission, Washington, DC 20207.

TIME AND DATE: Wednesday, January 8, 1997, 10:00 a.m.

LOCATION: Room 420, East West-Towers, 4330 East-West Highway, Bethesda, MD.

STATUS: Open to the public.

MATTER TO BE CONSIDERED:

Batting Helmet Face Guard Petition—HP 95–1 The staff will brief the Commission on Petition HP 95–1 from the American Academy of Facial Plastic and Reconstructive Surgery requesting that the Commission issue a rule to require face guards on children's batting helmets.

For a recorded message containing the latest agenda information, call (301) 504–0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East-West Highway, Bethesda, MD 20207 (301) 504–0800.

Dated: December 26, 1996.

Sadye E. Dunn,

Secretary.

[FR Doc. 96–33302 Filed 12–26–96; 2:43 pm]

BILLING CODE 6355–01–M

DEPARTMENT OF EDUCATION

President's Advisory Commission on Educational Excellence for Hispanic Americans; Meeting

AGENCY: President's Advisory Commission on Educational Excellence for Hispanic Americans, ED.

ACTION: Notice of Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the President's Advisory Commission for Educational Excellence for Hispanic Americans (Commission) and describes the functions of the Commission. Notice of this meeting is required under Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend.

DATES AND TIMES: Friday, January 17, 9:00 a.m.—5:45 p.m. (est) and Saturday, January 18, 1997, 9:00 a.m.—4:00 p.m. (est).

ADDRESSES: American Council on Education; One Dupont Circle, NW; Washington, D.C.

FOR MORE INFORMATION CONTACT: Edmundo DeLeon, Special Assistant, White House Initiative on Educational Excellence for Hispanic Americans (Initiative) at 202–401–1411 (telephone), 202–401–8377 (FAX), ed__DeLeon@ed.gov (e-mail) or mail: U.S. Department of Education, 600 Independence Ave. S.W., room 2115; Washington, D.C. 20202–3601.

SUMMARY INFORMATION: The Commission was established under Executive Order 12900 (February 22, 1994) to provide the President and the Secretary of Education with advice on (1) the progress of Hispanic Americans toward achievement of the National Goals and other standards of educational accomplishment; (2) the development, monitoring, and education for Hispanic Americans; (3) ways to increase, State, county, private sector and community involvement in improving education; and (4) ways to expand and complement Federal education initiatives.

As an open meeting to the public, the theme of the two day session is ''implementing collaborative community partnerships''. These partnerships will be explored by the Commission and the public in terms of recommendations made in the Commission's September 1996 report to the President, Our Nation on the Fault Line: Hispanic American Education, and grouped by key issues: early childhood, K–12, higher education, public policy, foundations and corporations, and public affairs (outreach).

Records are kept of all Commission proceedings and are available for public inspection at the Initiative, room 2115, 600 Independence Ave., S.W., from 9:00 a.m. to 5:00 p.m. (est).

Dated: December 23, 1996.

Edward Augustus,

Acting Assistant Secretary.

[FR Doc. 96–33045 Filed 12–27–96; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Office of Environment, Safety and Health

Environment, Safety and Health: Public Forums To Gather Scientific Data, Information and Views Relevant to a Department of Energy (DOE) Beryllium Standard

AGENCY: Office of Environment, Safety and Health, DOE.

ACTION: Notice of public data gathering Forums and opportunity to submit written comments.

SUMMARY: The Department of Energy (the Department or DOE) will hold two public forums to gather scientific data, information and views that will assist DOE in developing a notice of proposed rulemaking intended to help establish a health standard to protect DOE and DOE contractor employees from occupational exposure to beryllium. The Department urges those individuals or organizations with an interest in this topic to attend and participate in the forums as well as submit to DOE written comments and data on this subject.

DATES: The dates for the public forums are listed below. January 15 and 16, 1997, 9:00 a.m. to 4:30 p.m. each day in Albuquerque, NM; and January 22 and 23,1997, 9:00 a.m. to 4:30 p.m. each day in Oak Ridge, TN.

To ensure that all interested individuals have an opportunity to participate, those who would like to make an oral presentation should call in advance of the forum to schedule a 10-minute block of time. These requests should be submitted to the Department no later than 4:30 p.m., eastern standard time, on January 10, 1997, for the Albuquerque forum and no later than 4:30 p.m., eastern standard time, on January 17, 1997, for the Oak Ridge forum. Written comments and data (5 copies) must be received by the Department on or before February 7, 1997.

ADDRESSES: Requests to speak at the public forums, written comments and scientific data (5 copies of each) should be addressed to Jacqueline D. Rogers, U.S. Department of Energy, Office of Environment, Safety and Health, EH–51, 270CC, 19901 Germantown Road, Germantown, MD 20874–1290; 301–903–5684. The public data gathering forums will be held at the following locations.

Albuquerque, New Mexico:

The Albuquerque Convention Center, West Building, Picuris Room—Lower Level, 401 Second Street, NW., Albuquerque, NM 87185.

Oak Ridge, Tennessee:

The American Museum of Science and Energy, Auditorium, 300 South Tulane Avenue, Oak Ridge, TN 37830.

FOR FURTHER INFORMATION CONTACT:

Jacqueline D. Rogers, U.S. Department of Energy, Office of Environment, Safety and Health, EH–51, 270CC, 19901 Germantown Road, Germantown MD 20874–1290, 301–903–5684.

David Weitzman, U.S. Department of Energy, Office of Environment, Safety and Health, EH–51, 270CC, 19901 Germantown Road, Germantown MD 20874–1290, 301–903–5401.

Paul Wambach, U.S. Department of Energy, Office of Environment, Safety and Health, EH–61, 270CC, 19901 Germantown Road, Germantown MD 20874–1290, 301–903–7373.

SUPPLEMENTARY INFORMATION:

1. Background

The Department of Energy is gathering data, views and other relevant information to develop a health standard to control occupational exposure to beryllium at DOE facilities. The Department has a long history of beryllium use because of the element's many nuclear applications. Beryllium metal and ceramics are used in weapons, as reactor moderators or reflectors, and as reactor fuel element cladding. Inhalation of beryllium dust or particles can cause chronic beryllium disease (CBD), which is a granulomatous lung disease caused by a delayed hypersensitivity response to beryllium in the lung.

The current DOE permissible exposure limits (PELs) for beryllium were adopted in 1970 from the Occupational Safety and Health Administration's health standard, 29 CFR 1910.1000, Air Contaminant—Table Z-2. After the PELs were adopted, the industry experienced a significant reduction in the incidence rate of the disease. This led to the belief that CBD was occurring only among workers who had been exposed to high levels of beryllium decades earlier (i.e., in the 1940s). DOE is now discovering cases of CBD among workers who were first exposed in the 1970s and 1980s. DOE has found that some of these cases are occurring among workers who were exposed to levels well below the PEL for beryllium.

Although a small amount of research and production involving beryllium continues, the workers at risk for CBD are primarily those who were exposed prior to cessation of weapons production in 1989. However, as decontamination and decommissioning (D&D) work accelerates, DOE is concerned that more workers will be at risk for beryllium exposure.

DOE has concluded that current beryllium standards may not be adequate to protect workers. Therefore, DOE is gathering data, views and other relevant information to develop a revised standard for occupational exposure to beryllium at DOE facilities.

2. Public Forums and Written Comment Opportunity

DOE is holding the two public forums and inviting written comments in order to gather scientific data, information, and the views of DOE and DOE contractor employees (beryllium workers and their representatives) line managers, industrial hygienists, safety professionals, physicians, health professionals, scientists, and others. DOE is also inviting individuals in academic institutions, general industry, trade associations, and other government agencies who have expertise in the health effects, exposure monitoring, appropriate controls, and medical monitoring for beryllium to participate.

To help focus oral and written comment, DOE includes in this Notice a set of questions covering a variety of beryllium-related topics. Responses to these questions would be extremely helpful. Participants should bring 5 copies of their oral presentation to the forum and submit them at the registration desk. In order to accommodate as many participants as possible, individual oral presentations will be limited to 10 minutes, unless the presiding official determines that a different allocation of time is appropriate.

Questions for Comment

The Department is especially interested in answers supported by evidence and rationale whenever possible, to the following questions.

1. Should an 8-hour time weighted average (TWA) permissible exposure limit (PEL) other than the current 2 ug/m3 be adopted? If so, what level should be established? Please provide evidence for establishing a different PEL.

2. Should a short-term exposure limit (STEL) be established for intermittent exposures? If so, at what level should the STEL be set? Please provide evidence for establishing a STEL.

3. Should an action level be adopted? If so, what should the action level be? What actions should be triggered by this exposure level? Please provide evidence for establishing an action level.

4. Should a policy of maintaining exposures as low as reasonably achievable (ALARA) be adopted? Please provide evidence and rationale for adopting an ALARA policy.

5. If an ALARA policy is adopted, is the personal monitoring needed to measure performance feasible?

6. If a level was recommended in questions 1 through 3, is the recommended level technologically and economically feasible? Please provide evidence for establishing feasibility.

7. Will the introduction of a more stringent beryllium standard in any way reduce the demand for beryllium-containing products? If so, to what extent will (or can) the demand for these products be reduced and what would be the losses to industries that are affected?

8. Please describe the job titles and provide job descriptions for workers exposed to beryllium. Describe the operations that present the potential for beryllium exposure, each worker's location relative to sources of beryllium and the activities that the workers perform during the operation. In particular, if you are involved with decontamination and decommissioning work, please characterize the types of activities in this work where beryllium exposures can occur.

9. Please describe the frequency and duration of activities with potential or actual beryllium exposures. Identify the number of employees potentially exposed (i.e., workers not directly exposed but in an area where beryllium is used or working on tasks where exposures are negligible due to existing controls) as well as those with known exposures.

10. What is the lowest practical limit of detection of the sampling and analytical method for beryllium for both an 8-hour TWA PEL and a STEL?

11. What would be an appropriate monitoring strategy for airborne beryllium? What are the cost implications of different strategies? Would an appropriate strategy seek to demonstrate compliance with an exposure level, or seek to measure typical exposures? Should statistical methods be used to determine the sample size that is large enough to obtain the desired degree of precision in estimating the airborne beryllium exposure?

12. Are there exposure models that predict the incident of beryllium-related death and disease? Please provide references to these models.

13. Is smear sampling accurate enough to be acceptable for evaluation of beryllium contamination on all surfaces? Please provide evidence of smear sampling's efficacy for determining removal efficiencies.

14. Should statistical methods be used to determine the sample size that is large enough to obtain the desired degree of precision in estimating the beryllium contamination for the surface area of concern? Please provide evidence and rationale for statistical methods used to evaluate surface contamination.

15. Should any permissible surface contamination level be considered acceptable for workers who are

beryllium sensitive? If so, what is the acceptable level? Please provide evidence and rationale for acceptable surface contamination level.

16. Are there any indications that establishing ultra-low permissible surface contamination levels would provide any additional protection to workers? Please provide evidence of the health protection benefits and cost of implementing various permissible surface contamination levels, for example, the ''stop work level.''

17. What standards for contamination control should be applied to beryllium operations? Please provide descriptions of current practices for swipe sampling, levels acceptable in access controlled areas, levels acceptable for facilities and equipment released for uncontrolled use, and work rules for personal hygiene.

18. What engineering and work practice controls are routinely applied for beryllium work? How do the various controls compare with respect to efficiency in reducing exposures? Please support your answer with exposure data and a discussion of the time and cost required for implementation of various controls.

19. Could current beryllium exposures be reduced by the use of additional available engineering controls and work practices? Would such reductions be economically feasible? Please support your answer with a discussion of additional available controls, their efficiency in reducing exposures, and the associated time and cost for implementation.

20. Are there unique conditions in work settings where beryllium is produced or used that make engineering controls infeasible?

21. Are there conditions under which respirators use should be permitted? If so, what are the conditions? What respirator fit testing requirements should be included in the standard and when should such testing be required?

22. To the extent you might be able to forecast possible beryllium control measures, what would be the possible financial impacts of incremental spending for such controls by your facility? How large an effect is incremental spending on beryllium controls likely to have on the costs of products or services that you provide?

23. What examinations and tests should be included in a medical monitoring program aimed at the early detection of chronic beryllium disease? What should the time interval be between periodic medical examinations or tests?

24. What criteria should be used to determine who must be included in a medical monitoring program? Using this criteria, how many current workers at your facility would be included in the medical monitoring program.

25. Do you currently have a medical monitoring program for workers exposed to beryllium? What does this program entail (i.e., identify required tests, examinations, frequencies, costs, criteria for inclusion in the program). How many of your current workers are in the medical monitoring program?

26. Are estimates available of the medical costs associated with beryllium-related disease? Please provide references to these estimates.

27. Regarding current policies for medical removal:

a. What are the current practices and criteria for removing overexposed workers from beryllium jobs?

b. What specific biological indicators or clinical test results are currently used to determine overexposure?

c. For workers who have been removed from jobs because of beryllium overexposure, what alternate types of jobs were they given? Does this assignment have any impact on wages, position classification, etc.? How long does this reassignment usually last?

d. Are reassigned workers ever returned to jobs that include beryllium activities? If so, what are the criteria for returning?

The draft agenda for the forums is as follows:

Draft Agenda

Opening remarks
Presentations by Participants (10 minutes per speaker)
Next Steps—Closing

Issued in Washington, DC, on December 19, 1996.

Tara O'Toole,

Assistant Secretary Environment, Safety and Health.

[FR Doc. 96–33129 Filed 12–27–96; 8:45 am]

BILLING CODE 6450–01–P

Idaho Operations Office; Notice of Solicitation

SUMMARY: The U.S. Department of Energy (DOE) Idaho Operations Office (ID), in accordance with the Financial Assistance regulations in 10 CFR 600, announces competitive Solicitation Number DE–PS07–97ID13507 for DOE's Greenhouse of the Future Program. With this solicitation DOE intends to make a financial assistance award to support the Greenhouse of the Future Program.

AVAILABILITY OF SOLICITATION: Prospective applicants should send a written request for a copy of the solicitation and a DOE application instruction package (which includes standard forms, assurances and certifications) to the U.S. Department of Energy, Idaho Operations Office, 850 Energy Drive, MS–1221, Idaho Falls, Idaho 83401–1563, Attn: SOL DE–PS07–97ID13507, Connie Osborne, Contract Specialist (Telephone Number: 208–526–0093). Requests transmitted by facsimile at (208) 526–5548 will be accepted. It is advised that prospective applicants submit their requests in writing no later than January 17, 1997.

SUPPLEMENTARY INFORMATION: The DOE Agriculture Office is interested in promoting new agriculture technologies to reduce energy consumption in an environmentally sound way. The goals of the Greenhouse of the Future Research Program is to: Promote and advance U.S. greenhouse technologies and encourage U.S. universities (targeted at the undergraduate research level) to develop innovative greenhouse technologies.

DOE anticipates awarding one Financial Assistance Grant in accordance with DOE Financial Assistance regulations appearing at Title 10 of the Code of Federal Regulations, Chapter II, Subchapter H, Part 600 if funding is available. Federal funds available for this solicitation are expected to be $20,000 for the 12-month research period. The $20,000 will be used for greenhouse research and travel expenses to the Epcot® Floral and Garden Show. Travel expenses shall not exceed $5000. No fee or profit will be paid to the award recipients. The Catalog of Federal Domestic Assistance Number for this program is 81.104. Applicants must identify a project period which does not exceed 12 months. Applications identifying a project period for 12 months or less will be eligible for funding of $20,000 for the entire project period. The period of performance is anticipated to be 12 months. The successful applicant will be required to submit a final report at the end of the 12 month period to DOE. The objective of this solicitation is to promote the development of environmentally sound, new technologies for greenhouse food and floral production with the objective of conserving energy. To ensure that the competition elicits creative ideas, and not simply prototype fabrication capabilities, the contest will be a design competition, where the university teams submit conceptual ideas of their particular technologies. Interdisciplinary teamwork is strongly encouraged, particularly from the undergraduate level. Proposed projects should consider total systems integration to include energy conservation, pollution reduction, pest management, and crop productivity.

The statutory authority for this program is Sec 107 of the Energy Reorganization Act of 1974, Public Law 93488, 88 Stat. 1240 (U.S.C. 5817) and Federal Non-Nuclear Energy Research and Development Act of 1974. Public Law 93–577, 88 Stat.1878 (42 U.S.C. 5901 et seq.). A copy of the solicitation may be accessed on DOE–ID's home page using Universal Resource Locator address: http://www.inel.gov/procurement/index.html. The deadline for receipt of applications is 3:00 p.m. MST February 27, 1997.

Procurement Request Number: 07–97ID13507.000.

Dated: December 23, 1996.

R. Jeffrey Hoyles,

Director, Procurement Services Division.

[FR Doc. 96–33195 Filed 12–27–96; 8:45 am]

BILLING CODE 6450–01–P

Secretary of Energy Advisory Board; Notice of Open Meeting.

AGENCY: Department of Energy.

SUMMARY: Consistent with the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770), notice is hereby given of the following advisory committee meeting:

Name: Secretary of Energy Advisory Board—Electric System Reliability Task Force.

Dates and Times: Thursday, January 16, 1997, 8:30 AM—5:00 PM.

Place: JW Marriott Hotel, Capital Ballroom—Salon E, 1331 Pennsylvania Avenue, NW., Washington, D.C. 20004.

FOR FURTHER INFORMATION CONTACT: Richard C. Burrow, Secretary of Energy Advisory Board (AB–1), U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–1709.

SUPPLEMENTARY INFORMATION:

Background

The electric power industry is in the midst of a complex transition to competition, which will induce many far-reaching changes in the structure of the industry and the institutions which regulate it. This transition raises many reliability issues, as new entities emerge in the power markets and as generation becomes less integrated with transmission.

Purpose of the Task Force

The purpose of the Electric System Reliability Task Force is to provide advice and recommendations to the Secretary of Energy Advisory Board regarding the critical institutional, technical, and policy issues that need to be addressed in order to maintain the reliability of the nation's bulk electric system in the context of a more competitive industry.

Tentative Agenda

8:30—9:15 Opening Remarks
- Hazel R. O'Leary, Secretary of Energy
- Bob Hanfling, Chairman, Secretary of Energy Advisory Board
- Phil Sharp, Chairman, Electric System Reliability Task Force

9:15—9:30 Task Force Member Introductions

9:30—9:45 Break

9:45—10:30 Institutional Reliability Issues
- Mike Gent, National Electric, Reliability Council

11:15 Technical Reliability Issues
- Karl Stahlkopf, Electric Power, Research Institute

11:15—11:45 State Reliability Perspectives
- Duncan Kincheloe, Missouri, Public Utility Commission

11:45—1:00 Lunch

1:00—1:30 Federal Policy Issues
- Charles B. Curtis, Deputy Secretary of Energy

1:30—2:00 Public Comment

2:00—4:30 Development of a Task Force Work Plan

4:30 Adjourn

This tentative agenda is subject to change. The final agenda will be available at the meeting.

Public Participation

The Chairman of the Task Force is empowered to conduct the meeting in a fashion that will, in the Chairman's judgment, facilitate the orderly conduct of business. During its meeting in Washington, D.C. the Task Force welcomes public comment. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. The Task Force will make every effort to hear the views of all interested parties. Written comments may be submitted to David Cheney, Acting Executive Director, Secretary of Energy Advisory Board, AB–1, 1000 Independence Avenue, SW., Washington, DC 20585.

Minutes

Minutes and a transcript of the meeting will be available for public review and copying approximately 30 days following the meeting at the Freedom of Information Public Reading Room, 1E–190 Forrestal Building, 1000 Independence Avenue, SW, Washington, DC, between 9:00 AM and 4:00 PM, Monday through Friday except Federal holidays.

Issued at Washington, DC, on December 23, 1996.

Gail Cephas,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 96–33130 Filed 12–27–96; 8:45 am]

BILLING CODE 6450–01–P

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

SUMMARY: The Energy Information Administration (EIA) is soliciting comments concerning the proposed new form EIA–902, ''Geothermal Heat Pump Manufacturers Survey.''

DATES: Written comments must be submitted on or before February 28, 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 of your intention to do so as soon as possible.

ADDRESSES: Send comments to James Holihan, Office of Coal, Nuclear, Electric, and Alternate Fuels, EI–522, Forrestal Building, U.S. Department of Energy, Washington, D.C. 20585–0650, (202) 426–1147 (telephone number), (202) 426–1308 (fax number), JHolihan@eia.doe.gov (e-mail address).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to James Holihan at the address listed above.

SUPPLEMENTARY INFORMATION:

I. Background
II. Current Actions
III. Request for Comments

I. Background

In order to fulfill its responsibilities under the Federal Energy Administration Act of 1974 (Pub. L. 93–275) and the Department of Energy Organization Act (Pub. L. 95–91), the Energy Information Administration is obliged to carry out a central, comprehensive, and unified energy data and information program. As part of this program, EIA collects, evaluates, assembles, analyzes, and disseminates data and information related to energy resource reserves, production, demand, and technology, and related economic and statistical information relevant to the adequacy of energy resources to meet demands in the near and longer term future for the Nation's economic and social needs.

The Energy Information Administration, as part of its continuing effort to reduce paperwork and respondent burden (required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13)), conducts a presurvey consultation program to provide the general public and other Federal agencies with an opportunity to comment on proposed and/or continuing reporting forms. This program helps to ensure that requested data can be provided in the desired format, reporting burden is minimized, reporting forms are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

II. Current Actions

Form EIA–902 will be submitted in 1997 for approval by the Office of Management and Budget for a period not in excess of three years pursuant to Section 3507(d) of the Paperwork Reduction Act of 1980 (Pub. L. 96–511). EIA is providing this opportunity for the public to review and comment on the draft survey form and instructions.

This survey is a new collection. Data that would be collected on Form EIA–902 include the number of geothermal heat pumps shipped by type, regional destinations by type, type of customers, and distributions by market sector.

III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of responses.

General Issues

EIA is interested in receiving comments from persons regarding:

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. Practical utility is the actual usefulness of information to or for an agency, taking into account its accuracy, adequacy, reliability, timeliness, and the agency's ability to process the information it collects.

B. What enhancements can EIA make to the quality, utility, and clarity of the information to be collected?

As a Potential Respondent

A. Are the instructions and definitions clear and sufficient? If not, which instructions require clarification?

B. Can data be submitted in accordance with the due date specified in the instructions?

C. Public reporting burden for this collection is estimated to average two hours per response. Burden includes the total time, effort, or financial resources expended to generate, maintain, retain, or disclose or provide the information including: (1) Reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

Please comment on (1) the accuracy of our estimate and (2) how the agency could minimize the burden of the collection of information, including the use of automated collection techniques or other forms of information technology.

D. EIA estimates that respondents to this survey will not incur any reporting costs other than the reporting burden cited above. What is the estimated (1) total dollar amount annualized for capital and start-up costs and (2) recurring annual dollar amount of operation and maintenance and purchase of services costs associated with this data collection? The estimates should take into account the costs associated with generating, maintaining, and disclosing or providing the information.

E. Do you know of any other Federal, State, or local agency that collects similar data? If you do, specify the agency, the data element(s), and the methods of collection.

As a Potential User

A. Can you use data at the levels of detail indicated on the form?

B. For what purpose would you use the data? Be specific.

C. Are there alternate sources of data and do you use them? If so, what are their deficiencies and/or strengths?

D. For the most part, information is published by EIA in U.S. customary units, e.g., cubic feet of natural gas, short tons of coal, and barrels of oil. Would you prefer to see EIA publish more information in metric units, e.g., cubic meters, metric tons, and kilograms? If yes, please specify what information (e.g., coal production, natural gas consumption, and crude oil imports), the metric unit(s) of measurement preferred, and in which EIA publication(s) you would like to see such information.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 3506 (c)(2)(A) of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

Issued in Washington, D.C. December 24, 1996.

Yvonne Bishop,

Director, Office of Statistical Standards, Energy Information Administration.

[FR Doc. 96–33197 Filed 12–27–96; 8:45 am]

BILLING CODE 6450–01–P

Office of Energy Research

Energy Research Financial Assistance Program Notice 97–05 Energy Biosciences

AGENCY: Department of Energy (DOE).

ACTION: Notice inviting grant preapplications

SUMMARY: The Office of Basic Energy Sciences of the Office of Energy Research (ER), U.S. Department of Energy (DOE) invites preapplications from potential applicants for research funding in the Energy Biosciences program area. The intent in asking for a preapplication is to save the time and effort of applicants in preparing and submitting a formal project application that may be inappropriate for the program. The preapplication should consist of a two- to three-page concept paper on the research contemplated for an application to the Energy Biosciences program. The concept paper should focus on the scientific objectives and significance of the planned research, and include an outline of the approaches planned, and any other information relating to the planned research. No budget information or biographical data need be included; nor is an institutional endorsement necessary. The preapplication gives us the opportunity to advise potential applicants on the suitability of their research ideas to the mission of the DOE Energy Biosciences program. A response indicating the appropriateness of submitting a formal application will be sent from the Division of Energy Biosciences office in time to allow for an adequate preparation period for a formal application.

DATES: For timely consideration, all preapplications should be received by February 28, 1997. However, earlier submissions will be gladly accepted. A response to timely preapplications will be communicated by April 18, 1997. The deadline for receipt of formal applications is June 18, 1997.

ADDRESSES: Preapplications referencing Program Notice 97–05 should be forwarded to: U.S. Department of Energy, Office of Basic Energy Sciences, ER–17, Division of Energy Biosciences, 19901 Germantown Road, Germantown, MD 20874–1290, Attn: Program Notice 97–05. Fax submissions are acceptable, Fax Number (301) 903–1003.

FOR FURTHER INFORMATION CONTACT: Ms. Pat Snyder, Division of Energy Biosciences, Office of Basic Energy Sciences, ER–17, 19901 Germantown Road, Germantown, MD 20874–1290, telephone (301) 903–2873; E-mail pat.snyder@oer.doe.gov.

SUPPLEMENTARY INFORMATION: Before preparing a formal application, potential applicants should submit a brief preapplication, which consists of two to three pages of narrative describing research objectives. These will be reviewed relative to the scope and the research needs of the Energy Biosciences program. The Energy Biosciences program has the mission of generating *fundamental* biological information about plants and non-medical related microorganisms that can provide support for future energy related biotechnologies. The objective is to pursue *basic* biochemical, genetic and physiological investigations that may contribute towards providing alternate fuels, petroleum replacement products, energy conservation measures as well as other technologies such as phytoremediation related to DOE programs. Areas of interest include bioenergetic systems, including photosynthesis; control of plant growth and development, including metabolic, genetic, and hormonal and ambient factor regulation, metabolic diversity, ion uptake, transport and accumulation, stress physiology and adaptation; genetic transmission and expression; plant-microbial interactions, plant cell wall structure and function; lignocellulose degradative mechanisms; mechanisms of fermentations, genetics of neglected microorganisms, energetics and membrane phenomena; thermophile (molecular basis of high temperature tolerance); microbial interactions; and one-carbon metabolism, which is the basis of biotransformations such as methanogenesis. The objective is to discern and understand basic mechanisms and principles.

Funds are expected to be available for new grant awards in FY 1998. The magnitude of these funds available and the number of awards which can be made will depend on the budget process. The awards made during FY 1996 averaged close to $100,000 per year, mostly for a three-year duration. The principal purpose in using preapplications at this time is to reduce the expenditure of time and effort of all parties. Information about development and submission of applications, eligibility, limitations, evaluations and selection processes, and other policies and procedures may be found in the 10 CFR Part 605 and the Guide. The Application Guide for the Office of Energy Research Financial Assistance Program for formal submissions and copies of 10 CFR Part 605 are available from U.S. Department of Energy, Office of Basic Energy Sciences, ER–17, Division of Energy Biosciences, 19901 Germantown Road, Germantown, MD 20874–1290. Telephone requests may be made by calling (301) 903-2873. Instructions for preparation of an application are included in the application guide. Electronic access to ER's Financial Assistance Guide is possible via the Internet using the following Web site address: http://www.er.doe.gov/production/grants/grants.html.

The Catalog of Federal Domestic Assistance number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, D.C., on December 17, 1996.

John R. Clark,

Associate Director for Resource Management, Office of Energy Research.

[FR Doc. 96–33196 Filed 12–27–96; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[FERC–592]

Agency Information Collection Under Review by the Office of Management and Budget

December 24, 1996.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of request submitted for review to the Office of Management and Budget.

SUMMARY: The Federal Energy Regulatory Commission (Commission) has submitted the energy information collection listed in this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Any interested person may file comments on the collection of information directly with OMB and should address a copy of those comments to the Commission, as explained below. The Commission did not receive any public comments in response to an earlier Federal Register notice of September 18, 1996 (61 FR 49121–49122).

DATES: Comments must be filed on or before January 29, 1997.

ADDRESSES: Address comments to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Commission Desk Officer, 726 Jackson Place N.W., Washington, D.C. 20503. A copy of the comments should also be sent to Federal Energy Regulatory Commission, Division of Information Services, Attention: Mr. Michael Miller, 888 First Street, N.E., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 208–1415 and by e-mail at mmiller@ferc.fed.us.

SUPPLEMENTARY INFORMATION:

Description: The energy information collection submitted to OMB for review contains:

1. Collection of Information: FERC–592, ''Marketing Affiliates of Interstate Pipelines''.
2. Sponsor: Federal Energy Regulatory Commission.
3. Control No.: 1902–0157. The Commission is now requesting that OMB approve a three year extension of these mandatory collection requirements.
4. Necessity of Collection of Information: Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing provisions of the Natural Gas Policy Act and the Natural Gas Act (NGA). The Commission monitors the information maintained by interstate natural gas pipeline for transactions of transportation, sales, and storage activities between the pipelines and their marketing affiliates. The information is used to deter undue discrimination by pipeline companies in favor of their marketing affiliates. The information is also used by non-affiliated shippers or others (such as state commissions) to determine whether they have been harmed by affiliate preference and, in some cases, to prepare evidence for formal proceedings following the filing of a complaint. Additionally, pipelines provide 24-hour electronic access of this information to any interested party.

5. Respondent Description: The respondent universe currently comprises approximately 60 interstate natural gas pipelines.

6. Estimated Burden: 3,500 total burden hours, 60 respondents, 60 responses annually, 58.3 hours per response (average).

Statutory Authority: Sections 311, 501 and 504 of the Natural Gas Policy Act (15 U.S.C. 3301–3432) (P.L. 95–621) and Sections 4, 5, 7, 8, 10, 14, 16 and 20 of the Natural Gas Act (NGA). (15 U.S.C. 717–717w).

Lois D. Cashell,

Secretary.

[FR Doc. 96–33111 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[FERC–585]

Agency Information Collection Under Review by the Office of Management and Budget

December 24, 1996.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of request submitted for review to the Office of Management and Budget.

SUMMARY: The Federal Energy Regulatory Commission (Commission) has submitted the energy information collection listed in this notice to the Office of Management and Budget (OMB) for review under provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13). Any interested person may file comments on the collection of information directly with OMB and should address a copy of those comments to the Commission, as explained below. The Commission did not receive any public comments in response to an earlier Federal Register notice of August 12, 1996 (61 FR 41779–41780).

DATES: Comments must be filed on or before January 29, 1997.

ADDRESSES: Address comments to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Commission Desk Officer, 726 Jackson Place NW., Washington, DC 20503. A copy of the comments should also be sent to Federal Energy Regulatory Commission, Division of Information Services, Attention: Mr. Michael Miller, 888 First Street NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Michael Miller may be reached by telephone at (202) 208–1415 and by e-mail at mmiller@ferc.fed.us.

SUPPLEMENTARY INFORMATION:

Description: The energy information collection submitted to OMB for review contains:

1. Collection of Information: FERC–585, ''Reporting of Energy Shortages and Contingency Plans under PURPA 206.''

2. Sponsor: Federal Energy Regulatory Commission.

3. Control No.: 1902–0138. The Commission is now requesting that OMB approve a three year extension of these mandatory collection requirements.

4. Necessity of Collection of Information: Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing provisions of Section 206 of the Public Utility Regulatory Policies Act of 1979 (PURPA). Section 206, Continuance of Service, of PURPA, Pub.L. 95–617, 92 Stat. 3117 added to the Federal Power Act (FPA) Section 202, subsection (g) requiring the Commission to establish rules to require each public utility to report to the Commission and appropriate State regulatory authorities: (1) any anticipated shortage of electric energy or capacity which would affect the utility's ability to serve its customers; and (2) submit and periodically revise, contingency plans respecting shortages of electric energy or capacity which would equitably accommodate service to both direct retail customers and those served by utilities supplied at wholesale by the public utility.

The Commission uses the contingency plan information to evaluate and formulate appropriate options for action in the event of an anticipated shortage is reported or materializes. If the contingency plan data is not provided, the statutory provisions of the FPA and PURPA will not have been complied with, and information will not be available to assess whether utilities have planned for shortage conditions and/or developed plans with due consideration for equitable customer treatment, as required by the established statute.

The Commission also uses this information to ensure itself and firm power wholesale customers that both are kept informed about utility contingency plans and anticipated shortages of energy and capacity and to ensure that direct and indirect customers would be treated without undue prejudice or disadvantage during actual shortages.

5. Respondent Description: The respondent universe currently comprises approximately 110 public utilities. In the normal course of a public utility's operations, contingency plans are prepared and usually reviewed and updated periodically. However, the burden on each utility will vary primarily with respect to the number and size of wholesale customers and utility system customers supplied by the reporting utility. The number of respondents is based on the actual number of responses that were received by the Commission over the last three years.

6. Estimated Burden: 511 total burden hours, 7 respondents, 7 responses annually, 73 hours per response. The average annual burden hours is the weighted average of burden hours required for updating contingency plans (50 hours) per response [1]) and for reporting of anticipated shortages (100 hours per response [1]).

Statutory Authority: Sections 206 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2601) (P.L. 95–617) and Section 202, of the Federal Power Act (FPA). (16 U.S.C. 824a(g)).

Lois D. Cashell,

Secretary.

[FR Doc. 96–33112 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–360–000]

American Energy Solutions, Inc.; Notice of Issuance of Order

December 24, 1996.

American Energy Solutions, Inc. (AESI) submitted for filing a rate schedule under which AESI will engage in wholesale electric power and energy transactions as a marketer. AESI also requested waiver of various Commission regulations. In particular, AESI requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by AESI.

On December 5, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by AESI 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 385.214).

Absent a request for hearing within this period, AESI is authorized to issue securities and assume obligations or

[1] Rounded off.

liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of AESI's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 6, 1997. Copies of the full text of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33188 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–197–000]

Chandeleur Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

December 23, 1996.

Take notice that on December 18, 1996, Chandeleur Pipe Line Company (Chandeleur) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, to become effective June 1, 1997;

Pro Forma Sheet Nos. 18, 19, 19A, 19B, 21, 22, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 44, 45, 46, 47, 48, 49, 50, 64A, 65, 66, 67, 68, and 69

Chandeleur states that the pro forma tariff sheets are filed implementing tariff changes purporting to incorporate Gas Industry Standard Board (GISB) natural gas pipeline business procedures and Pro Forma Sheet Nos. 88–100 which were moved due to the above changes.

Chandeleur states that the purpose of this filing is to comply with the Commission's Order No. 587 issued July 17, 1996, in Docket No. RM96–1–000. In Order No. 587, Chandeleur Pipe Line Company is required to file *pro forma* tariff sheets incorporating the GISB standardize procedures for critical business practices—nominations; allocations, balancing, and measurement; invoicing; and capacity release—and standardized mechanism for electronic communication between Chandeleur and its Shippers. Chandeleur has made numerous changes in its tariff to implement by June 1, 1996 for Chandeleur standardize natural gas business procedures and the capability to provide natural gas business transactions via EDI-formatted files (GISB Compliant).

Chandeleur states that it is serving copies of the filing to its customers, State Commissions and interested parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before January 8, 1997. 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 motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33052 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM97–3–22–000]

CNG Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 23, 1996.

Take notice that on December 3, 1996, CNG Transmission Corporation (CNG) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets with a proposed effective date of January 1, 1997:

Thirteenth Revised Sheet No. 31
Twenty-Third Revised Sheet No. 32
Twenty-Third Revised Sheet No. 33
Tenth Revised Sheet No. 34
Thirteenth Revised Sheet No. 35
Thirteenth Revised Sheet No. 36

CNG states that the purpose of its filing is to adjust CNG's Account No. 858 rates to update CNG's annual Transportation Cost Rate Adjustment (TCRA) to reflect changes in rates made by upstream pipelines after CNG made its Annual TCRA filing on September 30, 1996 and accepted by letter order dated October 31, 1996. CNG states that it is making this out of cycle filing to reflect rate changes by Tennessee Gas Pipeline Company, as a result of the Commission-approved settlement in Docket No. RP95–112–000, and Texas Eastern Transmission Corporation as a result of its filing in Docket No. RP97–50–000. The annual impact of this filing is a total cost reduction of $3.6 million. The effect of the proposed update to the TCRA on each component of CNG's rates is more fully summarized in the workpapers attached to CNG's filing.

CNG states that copies of its filing are being mailed to CNG's customers and interested state commissions.

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, NE., Washington, DC, 20426, in accordance with Sections 385.211 and 385.214 of the Commission's Rules and Regulations. All such motions or protests were due to be filed in accordance with Section 154.210 of the Commission's Regulations. Any person wishing to become a party must file a motion to intervene. Copies of the filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33053 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–156–000]

Hopkinton LNG Corporation; Notice of Application

December 24, 1996.

Take notice that on December 16, 1996, Hopkinton LNG Corporation (Hopkinton), One Main Street, Cambridge, Massachusetts 02142–9150, filed in Docket No. CP97–156–000, an abbreviated application, pursuant to Section 7(c) of the Natural Gas Act and the Commission's regulations, for a limited jurisdiction certificate of public convenience and necessity, authorizing it to employ and operate in interstate commerce its existing LNG facility located in Hopkinton, Massachusetts, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Hopkinton states that it currently operates its LNG facility for the provision of services to support the local distribution operations of its affiliated local natural gas distribution utility, Commonwealth Gas Company (ComGas). Hopkinton explains that due to federal and state level restructuring activities, Hopkinton anticipates that it may, in the future, have excess capacity in its LNG facilities that is not required by Hopkinton to serve ComGas on a firm basis. Hopkinton says it seeks the

Commission's authorization to lease certain excess capacity in its LNG facility to its affiliated marketing company, COM/Energy Resources, Inc. (Resources). Hopkinton states that Resources will then utilize such leased capacity solely to support its own natural gas marketing activities, and will not provide any LNG storage, liquefaction or vaporization services to third parties. Hopkinton further states that the authorization it requests is in all relevant respects identical to the authorizations which the Commission has granted to United Cities Gas Company in FERC Docket Nos. CP93–507–000 and CP94–753–000.

Any person desiring to be heard or to make any protest with reference to said application should on or before January 7, 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 385.211 and 385.214) 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 in any proceeding herein 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 Commission by Sections 7 and 15 of the Natural Gas and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Hopkinton to appear or to be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33186 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–152–000]

Koch Gateway Pipeline Company; Notice of Request Under Blanket Authorization

December 24, 1996.

Take notice that on December 13, 1996, Koch Gateway Pipeline Company (Koch Gateway), Post Office Box 1478, Houston, Texas 77251–1478, filed in Docket No. CP97–152–000 a request pursuant to §§ 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct a 2-inch tap and a 2-inch meter station in Hinds County, Mississippi, to serve Tri-State Tile & Brick (Tri-State). Koch Gateway makes such request under its blanket certificate issued in Docket No. CP82-430-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Koch Gateway proposes to install the new delivery point on its existing lateral line in Hinds County, to satisfy Tri-State's request for 1,200 MMBtu of natural gas per day, on an interruptible basis. It is stated that the volumes proposed for delivery to Tri-State will be delivered pursuant to Koch Gateway's blanket transportation certificate authorized in Docket No. CP88–6–000 and under Koch Gateway's ITS Rate Schedule.

The estimated cost of constructing the proposed facilities is $60,000. Koch Gateway indicates that Tri-State will reimburse its construction cost.

Koch Gateway avers that its tariff provides for comprehensive delivery points, as well as comprehensive receipt points, for all ITS shippers. Koch Gateway therefore, states that any qualified shipper on Koch Gateway's system can potentially deliver natural gas to Tri-State. It is further stated that such services will be within the entitlements of their respective transportation agreements and pursuant to Koch Gateway's blanket transportation certificate.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filling a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33185 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER97–135–000]

Manner Technologies, L.L.C.; Notice of Issuance of Order

December 24, 1996.

Manner Technologies, L.L.C. (Manner Technologies) submitted for filing a rate schedule under which Manner Technologies will engage in wholesale electric power and energy transactions as a marketer. Manner Technologies also requested waiver of various Commission regulations. In particular, Manner Technologies requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by Manner Technologies.

On December 9, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protect the blanket approval of issuances of securities or assumptions of liability by Manner Technologies 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 385.214).

Absent a request for hearing within this period, Manner Technologies is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of Manner Technologies' issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 8, 1997. Copies of the full text of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E. Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33114 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP97–196–000]

Mid Louisiana Gas Company; Notice of Proposed Changes In FERC Gas Tariff

December 23, 1996.

Take Notice that on December 18, 1996, Mid Louisiana Gas Company (Mid Louisiana) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, with a proposed effective date of January 20, 1997:

Original Sheet No. 1B
First Revised Sheet No. 188
First Revised Sheet No. 189

Mid Louisiana states that the filing of the Revised Tariff Sheet is in response to Commission Orders 582 and 582–A, in Docket No. RM95–3–000 and RM95–3–001 wherein the Commission revised the filing and reporting requirements for interstate natural gas companies with regard to rate schedules and tariffs.

Pursuant to Section 154.7(a)(7) of the Commission's Regulations, Mid Louisiana respectfully requests waiver of any requirement of the Regulations in order to permit the tendered tariff sheets to become effective January 20, 1997, as submitted.

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 Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33051 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–160–000]

NorAm Gas Transmission Company; Notice of Request Under Blanket Authorization

December 23, 1996.

Take notice that on December 19, 1996, NorAm Gas Transmission Company (NorAm), filed in Docket No. CP97–160–000, an application pursuant to NorAm's authority granted in Docket No. CP82–284–001 and Section 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (NGA) (18 CFR 157.205, and 157.211) for authorization to construct and operate certain facilities in Arkansas to deliver gas to ARKLA, a distribution division of NorAm Energy Corporation (ARKLA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

NorAm specifically proposes to operate an existing delivery tap on NorAm's Line KM–12 for delivery of natural gas to ARKLA. NorAm states that ARKLA plans to utilize the existing tap as a second feed for its Rural Extension No. 75. It is stated that the tap is located in Section 5, Township 18 South, Range 15 West, Union County, Arkansas.

It is further stated that ARKLA would construct a 2-inch U-Shape meter station at its cost and convey ownership to NorAm and NorAm supervise the installation and operation of the meter station at an estimated cost of $200. NorAm states that the estimated volumes to be delivered through this tap are approximately 850,000 MMBtu annually and 240 MMBtu on a peak day. NorAm further states that ARKLA would reimburse NorAm for the construction costs.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or noticed of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33046 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP95–396–013]

Tennessee Gas Pipeline Company; Notice of Compliance Filing

December 23, 1996.

Take notice that on December 16, 1996, Tennessee Gas Pipeline Company (Tennessee), tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume 1, Second Revised Sheet No. 314C, to be effective on December 16, 1996.

Tennessee states that it is filing the subject tariff sheet in compliance with the November 18, 1996 Order on Rehearing of the Commission issued in Docket No. RP95–396–002, et al. Tennessee Gas Pipeline Company, 77 FERC ¶ 61,187 (1996) (''November 18th Order''). Tennessee states that the revised tariff sheet clarifies that parties ''bumped'' as a result of an intra-day nomination change may renominate to delivery points as well as receipt points.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, D.C. 20426, in accordance with 18 CFR Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Copies of this filing are on file with the Commission and available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33049 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–157–000]

Texas Eastern Transmission Corporation; Notice of Request Under Blanket Authorization

December 24, 1996.

Take notice that on December 17, 1996, Texas Eastern Transmission Corporation (TETCO), 5400 Westheimer

Court, Houston, Texas 77056–5310 filed in Docket No. CP97–157–000 a request pursuant to §§ 157.205, and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for approval and permission to construct and install a delivery point for Union Natural Gas Pipeline Company (Union Natural) to enable Union Natural to make deliveries to the City of Magnolia, Texas, under the blanket certificate issued in Docket No. CP82–535–000, pursuant to Section 7(c) of the Natural Gas Act (NGA), all as more fully set forth in the request which is on file with the Commission and open to public inspection.

TETCO states that it proposes to construct and install a point of delivery on TETCO's Line No. 11 located in Montgomery County, Texas. TETCO indicates that it will deliver up to 800 Dth per day of firm transportation service for Union Natural pursuant to TETCO's Rate Schedule FT–1. TETCO asserts that such service will be performed utilizing existing capacity on TETCO's system and will have no impact on TETCO's peak day or annual deliveries. TETCO submits that its proposal herein will be accomplished without detriment or disadvantage to TETCO's other customers. It is indicated that the total estimated expenses for the delivery point, including an allowance for federal income taxes, are $38,069 for which Union Natural has agreed to reimburse TETCO.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33187 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP96–211–007]

Transcontinental Gas Pipe Line Corporation; Notice of Compliance Filing

December 23, 1996

Take notice on December 18, 1996, Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing certain tariff sheets to its FERC Gas Tariff, Third Revised Volume No. 1, which tariff sheets are listed on Attachment A attached to the filing. The proposed effective date for the tariff sheets is January 1, 1997.

Transco states that the purpose of the instant filing is to comply with the Commission's order dated December 3, 1996 in Docket No. RP96–211–005 (the December 3 Order). The December 3 Order directed Transco within 15 days from the date of the Order to (i) refile to eliminate a perceived limitation on capacity releases or file support for the limitation based on operational reasons, (ii) refile to eliminate its proposed TCQ limitations from its tariff or explain fully such provision, and (iii) refile pro forma tariff sheets as actual tariff sheets effective December 1, 1996. The revised tariff sheets comply with the requirement of the December 3 Order, save for the effective date of the tariff sheets.

Transco states that it is serving copies of that instant filing to customers, State Commissions and other interested parties.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33050 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. TM97–5–29–000]

Transcontinental Gas Pipe Line Corporation; Notice of Proposed Changes in FERC Gas Tariff

December 24, 1996.

Take notice that on December 19, 1996 Transcontinental Gas Pipe Line Corporation (Transco) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, Second Revised Twenty-eighth Revised Sixth Revised Sheet No. 28 and First Revised Thirtieth Revised Sixth Revised Sheet No. 28, with a proposed effective August 1, 1996 and December 1, 1996, respectively.

Transco states that the purpose of the instant filing is to track rate and fuel changes attributable to storage service purchased from Texas Eastern Transmission Corporation (TETCO) under its Rate Schedule X–28 the costs of which are included in the rates and charges payable under Transco's Rate Schedule S–2. This tracking filing is being made pursuant to Section 26 of the General Terms and Conditions of Transco's Volume No. 1 Tariff.

Transco states that included in Appendix B attached to the filing is an explanation of the rate and fuel changes and details regarding the computation of the revised Rate Schedule S–2 rates.

Transco states that copies of the filing are being mailed to each of its S–2 customers and interested State Commissions.

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, Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make 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 in the Public Reference Room.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33190 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER96–2879–000]

US Energy, Inc.; Notice of Issuance of Order

December 24, 1996.

US Energy, Inc. (US Energy) submitted for filing a rate schedule under which US Energy will engage in wholesale electric power and energy transactions as a marketer. US Energy also requested waiver of various Commission regulations. In particular, US Energy requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liability by US Energy.

On December 11, 1996, pursuant to delegated authority, the Director, Division of Applications, Office of Electric Power Regulation, granted requests for blanket approval under Part 34, subject to the following:

Within thirty days of the date of the order, any person desiring to be heard or to protest the blanket approval of issuances of securities or assumptions of liability by US Energy 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 Procedures (18 CFR 385.211 and 385.214).

Absent a request for hearing within this period, US Energy is authorized to issue securities and assume obligations or liabilities as a guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issuance or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, and is reasonably necessary or appropriate for such purposes.

The Commission reserves the right to require a further showing that neither public nor private interests will be adversely affected by continued approval of US Energy's issuances of securities or assumptions of liability.

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is January 10, 1997. Copies of the full text of the order are available from the Commission's Public Reference Branch, 888 First Street, N.E., Washington, D.C. 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33113 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. EG97–10–000, et al.]

CMS Morocco Operating Company SCA, et al.; Electric Rate and Corporate Regulation Filings

December 23, 1996.

Take notice that the following filings have been made with the Commission:

1. CMS Morocco Operating Company SCA

[Docket No. EG97–10–000]

On October 31, 1996, CMS Morocco Operating Company SCA (''Applicant''), with its principal office at c/o CMS Generation Co., Fairlane Plaza South, 330 Town Center Drive, Suite 1000, Dearborn, Michigan 48126, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's Regulations. On December 19, 1996, Applicant filed an amendment to this application. In its amendment, Applicant states that it is a company duly incorporated under the laws of Morocco. Applicant also amends the first line of Section IV(3) of its application by deleting the word ''directly'' because it may create unnecessary ambiguity. All other aspects of its Application remain unchanged. Applicant believes these changes should have no material impact on its application for determination of exempt wholesale generator status.

Applicant will operate two existing 330 MW coal-fired units and operate two additional 348 MW units to be constructed. Electric energy produced by the Facility will be sold at wholesale to the state-owned Office National de l'Electricite. In no event will any electric energy be sold to consumers in the United States.

Comment date: January 13, 1997, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

2. City of Las Cruces, New Mexico

[Docket No. EL97–16–000]

Take notice that on December 13, 1996, the City of Las Cruces, New Mexico tendered for filing a petition for exemption in lieu of filing fee for a petition for a declaratory order.

Comment date: January 9, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. Resale Power Group of Iowa, Inc. v. IES Utilities, Inc.

[Docket No. EL97–17–000]

Take notice that on December 18, 1996, pursuant to Section 306 of the Federal Power Act, 16 U.S.C. 824e, and Rule 206 of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 CFR 385.206, Resale Power Group of Iowa, Inc.(RPGI), c/o Farmers Electric Cooperative, Inc., 5047 Cosgrove Road S.W., Kalona, Iowa, 52247, filed a complaint against IES Utilities, Inc. (IES Utilities). The complaint requests that the Commission issue an order directing IES Utilities to file a jurisdictional contract with the Commission. The contract at issue is a Joint Transmission Agreement (JTA) which governs IES Utilities' use of certain transmission facilities for which RPGI has provided capital to construct and in which RPGI members hold undivided joint interests. Under the JTA, in return for its use of the transmission facilities, IES Utilities pays RPGI a ''transmission use fee'' that IES collects in other rates. RPGI asserts that such contract is required to be filed with the Commission pursuant to Section 205(c) of the Federal Power Act.

Comment date: January 31, 1997, in accordance with Standard Paragraph E at the end of this notice. Answers to the complaint shall be due on or before January 31, 1997.

4. Arizona Public Service Company

[Docket Nos. ER96–2999–000, ER97–31–000]

Take notice that on December 17, 1996, Arizona Public Service Company (APS) tendered for filing a request that the Amendment to APS' FERC Electric Coordination Tariff, Original Volume No. 1 (Tariff), filed November 12, 1996, be allowed an effective date of September 6, 1996 in order to coincide with the execution date of the Service Agreement with Edison Source Energy in Docket ER96–2999–000.

A copy of this filing has been served on all parties on the Service List.

Comment date: January 2, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. Exact Power Company, Inc.

[Docket No. ER97–382–000]

Take notice that on November 20, 1996, Exact Power Company, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Central Illinois Light Company

[Docket No. ER97-767-000]

Take notice that on December 11, 1996, Central Illinois Light Company (CILCO), 300 Liberty Street, Peoria, Illinois 61602, tendered for filing with the Commission a substitute Index of Customers under its Coordination Sales Tariff and service agreements for two new customers.

CILCO requested an effective date of December 9, 1996.

Copies of the filing were served on all affected customers and the Illinois Commerce Commission.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. NIPSCO Energy Services, Inc.

[Docket No. ER97–768–000]

Take notice that on December 12, 1996, NIPSCO Energy Services, Inc., tendered for filing an executed Power Sales Enabling Agreement between NIPSCO Energy Services, Inc. and Valero Power Services Company.

Under the Power Sales Enabling Agreement, NIPSCO Energy Services, Inc. may sell power and energy to Valero Power Services Company pursuant to the Power Sales Tariff filed by NIPSCO Energy Services, Inc. in docket No. ER96–1431–000 and allowed to become effective by the Commission on May 29, 1996, as NIPSCO Energy Services, Inc. FERC Rate Schedule 1. Northern Indiana Public Service Company and NIPSCO Energy Services, Inc., 75 FERC ¶ 61,213 (1996). NIPSCO Energy Services, Inc. and Valero Power Services Company have requested that the Service Agreement be allowed to become effective as of December 15, 1996.

Copies of this filing have been sent to the Indiana Utility Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. Southern Company Services, Inc.

[Docket No. ER97–769–000]

Take notice that on December 12, 1996, Southern Company Services, Inc. (SCSI), acting on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (collectively referred to as Southern Companies) filed seven (7) service agreements under Southern Companies' Market-Based Rate Power Sales Tariff (FERC Electric Tariff, Original Volume No. 4) with the following entities: (i) Stand Energy Corporation; (ii) Sonat Power Marketing, L.P.; (iii) Southeastern Power Administration; (iv) Valero Power Services Company; (v) Industrial Energy Applications, Inc.; (vi) Western Power Services, Inc.; and (vii) Enron Power Marketing, Inc. SCSI states that the service agreements will enable Southern Companies to engage in short-term market-based rate transactions with this entity.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. UtiliCorp United Inc.

[Docket No. ER97–770–000]

Take notice that on December 12, 1996, UtiliCorp United Inc., tendered for filing on behalf of its operating division, Missouri Public Service, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 10, with PanEnergy Trading and Market Services, L.L.C. The Service Agreement provides for the sale of capacity and energy by Missouri Public Service to PanEnergy Trading and Market Services, L.L.C. pursuant to the tariff, and for the sale of capacity and energy by PanEnergy Trading and Market Services, L.L.C. to Missouri Public Service pursuant to PanEnergy Trading and Market Services, L.L.C.'s Rate Schedule No. 1.

UtiliCorp also has tendered for filing a Certificate of Concurrence by PanEnergy Trading and Market Services, L.L.C.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. UtiliCorp United Inc.

[Docket No. ER97–771–000]

Take notice that on December 12, 1996, UtiliCorp United Inc., tendered for filing on behalf of its operating division, WestPlains Energy-Colorado, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 11, with PanEnergy Trading and Market Services, L.L.C. The Service Agreement provides for the sale of capacity and energy by WestPlains Energy-Colorado to PanEnergy Trading and Market Services, L.L.C. pursuant to the tariff, and for the sale of capacity and energy by PanEnergy Trading and Market Services, L.L.C. to WestPlains Energy-Colorado pursuant to PanEnergy Trading and Market Services, L.L.C.'s Rate Schedule No. 1.

UtiliCorp also has tendered for filing a Certificate of Concurrence by PanEnergy Trading and Market Services, L.L.C.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. PacifiCorp

[Docket No. ER97–772–000]

Take notice that on December 12, 1996, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, the August 5, 1996, Long-Term Power Sales Agreement (Agreement) between PacifiCorp and Utah Municipal Power Agency (UMPA).

Copies of this filing were supplied to UMPA, the Public Utility Commission of Oregon, Public Service Commission of Utah, and the Washington Utilities and Transportation Commission.

PacifiCorp requests an effective date of January 1, 1997 to be assigned to the Agreement.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464–6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. Illinois Power Company

[Docket No. ER97–773–000]

Take notice that on December 12, 1996, Illinois Power Company (Illinois Power), 500 South 27th Street, Decatur, Illinois, 62525, tendered for filing a modification to its Power Sales (PS) Tariff, proposing to modify the billing section to provide that when IP obtains transmission service under its own open access tariff for power sales made under the power sales tariff, it will separately state the prices for wholesale generation, transmission services and ancillary services.

Illinois Power has requested an effective date of February 10, 1997.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. Interstate Power Company

[Docket No. ER97–774–000]

Take notice that on December 12, 1996, Interstate Power Company (IPW), tendered for filing a Transmission Service Agreement between IPW and Dairyland Power Cooperative

(Dairyland). Under the Transmission Service Agreement, IPW will provide firm point-to-point transmission service to Dairyland.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. UtiliCorp United Inc.

[Docket No. ER97–775–000]

Take notice that on December 12, 1996, UtiliCorp United Inc., tendered for filing on behalf of its operating division, WestPlains Energy-Kansas, a Service Agreement under its Power Sales Tariff, FERC Electric Tariff Original Volume No. 12, with PanEnergy Trading and Market Services, L.L.C. The Service Agreement provides for the sale of capacity and energy by WestPlains Energy-Kansas to PanEnergy Trading and Market Services, L.L.C. pursuant to the tariff, and for the sale of capacity and energy by PanEnergy Trading and Market Services, L.L.C. to WestPlains Energy-Kansas pursuant to PanEnergy Trading and Market Services, L.L.C.'s Rate Schedule No. 1.

UtiliCorp also has tendered for filing a Certificate of Concurrence by PanEnergy Trading and Market Services, L.L.C.

UtiliCorp requests waiver of the Commission's Regulations to permit the Service Agreement to become effective in accordance with its terms.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. Cinergy Services, Inc.

[Docket No. ER97–776–000]

Take notice that on December 12, 1996, Cinergy Services, Inc. (Cinergy), tendered for filing a service agreement under Cinergy's Open Access Transmission Service Tariff (the Tariff) entered into between Cinergy and Powertec International, L.L.P.

Cinergy and Powertec International, L.L.P. are requesting an effective date of December 1, 1996.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. West Texas Utilities Company

[Docket No. ER97–777–000]

Take notice that on December 12, 1996, West Texas Utilities Company (WTU), submitted for filing the Denison Dam Pooling Agreement, dated December 12, 1996, between Tex-La Electric Cooperative of Texas, Ins. and Rayburn country Electric Cooperative, Inc. and West Texas Utilities Company. Under the Agreement, WTU will dispatch, schedule, receive and backup power and energy from the Southwestern Power Administration's (SWPA's) Denison Dam for the account of Tex-La and Rayburn.

WTU seeks an effective date of December 13, 1996, and, accordingly, seeks waiver of the Commission's notice requirements. WTU served copies of the filing on Tex-La, Rayburn, SWPA and the Public Utility Commission of Texas.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. NXIS, LLC

[Docket No. ER97–778–000]

Take notice that on December 12, 1996, NXIS, LLC, a California limited liability company, tendered for filing its FERC Electric Rate Schedule No. 1 to be effective on the earlier of the date of the Commission's order in the proceeding or February 12, 1997, and requested that the Commission grant blanket authorization for NXIS, LLC to make wholesale sales of electric power in interstate commerce at rates to be negotiated with the purchaser, that the Commission waive the cost of service filing requirements of 18 CFR 35.12, and grant such other waivers and authorizations as have been granted to other power marketers.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. Ohio Valley Electric Corporation

[Docket No. ER97–779–000]

Take notice that on December 12, 1996, Ohio Valley Electric Corporation (OVEC), tendered for filing a Service Agreement dated December 6, 1996, for Non-Firm Point-to-Point Transmission Service (the Service Agreement) between AIG Trading Corporation (AIG) and OVEC. OVEC proposes an effective date of December 6, 1996 and requests waiver of the Commission's notice requirement to allow the requested effective date. The Service Agreement provides for non-firm transmission service by OVEC to AIG.

In its filing, OVEC states that the rates and charges included in the Service Agreement are the rates and charges set forth in OVEC's Order No. 888 compliance filing (Docket No. OA96–190–000).

A copy of this filing was served upon AIG.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. Delmarva Power & Light Company

[Docket No. ER97–780–000]

Take notice that on December 12, 1996, Delmarva Power & Light Company (Delmarva), tendered for filing a service agreement providing for non-firm point-to-point transmission service from time to time to Tennessee Power Company pursuant to Delmarva's open access transmission tariff. Delmarva asks that the Commission set an effective date for the service agreement of December 10, 1996, the date on which it was executed.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. Delmarva Power & Light Company

[Docket No. ER97–781–000]

Take notice that on December 12, 1996, Delmarva Power & Light Company (Delmarva), tendered for filing service agreements providing for firm point-to-point transmission service to Duke Louis Dreyfus pursuant to Delmarva's open access transmission tariff.

Delmarva states that a copy of the filing was provided to Duke/Louis Dreyfus.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. Delmarva Power & Light Company

[Docket No. ER97–782–000]

Take notice that on December 12, 1996, Delmarva Power & Light Company (Delmarva), tendered for filing service agreements providing for firm point-to-point transmission service to the City of Dover pursuant to Delmarva's open access transmission tariff.

Delmarva states that copies of the filing were provided to the City of Dover and its agent, Duke/Louis Dreyfus.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

22. Illinois Power Company

[Docket No. ER97–783–000]

Take notice that on December 12, 1996, Illinois Power Company tendered for filing a summary of its activity for the second and third quarters of 1996 under its Market Based Rate Tariff, FERC Electric Tariff, Original Volume No. 7.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

23. Maine Electric Power Company

[Docket No. ER97–785–000]

Take notice that on December 13, 1996, Maine Electric Power Company (MEPCO), tendered for filing a Non-Firm Point-to-Point Transmission Service Agreement entered into with Morgan Stanley Capital Group Inc. Service will be provided pursuant to

MEPCO's Open Access Transmission Tariff, designated rate schedule MEPCO-FERC Electric Tariff, Original Volume No. 1, as supplemented.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

24. Central Maine Power Company

[Docket No. ER97–786–000]

Take notice that on December 13, 1996, Central Maine Power Company (CMP), tendered for filing a Non-Firm Point-to-Point Transmission Service Agreement entered into with Equitable Power Services Company. Service will be provided pursuant to CMP's Open Access Transmission Tariff, designated rate schedule CMP—FERC Electric Tariff, Original Volume No. 3, as supplemented.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

25. Maine Electric Power Company

[Docket No. ER97–787–000]

Take notice that on December 13, 1996, Maine Electric Power Company (MEPCO), tendered for filing a Non-Firm Point-to-Point Transmission Service Agreement entered into with Equitable Power Services Company. Service will be provided pursuant to MEPCO's Open Access Transmission Tariff, designated rate schedule MEPCO—FERC Electric Tariff, Original Volume No. 1, as supplemented.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

26. H. Peter Burg

[Docket No. ID–2401–001]

Take notice that on November 27, 1996, H. Peter Burg (Applicant) tendered for filing an application under Section 305(b) of the Federal Power Act to hold the following positions:

Director, President and Chief Operating
Ohio Edison Company
Director
KeyBank National Association, an affiliate of KeyCorp.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

27. Carol A. Cartwright

[Docket No. ID–2672–001]

Take notice that on November 27, 1996, Carol A. Cartwright (Applicant) tendered for filing an application under Section 305(b) of the Federal Power Act to hold the following positions:

Director,
Ohio Edison Company
Director
KeyBank National Association, an affiliate of KeyCorp.

Comment date: January 6, 1997, in accordance with Standard Paragraph E at the end of this notice.

28. Cedar Falls Utilities Light & Power

[Docket No. OA97–71–000]

Take notice that on December 4, 1996, Cedar Falls Utilities Light & Power tendered for filing a request for waiver of separation of functions.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

29. New England Power Company

[Docket No. OA97–89–000]

Take notice that on December 16, 1996, New England Power Company amended tariff sheets unbundling its FERC Electric Tariffs, Original Volume Nos. 5 and 6, and an unexecuted Service Agreement under its Open Access Tariff, Original Volume No. 9, in compliance with Order 888.

Comment date: January 16, 1997, in accordance with Standard Paragraph E at the end of this notice.

30. Empire District Electric Company

[Docket No. OA97–93–000]

Take notice that on December 17, 1996, Empire District Electric Company tendered for filing a request for waiver of the Standards of Conduct.

Comment date: January 17, 1997, in accordance with Standard Paragraph E at the end of this notice.

31. The Washington Water Power Company

[Docket No. TX97–3–000]

Take notice that on December 16, 1996, The Washington Water Power Company (WWP) filed with the Federal Energy Regulatory Commission an application requesting that the Commission order Puget Sound Power Company (Puget) as a transmitting utility to provide transmission services pursuant to Section 211 *et seq* of the Federal Power Act. This is the second request of WWP for such service, the first request having been given Docket No. TX97–2–000. WWP has also moved to consolidate the two dockets.

WWP is seeking transmission services from Puget to deliver wholesale electric power to Whatcom County PUD No. 1 for ultimate delivery to Tosco Refining Company (Tosco) in Ferndale, Washington, pursuant to a contract between WWP and Tosco. Puget has declined to provide the service. The service is proposed to commence on November 21, 1996 and terminate at 0000 hours, January 1, 2001, with a total capacity of up to 30 megawatts of firm transmission service.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

32. Black Hills Power and Light Company

[Docket No. ER96–2588–000]

Take notice that on December 17, 1996, Black Hills Power and Light Company tendered for filing an amendment in the above-referenced docket.

Comment date: January 6, 1997, 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.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33184 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ER97–757–000, et al.]

Pennsylvania Power & Light Company, et al.; Electric Rate and Corporate Regulation Filings

December 20, 1996.

Take notice that the following filings have been made with the Commission:

1. Pennsylvania Power & Light Company

[Docket No. ER97–757–000]

Take notice that on December 11, 1996, Pennsylvania Power & Light Company (PP&L), filed a Service Agreement, dated November 4, 1996, with Wisconsin Electric Co. (Wisconsin) for the sale of capacity and/or energy under PP&L's Short Term Capacity and Energy Sales Tariff. The Service

Agreement adds Wisconsin as an eligible customer under the Tariff.

PP&L requests an effective date of December 11, 1996, for the Service Agreement.

PP&L states that copies of this filing have been supplied to Wisconsin and to the Pennsylvania Public Utility Commission.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. Pennsylvania Power & Light Company

[Docket No. ER97–758–000]

Take notice that on December 11, 1996, Pennsylvania Power & Light Company (PP&L), filed a Service Agreement dated September 18, 1996, with Carolina Power & Light Company (Carolina Power) under PP&L's FERC Electric tariff, Original Volume No. 1. The Service Agreement adds Carolina Power as an eligible customer under the Tariff.

PP&L requests an effective date of December 11, 1996, for the Service Agreement.

PP&L states that copies of this filing have been supplied to Carolina Power and to the Pennsylvania Public Utility Commission.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

113. Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company

[Docket No. ER97–759–000]

Take notice that on December 11, 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 IUC Power Services (IUC Pwr Ser), dated November 25, 1996. This Service Agreement specifies that IUC Pwr Ser 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 10, 1995 in Jersey Central Power & Light Co., Metropolitan Edison Co. and Pennsylvania Electric Co., Docket No. ER95-726-000 and allows GPU and IUC Pwr Ser 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: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. PacifiCorp

[Docket No. ER97–760–000]

Take notice that on December 11, 1996, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, Service Agreements with Portland General Electric Company and Utah Associated Municipal Power Systems under, PacifiCorp's FERC Electric Tariff, Original Volume No. 11.

Copies of this filing were supplied to the Washington Utilities and Transportation Commission and the Public Utility Commission of Oregon.

A copy of this filing may be obtained from PacifiCorp's Regulatory Administration Department's Bulletin Board System through a personal computer by calling (503) 464-6122 (9600 baud, 8 bits, no parity, 1 stop bit).

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. UtiliCorp United Inc.

[Docket No. ER97–761–000]

Take notice that on December 11, 1996, UtiliCorp United Inc. (UtiliCorp) filed service agreements with Tennessee Power Company for service under its non-firm point-to-point open access service tariff for its operating divisions, Missouri Public Service, WestPlains Energy-Kansas and WestPlains Energy-Colorado.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Cinergy Services, Inc.

[Docket No. ER97–762–000]

Take notice that on December 11, 1996, Cinergy Services, Inc. (Cinergy), tendered for filing a service agreement under Cinergy's Non-Firm Power Sales Standard Tariff (the Tariff) entered into between Cinergy and Paragould Light & Water Commission.

Cinergy and Paragould Light & Water Commission are requesting an effective date of December 1, 1996.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. NIPSCO Energy Services, Inc.

[Docket No. ER97–763–000]

Take notice that on December 11, 1996, NIPSCO Energy Services, Inc., tendered for filing an executed Power Sales Enabling Agreement between NIPSCO Energy Services, Inc. and Alpena Power Company.

Under the Power Sales Enabling Agreement, NIPSCO Energy Services, Inc. may sell power and energy to Alpena Power Company pursuant to the Power Sales Tariff filed by NIPSCO Energy Services, Inc. in Docket No. ER96–431–000 and allowed to become effective by the Commission on May 29, 1996, as NIPSCO Energy Services, Inc. FERC Rate Schedule 1. Northern Indiana Public Service Company and NIPSCO Energy Services, Inc., 75 FERC ¶ 61,213 (1996). NIPSCO Energy Services, Inc. and Alpena Power Company have requested that the Service Agreement be allowed to become effective as of December 15, 1996.

Copies of this filing have been sent to the Indiana Utility Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. NIPSCO Energy Services, Inc.

[Docket No. ER97–764–000]

Take notice that on December 11, 1996, NIPSCO Energy Services, Inc., tendered for filing an executed Power Sales Enabling Agreement between NIPSCO Energy Services, Inc. and The Power Company of America.

Under the Power Sales Enabling Agreement, NIPSCO Energy Services, Inc. may sell power and energy to The Power Company of America pursuant to the Power Sales Tariff filed by NIPSCO Energy Services, Inc. in Docket No. ER96-1431-000 and allowed to become effective by the Commission on May 29, 1996, as NIPSCO Energy Services, Inc. FERC Rate Schedule 1. Northern Indiana Public Service Company and NIPSCO Energy Services, Inc., 75 FERC ¶ 61,213 (1996). NIPSCO Energy Services, Inc. and The Power Company of America have requested that the Service Agreement be allowed to become effective as of December 15, 1996.

Copies of this filing have been sent to the Indiana Utility Regulatory Commission and the Indiana Office of Utility Consumer Counselor.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Revelation Energy Resources Corp.

[Docket No. ER97-765-000]

Take notice that on December 11, 1996, Revelation Energy Resources Corporation (RER), tendered for filing pursuant to Rule 205 of the Commission's Rules of Practice and Procedure an Application for Blanket Approvals, Waivers and Order Approving Rate Schedule, requesting authorization to engage in electric power and energy transactions as a marketer. RER also requests certain authorizations, waiver of certain regulations, and an order accepting its proposed FERC Electric Rate Schedule No. 1, which provides for the sale of electric energy and/or capacity at negotiated rates.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Central Illinois Light Company

[Docket No. ER97-766-000]

Take notice that on December 11, 1996, Central Illinois Light Company (CILCO), 300 Liberty Street, Peoria, Illinois 61602, tendered for filing with the Commission a substitute Index of Point-to-Point Transmission Service Customers under its Open Access Transmission Tariff and service agreements for four new customers.

CILCO requested an effective date of December 4, 1996.

Copies of the filing were served on all affected customers and the Illinois Commerce Commission.

Comment date: January 3, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. Hoffmann-La Roche Inc.

[Docket No. QF80-20-001]

On December 16, 1996, Hoffmann-La Roche Inc. tendered for filing a supplement to its filing in this docket.

This supplement pertains to the technical aspects of the facility. No determination has been made that these submittals constitute a complete filing.

Comment date: January 16, 1997, 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.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33115 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–P

[Project No. 11163–000 Maine/New Hampshire]

Consolidated Hydro Maine, Inc.; Notice of Availability of Environmental Assessment

December 23, 1996.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the application for a new license for the South Berwick Hydroelectric Project, located on the Salmon Falls River in the towns of South Berwick, Maine and Rollinsford, New Hampshire and has prepared a final Environmental Assessment (EA) for the project. In the EA, the Commission's staff has analyzed the potential environmental impacts of the existing project and has concluded that approval of the project, with appropriate environmental protection or enhancement measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference Branch, Room 2A, of the Commission's offices at 888 First Street NE., Washington, DC 20426.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33048 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

[Project Nos. 2551–004–MI and 2579–010–IN]

Indiana Michigan Power Company; Notice of Availability of Environmental Assessment

December 23, 1996.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission's) regulations, 18 CFR Part 380 (Order No. 486, 52 FR 47897), the Office of Hydropower Licensing has reviewed the applications for new license for two existing licensed hydropower projects on the St. Joseph River owned and operated by the Indiana Michigan Power Company: the Buchanan Project, No. 2551, located in Berrien County, Michigan; and the Twin Branch Project, No. 2579, located in St. Joseph County, Indiana. Subsequently, the Commission's staff prepared one Environmental Assessment (EA) that discusses the relicensing of the two projects.

In the EA, staff evaluates the potential environmental impacts that would result from the continued operation of the projects. Staff concludes that relicensing the projects with appropriate enhancement measures would not constitute a major federal action significantly affecting the quality of the human environment.

Copies of the EA are available for review in the Public Reference and Files Maintenance Branch, Room 2A, of the Commission's offices at 888 First Street NE., Washington, DC 20426.

For further information, please contact Jim Haimes Environmental Coordinator, at (202) 219–2780.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33047 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

Notice of Minor New License

December 24, 1996.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. Type of Application: Minor New License.

b. Project No.: 2032–001.

c. Dated filed: September 25, 1996.

d. Applicant: Lower Valley Power & Light, Inc.

e. Name of Project: Strawberry.

f. Location: On the Strawberry Creek, in Lincoln County, Wyoming.

g. Filed Pursuant to: Federal Power Act, 16 USC 791(a)–825(r).

h. Applicant Contact: Mr. Winston G. Allred, Lower Valley Power & Light, Inc., 345 North Washington Street, P.O. Box 188, Ofton, WY 83110, (307) 886–3175.

i. FERC Contact: Héctor M. Pérez, (202) 219–2843.

j. Deadline for filing interventions and protests: March 4, 1997.

k. Status of Environmental Analysis: This application is not ready for environmental analysis at this time—see attached paragraph E.

l. Brief Description of Project: The project consists of: (1) A 22-foot-high, 110-foot-long reinforced concrete gravity dam with a 24-foot-long right abutment, a 40-foot-long overflow spillway with a crest elevation of 7,020 feet NGVD, a 16-foot-long intake sluice section, and a 30-foot-long left abutment; (2) a reservoir with a surface area of 2.8 acres at normal pool elevation of 7,021 feet; (3) an 11,300-foot-long, 36-inch-diameter steel penstock; (4) a powerhouse with three turbine-generator units with a total installed capacity of 1,500 kilowatts; (5) a substation; and (6) other appurtenances.

m. This notice also consists of the following standard paragraph: B1, and E.

B1. Protests or Motions to Intervene—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

E. Filing and Service of Responsive Documents—The application is not ready for environmental analysis at this time; therefore, the Commission is not now requesting comments, recommendations, terms and conditions, or prescriptions.

When the application is ready for environmental analysis, the Commission will notify all persons on the service list and affected resource agencies and Indian tribes. If any person wishes to be placed on the service list, a motion to intervene must be filed by the specified deadline date herein for such motions. All resource agencies and Indian tribes that have official responsibilities that may be affected by the issues addressed in this proceeding, and persons on the service list will be able to file comments, terms and conditions, and prescriptions within 60 days of the date the Commission issues a notification letter that the application is ready for an environmental analysis. All reply comments must be filed with the Commission within 105 days from the date of that letter.

All filings must (1) bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

Lois D. Cashell,

Secretary.

[FR Doc. 96–33189 Filed 12–27–96; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5672–2]

Agency Information Collection Activities: Submission for OMB Review; Comment Request; Lead-based Paint Abatement and Repair Maintenance Study in Baltimore

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: Lead-Based Paint Abatement and Repair Maintenance Study in Baltimore (EPA ICR No. 1603.03, OMB Control No. 2070–0123). 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 29, 1997.

FOR FURTHER INFORMATION OR A COPY CALL: Sandy Farmer at EPA, (202) 260–2740, and refer to EPA ICR No. 1603.03.

SUPPLEMENTARY INFORMATION:

Title: Lead-Based Paint Abatement and Repair Maintenance Study in Baltimore (EPA ICR No.1603.03, OMB Control No. 2070–0123) expiring 1/31/97. This is a request for an extension of a currently approved collection.

Abstract: The EPA is sponsoring a study of private households in Baltimore, Maryland to investigate lead-based paint abatement practices. Low-cost practical repair and maintenance approaches to the problem of lead-based paint and lead-contaminated dust in U.S. Housing will also be examined.

From each study household EPA is periodically collecting both environmental and biological samples as well as questionnaire data over a three-year period. EPA is collecting samples of interior surface dust, exterior soil, and drinking water from study dwellings for lead analysis, as well as collecting blood for lead analysis from children living in such dwellings. A structured questionnaire is being used to collect relevant data on occupational, behavioral, and housing characteristics that can influence lead exposure.

EPA will use this study to evaluate low-cost lead abatement strategies. The study findings will be used by the Department of Housing and Urban Development (HUD) in preparing a report to Congress. The Centers for Disease Control (CDC) will use the study findings to provide guidance to state and local childhood lead poisoning prevention programs. The final report may be used directly by state and local agencies, private property owners, and managers of public and Indian housing to decide on cost-effective methods of addressing lead poisoning and lead abatement concerns.

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 12, 1996 (FR 48152); no comments were received.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 6.5 hours per response. 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: Households.

Estimated Number of Respondents: 105.

Frequency of Response: On occasion.

Estimated Total Annual Hour Burden: 683 hours.

Estimated Total Annualized Cost Burden: $20,941.

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.1603.03 and OMB Control No. 2070–0123 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 24, 1996.

Stephen T. Vineski,

Acting Director, Regulatory Information Division.

[FR Doc. 96–33139 Filed 12–27–96; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5672–1]

Science Advisory Board; Notification of Public Advisory Committee Meetings; January 1997

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that several committees of the Science Advisory Board (SAB) will meet on the dates and times described below. All times noted are Eastern Time. All meetings are open to the public, however, seating is limited and available on a first come basis. Documents that are the subject of SAB reviews are normally available from the originating EPA office and are *not* available from the SAB Office. Public drafts of SAB reports are available to the Agency and the public from the SAB office. Details on availability are noted below.

1. Executive Committee (EC)

The Science Advisory Board's (SAB's) Executive Committee (EC) will conduct a public meeting on Wednesday and Thursday, January 15–16, 1997. The meeting will convene at 8:30 am in the Administrator's Conference Room 1103—West Tower of the U.S. Environmental Protection Agency Headquarters Building at 401 M Street SW, Washington, DC 20460, and adjourn no later than 5:30 pm each day.

At this meeting, the Executive Committee will receive updates from its committees and subcommittees concerning their recent and planned activities. As part of these updates, some committees will present draft reports for Executive Committee review and approval. Expected drafts include: (a) Disinfection Byproducts Research Plan Review Report (Drinking Water Committee); and (b) Marsh Management Report (Ecological Processes and Effects Committee)

The Post-Report Activities Subcommittee, appointed by the Chair following the last meeting, will present recommendations to guide SAB members' behavior as it relates to discussing SAB reports once they have been transmitted to the Administrator.

Other items currently on the agenda include the following:

(a) Discussions with Agency officials: (1) Ms. Jeanie Nelson, Counsel to the Administrator, *subject:* Impact of the SAB's Beyond the Horizon Report on EPA programs; and (2) Dr. Penny Fenner-Crisp, *subject:* Activities of the Food Quality Protection Act Advisory Committee, and Activities of the Advisory Committee on Endocrine Disruptors.

(b) A Consultation on the assessment of Peer Review at EPA.

(c) On Wednesday afternoon, a subset of the Executive Committee will function as a ''Lookout Panel'' by meeting with leaders of the Agency's Office of Pesticides Program to consider different 20-year scenarios of the future.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning the meeting or who wishes to submit comments should contact Dr. Donald G. Barnes, Designated Federal Official for the Executive Committee, Science Advisory Board (1400), U.S. EPA, Washington, DC 20460, phone (202)–260–4126; fax (202)–260–9232; or via Email at: BARNES.DON@EPAMAIL.EPA.GOV. Copies of the draft meeting agenda and available draft reports listed above can be obtained from Ms. Priscilla Tillery-Gadson at the above phone and fax numbers or via the Internet at: TILLERY.PRISCILLA@EPAMAIL.EPA.GOV.

2. Integrated Risk Project: Risk Reduction Options Subcommittee (RROS)

The Risk Reduction Options Subcommittee (RROS) of the Science Advisory Board's (SAB) Integrated Risk Project (IRP) will meet Thursday and Friday, January 16–17, 1997. Through the courtesy of the School of Public Policy the meeting will be held in Press Room A (conference room) and Skyboxes 21, 22 and 23 (breakout rooms) in the Bill Moore Student Success Center, Georgia Institute of Technology, Atlanta GA. The meeting will begin at 8:30 am Thursday and end by 5:00 pm Friday.

The Student Success Center is located between the stadium and Tech Tower just north of North Avenue, off the main entrance to Georgia Tech. To reach the Success Center from North Avenue, go up the stairs immediately before the pedestrian overpass on North Avenue. To reach the Student Success Center from MARTA (the subway), get off at the North Avenue stop, and walk west on North Avenue until you reach the pedestrian overpass (just before the main entrance to Tech), go up the stairs. The Student Success Center is the first building on the right after crossing the lawn at the top of the stairs. It is attached to the stadium, to the west of the Wardlaw Center.

PURPOSE OF THE MEETING: The main purpose of the meeting is to discuss and test a draft methodology for developing risk reduction options for environmental problems. The Subcommittee's activities are part of an SAB project to update the 1990 SAB report, Reducing Risk: Setting Priorities and Strategies for Environmental Protection. In a letter dated October 25, 1995, to Dr. Matanoski, Chair of the SAB Executive Committee, Deputy Administrator Fred Hansen charged the SAB to: (a) Develop an updated ranking of the relative risk of different environmental problems based upon explicit scientific criteria; (b) provide an assessment of techniques and criteria that could be used to discriminate among emerging environmental risks and identify those that merit serious, near-term Agency attention; (c) assess the potential for risk reduction and propose alternative technical risk reduction strategies for the environmental problems identified; and (d) identify the uncertainties and data quality issues associated with the relative rankings. The project is being conducted by several SAB panels, including RROS, working at the direction of an ad hoc Steering

Committee established by the Executive Committee.

FURTHER INFORMATION: An agenda and a roster can be obtained from the Subcommittee Secretary, Mrs. Dorothy Clark, tel. (202) 260–8414, fax (202) 260–7118, or Email CLARK.DOROTHY@EPAMAIL.EPA.GOV. Members of the public desiring additional information about the meeting should contact Mrs. Kathleen Conway, Designated Federal Official, Risk Reduction Options Subcommittee, Science Advisory Board (1400), U.S. EPA, 401 M Street, SW, Washington, DC 20460; telephone/voice mail at (202) 260–2558; fax at (202) 260–7118; or via Email at CONWAY.KATHLEEN@EPAMAIL.EPA.GOV.

Members of the public who wish to make a brief oral presentation to the Committee must contact Mrs. Conway in writing (by letter or by fax—see previously stated information) no later than 12 noon Eastern Time, Wednesday, January 8, 1997 in order to be included on the Agenda. Public comments will be limited to five minutes per speaker or organization. The request should identify the name of the individual who will make the presentation, the organization (if any) they will represent, any requirements for audio visual equipment (e.g., overhead projector, 35mm projector, chalkboard, etc), and at least 35 copies of an outline of the issues to be addressed or the presentation itself.

3. Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) Review Subcommittee (MARSSIMRS) of the Radiation Advisory Committee (RAC)

The Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) Review Subcommittee (MARSSIMRS) of the Science Advisory Board's (SAB's) Radiation Advisory Committee (RAC), will review the technical basis of the draft Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM), dated December 1996 in a public meeting on Wednesday, January 22 and Thursday, January 23, 1997. The meeting will begin at 9:00 am on Wednesday, January 22, 1997 and end no later than 5:00 pm Thursday, January 23, 1996. On the morning of the first and second day of the meeting, Wednesday, January 22, 1997 and Thursday, January 23, 1997, the MARSSIMRS will meet in South Conference Room No. 4 from 9:00 am. to 12:00 noon at the U.S. Environmental Protection Agency Headquarters Building, 401 M Street, SW, Washington, D.C. 20460. On the afternoon of each day January 22 and 23, 1996, from 1:00 pm to 5:00 pm, the MARSSIMRS Workgroups will meet in ''break-out'' sessions for each of three MARSSIMRS workgroups in South Conference Room Numbers 8, 10, and 12, and may also utilize the Science Advisory Board Conference Room 2103 in Waterside Mall, depending on space needs at that time. Workgroup No. 1 will deal with Integration Issues, Workgroup No. 2 will deal with Monitoring, and Workgroup No. 3 will deal with Statistics. The Subcommittee previously met on July 31 and August 1, 1996 (See Federal Register Vol. 61, No. 123, Tuesday, June 25, 1996, pages 32796–32798) to plan for the upcoming review.

The charge to the Subcommittee is as follows: (a) Is the overall approach to the planning, data acquisition, data assessment, and data interpretation as described in the MARSSIM technically acceptable? (b) Are the methods and assumptions for demonstrating compliance with a dose- or risk-based regulation technically acceptable?

Are the hypothesis and statistical tests and their method of application appropriate?

The draft document being reviewed by the MARSSIMRS at this meeting is the draft MARSSIM Manual, dated December 1996. Copies of this draft document are available from the originating EPA office (see below) and are *not* available from the SAB Office. The EPA document number is EPA 402–R–96–018. A limited supply of single copies of this document will be available at no cost at the meeting on January 22 and 23, 1997. This document will also be available via the INTERNET at http://www.epa.gov/ radiation/ cleanup around mid-December. This EPA document will also be available from the National Technical Information Service (NTIS) in this same time-frame (mid-December) for a fee. The NTIS document number is NTIS–PB97–117659. The NTIS sales desk is open between 8:30 am and 5:00 pm Eastern Time, Monday through Friday at (703) 487–4650. For the hearing impaired, call (703) 487–4639. For RUSH service (which entails an additional fee), call 1–800–NTIS. Fax orders can be sent to (703) 321–8547. To order by mail, send orders to: NTIS, 5285 Port Royal Road, Springfield, VA 22161. The background documents that support this review, as well as the draft MARSSIM, dated December 1996 (EPA draft document number EPA 402–R–96–018; also referred to as NUREG–1575)) will be available in the Agency's Air and Radiation Docket around mid-December. Please address written inquiries as follows: USEPA, Attn: Air and Radiation Docket, Mail Stop 6102, Air Docket No. A–96–44, Room M1500, First Floor, Waterside Mall, 401 M Street, SW, Washington, DC 20460. The docket may be inspected from 8:00 am to 4:00 pm, Monday through Friday, excluding Federal holidays, in Room M1500. A reasonable fee may be charged for copies of docket materials. Inquiries regarding access to the public information docket should be directed to Mr. Mark Doehnert, ORIA Staff at (202) 233–9386. To discuss technical aspects of the draft document or any supporting or background information, please contact Mr. Doehnert, Radiation Protection Division (6603J), Office of Radiation and Indoor Air (ORIA), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460, tel. (202) 233–9386; FAX (202) 233–9650; Email at DOEHNERT.MARK@EPAMAIL.EPA.GOV.

Members of the public who wish to make a brief oral presentation at this meeting must contact Mrs. Diana L. Pozun in writing (via fax or letter), Staff Secretary, in writing via fax (202) 260–7118 or Email POZUN.DIANA@EPAMAIL.EPA.GOV) no later than noon, Eastern Time on Wednesday, January 15, 1997, in order to have time reserved on the agenda. For a copy of the proposed agenda, please contact Ms. Pozun at the numbers given above. For questions regarding technical issues to be discussed, please contact Dr. K. Jack Kooyoomjian, Designated Federal Official, Science Advisory Board (1400), US EPA, 401 M Street, SW, Washington DC 20460, by telephone at (202) 260–2560, fax at (202) 260–7118, or via the Email at: KOOYOOMJIAN.JACK@EPAMAIL.EPA.GOV.

4. Radiation Advisory Committee (RAC)

The Radiation Advisory Committee (RAC) of the Science Advisory Board (SAB) will conduct a planning, coordination and review meeting on Friday, January 24, 1997 from 9:00 a.m. and ending no later than 3:00 p.m. that day. The RAC last met on July 31 & August 1, 1996 (See Federal Register Vol. 61, No. 123, Tuesday, June 25, 1996, pages 32796–32798). The meeting will take place at the Washington Information Center Conference Room No. 17. If additional space is needed, the RAC may also utilize the Science Advisory Board Conference Room 2103 at the U.S. Environmental Protection Agency Headquarters Building, 401 M Street, SW, Washington, D.C. 20460. Additional space needs will be determined at the time of the meeting. Expected topics include the following: an update on the recently initiated MARSSIM review; discussions on the Office of Radiation and Indoor Air (ORIA) efforts to revise the NORM (Naturally-Occurring Radioactive Material) Draft Scoping Document; an update on the status of the Biological Effects of Ionizing Radiation (BEIR) VI study and the scoping study for BEIR VII, a briefing on the conclusions of the National Academy of Science review of the risk of Electro-Magnetic Fields (EMF), and continued discussion on ORIA's radon activities. Other topics will be reviewed as time permits.

To discuss technical aspects of the ORIA projects, or any supporting or background information, please contact Mr. Brian Littleton, (6601J), Office of Radiation and Indoor Air (ORIA), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460, tel. (202) 233–9216; fax (202) 233–9651; or Email: LITTLETON.BRIAN-@EPAMAIL.EPA.GOV.

Members of the public who wish to make a brief oral presentation at this meeting must contact Mrs. Diana L. Pozun, Staff Secretary, in writing (via fax or letter) fax (202) 260–7118 or Email POZUN.DIANA@EPAMAIL.EPA.GOV) no later than noon eastern time Wednesday, January 15, 1997, in order to have time reserved on the agenda. For a copy of the proposed agenda, please contact Ms. Pozun at the numbers given above. For questions regarding technical issues to be discussed, please contact Dr. K. Jack Kooyoomjian, Designated Federal Official, Science Advisory Board (1400), US EPA, 401 M Street, SW, Washington DC 20460, tel. (202) 260–2560, fax (202) 260–7118, or via Email at: KOOYOOMJI-AN.JACK@EPAMAIL.EPA.GOV.

Providing Oral or Written Comments at SAB Meetings

The Science Advisory Board expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. In general, for meetings, opportunities for oral comment will usually be limited to no more than five minutes per speaker and no more than thirty minutes total. Written comments (at least 35 copies) received in the SAB Staff Office sufficiently prior to a meeting date (usually one week before the meeting), may be mailed to the relevant SAB committee or subcommittee; comments received too close to the meeting date will normally be provided to the committee at its meeting. Written comments may be provided to the relevant committee or subcommittee up until the time of the meeting.

Information concerning the Science Advisory Board, its structure, function, and composition, may be found in The FY1996 Annual Report of the Staff Director which is available from the SAB Committee Evaluation and Support Staff (CESS) by contacting US EPA, Science Advisory Board (1400), Attention: CESS, 401 M Street, SW, Washington, DC 20460 or via fax (202) 260–1889. Additional information concerning the SAB can be found on the SAB Home Page at: HTTP://WWW.EPA/SCIENCE1/.

Dated: December 23, 1996.

Donald G. Barnes,

Staff Director, Science Advisory Board.

[FR Doc. 96–33141 Filed 12–27–96; 8:45 am]

BILLING CODE 6560–50–P

[FRL–5671–9]

Release of Volume 1, Framework for Risk-Management Decision-Making—January 29, 1997—Risk Assessment and Risk Management

Pursuant to the Federal Advisory Committee Act, Public Law 92–463, notice is hereby given that the Commission on Risk Assessment and Risk Management, established as an Advisory Committee under Section 303 of the Clean Air Act Amendments of 1990, will release Volume 1, *Framework for Risk-Management Decision-Making,* of its two volume final report on January 29. It is anticipated that Volume 2 will be released at the end of February. A public meeting will be held on January 29, 1997; however, the exact location and time has yet to be determined. Another Federal Register notice will be issued with that information. If you are interested in participating and miss the time and location notification in the second Federal Register, please fax a note to 202–233–9540 with your name and fax number so we can fax you the information directly.

If you are unable to attend, but wish to receive a copy of the final report, either fax your request to 202–233–9540, mail your request to the Commission on Risk Assessment and Risk Management, 529 14th Street NW, Room 452, Washington, DC 20045, or obtain via the internet at http://www.riskworld.com. Be sure to indicate your complete mailing address and a phone number where you can be reached. *If you have already requested a copy of the draft report, it is not necessary to send another request.* Everyone who requested a draft report will be sent Volume 1 immediately following the public meeting and Volume 2 when it becomes available.

If you need additional information, please call 202–233–9537. The report will not be available prior to January 29, 1997.

Dated: December 19, 1996.

Gail Charnley,

Executive Director, Commission on Risk Assessment and Risk Management.

[FR Doc. 96–33140 Filed 12–27–96; 8:45 am]

BILLING CODE 6560–50–M

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

President's Committee of Advisors on Science and Technology; Meeting

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and summary agenda for a meeting of the President's Committee of Advisors on Science and Technology (PCAST), and describes the functions of the Committee. Notice of this meeting is required under the Federal Advisory Committee Act.

DATES AND PLACE: January 15, 1997. NASA Headquarters, Program Review Center (PRC), Ninth Floor, Room 9H40, 300 E. Street, S.W., Washington, D.C. 20546–0001.

TYPE OF MEETING: Open.

PROPOSED SCHEDULE AND AGENDA: The PCAST will meet in an open session during the morning of Wednesday, January 15, 1997, beginning at approximately 9:30 a.m. The meeting will focus on concluding the 1996 PCAST panel activities as well as on current activities of the Office of Science and Technology Policy (OSTP) and the National Science and Technology Council (NSTC). This session will end at approximately 12:00 Noon.

The morning session may be interrupted for the PCAST to gather at the White House to be introduced to the President and/or Vice President of the United States.

FOR FURTHER INFORMATION: For information regarding time, place, and agenda, please call Jeanie Hall at (202) 456–6100 prior to 3:00 p.m. on Friday, January 10, 1997. Other questions may be directed to Angela Phillips Diaz, Executive Secretary for PCAST, or Andrea Razzaghi, Acting Policy Analyst for PCAST, at (202) 456–6100. Please note that public seating for this meeting is limited, and is available on a first-come, first-served basis.

SUPPLEMENTARY INFORMATION: The President's Committee of Advisors on Science and Technology was established on November 23, 1993, by Executive Order 12882, as amended, and continued through September 30, 1997, by Executive Order 12974. The purpose of PCAST is to advise the President on matters of national importance that have significant science and technology content, and to assist the President's National Science and Technology Council in securing private sector participation in its activities. The Committee members are distinguished individuals appointed by the President from non-Federal sectors. The PCAST is co-chaired by John H. Gibbons, Assistant to the President for Science and Technology, and by John Young, former President and CEO of Hewlett-Packard Company.

Dated: December 20, 1996.

Barbara Ann Ferguson,

Assistant Director for Budget and Administration Office of Science and Technology Policy.

[FR Doc. 96–33043 Filed 12–24–96; 10:36 am]

BILLING CODE 3170–01–P

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.: 201–200063–15

Title: NYSA–ILA Tonnage Assessment Agreement

Parties: New York Shipping Association International Longshoremen Association

Synopsis: The proposed amendment reduces certain tonnage assessment rates in the Port of New York and New Jersey.

By order of the Federal Maritime Commission.

Dated: December 23, 1996.

Joseph C. Polking,

Secretary.

[FR Doc. 96–33071 Filed 12–27–96; 8:45 am]

BILLING CODE 6730–01–M

Request for Additional Information

Agreement No.: 202–007540–069

Title: United States Atlantic and Gulf/Southeastern Caribbean Agreement

Parties:

Crowley American Transport, Inc.
NPR, Inc., d/b/a/ Navieras
Sea-Land Service Inc.
Caribbean General Maritime, Ltd.
King Ocean Service
Seaboard Marine, Ltd.
Tecmarine Lines, Inc.
Tropical Shipping and Construction Co., Ltd.

Synopsis: Notice is hereby given that the Federal Maritime Commission pursuant to section 6(d) of the Shipping Act of 1984, 46 U.S.C. app. § 1705, has requested additional information from the parties to the Agreement in order to complete the statutory review of Agreement No. 202–007540–069 as required by the 1984 Act. This action extends the review period as provided in section 6(c) the Act.

By order of the Federal Maritime Commission

Dated: December 23, 1996.

Joseph C. Polking,

Secretary.

[FR Doc. 96–33070 Filed 12–27–96; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. The Federal Reserve 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. Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the OMB 83-I and supporting statement and the approved collection of information instrument will be placed into OMB's public docket files. The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collections of information are necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before February 28, 1997.

ADDRESSES: Comments, which should refer to the OMB control number or agency form number, should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Robert T. Maahs, Supervisory Financial Analyst (202-872-4935) or Tina Robertson, Supervisory Financial Analyst (202-452-2949). A copy of the proposed form, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Chief, Financial Reports Section (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Dorothea Thompson (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

GENERAL INFORMATION

Under the Bank Holding Company Act of 1956, as amended, the Board is responsible for the supervision and regulation of all bank holding companies. The FR Y-9 and FR Y-11 series of reports historically have been, and continue to be, the primary source of financial information on bank holding companies and their nonbanking activities between on-site inspections. Financial information, as well as ratios developed from these reports, are used to detect emerging financial problems, to review performance for pre-inspection analysis, to evaluate bank holding company mergers and acquisitions, and to analyze a holding company's overall financial condition and performance as part of the Federal Reserve System's overall supervisory responsibilities.

Proposal to approve under OMB delegated authority the revision of the following reports:

1. Report title: Consolidated Financial Statements for Bank Holding Companies
Agency form number: FR Y-9C
OMB control number: 7100-0128
Frequency: Quarterly
Reporters: Bank holding companies
Annual reporting hours: 188,682
Estimated average hours per response: Range from 5 to 1,250 hours
Number of respondents: 1,389
Small businesses are affected.

General description of report: The information collection is mandatory 12 U.S.C. 1844(b) and (c) and 12 CFR 225.5(b). Confidential treatment is not routinely given to the data in these reports. However, confidential treatment for the reporting information, in whole or in part, can be requested in accordance with the instructions to the form.

Data reported on the FR Y-9C, Schedule HC-H, Column A, requiring information on ''assets past due 30 through 89 days and still accruing'' and memoranda item 2 are confidential pursuant to Section (b)(8) of the Freedom of Information Act 5 U.S.C. 552(b)(8).

The FR Y-9C consolidated financial statements are currently filed by top-tier bank holding companies with total consolidated assets of $150 million or more and by lower-tier bank holding companies that have total consolidated assets of $1 billion or more. In addition, all multibank bank holding companies with debt outstanding to the general public or engaged in certain nonbank activities, regardless of size, must file the FR Y-9C. The following bank holding companies are exempt from filing the FR Y-9C, unless the Board specifically requires an exempt company to file the report: bank holding companies that are subsidiaries of another bank holding company and have total consolidated assets of less than $1 billion; bank holding companies that have been granted a hardship exemption by the Board under section 4(d) of the Bank Holding Company Act; and foreign banking organizations as defined by section 211.23(b) of Regulation K.

The report includes a balance sheet, income statement, and statement of changes in equity capital with supporting schedules providing information on securities, loans, risk-based capital, deposits, average balances, off-balance sheet activities, past due loans, and loan charge-offs and recoveries.

The Federal Reserve proposes revisions to the FR Y-9C that would be effective with the March 31, 1997, reporting date. Most of the proposed new items are needed to maintain consistency with comparable items recently proposed or previously added to the commercial bank Reports of Condition and Income (Call Report). The proposed revisions to the FR Y-9C consist of combining or eliminating several line items, revising the reporting for assets sold with recourse, implementing Financial Accounting Standards Board Statement Number 125, Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities, for reporting transfers and servicing of financial assets, and adding the reporting of credit derivative instruments. The result of these revisions would be a net reduction of fifteen reporting items on the FR Y-9C. The proposed revisions do not include Call Report changes that were proposed by the Federal Financial Institutions Examination Council to improve the monitoring of interest rate risk exposures.

The Federal Reserve is attempting to minimize reporting burden by making appropriate reporting revisions in a manner consistent with the Call Report and effective with the same reporting period. In addition, revisions and clarifications to existing instructions would be incorporated into this report.

2. Report title: Parent Company Only Financial Statements for Large Bank Holding Companies
Agency form number: FR Y-9LP
OMB control number: 7100-0128
Frequency: Quarterly
Reporters: Bank holding companies
Annual reporting hours: 30,819
Estimated average hours per response: Range from 2.0 to 13.5 hours
Number of respondents: 1,716
Small businesses are affected.

General description of report: The information collection is mandatory 12 U.S.C. 1844(b) and (c) and 12 CFR 225.5(b). Confidential treatment is not routinely given to the information in these reports. However, confidential treatment for the report information, in whole or in part, can be requested in accordance with the instructions to the form.

The FR Y-9LP includes standardized financial statements filed quarterly on a parent company only basis from each bank holding company that files the FR Y-9C. In addition, for tiered bank holding companies, a separate FR Y-9LP must be filed for each lower tier bank holding company if the top tier bank holding company files the FR Y-9C. The following bank holding companies are exempt from filing the FR Y-9LP, unless the Board specifically requires an exempt company to file the report: bank holding companies that have been granted a hardship exemption by the Board under section 4(d) of the Bank Holding Company Act; and foreign banking organizations as defined by section 211.23(b) of Regulation K.

The Federal Reserve proposes minor revisions to the FR Y-9LP to maintain consistency with the revisions proposed to the FR Y-9C, and would be effective with the March 31, 1997, reporting date.

3. Report title: Parent Company Only Financial Statements for Small Bank Holding Companies
Agency form number: FR Y-9SP
OMB control number: 7100-0128
Frequency: Semiannual
Reporters: Bank holding companies
Annual reporting hours: 32,295

Estimated average hours per response: Range from 1.5 to 6.0 hours
Number of respondents: 4,306
Small businesses are affected.

General description of report: The information collection is mandatory 12 U.S.C. 1844(b) and (c) and 12 CFR 225.5(b). Confidential treatment is not routinely given to the information in these reports. However, confidential treatment for the report information, in whole or in part, can be requested in accordance with the instructions to the form.

The FR Y-9SP is a parent company only financial statement filed by one-bank holding companies with total consolidated assets of less than $150 million on a semiannual basis. This report, an abbreviated version of the more extensive FR Y-9LP, is designed to obtain basic balance sheet and income statement information, information on intercompany transactions, and data for capital adequacy evaluation.

The Federal Reserve proposes minor revisions to the FR Y-9SP to maintain consistency with the revisions proposed to the FR Y-9C, and would be effective with the June 30, 1997, reporting date.

4. Report title: Quarterly Financial Statements of Nonbank Subsidiaries of Bank Holding Companies
Agency form number: FR Y-11Q
OMB control number: 7100-0244
Frequency: Quarterly
Reporters: Bank holding companies
Annual reporting hours: 6,845
Estimated average hours per response: Range from 3.0 to 8.0 hours
Number of respondents: 276
Small businesses are affected.

General description of report: The information collection is mandatory 12 U.S.C. 1844(b) and (c) and 12 CFR 225.5(b). Confidential treatment is not routinely given to most of the data in these reports. However, confidential treatment for the report information, in whole or in part, can be requested in accordance with the instructions to the form. FR Y-11Q, memorandum item 7.a, ‘‘loans and leases past due 30 through 89 days’’ and FR Y-11Q, memorandum item 7.d, ‘‘loans and leases restructured and included in past due and nonaccrual loans’’ are confidential pursuant to Section (b)(8) of the Freedom of Information Act 5 U.S.C. 552(b)(8).

The FR Y-11Q is filed quarterly by the top tier bank holding companies for each nonbank subsidiary of a bank holding company with total consolidated assets of $150 million or more in which the nonbank subsidiary has total assets of 5 percent or more of the top-tier bank holding company's consolidated Tier 1 capital, or where the nonbank subsidiary's total operating revenue equals 5 percent or more of the top-tier bank holding company's consolidated total operating revenue. The report consists of a balance sheet, income statement, off-balance-sheet items, information on changes in equity capital, and a memoranda section.

The Federal Reserve proposes minor revisions to the FR Y-11Q to maintain consistency with the revisions proposed to the FR Y-9C, and would be effective with the March 31, 1997, reporting date.

5. Report title: Annual Financial Statements of Nonbank Subsidiaries
Agency form number: FR Y-11I
OMB control number: 7100-0244
Frequency: Annual
Reporters: Bank holding companies
Annual reporting hours: 6,560
Estimated average hours per response: Range from .4 to 8.0 hours
Number of respondents: 2,050
Small businesses are affected.

General description of report: The information collection is mandatory 12 U.S.C. 1844(b) and (c) and 12 CFR 225.5(b). Confidential treatment is not routinely given to the data in these reports. However, confidential treatment for the report information, in whole or in part, can be requested in accordance with the instructions to the form. FR Y-11I, Schedule A, item 7.a, ‘‘loans and leases past due 30 through 89 days’’ and FR Y-11I, Schedule A, item 7.d, ‘‘loans and leases restructured and included in past due and nonaccrual loans’’ are confidential pursuant to Section (b)(8) of the Freedom of Information Act 5 U.S.C. 552(b)(8).

The FR Y-11I is filed annually by the top tier bank holding companies for each of their nonbank subsidiaries that are not required to file a quarterly FR Y-11Q. The FR Y-11I report consists of similar balance sheet, income statement, off-balance-sheet, and change in equity capital information that is included on the FR Y-11Q. In addition, the FR Y-11I also includes a loan schedule to be submitted only by respondents engaged in credit extending activities.

The Federal Reserve proposes minor revisions to the FR Y-11I to maintain consistency with the revisions proposed to the FR Y-9C, and would be effective with the December 31, 1997, reporting date.

Board of Governors of the Federal Reserve System, December 24, 1996.

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–33161 Filed 12–27–96; 8:45am]

BILLING CODE 6210–01–F

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System
ACTION: Notice

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. The Federal Reserve 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. Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the OMB 83-I and supporting statement and the approved collection of information instruments will be placed into OMB's public docket files. The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collections of information are necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, 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 information collections on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before February 28, 1997.

ADDRESSES: Comments, which should refer to the OMB control number (or agency form number), should be addressed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed forms and instructions, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other doucments that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Chief, Financial Reports Section (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Dorothea Thompson (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension, with revision, of the following reports:

1. Report title: Weekly Report of Eurodollar Liabilities Held by Selected U.S. Addressees at Foreign Offices of U.S. Banks
Agency form number: FR 2050
OMB control number: 7100-0068
Frequency: Weekly
Reporters: Large foreign branches and banking subsidiaries of U.S. banks
Annual reporting hours: 2,860
Estimated average hours per response: 1.0
Number of respondents: 54 branches, 1 subsidiary
Small businesses are not affected.

General description of report: This information collection is voluntary (12 U.S.C. 248(a)(2), 353 et seq., 461, 602, and 625) and is given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: This report collects data on overnight and term Eurodollars held by certain U.S. residents in selected foreign branches and subsidiaries of U.S. commercial banks and Edge and agreement corporations. The data are used for the construction of the Eurodollar component of the monetary aggregates and for analysis of banks' liability management practices.

Under the proposed revisions the reporting threshold would be raised from a weekly average of $200 million to $350 million in Eurodollar liabilities. Additions and deletions to the reporting panel would be made only annually. The number of data items collected would be reduced from 4 to 2. As a result of the redefinition of the M2 monetary aggregate in February 1996, the overnight Eurodollar component of M2 was moved to the non-M2 component of M3, where the term component currently is included. Since the separation of the two nonnegotiable Eurodolllar items (overnight and term) is no longer necessary, they would be combined into a single item, and the memorandum item would be dropped from the report.

The revised report would be implemented as of the reporting week ending Monday, March 31, 1997.

2. Report title: Quarterly Report of Assets and Liabilities of Large Foreign Offices of U.S. Banks
Agency form number: FR 2502q
OMB control number: 7100-0079
Frequency: Quarterly
Reporters: Large foreign branches and banking subsidiaries of U.S. banks
Annual reporting hours: 7,266
Estimated average hours per response: 3.5
Number of respondents: 483 branches, 36 subsidiaries
Small businesses are not affected.

General description of report: This information collection is mandatory (12 U.S.C. 248(a)(2), 353 et seq., 461, 602, and 625) and is given confidential treatment (5 U.S.C. 552(b)(4)).

Abstract: This report collects assets and liability information from foreign branches and subsidiaries of U.S. commercial banks and Edge and agreement corporations. A separate schedule collects information on Eurodollar liabilities payable to certain U.S. addressees. The data are used in the construction of the monetary aggregates and to monitor flows of funds between banks and their branches. The data also are combined with data from other sources to develop a profile of the total exposure of U.S. banks to individual countries. Together with data from the Department of the Treasury, the FR 2502q provides information that the Bank for International Settlements compiles from all G-10 countries on international banking market developments. In addition, data from the FR 2502q are used by the Department of Commerce to estimate the capital accounts portions of the balance of payments.

Under the proposed revisions, the reporting threshold for branches would be raised from $150 million to $500 million in total assets. The number of data items collected on the Eurodollar schedule would be reduced from three to one, and updates and clarifications would be made to the reporting form and instructions.

The revised report would be implemented on the March 31, 1997, as-of date.

Board of Governors of the Federal Reserve System, December 24, 1996

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–33162 Filed 12–27–96; 8:45AM]

BILLING CODE 6210–01–F

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Board of Governors of the Federal Reserve System

ACTION: Notice

Background

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act of 1995, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR 1320 Appendix A.1. The Federal Reserve 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. Board-approved collections of information will be incorporated into the official OMB inventory of currently approved collections of information. A copy of the OMB 83-I and supporting statement and the approved collection of information instrument will be placed into OMB's public docket files. The following information collection, which is being handled under this delegated authority, has received initial Board approval and is hereby published for comment. At the end of the comment period, the proposed information collection, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments must be submitted on or before February 28, 1997.

ADDRESSES: Comments, which should refer to the OMB control number (or Agency form number in the case of a new information collection that has not yet been assigned an OMB number), should be addressed to William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, DC 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M-P-500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

A copy of the comments may also be submitted to the OMB desk officer for the Board: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed form and instructions, the Paperwork Reduction Act Submission (OMB 83-I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Mary M. McLaughlin, Federal Reserve Board Clearance Officer (202-452-3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact Dorothea Thompson (202-452-3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

Proposal to approve under OMB delegated authority the extension, with revision, of the following report:

1. Report title: Application for Employment with the Board of Governors of the Federal Reserve System (''Application'')
Agency form number: FR 28
OMB control number: 7100-0181
Frequency: on occasion
Reporters: applicants for employment with the Board
Annual reporting hours: 8,500
Estimated average hours per response: 1.0
Number of respondents: 8,500
Small businesses are not affected.

General description of report: This information collection is required to obtain or retain a benefit (12 U.S.C. 244 and 248(1)) and is given confidential treatment under the Privacy Act (5 U.S.C. 552(a)) and the Freedom of Information Act (5 U.S.C. 552(b)(2) and b(6)).

Abstract: The Federal Reserve Board proposes to extend the Application, with revisions, for three years. The purpose of the Application is to collect information to determine the qualifications, suitability, and availability of applicants for employment with the Board. The Application asks about education, training, employment, and other information covering the period since the Applicant left high school.

The proposed revisions include substantively revising several items. There are no proposed deletions. The Board further proposes revising text to comply with current law, to reflect changes in societal language preferences, and to reflect changes in the Board's *Rules Regarding Equal Opportunity*.

Board of Governors of the Federal Reserve System, December 24, 1996

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–33163 Filed 12–27–96; 8:45am]

BILLING CODE 6210–01–F

[Docket No. R-0841]

Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice.

SUMMARY: The Board is increasing from 10 percent to 25 percent the amount of total revenue that a nonbank subsidiary of a bank holding company (a so-called section 20 subsidiary) may derive from underwriting and dealing in securities that a member bank may not underwrite or deal in. The revenue limit is designed to ensure that a section 20 subsidiary will not be engaged principally in underwriting and dealing in such securities in violation of section 20 of the Glass-Steagall Act. Based on its experience supervising these subsidiaries and developments in the securities markets since the revenue limitation was adopted in 1987, the Board has concluded that a company earning 25 percent or less of its revenue from underwriting and dealing would not be engaged principally in that activity for purposes of section 20.

EFFECTIVE DATE: March 6, 1997.

FOR FURTHER INFORMATION CONTACT: Gregory A. Baer, Managing Senior Counsel (202/452-3236), Thomas M. Corsi, Senior Attorney (202/452-3275), Legal Division; Michael J. Schoenfeld, Senior Securities Regulation Analyst (202/452-2781), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452-3544), Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC.

SUPPLEMENTARY INFORMATION:

I. Background

Section 20 of the Glass-Steagall Act provides that a member bank of the Federal Reserve System may not be affiliated with a company that is ''engaged principally'' in underwriting and dealing in securities.[1] In 1987, the Board first interpreted that phrase to allow bank affiliates to engage in underwriting and dealing in bank-ineligible securities—that is, those securities that a member bank would not be permitted to underwrite or deal in—when the Board approved applications by three bank holding companies to underwrite and deal in commercial paper, municipal revenue bonds, mortgage-backed securities, and consumer-receivable-related securities (hereafter, ''tier-one securities'').[2] In

---

[1] 12 U.S.C. 377.

[2] *Citicorp, J.P. Morgan & Co., and Bankers Trust New York Corp.*, 73 Federal Reserve Bulletin 473 (1987) (hereafter, *1987 Order*), *aff'd, Securities Industry Ass'n* v. *Board of Governors*, 839 F.2d 47,

1989, the Board allowed five bank holding companies to underwrite and deal in all debt and equity securities (hereafter, ''tier-two securities''). [3]

Currently, forty-one subsidiaries of bank holding companies are authorized to engage in underwriting and dealing activities that are not authorized for a member bank. Fifteen of these so-called section 20 subsidiaries have authority to underwrite and deal in tier-one securities pursuant to the *1987 Order.* Pursuant to the *1989 Order,* twenty-three section 20 subsidiaries have authority to underwrite and deal in all tier-two securities, and three may underwrite and deal in all debt securities.

The Board has established a revenue test to determine whether a company is ''engaged principally'' in underwriting and dealing for purposes of section 20. The revenue test provides that a section 20 subsidiary may not derive more than 10 percent of its total revenue from underwriting and dealing in bank-ineligible securities. The Board arrived at this revenue test through a series of interpretive steps, in a series of orders.

The Board interpreted the meaning of ''engaged principally'' in its 1987 order allowing Bankers Trust New York Corporation to engage in private placement of commercial paper. [4] Having satisfied itself that the ''engaged principally'' language of section 20 must allow some level of underwriting and dealing, [5] the Board was required to choose between two alternative meanings of ''principal.'' The first meanings of ''principal,'' advocated by the applicant, included definitions such as ''chief,'' ''main,'' or ''largest,'' and translated into allowing underwriting and dealing to constitute up to 50 percent of the section 20 subsidiary's business or, alternatively, to constitute anything other than its largest business (collectively, the ''largest activity interpretation''). The second meaning included definitions such as ''primary,'' ''substantial,'' ''leading,'' ''important,'' or ''outstanding'' and translated into a stricter limitation on underwriting and dealing—that is, allowing underwriting and dealing subject to a limit somewhat lower than 49 percent of the applicants' business. [6] Based on the purposes and legislative history of Glass-Steagall Act, the Board chose the latter interpretation. [7]

The Board further found in the *Bankers Trust* order that the best measure of the underwriting and dealing activity for purposes of section 20 was the gross revenue derived from that activity. [8] The *Bankers Trust* order found that a company deriving less than five percent of revenue would be in compliance with section 20, but did not attempt to identify the maximum percentage of revenue permitted by the statute.

Finally, in its *1987 Order,* the Board translated its interpretation of ''engaged principally'' into a quantitative limit on the amount of gross revenue that could permissibly be derived from underwriting and dealing. The Board found that underwriting and dealing in bank-ineligible securities would not be a ''substantial'' activity for a section 20 subsidiary if the gross revenue derived from that activity did not exceed 5 to 10 percent of the total gross revenue of the subsidiary. [9] As a prudential matter, the Board initially limited ineligible revenue to 5 percent of total revenue in order to gain experience in supervising such subsidiaries. In 1989, the Board allowed section 20 subsidiaries to increase their underwriting and dealing revenue to 10 percent of total revenue. [10]

No changes were made to the revenue test in subsequent orders until, in January 1993, the Board allowed section 20 subsidiaries to use an alternative revenue test that was indexed to account for changes in interest rates since 1989. [11] The Board found that historically unusual changes in the level and structure of interest rates had distorted the revenue test as a measure of the relative importance of ineligible securities activity in a manner that was not anticipated when the 10 percent limit was adopted in 1989. In particular, the Board found that because bank-eligible securities (such as U.S. government securities) tended to be shorter term than ineligible securities, an increase in the steepness of the yield curve had caused the revenue earned by at least some section 20 subsidiaries from holding eligible securities to decline in relation to ineligible revenue, even as the relative proportion of eligible and ineligible securities activities being conducted by these subsidiaries remained unchanged. [12] Five section 20 subsidiaries are currently operating under this indexed test; use of the test has not been more widespread because the systems necessary to administer it are expensive and complicated.

II. Proposed Change to Revenue Limit

On July 31, 1996, the Board proposed to maintain the revenue measure but increase the revenue limit from 10 percent of total revenue to 25 percent. [13] The Board based this proposed increase on the experience it has gained through supervision of the section 20 subsidiaries over a nine-year period. The Board stated its belief that the limitation of 10 percent of total revenue it adopted in 1987, without benefit of this experience, had unduly restricted the underwriting and dealing activity of section 20 subsidiaries. The Board noted that changes in the product mix that section 20 subsidiaries are permitted to offer and developments in the securities markets had affected the relationship between revenue and activity since 1987.

---

66 (2d Cir.), *cert. denied,* 486 U.S. 1059 (1988) (hereafter, *Citicorp); Chemical New York Corp., Chase Manhattan Corp., Bankers Trust New York Corp., Citicorp, Manufacturers Hanover Corp., and Security Pacific Corp.,* 73 Federal Reserve Bulletin 731 (1987) (approving underwriting and dealing in consumer-receivable-related securities, after having deferred decision for 60 days in its *1987 Order*).

[3] *J.P. Morgan & Co., The Chase Manhattan Corp., Bankers Trust New York Corp., Citicorp, and Security Pacific Corp.,* 75 Federal Reserve Bulletin 192 (1989) (hereafter *1989 Order), aff'd, Securities Industries Ass'n* v. *Board of Governors,* 900 F.2d 360 (D.C. Cir. 1990) (hereafter, *SIA II*).

[4] *Bankers Trust New York Corporation,* 73 Federal Reserve Bulletin 138 (1987) (hereafter, *Bankers Trust*).

[5] *Bankers Trust* order at 141; *1987 Order* at 474.

[6] *Bankers Trust* order at 140–42; *see also 1987 Order* at 477–78, 482–83.

[7] *Bankers Trust* order at 142.

[8] *Bankers Trust* order at 145; *1987 Order* at 483–485. In terms of what revenue to consider, the Board ruled that securities that a member bank was authorized to underwrite under section 16 of the Glass-Steagall Act (for example, U.S. government securities) were not covered by the prohibition of section 20; accordingly, the Board decided that revenue derived from underwriting and dealing in such securities should not count as underwriting and dealing for purposes of section 20. Rather, only revenue earned on ''ineligible securities''—those that a member bank could not underwrite or deal in—was counted toward the section 20 limit. *1987 Order* at 478; *Citicorp,* 839 F.2d at 62.

The Board also established a test based on the company's share of the market in a particular security, but this market share test was subsequently struck down by the Second Circuit. The court of appeals held that ''by using the term 'engaged principally,' Congress indicated that its principal anxiety was over the perceived risk to bank solvency resulting from their over-involvement in securities activity. A market share limitation simply does not further reduce this congressional worry.'' *Citicorp,* 839 F.2d at 68.

[9] *1987 Order* at 485.

[10] 75 FR 751 (1989).

[11] *Order Approving Modifications to the Section 20 Orders,* 79 Federal Reserve Bulletin 226 (1993) (hereafter, *1993 Modification Order*).

[12] *1993 Modification Order* at 228. Under the indexed revenue test, current interest and dividend revenue from eligible and ineligible activities for each quarter are increased or decreased by an adjustment factor provided by the Board. The adjustment factors, which are calculated for securities of varying durations, represent the ratio of interest rates on Treasury securities in the most recent quarter to those in September 1989. Section 20 subsidiaries may use the adjustment factors to ''index'' actual interest and dividend revenue based upon the average duration of their eligible and ineligible securities portfolios.

[13] 61 FR 40643 (August 5, 1996).

III. General Summary of Comments

The Board received 42 public comments: 26 from banks, bank holding companies and their trade groups; three from securities firms and one of their trade groups; and the remainder from members of Congress, a community group, a think tank, the Conference of State Bank Supervisors, and individuals. Thirty-four commenters favored the proposal, and eight opposed. The banking industry comments generally supported the proposal, and the securities industry comments generally opposed. The remaining comments were mixed.

Several banking industry commenters asked the Board to raise the revenue limit higher than 25 percent, generally to 49 percent. Several banking industry commenters also asked the Board to supplement the revenue test with an asset-based test or a sales volume test.

The securities industry commenters argued that comprehensive reform of the financial services industry is necessary and can be accomplished only through legislative action. The Securities Industry Association (SIA) expressed concern that if the Board were to increase the revenue limit to 25 percent, banks and bank affiliates would have little or no incentive to support a financial services modernization bill, because they would have received by rule much of the relief they would have sought in legislation. [14] Securities industry commenters also argued that securities, insurance, and other financial services firms would be placed at a competitive disadvantage with banks.

Several commenters opposed the increase in the limits on the grounds that the Board had previously rejected in its *1987 Order* any percentage limit greater than 10 percent. Commenters also stated that a level of ineligible securities activity giving rise to 25 percent of revenue must be considered ''substantial'' and therefore to constitute being principally engaged in that activity.

The SIA argued that a 25 percent limit as a measure of ''substantial'' was inconsistent with other laws that establish presumptions on a percentage basis, including the Bank Holding Company Act and regulations of the Board and the other banking agencies. The SIA also argued that raising the revenue limit to 25 percent could well render section 20 meaningless by permitting affiliations between member banks and the largest investment banks in the country, and would thus be contrary to the intent of Congress in enacting the Glass-Steagall Act to divorce commercial and investment banking.

A community group argued that allowing bank holding companies to expand further into securities underwriting without increased scrutiny under the Community Reinvestment Act would result in further neglect by banks and bank holding companies of the credit needs of low- and moderate-income neighborhoods and households and small businesses. The commenter argued that banks affiliated with section 20 subsidiaries have closed branches and reduced services to the public, and therefore that the operation of section 20 subsidiaries has had adverse effects on the public. The commenter argued that one of the problems that Congress meant to address with the Glass-Steagall Act was the diversion of financial resources in the banking system to the securities markets—a diversion that allowed and encouraged speculation in the securities markets and removed such funds from use in the retail banking business. Finally, the commenter argued that allowing expanded securities underwriting and dealing could undermine confidence in U.S. banks during declines in the securities markets.

The Board received five comment letters from members of Congress. Four Representatives supported the Board's proposal, and one opposed it.

IV. Final Order

A. Introduction

Interpreting section 20 is a difficult task. The language of the statute is ''intrinsically ambiguous,'' [15] and further inquiry into the legislative history is therefore necessary to interpret it. As the Board noted in its *1987 Order,* this inquiry ''requires application of a statute adopted over 50 years ago in very different circumstances to a financial services marketplace that technology and other competitive forces have altered in a manner and to an extent never envisioned by the enacting Congress.'' [16] Furthermore, although the general purpose of the Glass-Steagall Act was to divorce commercial and investment banking, the express language of section 20 clearly allows some level of investment banking for bank affiliates. [17]

Although a few commenters criticized the Board for preempting the Congress by reviewing its section 20 orders, the Board has in fact delayed a review of its section 20 orders in the hope that Congressional action would make such a review unnecessary. The Board continues to believe that reform of the laws governing this nation's financial services is needed in order to ensure that our nation's financial system remains innovative and competitive and provides services to customers at the lowest possible cost. The Board does not believe that an increase in the revenue limit detracts from the need for comprehensive reform and does not intend for this step to substitute for such reform. Rather, the Board is exercising its statutory responsibility to administer section 20 in light of significant changes to the securities markets in the years since the Board first analyzed its terms.

Summary

After considering the comments received, the Board has decided to adopt the proposal and amend its section 20 orders to allow up to 25 percent of total revenue to be earned from underwriting and dealing in bank-ineligible securities. The Board has concluded that a 25 percent revenue limit is consistent with section 4(c)(8) of the Bank Holding Company Act and section 20 of the Glass-Steagall Act.

[14] Seven members of the SIA wrote separately to dissent from its views. The commenters noted that the association had recently supported other, non-comprehensive legislative reform of financial services regulation.

[15] *Citicorp,* 839 F.2d at 63; *cf. Board of Governors v. Agnew,* 329 U.S. 441, 446 (1947) (the related term ''primarily engaged'' is susceptible to a range of ''accepted and common meanings'').

[16] *1987 Order* at 475.

[17] The premise for this divorce was that the affiliation of commercial banking had yielded abuses that had to be corrected. *See generally Investment Company Instit. v. Camp,* 401 U.S. 617, 629-34 (1970) (discussing legislative history). However, recent research indicates that this premise may have been inaccurate. *See* James S. Ang and Terry Richardson, *The Underwriting Experience of Commercial Bank Affiliates Prior to the Glass-Steagall Act: A Reexamination of Evidence for Passage of the Act,* 18 J. Banking and Finance 351, 385 (1994) (''We have found no evidence that bonds underwritten by the security affiliates of commercial banks as a group [from 1926-1934] were in *any* way inferior to the bonds underwritten by investment banks. . . . Bank affiliate issue default rates were lower, *ex ante* yields were lower, *ex post* prices were higher and yield/price relation no different than investment bank issues.''); Randall S. Kroszner and Raghuram G. Rajan, *Is the Glass-Steagall Act Justified? A Study of the U.S. Experience with Universal Banking Before 1933,* 84 Amer. Econ. Rev. 810, 829 (''Not only did bank affiliates underwrite higher-quality issues [from 1921-29], but also we find that the affiliate-underwritten issues performed better than comparable issues underwritten by independent investment banks.''); George J. Benston, *The Separation of Commercial and Investment Banking: The Glass-Steagall Act Revisited and Reconsidered* 41 (1990) (''The evidence from the pre-Glass-Steagall period is totally inconsistent with the belief that banks' securities activities or investments caused them to fail or caused the financial system to collapse.'').

C. Glass-Steagall Act Analysis

Based on its nine years of experience supervising section 20 subsidiaries, the Board has concluded that a company whose ineligible revenue approaches 10 percent of total revenue is neither engaged principally, nor on the verge of being engaged principally, in underwriting and dealing for purposes of section 20. The Board has decided that a section 20 subsidiary will not be engaged principally in such activities so long as ineligible revenue does not exceed 25 percent of total revenue.

In reaching this decision, the Board has not revisited its decisions, beginning with its *Bankers Trust* order in 1987, that the ''engaged principally'' standard of section 20 must be interpreted as ''substantial'' or ''primary,'' rather than as ''chief'' or ''main'' or ''largest.'' The Board did not propose such a reinterpretation. Similarly, the Board has not revisited its use of revenue as the appropriate measure of business activity.

The Board has reviewed, however, its decision in the *1987 Order* that underwriting and dealing in bank-ineligible securities would be a ''substantial activity'' of a section 20 subsidiary if such underwriting and dealing generated more than 10 percent of the section 20 subsidiary's total revenue. The Board has concluded that the 10 percent revenue limit unduly restricts the underwriting and dealing activity of section 20 subsidiaries to a level that falls short of ''principal engagement'' for purposes of section 20. This conclusion is based on the Board's experience with the section 20 subsidiaries through the process of examination and supervision. The conclusion is also supported by identifiable changes in the relationship between gross revenue and underwriting and dealing activity since the Board's *1987 Order.*

First, a given level of activity in underwriting and dealing in tier-two securities pursuant to the *1989 Order* generally yields substantially higher revenue than an equivalent level of activity in underwriting and dealing in tier-one securities pursuant to the *1987 Order.* Underwriting fees for tier-two securities are significantly larger than fees for tier-one securities, particularly with respect to equity securities and non-investment-grade debt securities.[18] Similarly, bid/offer spreads on many corporate bonds and other tier-two securities are significantly wider than the spreads on tier-one securities. Put another way, the Board has concluded that (all else being equal) a company that maintained a constant level of underwriting and dealing activity over the past nine years but shifted its product mix to include tier-two securities would have seen a significant increase in ineligible revenue.

Commenters confirmed this experience. One large bank holding company noted that since receiving approval in late 1994 to engage in corporate debt and equity activities, it had earned ''an ever increasing level of revenue derived from ineligible securities underwriting and dealing activities without a corresponding percentage increase in the number or size of the transactions involving ineligible securities. The factor primarily responsible for this revenue increase is . . . the revenues generated by corporate—particularly high yield—debt activities. The same level of corporate debt activity as a percentage of total transactions yields greater ineligible revenues than a comparable number of transactions involving commercial paper or municipal revenue bonds.''

Second, a converse trend has developed with respect to eligible revenue, where market changes have reduced the eligible revenue derived from a given level of activity. Most notably, increased competition in brokerage services has diminished revenue as a function of activity.[19] Lower commissions have required companies to increase volume in order to maintain a given level of eligible revenue. This market change particularly affects any company with a large retail investor base—generally those operating under the 1987 Order—that wishes to engage in any significant level of ineligible securities activities, as it must generally rely on brokerage activities in order to generate eligible revenue. In contrast, the overwhelming majority of companies operating under the 1989 Order have an institutional investor base and generate eligible revenue through underwriting and dealing in bank-eligible securities.

Finally, relative securities returns have varied over the years, changing the mix of eligible and ineligible revenue. As noted above, interest rate changes have reduced eligible interest revenue relative to ineligible interest revenue. For the great majority of companies that have elected not to use the indexed revenue test, these interest rate changes have continued to skew their reported ratio of ineligible to total revenue, though to a far lesser extent since a recent clarification to the revenue limit, which stated that interest earned on most investment-grade debt securities is treated as eligible income.[20] In addition, short term interest rates have on balance declined over the period, and equity prices have trended higher. Therefore, companies with tier-two powers who are engaged in equity securities activity may well have seen an increase in their ratio of ineligible revenue to total revenue.

Commenters supported this conclusion. Seven bank holding company commenters and two bank trade associations specifically noted that these developments had affected their institutions or members. None of the commenters opposed to an increase in the revenue limit disputed the Board's analysis.[21]

The Board recognizes that one reason underwriting and dealing spreads are higher for some activities than for others is to compensate for risk. The risks of holding high-yield bonds in inventory, for example, are higher than the risks of holding commercial paper, which is short-term and generally issued by a highly rated company and backed by a bank line of credit. However, in the Board's experience, as confirmed by the commenters, these wider spreads have resulted in higher revenue even after accounting for losses attributable to pricing, credit or other risks.[22] In the Board's experience, the ability to earn these higher profits derives from financial innovation in structuring transactions, ability to foresee shifting public needs gained from an experienced sales force, research on the

[18] *See, e.g., Investment Dealer's Digest* 12 (Feb. 19, 1996); *Investment Dealer's Digest* 19 (February 15, 1988).

[19] *See, e.g., The Economist* 9 (April 15, 1995) (''Commissions on listed securities as a percentage of the value of trade in these instruments have fallen from 70-90 basis points in the early 1980s to below 40 basis points. Even for over-the-counter trading . . . returns have fallen from 80-90 basis points to around 20 basis points.'')

[20] 61 FR 48953 (1996).

[21] One commenter stated that the Board was precluded from changing its view that ineligible revenue in excess of 10 percent would violate section 20 because once the Board had made a reasonable interpretation of a statute, and that interpretation was affirmed by a court, the Board may not thereafter adopt a position inconsistent with that interpretation. This statement is incorrect as a matter of law. *See, e.g., Smiley v. Citibank (South Dakota), N.A.,* 116 S.Ct. 1730, 1734 (1996) (agency may reverse an earlier position and receive judicial deference so long as the change is not ''sudden and unexplained''). As demonstrated above, the Board's amendment to the revenue limit is based on nine years of experience supervising section 20 subsidiaries and identifiable market and regulatory developments since the initial interpretation.

[22] The same point can be made with respect to the indexed revenue test, which took into account an increase in the steepness of the yield curve. Such a change in the shape of the yield curve may be caused by a rise in expected future interest rates, with no increase in interest rate risk.

issuer that is credited by the market, the ability to use marketing expertise to avoid losses, and accuracy in pricing.[23] Each of these skills yields greater rewards with respect to tier-two securities than tier-one securities, as tier-two securities generally trade in thinner markets where the frequency of trading is lower, the number of intermediaries smaller, and therefore the ability to gain a competitive advantage is greater.

Although the point was not raised by the commenters, the Board recognizes that these market and regulatory developments may have affected each section 20 subsidiary differently, depending on the products it offers and the duration of its interest rate-sensitive assets. However, the Board continues to believe that only a single revenue limit should govern.[24] Any standard that attempted to reflect the characteristics of each security approved for a section 20 subsidiary would be unworkable. Determination of compliance on a case-by-case basis would appear to be the only alternative to a quantitative test. The Board is concerned that such a practice could lead to substantial uncertainty among section 20 subsidiaries as well as the potential for inconsistent interpretations of the statute among section 20 subsidiaries and examiners. Therefore, the Board continues to prefer to use a single, bright-line standard.

Although not disputing the Board's analysis, one commenter stated that any amount of activity rising to 25 percent of total activity was by definition ''substantial'' and therefore inconsistent with the Glass-Steagall Act. The Board disagrees. The Board has used a ''substantial activity'' test as a way of determining whether a section 20 subsidiary is ''engaged principally'' in underwriting and dealing. This reading is consistent with the general interpretation of ''principal'' as meaning ''primary,'' ''substantial,'' ''leading,'' important,'' or ''outstanding''[25] and with the definition of substantial as ''an essential part, point or feature.''[26] The Board believes that an activity that represents less than 25 percent of a firm's total activity—or, put another way, where 75 percent of the firm's activity is in other areas—is not per se a ''principal,'' ''primary,'' ''substantial,'' ''leading,'' ''important,'' outstanding,'' or ''essential'' part of that firm's activity.

The Board notes that its decision is consistent with an interpretation of a parallel statute. As several commenters noted, the New York State Banking Department has taken the position that a company would not be ''engaged principally'' in underwriting and dealing for purposes of New York State's ''little Glass-Steagall Act''—which contains the same ''engaged principally'' standard as section 20—if underwriting and dealing was 25 percent or less of its total business activities.[27]

Several commenters urged the Board to adopt a greater increase in the revenue limit—to 50 percent or, in one case, 33 percent—on the grounds that such an increase would be consistent with safety and soundness and not pose risks to banks affiliated with a section 20 subsidiary. The Board notes, however, that although safety and soundness is clearly a relevant factor under the Bank Holding Company Act, the Board has limited authority to interpret section 20 based on whether underwriting and dealing activities can be conducted consistent with safety and soundness. Congress itself has decided when a company's risks of underwriting and dealing are too great to allow affiliation with a bank: whenever they constitute a principal activity of that company. Thus, even if the Board were to find that affiliation posed minimal risks, that finding would not allow the Board to raise the section 20 revenue limit to 100 percent. Nor would a finding that affiliation poses extreme risks allow the Board to lower the section 20 revenue limit to zero (though the Bank Holding Company Act, discussed below, could).

Commenters raised two objections to the proposed increase in the revenue limit based on the volume of underwriting and dealing that it would allow. One commenter stated that even under a 10 percent revenue limit, several section 20 subsidiaries were among the largest underwriters in the United States and that therefore an increase in the limit was unjustified. The Board notes that in its *1987 Order* first authorizing the establishment of a section 20 subsidiary, it required that underwriting and dealing in each security not exceed 5 percent of the total domestic underwriting and dealing in that security. As noted above, this market share test was struck down by the Second Circuit as unsupported by the language, legislative history, and purposes of the Glass-Steagall Act.

Other commenters argued that if the threshold for the revenue test were increased from 10 percent to 25 percent, then banks would be permitted to affiliate with the nation's largest investment banks, contrary to the express purpose of section 20 of the Glass-Steagall Act.[28] This argument is basically a restatement of the market share test. The relevant question for purposes of interpreting the Glass-Steagall Act is whether the Board's interpretation would have allowed banks to affiliate with the securities affiliates of the 1920s and 1930s[29] or companies engaged in activities similar to those affiliates, not whether it would allow banks to affiliate with the investment banks of today. Although data are sketchy, the Board believes that securities firms deriving more than 25 percent of their income from underwriting and dealing in securities were common in the pre-Glass-Steagall period, and thus that the revenue limit the Board is adopting today is consistent with the purposes of the Act.[30] The

---

[23] *See generally* Ernest Bloch, Inside Investment Banking (2d ed. 1989); 81-104. 248-73; Kenneth Garbade, Securities Markets 473-74, 493-97 (1982).

[24] In *Citicorp,* the petitioner argued that because the Board's interpretation of section 20 necessitated regulation, it a fortiori contravened the Act. The court of appeals rejected this argument, ''The Board's interpretation is one that attempts to walk the line that Congress laid down.'' 839 F.2d at 66.

[25] *Bankers Trust* order at 141-42.

[26] *The Shorter Oxford English Dictionary,* 2172 (3d ed. 1973), *cited in Citicorp,* 839 F.2d at 64.

[27] See Letter from Jill Considine, Superintendent of Banks, New York State Banking Department, to Morgan Guaranty Trust Company and Bankers Trust Company (Dec. 23, 1986). Although one commenter argued that a 25 percent limit is inconsistent with percentage limits established in other banking statutes and regulations, those statutes do not rest on an interpretation of the phrase ''engaged principally.'' Moreover, the most prominent example cited by the commenter, the presumption of control in the Bank Holding Company Act, is consistent with a 25 percent revenue limit, as it establishes a presumption of control over a bank holding company based on ownership of 25 percent or more of the company's securities. *See* 12 U.S.C. 1841(a)(2). The difference between a test of ''25 percent or less'' (under section 20) and a test of ''less than 25 percent'' (under the Bank Holding Company Act) is infinitesimal.

[28] Similarly, although one commenter argued that a 25 percent revenue limit could allow underwriting and dealing to be the first or second largest activity in the section 20 subsidiary, the Board believes that the relationship to total revenue, not the relationship to other activities, is controlling.

[29] By the time of the enactment of Glass-Steagall, the major securities affiliates of banks had been dissolved. W. Nelson Peach, *The Security Affiliates of National Banks* 158 (1941). Thus, the Glass-Steagall Act was aimed at preventing a recurrence of earlier abuses—most particularly, those leading up to the stock market crash of 1929—rather than at conditions prevailing at the time of its passage.

[30] *See, e.g., Agnew,* 329 U.S. at 445 (finding that in 1943 one of the nation's leading underwriters, Eastman, Dillon & Co., earned between 26 percent and 40 percent of its revenue by underwriting securities). A description of the nation's two largest securities affiliates by an observer of the time appears to indicate that they derived revenue substantially in excess of 25 percent of its revenue from underwriting and dealing. ''The volume of securities originated and distributed by [the National City Company, a securities affiliate of National City Bank,] was so large that it was necessary to have a separate vice-president in charge of securities issued by industrial

Board notes that while the largest section 20 subsidiaries currently derive substantial eligible revenue from the U.S. Treasury market, the federal government was running a budgetary surplus in the pre-Glass-Steagall period, and the outstanding federal debt and therefore the market for government securities were small.[31] Thus, most securities affiliates of that period could not have derived substantial eligible revenue from underwriting and dealing in government securities.

Second, although not relevant to the statutory interpretation, the Board is not convinced that a 25 percent revenue limit would allow unlimited affiliation between banks and investment banks for purposes of section 20. Adverse commenters provided no data to support their assertion that it would. The Board has reviewed the publicly available financial information for a sample of the largest investment banks, and it is not apparent that they would be in compliance with a 25 percent revenue limit.[32]

D. Bank Holding Company Act Analysis.

In its *1987 Order* and *1989 Order*, the Board concluded that the applicants' proposed underwriting and dealing activities were closely related to banking and could be expected to result in significant benefits to the public in the form of increased competition, greater convenience to customers, increased efficiency and maintenance of domestic and international competitiveness.[33] The Board's experience in supervising section 20 subsidiaries has borne out this conclusion, and the Board has now concluded that a further increase in the revenue limit to 25 percent would extend these benefits.[34] Numerous commenters stressed that an increase in the revenue limit would allow section 20 subsidiaries to operate more efficiently and compete more effectively domestically and globally. Such competition should benefit both institutional and individual customers by increasing customer choice and lowering prices. Furthermore, commenters indicated that a higher limit would facilitate the creation of new section 20 subsidiaries, thereby increasing competition.

The Board has also concluded, as it had in its original orders, that an increase in the revenue limit will not cause any adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices that would outweigh the projected public benefits.[35] Accordingly, these benefits will not come at an increased risk to the safety and soundness or reputation of the nation's banks or to the federal safety net. Bank holding companies have demonstrated over the past nine years that they are able to manage the risks of investment banking, and section 20 subsidiaries operate as separately capitalized subsidiaries of a bank holding company, outside the control of any affiliated bank and therefore outside the protections of the federal safety net.[36] Section 20 subsidiaries must register as broker-dealers and remain subject to the capital regulations of the Securities Exchange Commission.

Protection against unfair competition and undue concentration of resources is provided by the antitrust laws and special anti-tying restrictions applicable only to banks,[37] which prohibit a bank from using its products to require or induce customers to use the products of its securities affiliate. A section 20 subsidiary is also subject to the consumer protection and anti-fraud provisions of the Securities Exchange Acts of 1933 and 1934.[38] In the Board's experience, competition in the securities markets remains vibrant.

The Community Reinvestment Act does not provide for consideration of a bank's community lending performance in deciding whether a nonbanking activity is permissible under section 4 of the Bank Holding Company Act or in deciding what level of underwriting and dealing activity is permitted by section 20 of the Glass-Steagall Act. In any event, the Board believes that expanded securities activities by bank holding companies will not adversely affect low- and moderate-income neighborhoods and households or small businesses. At least one study has shown that section 20 subsidiaries bring a larger proportion of smaller-sized issues and lower-credit-rated new issues of non-financial firms to market than do independent investment banks.[39] Although banks affiliated with section 20 subsidiaries have closed branches since 1987, particularly over the past few years, these closings are intrinsic to the consolidation that is occurring in the banking industry. Commenters provided no evidence that a bank with a securities affiliate is more likely to close branches than a like-sized bank without one.[40] More importantly, the number of branch offices nationwide has increased each year between 1987 and 1995, and the population per branch has declined each year.[41] Finally, regardless of the activities of its nonbanking affiliates, a bank's record for lending continues to be subject to review and rating under the Community Reinvestment Act.

V. Indexed Revenue Test

In conjunction with today's order, the Board is eliminating its alternative indexed revenue test, which as noted

corporations, a vice-president in charge of municipal securities, a vice-president in charge of railroad securities, a vice-president in charge of foreign work, a vice-president in charge of accounting and treasury work, and a vice president in charge of the selling organization.'' *See* Peach at 94. Similarly, from 1917 to 1927, the securities affiliate of Chase National Bank of New York, Chase Securities Corporation, ''was identified only with major issues of bonds, offering such bonds at wholesale without public notice.'' *Id.* at 96.

[31] *See* Robert J. Gordon, *The American Business Cycle: Continuity and Change* 382 (1986); Benjamin M. Friedman, *The Changing Roles of Debt and Equity in Financing U.S. Capital Formation* 96, Table 6.2 (1982).

[32] Determining the ineligible revenue of independent investment banks is difficult because they do not segregate ineligible revenue from eligible revenue in their annual reports or the FOCUS reports that they file with the Securities Exchange Commission. For example, an investment bank may report a given figure for interest and dividends earned on securities without a separate breakdown of what percentage of that amount was earned from government securities, and many of the largest firms are primary dealers in government securities.

[33] *See 1987 Order* at 489-90; *1989 Order* at 200–02.

[34] The Board reached the same conclusion when it reviewed its section 20 orders in 1994. *See* 59 FR 35516–35517 (1994).

[35] *Accord 1987 Order* at 490–502; *1989 Order* at 202–10. Two commenters disagreed with this analysis, pointing to recent claims made against Bankers Trust Corporation regarding derivatives trading, an NASD action against Citicorp for failing to ensure that brokers complied with continuing education requirements, and the Board's 1996 enforcement action against Swiss Bank Corporation for violating the revenue limit. The Board has concluded that these isolated incidents are not sufficient to question the safety and soundness of underwriting and dealing generally. Moreover, the Citicorp and Swiss Bank actions were compliance issues that did not result in losses to either the section 20 subsidiary or an affiliated bank, or in any other safety and soundness problems. While Bankers Trust did suffer from abuses in its derivatives activities, these were bank-eligible activities that were conducted at the bank as well as the section 20 subsidiary. The section 20 revenue limit does not constrain this activity.

[36] The federal safety net includes deposit insurance, access to the Federal Reserve's discount window, and access to the payments system.

[37] 12 U.S.C. 1972(1).

[38] 15 U.S.C. 77a-77z; 15 U.S.C. 78a-78ll.

[39] Amar Gande, Manju Puri, et al., *Bank Underwriting of Debt Securities: Modern Evidence*, in *Bank Structure and Competition* 651 (1996) (working paper).

[40] *Cf. A Review and Evaluation of Federal Margin Regulations: A Study by the Staff of the Board of Governors of the Federal Reserve System* (December 1984) (concluding that concerns that securities credit diverts funds from more productive uses are unfounded).

[41] *See* Stephen A. Rhoades, *Bank Mergers and Industrywide Structure, 1980–94: Staff Study of Board of Governors of the Federal Reserve System* 25 (1996); Myron L. Kwast, *United States Banking Consolidation: Current Trends and Issues* Table 3 (1996) (paper presented to OECD).

above is indexed to account for changes in interest rates since 1989. The Board has concluded that distortion of the revenue limit from interest rate fluctuations has been addressed by today's increase in the revenue limit and by the recent clarification of the revenue limit, which stated that interest earned on most investment-grade debt securities is treated as eligible income.

VI. Section 32 of the Glass-Steagall Act

Also in conjunction with today's order, the Board intends to interpret section 32 of the Glass-Steagall Act generally to prohibit interlocks between a bank and any company that derives more than 25 percent of its total revenue from underwriting and dealing in bank-ineligible securities. Section 32 prohibits personnel interlocks between a member bank and any company ''primarily engaged'' in underwriting and dealing in securities.[42] Since 1987, the Board has interpreted ''engaged principally'' under section 20 and ''primarily engaged'' under section 32 consistently.[43] The Board and the courts have noted that section 20 should be interpreted at least as strictly as section 32 because ''the dangers resulting from affiliation are arguably greater than those resulting only from personnel interlocks.''[44]

The Board has not, however, measured compliance with section 32 and section 20 in the same manner, relying on a more qualitative analysis for purposes of section 32. This difference is largely attributable to the fact, as noted above, that the Board does not gather detailed revenue information from securities companies other than section 20 subsidiaries. Furthermore, while the Board must continuously monitor compliance with section 20, and is thus in need of a bright-line test, inquiries under section 32 are infrequent.

Thus, in 1958, the Board established a nine-part guideline for determining compliance with section 32 that included ''the dollar volume of business of the kinds described in section 32 engaged in by the firm or organization'' and ''the percentage ratio of such dollar volume to the dollar volume of the firm's total business.'' However, the Board did not establish a revenue or dollar volume limit. A subsequent staff letter noted that ''the Board generally has determined that a securities firm, which [sic] receives 10 percent of its gross income from section 32 business, is 'primarily engaged' within the meaning of [section 32],'' and the Board in its *1987 Order* noted that the Board had developed a ''general guideline'' to that effect. The Board has never, however, imposed a specific limitation in order to enforce compliance with section 32, and has found firms deriving more than 10 percent of their revenue from underwriting and dealing not to be primarily engaged. Nor has the Board ever reviewed the appropriateness of its 10 percent guideline since its apparent adoption in the 1950s, despite significant developments in the securities markets since that time.

In light of those developments and the Board's action on the section 20 revenue limit, the Board will generally find a securities firm to be primarily engaged in underwriting and dealing for purposes of section 32 when more than 25 percent of its total revenue derives from underwriting and dealing in bank-ineligible securities.

By order of the Board of Governors of the Federal Reserve System, December 20, 1996.

William W. Wiles,

Secretary of the Board.

[FR Doc. 96–32944 Filed 12–27–96; 8:45 am]

BILLING CODE 6210–01–P

[42] 12 U.S.C. 78.

[43] *Bankers Trust* order at 142. The Board relied on the Supreme Court's interpretation of section 32 in *Agnew* in determining that ''engaged principally'' denotes substantial activity as opposed to the largest activity. However, the *Agnew* Court did not translate its interpretation of ''primarily engaged'' into a limitation on revenue or any other test of business activity.

[44] *Citicorp* at 67.

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 22, 1997.

A. Federal Reserve Bank of Cleveland (R. Chris Moore, Senior Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101:

1. FJSB Bancshares, Inc., Fort Jennings, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of The Fort Jennings State Bank, Fort Jennings, Ohio.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Waterfield Bank Corp., Indianapolis, Indiana; to become a bank holding company by acquiring 100 percent of the voting shares of First National Bank of Mitchell, Mitchell, Indiana.

Board of Governors of the Federal Reserve System, December 23, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–33089 Filed 12–27–96; 8:45 am]

BILLING CODE 6210–01–F

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 24, 1997.

A. Federal Reserve Bank of Chicago (James A. Bluemle, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. Amcore Financial, Inc., Rockford, Illinois; to acquire 100 percent of the voting shares of First National Bancorp, Inc., Monroe, Wisconsin, and thereby indirectly acquire First National Bank & Trust, Monroe, Wisconsin.

2. Michigan Heritage Bancorp, Inc., Novi, Michigan; to become a bank holding company by acquiring 100 percent of the voting shares of Michigan Heritage Bank, Novi, Michigan (in organization).

3. Vanderbilt Holding Company, Inc., Fairfax, Iowa; to become a bank holding company by acquiring 100 percent of the voting shares of Fairfax State Savings Bank, Fairfax, Iowa.

4. Vermilion Bancorp, Inc., Danville, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of American Savings Bank of Danville, Danville, Illinois.

B. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. Union Planters Corporation, Memphis, Tennessee; to acquire 100 percent of the voting shares of SBT Bancshares, Inc., Selmer, Tennessee, and thereby indirectly acquire Selmer Bank & Trust Company, Selmer, Tennessee.

C. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105:

1. TRP Acquisition Corporation, Burr Ridge, Illinois; to becoming a bank holding company by acquiring at least 19.9 percent of the voting shares of Trans Pacific Bancorp, San Francisco, California, and thereby indirectly acquire Trans Pacific National Bank, San Francisco, California.

Board of Governors of the Federal Reserve System, December 24, 1996.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 96–33160 Filed 12-27-96; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Notice of Meeting of the National Bioethics Advisory Commission

SUMMARY: Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), this notice is hereby given to announce open meetings of the National Bioethics Advisory Commission (NBAC). The purposes of the meetings are to address: (I) The protection of the rights and welfare of human research subjects and (ii) the management and use of genetic information.

DATES: January 9, 1997, 8:00 a.m.–4:30 p.m. and January 10, 1997, 8:30 a.m.–12:00 p.m.

PLACE: The Madison Hotel, 15th and M Sts, N.W., Washington, D.C. 20005.

SUPPLEMENTARY INFORMATION: The President established the National Bioethics Advisory Commission (NBAC) by Executive Order 12975, October 3, 1995. The purpose of the NBAC is to provide advice and make recommendations to the National Science and Technology Council, and other appropriate entities on bioethical issues arising from research on human biology and behavior and the applications, including the clinical applications, of that research.

National Bioethics Advisory Commission Meeting, The Madison Hotel, Washington, D.C., Thursday, January 9, 1997

Tentative Agenda

Morning Session

8:00 a.m.—Call to order and Opening Remarks by Chair
8:15 a.m.—Discussion of the activities of the NBAC Human Subjects Subcommittee
10:15 a.m.—Break
10:30 a.m.—Discussion of the activities of the NBAC Genetics Subcommittee
12:30 p.m.—Lunch

Afternoon Session

1:45 p.m.—Continuation of morning discussions
3:00 p.m.—Break
3:15 p.m.—Discussion of future NBAC activities
4:00 p.m.—Public Comment
4:30 p.m.—Adjourn

National Bioethics Advisory Commission, The Madison Hotel, Washington, D.C. Friday, January 10, 1997

Tentative Agenda

8:00 a.m.—Meeting of the Genetics Subcommittee of the National Bioethics Advisory Commission
10:00 a.m.—Break
10:30 a.m.—Meeting of the Human Subjects Subcommittee of the National Bioethics Advisory Commission
12:30 p.m.—Adjourn

Public Participation

The two days of meetings are open to the public with attendance limited to space available. Members of the public who wish to make oral statements should contact NBAC at the address or telephone number listed below as soon as possible, prior to the meeting. Reasonable provisions will be made to include on the agenda presentations by persons requesting an opportunity to speak. Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other special accommodations, should also contact NBAC at the address or telephone number listed below as soon as possible prior to the meeting. Persons who wish to file written statements with NBAC may do so at any time.

FOR FURTHER INFORMATION CONTACT: Patricia Norris, Communications Director, National Bioethics Advisory Commission, MSC–7508, 6100 Executive Boulevard, Suite 3C01, Rockville, Maryland 20892–7508, telephone 301–402–4242, fax number 301–480–6900.

Dated: December 20, 1996.

Philip R. Lee,

Assistant Secretary for Health.

[FR Doc. 96–33091 Filed 12–27–96; 8:45 am]

BILLING CODE 4160–17–M

Health Care Financing Administration

[HCFA–R–187]

Agency Information Collection Activities: Submission for OMB Review; 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, has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information. 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: Extension of a currently approved collection; *Title of Information Collection:* National Provider System(NPS); *Form No.*: HCFA–R–187; *Use:* HHS is consolidating provider enumeration across programs. The NPS will be used in program operations and management to assign provider identification numbers, i.e., billing numbers for claims processing and payment. It will replace the current Medicare Physician and eligibility System (MPIES) and UPIN; it will replace the enumeration functions of the Medicare OSCAR, CLIA, and NSC provider numbering systems. *Frequency:* On occasion; *Affected Public:* Federal Government, State, Local or Tribal Government, Individuals or Households, Business or other for-profit, and Not-for-profit institutions; *Number of Respondents:* 88; *Total Annual Hours:* 23,000.

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 30 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: OMB Human Resources and Housing Branch, Attention: Allison Eydt, New Executive Office Building, Room 10235, Washington, D.C. 20503.

Dated: December 12, 1996.

Edwin J. Glatzel,

Director, Management Analysis and Planning Staff, Office of Financial and Human Resources, Health Care Financing Administration.

[FR Doc. 96–33150 Filed 12–27–96; 8:45 am]

BILLING CODE 4120–03–P

Medicaid Bureau; Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Health Care Financing Administration (HCFA), (Federal Register, Vol. 59, No. 60, pp. 14628–14662, dated Tuesday, March 29, 1994, and Federal Register, Vol. 59, No. 132, pg. 35528, dated Tuesday, July 12, 1994) is amended to reflect changes to the subordinate structure within HCFA's Medicaid Bureau.

The Medicaid Bureau is streamlining their organization by abolishing its current substructure and creating a new organization comprised of six offices with no subordinate levels. The offices are functionally grouped to support services provided to specific Medicaid Bureau customers. Within the new structure operational and policy functions are no longer separated but are combined in each office.

The specific amendments to Part F are described below:

- Section F.10.A.5. (Organization) is amended to read as follows:

5. Medicaid Bureau (FAB)

a. Office of Long Term Care Services (FAB4)

b. Office of Medical Services (FAB5)

c. Office of Beneficiary Services (FAB6)

d. Office of Financial Services (FAB7)

e. Office of Information Systems and Data Analysis (FAB8)

f. Office of Program and Organizational Services (FAB9)

- Section F.20.A.5. (Functions) is amended to read as follows:

a. Office of Long Term Care Services (FAB4)

- Formulates, evaluates, and prepares policies, specifications for regulations, instructions, preprints, and procedures related to Medicaid payment and coverage policy for continuing and long-term care.
- Provides oversight of planning, development, implementation, and monitoring of Medicaid program operations in regional offices and State Medicaid agencies related to the provision and payment for continuing and long-term care, both institutional and non-institutional.
- Reviews State Plan Amendments related to continuing and long-term care, provides consultation to regional offices, and makes recommendations for approval and disapproval.
- Oversees and coordinates the assessment process for the operational implementation of the Medicaid program for continuing and long-term care under State plans and home and community-based services waivers.
- Provides ongoing policy and operational support, in concert with the Office of Research and Demonstrations, for Section 1115 demonstrations in continuing and long-term care.
- Provides authoritative interpretation of Medicaid coverage and payment policy for continuing and long-term care for providers, Regional Offices, State governments, Congressional Staffs, other agencies of the Federal government, interest groups and the general public.
- Develops, evaluates, and reviews policies and operational implementation of the entire range of continuing and long-term care services under Medicaid including all institutional and non-institutional sources of care, including: home and community-based services including waivers and State plan issues, nursing facilities, intermediate care facilities for persons with mental retardation/developmental disabilities, psychiatric services for persons under age 21, hospice, home health, personal care, private duty nursing, habilitation, rehabilitation, physical therapy, occupational therapy, respiratory therapy, speech therapy, language and hearing services, residential treatment

facilities, private non-medical institutions, medical day care, subacute care, community supported living arrangements, behavioral/mental health, substance abuse treatment, pre-admission screening and annual resident review (PASARR) and case management.

• Develops and interprets policy and oversees operational implementation of a wide range of areas as they impact continuing and long-term care services, including: comparability, sufficiency, amount, duration and scope of services, the Boren Amendment, provider appeals, essential community providers of LTC, provider qualifications including conditions of participation for Medicaid providers, distinct part issues, and inmates of public institutions.

• Serves as focal point for enforcing State agency compliance with statute, regulations and instructions as they affect continuing and long-term care.

• Develops and puts in place strategies to assure new and existing legislation, regulations and policy for Medicaid continuing and long-term care is implemented effectively, including: development of written guidance, best practices information, training materials, technical assistance to States through telecommunications and on-site visits, data bases etc.

• Assumes principal responsibility for Bureau implementation of continuing and long-term care objectives in the MB and HCFA strategic plans.

• Supports cross-cutting activities in relation to functional areas of responsibilities involving: (1) Section 1115 waivers, (2) quality of care initiatives, (3) health care reform, (4) fraud and abuse strategies, (5) legislative development, (6) communication strategy and implementation, and (7) internal budget and contracting.

b. Office of Medical Services (FAB5)

• Develops, interprets, and reviews Medicaid coverage and payment policies and procedures pertaining to maternal and child health services, family planning services, sterilization, hysterectomy, abortion, teenage pregnancy services, vaccines for children, school-based health services, nutrition services, early intervention services, pregnancy related services, lab and X-ray services, dental services, nurse-midwife services, pediatric nurse practitioner services/certification family services, transportation services, TB related services, medical day care, prescribed drugs, dentures and prosthetic devices and eyeglasses, other diagnostic, screening and preventive services, physician services and all other non-LTC services, provider appeals, and Indian health services; comparability and sufficiency of services and uniform availability of services statewide (hereafter designated as medical and remedial care services).

• Formulates, evaluates, and prepares policies, specifications for regulations, instructions, preprints, procedures and general instructions related to Medicaid medical and remedial care coverage and payment activities.

• Makes recommendations for legislative changes to improve program policy and ease of administration.

• Reviews State plan amendments and makes recommendations on approvals/disapprovals.

• Provides interpretations of Medicaid medical and remedial care coverage payment policies to regional offices, congressional staffs, other Departments of the Federal government, interest groups, and State agencies.

• Provides medical advice and consultation pertaining to the Medicaid program.

• Reviews, with the Office of Research and Demonstrations, research and demonstration agendas in the area of Medicaid medical and remedial care coverage and payment.

• Identifies, studies, and makes recommendations for modifying Medicaid medical and remedial care payment and coverage policies to reflect changes in recipient health care needs, program objectives, and the health care delivery system.

• Develops, evaluates, and reviews Medicaid coverage and payment hospital policies (including hospital Boren Amendment issues and Disproportionate Share Hospitals), regulations, and procedures pertaining to services provided by hospitals and Christian Science Sanitoriums under Medicaid; and Early and Periodic Screening, Diagnosis and Treatment (EPSDT) under Medicaid.

• Reviews requests for waivers under Section 1915 (c) and (d) of the Social Security Act.

• Monitors State medical and remedial care compliance to State plan and oversees the compliance process.

• Provides interpretations of policies to regional offices, congressional staffs, other Departments of the Federal government, interest groups and State agencies.

• Coordinates with other HCFA bureaus, divisions, and offices, the Social Security Administration, and other departmental components in the development of medical and remedial care policies.

• Provides policy, operational and systems support for implementation of the Medicaid drug rebate program.

• Coordinates with the Bureau of Data Management and Strategy and the States in the development of systems specifications for the format, transmission methods, data entry, maintenance, and modification of drug product data submitted by manufacturers.

• Develops and disseminates drug rebate technical notes, letters to Medicaid State Agencies, and acceptance letters to drug manufacturers. Processes signed drug rebate agreements.

• Maintains liaison with, and provides technical assistance to drug manufacturers, Medicaid State agencies, pharmaceutical associations, private sector vendors, and other parties regarding the drug rebate program.

• Establishes and maintains telephone ‘‘hotline’’ in answering queries regarding the monthly Consumer Price Index Urban and current Manufacturer and State address information.

• Prepares an annual report to Congress on drug product and expenditure data.

• Supports cross-cutting activities in relation to functional areas of responsibilities involving: (1) Section 1115 waivers, (2) quality of care initiatives, (3) health care reform, (4) fraud and abuse strategies, (5) legislative development, (6) communication strategy and implementation, and (7) internal budgeting and contracting.

c. Office of Beneficiary Services (FAB6)

• Provides beneficiary casework services by responding to written and person inquiries and inquires made by other interested parties on behalf of beneficiaries which are directed to the bureau.

• Uses HCFA hotline to improve beneficiary access to the bureau.

• Develops with partners and stakeholders a network of contacts to facilitate casework and outreach to beneficiaries.

• Working with States and Regional Offices, develops and implements strategies to inform individuals of benefits available and how to gain access to the program.

• Develops consumer information directed at informing beneficiaries on a variety of programmatic issues.

• Identifies and develops reports on significant trends identified through casework activities.

• Serves as ombudsperson for beneficiaries through representation on workgroups and at meetings within and outside HCFA.

• In conjunction with partners and stakeholders, develops strategies for addressing and overseeing eligibility and service access issues for beneficiaries.

• Develops strategies for addressing and overseeing quality issues for beneficiaries.

• Serves as the focal point in the bureau for special populations such as Native Americans, HIV/AIDS, individuals in rural areas, the homeless and migrants.

• Develops multi-faceted initiatives focused on priority program areas and special need of special populations.

• Collaborates with Federal and State agencies and private organizations to identify and eliminate barriers and improve health status of Medicaid beneficiaries.

• Works with Regional Offices to identify States' needs and coordinates initiatives for technical assistance, information exchange and capacity for addressing beneficiary issues.

• Develops, interprets and issues Medicaid policies and procedures for implementing mandatory and optional eligibility groups, financial eligibility requirements and non-financial eligibility requirements such as age, disability, residence and citizenship and beneficiary appeals.

• Develops, interprets and issues Medicaid policies and procedures for eligibility administration and beneficiary rights and responsibilities, confidentiality, outstationing of eligibility workers and other technical policies such as advance directives and state wideness.

• Develops, implements and coordinates a system for reviewing the States' performance of Income Eligibility Verification System (IEVS) requirements. Develops and interprets regulations and policies for States to establish IEVS.

• Evaluates and contributes to development of policies for Aid to Families with Dependent Children and Supplemental Security Income which have impact on Medicaid eligibility (including welfare reform proposals).

• Develops, directs and operates a national quality control program to determine the effectiveness of Medicaid State agencies' performance in the area of Medicaid eligibility determinations and negative case actions. As part of this function, the team establishes, maintains and disseminates MEQC schedules, develops Regional office reporting requirements, reviews State corrective action plans, participates in development of fiscal disallowances and preparing recommendations for waivers of disallowances.

• Encourages State to develop alternatives to the traditional Medicaid Quality Control (MEQC) program through MEQC pilots and participates in the development, review and approval tracking and development of reports relative to such pilots.

• Develops with partners strategies and guideline outside MEQC for monitoring State's eligibility policies and operations and evaluates finding resulting from these monitoring activities.

• Provides consultation on State plan amendments and prepares disapproval actions.

• Recommends specific action for new or proposed legislation on eligibility and beneficiary related issues.

• Provides consultation on eligibility aspects of Home and Community-based waivers.

• Prepares specifications for regulation, State plan preprints and manual instructions in program areas within the scope of this team's responsibilities.

• Maintains liaison with the Social Security Administration, Administration for Families and Children, Public Health Services, USDA and other Federal and State agencies that provide assistance and services to Medicaid beneficiaries.

• Supports cross-cutting activities in relation to functional areas of responsibilities involving: (1) Section 1115 waivers, (2) quality of care initiatives, (3) health care reform, (4) fraud and abuse strategies, (5) legislative development, (6) communication strategy and implementation, and (7) internal budgeting and contracting.

• Serves as the focal point for Medicaid third party liability (TPL) operating instructions and policy guidance to Medicaid State agencies and regional offices.

• Develops and implements the regulations and operating instructions for regional offices and States to implement TPL programs.

• Reviews proposed legislation and regulations for potential impact on TPL operations and makes recommendations for changing regulations to improve TPL program administration.

• Investigates and corrects problems in TPL operational implementation by Medicaid State agencies.

• Assists regional offices in resolving operating issues involving various operational policies affecting TPL.

• Develops, interprets, and issues policies under Medicaid to ensure the appropriate allocation of health care/administrative costs under the Medicaid Bureau Strategic Plan.

• Develops, interprets and issues policies for third-party liability provisions; the liability of recipients and applicants for payment of coinsurance, deductible, and other cost sharing amounts; payment of premiums; cost avoidance; coordination of benefits; free care; cross-over claims; and estate recoveries.

d. Office of Financial Services (FAB7)

• Participates in the development and evaluation of proposed legislation or other remedies to improve financial programs and services.

• Reviews proposed legislation, regulations, and operating initiatives for their impact and to respond to congressional inquiries.

• Prepares regulations, manuals, program guidelines, general instructions, reporting instructions, and other written products related to financial policies, operations, and services.

• Serves as Medicaid Bureau liaison with the Office of Inspector General and the Department of Justice regarding audit services.

• Provides oversight and coordinates the national Medicaid medical assistance and administrative costs budgets and justifications. Develops and maintains budget preparation and execution policies and procedures used by States and regional offices.

• Formulates the national Medicaid operating and President's budget for medical assistance payments and administrative costs.

• Develops information necessary to support the budget submissions and congressional budget justifications. Develops, implements, and maintains the Medicaid budget preparation and execution policies and procedures for use by the States and Regional Offices (ROs) in administering the Medicaid program.

• Prepares the Congressional Quarterly Status of Funds report using State agency, RO, and Central Office data. Performs statistical and analytical reviews of State agency and RO submissions to establish historical trends and projections of the Medicaid program expenditures.

• Conducts onsite reviews of State agencies and ROs to determine methodologies used for budget preparation and execution and to evaluate capability and accuracy of the various systems.

• Establishes policies and procedures by which Medicaid State agencies and regional offices submit quarterly budget estimates and reports and administers the State grants process for administrative and program payments.

- Maintains financial control over grants to States for Public Assistance (Medical Assistance Program) under Section 1903(d) of the Social Security Act.
- Reviews State expenditure reports together with recommendations regarding the allocability of expenditures provided by the RO, determines whether the recommended action is consistent with Federal law and regulations, prepares recommendations as to appropriate action attempts to resolve all issues with the ROs, documents unresolved issues to be referred to the appropriate HCFA authority for decisions, and incorporates the results of decisions in grants.
- Prepares grant award documents.
- Provides technical assistance and training to regional financial management staff in the monitoring of expenditures to assure full accountability for expenditures and develops appropriate financial management instructions.
- Reviews all State claims for Federal payment under Title XIX of the Social Security Act including regional office disallowances of State claims.
- Serves as the focal point for the defense of disallowance decisions before the Department Appeals Board.
- Ensures consistency with Federal laws, regulations, and policy in all actions that may result in disallowances of State claims for FFP. Reviews, secures necessary clearances, and provides technical assistance to regional offices in deferrals and disallowance notifications.
- Ensures the timely recovery of Federal funds and related interest; tracks disallowances from initiation through issuance, appeal and recovery of the Federal share of expenditures, preparing periodic reports on the status of disallowance actions; assists in the defense of disallowances, providing technical assistance to the Department Appeals Board (DAB) and legal staffs of the Departments of Health and Human Services and Justice in administrative or judicial appeals of Medicaid disallowances; and disseminates and implements all DAB and Court decisions.
- Provides oversight, administration, maintenance, and amendments and revisions of the Medicaid Budget and Expenditure System.
- Develops, coordinates, and maintains an automated system for budgets, grants, and expenditure reports and produces periodic reports from this system.
- Directs regional office financial reviews and audits of State agencies and oversees the Medicaid claims processing review activity.
- Directs the national financial management review process to monitor State Medicaid expenditures, develops financial management review guides, establishes the national schedule of reviews and provides instructions and technical assistance to ensure that reviews and policies are consistently implemented.
- Monitors regional office Medicaid financial management participating in onsite reviews and preparing periodic reports of activities and results and national performance.
- Collects, evaluates, and develops related information and calculates the Federal fiscal year National DSH payment target and State DSH allotments.
- Develops the Federal Register notice to publish the Federal fiscal year National DSH target and State DSH allotments.
- Establishes policies and procedures by which Medicaid State agencies and regional offices submit quarterly budget and expenditure information on State receipts under donation and taxes programs in accordance with the provisions of the Medicaid statute and regulations.
- Collects, evaluates, and develops information and reporting on State receipts of donations and taxes.
- In coordination with the regional offices, calculates States' limits on receipts of donations and taxes and any applicable reduction in Federal financial participation.
- Prepares regulations, manuals program guidelines, and other instructions related to donations and taxes provisions.
- Provides interpretations of established Medicaid policies to regional offices, congressional staffs, and other departmental offices on donations and taxes provisions.
- Establishes HCFA payment policy for Medicaid administrative costs. Responsible for operational policies regarding availability of Federal Financial Participation (FFP), designation of appropriate FFP rates, and for issuing interpretations to regional offices regarding operational FFP issues.
- Develops and coordinates the fiscal aspects of the Medicaid program, and sets and interprets Federal funding policies and regional office and State operational procedures.
- Provides the definitive interpretation of Federal funding of State Medicaid administrative costs, operational policies on the allocability and availability of Federal financial participation (FFP), and the appropriate FFP rates.
- Participates with HCFA components in development, review, and evaluation of State health system reforms under State Section 1115 waiver programs.
- Participates in development, implementation, oversight and negotiation activities related to the financial and budget neutrality provisions of the States' Section 1115 programs, managed care and other health care reform initiatives, including reporting, rate setting, and conditions of Federal financial participation.
- Performs statistical and analytical reviews of State agency and RO submissions to establish historical trends and projections of the Medicaid budget estimates and program expenditures related to States' Section 1115 programs, managed care and other health care reform initiatives.
- Participates in onsite reviews of State agencies and ROs for oversight, technical assistance and negotiation of issues related to the provisions of States' Section 1115 programs and health care reform initiatives.
- Develops evaluates, interprets and reviews policies, regulations, standards and procedures, and provides operational oversight, pertaining to physician referral provisions.
- Provides oversight for the implementation and continuing operational support related to physician referral.
- Develops, plans and executes analytical studies to identify programmatic, operational or management areas of fiscal vulnerability or which impact the fiscal integrity of the Medicaid program.
- Performs financial analyses of and makes recommendations for addressing areas of fiscal vulnerability.
- In partnership with States, develops approaches to improve the fiscal integrity of the Medicaid program and reduce areas of fiscal vulnerability.
- Supports cross-cutting activities in relation to functional areas of responsibilities involving: (1) Section 1115 waivers, (2) quality of care initiatives, (3) health care reform, (4) fraud and abuse strategies, (5) legislative development, (6) communication strategy and implementation, and (7) internal budgeting and contracting.

e. Office of Information Systems and Data Analysis (FAB8)

- Serves as the Bureau's focal point to improve State/Federal decision making through the effective use of information.

• Develops information requirements for decision making in State/Federal health care programs through its leadership role in defining information requirements via customer input, and reconciles information needs.

• Develops staff capability for information analysis by incorporating data and statistical analysis techniques into program/policy training, providing tools and materials necessary to facilitate data and information analysis, and ensures teams needing these skills are staffed with such members experienced in their use.

• Serves as clearinghouse for information on Medicaid programs and data availability to support comparative analyses.

• Monitors and tracks Medicaid population through 2082 and the Medicaid Statistical Information System data.

• Develops and maintains an automated system providing State-by-State inventories of Medicaid program characteristics.

• Develops, implements, and directs mathematical and statistical procedures, including sampling, precision, universe identification, etc., in support of the Medicaid quality control and assessment programs, as well as other Medicaid program activities.

• Provides statistical support and performs analyses related to Federal and State Medicaid program design quality and operations.

• Assists BDMS in setting standards to assure data accuracy and consistency through the development of data definitions, system edits, etc.

• Develops and maintains a centralized State data profile to support State and regional efforts to foster improvements to State program design via the assistance of technological advances made by other States and the private sector, including state-of-the-art technology in electronic data processing.

• Coordinates with all State Medicaid agencies, in conjunction with HCFA regional offices and BDMS, implementation of system coding and other changes related to the Medicare program's Physician Payment Reform initiative and other data initiatives such as common coding, uniform billing, and electronic data interchange.

• Develops, plans and executes analytical studies at the request of the Bureau Director; analyzes current Medicaid policies to identify weaknesses, define options for change, and assess their impact; and effectively communicates and disseminates findings associated with the program analyses and policy studies described above.

• Analyzes large-scale databases and designs population-based surveys and other analyses to enhance program operations and policy coherency.

• Provides the bureau with internal systems expertise to produce and interpret operational performance indicators from the manipulation of computer-stored financial and program data and to review the integrity of systems operating within the Bureau.

• Serves as a focal point for Medicaid funding requests and coordinates with the appropriate components within HCFA and the Department and prepares the recommendations for final decisions regarding approval or disapproval.

• Directs the development and issuance of regulations, specifications, requirements, procedures, and instructional material to implement and maintain operational systems for processing Medicaid claims/encounter data and defines their application to the States and program recipients.

• Monitors Medicaid automated systems requirements, standards and procedures pertaining to the review and evaluation of State agency automated data processing, claims/encounter data processing, information retrieval systems, and integrated eligibility systems, in terms of their development, operations and funding to determine State compliance with published Federal requirements.

• Performs periodic reviews of State systems to identify deficiencies with regard to failing to meet performance standards developed by these and other HCFA staff.

• Reviews and approves State agency requests for Federal Financial Participation (FFP) associated with the cost of developing and operating Medicaid claims/encounter data processing, information retrieval systems, as well as integrated eligibility systems.

• Provides policy guidance for the application of conceptual equivalency in the determination of whether uncertified automated systems meet the Federal Medicaid Management Information System (MMIS) requirements, as well as provides technical guidance to HCFA components involved in the development of MMIS re-certification standards.

• Central coordination/liaison office for working with other HCFA components (e.g. BDMS, BPO, HSQB, ORD, etc.) on data and system-related issues. Similarly relates to other governmental agencies and the private sector on Medicaid issues, in concert with BDMS' overall strategy/guidance.

• Promotes standardized electronic data interchange (EDI) and its adoption by States; works with Regional Offices, the National Uniform Billing Committee, and other health care claims/encounter work groups toward this end together with the State Medicaid Director's Association, the Medicare program and other interested parties for purposes of developing national standards.

• Participates on the American National Standards Institute (ANSI) committees (and other similar groups) regarding data elements for eligibility, health care services, coverage, payment, etc. information.

• Monitors State electronic verification/claims submission/processing/payment systems, as well as HCPCS issues, and the conversion of the HCFA 1450 and 1500 to electronic formats.

• Coordinates with all State Medicaid Agencies the adoption of national standards for paper and electronic data interchange-based administrative transactions such as claims, encounters, remittance advice and eligibility inquiries.

f. Office of Program and Organizational Services (FAB9)

• Promote and support States' development of Medicaid program transitions to health system reform.

• Provide leadership to the Medicaid Bureau's coordinating activities related to State-initiated health system reforms accomplished through Statewide Section 1115 projects.

• Serve as the Medicaid Bureau's clearinghouse for information on State reform initiatives; identify needs and coordinate initiatives for technical assistance, information exchange and capacity building to further States' progress toward program reforms.

• Implement collaborative initiatives among Federal and State agencies and private organizations, for complementary efforts to improve health service delivery and/or financing in priority areas.

• Support management of Medicaid strategic planning, through analyses of data, trends and external forces, assessment of program activities in light of planned objectives, and coordination of Medicaid planning activities with other agencies and organizations.

• Serves as liaison with and ombudsman for the Medicaid regional components. Ensure that meaningful dialogue, instead of just one-way information flow, occurs during teleconferences and conferences.

Ensures involvement and participation by ORD and OMC when necessary to resolve operational conflicts impacting the Medicaid program. Represents the regions at leadership meetings of the Bureau, and provides leadership on Bureau priorities for regional office work.

• Compile and analyze other bureaus' plans to the extent they affect Medicaid resource use in the regions or in the bureau.

• Provide leadership in the development and revisions of the HCFA workplan related to the bureau's responsibilities or of the Medicaid Bureau work plan. Prepare Medicaid Bureau strategies.

• Represent the Bureau with AAORM staff. Participate in AAORM conference calls with the Regional Administrators and provide alerts to the leadership of the Medicaid Bureau when issues arise that will affect the Bureau's planning.

• Provide leadership within the Medicaid in the development of legislative implementation plans.

• Provides leadership on the evaluation of the Medicaid Bureau's structure and on the development and implementation of the means for dealing with the results of evaluations.

• Evaluates Medicaid operations and leadership, and HCFA-wide policies and programs to develop, coordinate, and implement bureau-wide management, budget, personnel and administrative policies and programs. Leads the design, implementation, and operation of Bureau processes, methods and policy to be followed by all subdivisions of the Bureau in the areas of budget and financial operations, procurement, work planning, personnel, management analysis and evaluation, administrative and general services, and equal employment opportunity.

• Executes the budget for the bureau through the issuance of staff and dollar controls, budget allowances for administrative expenditures, and employment ceilings to the Bureau Director and team managers.

• Provides advice and assistance with regard to the development, coordination and control of manual issuances. Interprets and produces various program information reports.

• Serves as focal point for public information (e.g., newsletter articles, FOIA and Privacy Act requests, etc.). Plans, directs and coordinates the Bureau's paperwork burden reduction and information collection budget programs.

• Provides leadership of a program to ensure that the Bureau is responsive to States, regional offices, other central office components and the public. Directs a Bureau-wide tracking and control system on correspondence, policies, regulations, action documents, etc., and provides training and technical assistance on standards for content of written documents.

• Represents the Medicaid Bureau and participates on teams charged with redesigning HCFA-wide administrative and management programs, policies and procedures.

• Serves as focal point for the General Accounting Office and the Office of the Inspector General reports relating to MB and coordinates other operational reviews of and within MB (e.g., internal control reviews).

• Develops and conducts a curriculum and courses to develop or increase the knowledge of the Medicaid program of staff from the MB, regional offices, States, and other partners and stakeholders.

• Coordinates, tracks, and produces reports on State plan amendments, home and community-based waivers, State plan preprints, legislative proposals (A19s), regulations, correspondence, and Section 1115 health care reform waivers.

• Develops and maintains general program compliance policies and tracks status of compliance issues.

• Serves as the liaison and coordinator between the public and other Federal agencies and the MB to address the needs of such individuals and organizations. These activities include securing appropriate attendees at meetings, participants on workgroup and teams, and tracking the MB resources committed to such activities.

• Develops and maintains a bureau administrative protocol and develops instructions for MB, regional offices, and States on submission and processing State plan amendments.

• Directs the Bureau's ADP activities relating to development, implementation, and administration of mainframe and PC-based ADP systems.

• Ensures adherence to all HCFA Automated Data Processing (ADP) security measures, policies, and procedures and assists with the development, modification, and review of ADP policies.

• Provides bureau support on issues related to microcomputer systems. Serves as the primary bureau contact point in coordinating with the Bureau of Data Management and Strategy on issues associated with system applications.

Dated: September 20, 1996.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

[FR Doc. 96–33094 Filed 12–27–96; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4061–N–04]

Announcement of Funding Awards for Fiscal Year 1996 for Section 8 Family Self-Sufficiency Program Coordinators

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 document notifies the public of funding awards for Fiscal Year (FY) 1996 to housing agencies (HAs) under the Section 8 Family Self-Sufficiency (FSS) program. The purpose of this Notice is to publish the names and addresses of the award winners and the amount of the awards made available by HUD to provide funding for FSS program coordinators.

FOR FURTHER INFORMATION CONTACT: Gerald J. Benoit, Director, Operations Division, Office of Rental Assistance, Office of Public and Indian Housing, Room 4220, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410–8000, telephone (202) 708–0477. (This telephone number is not toll-free.) A telecommunications device for hearing- and speech-impaired individuals (TTY) is available at 1–800–877–8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION: The purpose of the rental voucher and rental certificate programs is to assist eligible families to pay the rent for decent, safe, and sanitary housing. The FY 96 awards announced in this notice were selected for funding consistent with the provisions in the Notice of Funding Availability (NOFAs) published in the Federal Register on July 26, 1996 (61 FR 39261).

The funding for FSS service coordinators allows housing agencies to employ a coordinator to work with the Program Coordinating Committee and with local service providers to assure that program participants are linked to the supportive services they need to achieve self-sufficiency.

A total of $9,316,949 of grant funds was awarded to 289 recipients. 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 publishing the names, addresses, and amounts of those awards as shown on the attachment.

Dated: December 23, 1996.

Michael B. Janis,

General Deputy, Assistant Secretary for Public and Indian Housing.

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)

Field office	Housing agency name	Address	Amount
BOSTON	LYNN HOUSING AUTHORITY	174 SOUTH COMMON STREET LYNN, MA 01905.	$42,000
	LOWELL HOUSING AUTHORITY	350 MOODY STREET LOWELL, MA 01853	42,500
	ACTON HOUSING AUTHORITY	68 WINDSOR AVENUE ACTON, MA 01720	29,505
	DENNIS HOUSING AUTHORITY	167 CENTER STREET SOUTH DENNIS, MA 02660.	31,395
	GLOUCESTER HOUSING AUTHORITY	P.O. BOX 1599 GLOUCESTER, MA 01931	32,274
	SALEM HOUSING AUTHORITY	27 CHARTER STREET SALEM, MA 01970	41,250
	SAUGUS HOUSING AUTHORITY	19 TALBOT STREET SAUGUS, MA 01906	31,662
	WAKEFIELD HOUSING AUTHORITY	26 CRESCENT STREET WAKEFIELD, MA 01880.	22,776
	LEOMINISTER HOUSING AUTHORITY	100 MAIN STREET LEOMINISTER, MA 01453.	38,105
	NORWOOD HOUSING AUTHORITY	40 WILLIAM SHYNE CIRCLE NORWOOD, MA 02062.	37,298
	EVERETT HOUSING AUTHORITY	90 CHELSEA STREET EVERETT, MA 02149.	42,500
	MELROSE HOUSING AUTHORITY	910 MAIN STREET MELROSE, MA 02176	24,773
	ANDOVER HOUSING AUTHORITY	100 MORTON STREET ANDOVER, MA 01810.	42,500
	MILFORD HOUSING AUTHORITY	45 BIRMINGHAM COURT MILFORD, MA 01757.	12,480
	DANVERS HOUSING AUTHORITY	14 STONE STREET DANVERS, MA 01923	21,060
	WOBURN HOUSING AUTHORITY	59 CAMPBELL STREET WOBURN, MA 01801.	42,500
	WAYLAND HOUSING AUTHORITY	106 MAIN STREET WAYLAND, MA 01778	17,306
	READING HOUSING AUTHORITY	22 FRANK D. TANNER DRIVE READING, MA 01867.	24,975
	ATTLEBORO HOUSING AUTHORITY	37 CARLON STREET ATTLEBORO, MA 02703.	22,984
	SHREWSBURY HOUSING AUTHORITY	36 N. QUINSIGAMOND AVENUE SHREWSBURY, MA 01545.	24,012
Totals			623,855
HARTFORD	MILFORD HA	P.O. BOX 291, MAIN OFFICE MILFORD, CT 06406.	16,208
	ANSONIA HA	75 CENTRAL STREET ANSONIA, CT 06401.	42,214
	NORWALK HA	24½ MONROE STREET SOUTH NORWALK, CT 06856.	34,466
	TORRINGTON HA	TORRINGTON TOWERS TORRINGTON, CT 06790.	39,446
	HARTFORD HA	475 FLATBUSH AVENUE HARTFORD, CT 0616.	42,078
Totals			174,412
MANCHESTER	Keene Housing Authority	105 Castle Street KEENE, NH 03431	33,270
	BURLINGTON HOUSING AUTHORITY	230 St. Paul Street BURLINGTON, VT 05401.	32,053
	BANGOR HOUSING AUTHORITY	161 Davis Road BANGOR, ME 04401	32,942
	Westbrook Housing Authority	P.O. BOX 349 WESTBROOK, ME 04098	42,995
	Augusta Housing Authority	16 Cony Street CITY CENTER PLAZA AUGUSTA, ME 04330.	22,429
Totals			163,689
PROVIDENCE	PAWTUCKET HOUSING AUTHORITY	214 ROOSEVELT AVENUE PAWTUCKET, RI 02862.	34,042
	RHODE ISLAND HOUSING & MORTGAGE FINANCE.	44 WASHINGTON STREET PROVIDENCE, RI 02903.	38,513
	NORTH PROVIDENCE HOUSING AUTHORITY.	945 CHARLES STREET NORTH PROVIDENCE, RI 02904.	32,500
Totals			105,055
NEW YORK	CITY OF PORT JERVIS	P.O. BOX 1002 PORT JERVIS, NY 12771	27,497
	VILLAGE OF KIRYAS JOEL	500 FOREST ROAD SUITE 202 MONROE, NY 10905.	42,500
	TOWN OF BABYLON	P.O. BOX 2791 NORTH BABYLON, NY 11703.	42,250
	NORTH FORK H.A	110 SOUTH STREET GREENPORT, NY 11944.	42,000

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
Totals			154,247
BUFFALO	Gloversville Housing Authority	181 WEST STREET GLOVERSVILLE, NY 12078.	25,069
	Town of Colonie	MEMORIAL TOWN HALL NEWTONVILLE, NY 12128.	40,681
	Cohoes Housing Authority	100 MANOR AVENUE COHOES, NY 12047	34,199
	City of Fulton	125 WEST BROADWAY FULTON, NY 13069.	26,250
Totals			126,199
NEWARK	NEPTUNE HOUSING AUTHORITY	1910 ALBERTA AVENUE NEPTUNE, NJ 07753.	34,000
	PASSAIC COUNTY HOUSING AUTHORITY	ADMIN BUILDING 401 GRAND STREET PATERSON, NJ 07505.	33,450
	FORT LEE HOUSING AUTHORITY	1403 TERESA DRIVE FORT LEE, NJ 07024.	41,600
	BOOTON HOUSING AUTHORITY	125 CHESTNUT STREET BOONTON, NJ 07005.	42,000
	LONG BRANCH HOUSING AUTHORITY	P.O. BOX 335 GARFIELD COURT LONG BRANCH, NJ 07740.	42,500
	MILVILLE HOUSING AUTHORITY	P.O. BOX 803 MILVILLE, NJ 08332	36,169
	LAKEWOOD HOUSING AUTHORITY	317 SAMPSON AVENUE LAKEWOOD, NJ 08701.	42,500
	WOODBRIDGE HOUSING AUTHORITY	10 BUNNS LANE WOODBRIDGE, NJ 07095.	40,386
	NEW JERSEY DCA	CN 806 101 S. BROAD STREET TRENTON, NJ 08625.	41,543
	WARREN COUNTY HOUSING AUTHORITY.	415 B FRONT STREET BELVDERE, NJ 07060.	42,500
	WEEHAWKEN HOUSING AUTHORITY	525 GREGORY AVENUE WEEHAWKEN, NJ 07087.	41,918
	PLAINFIELD HOUSING AUTHORITY	510 E. FRONT STREET PLAINFIELD, NJ 07060.	40,500
	LAKEWOOD TOWNSHIP HOUSING AUTHORITY.	600 KENNEDY BLVD. LAKEWOOD, NJ 08701.	42,500
	WEST ORANGE HOUSING AUTHORITY	66 MAIN STREET WEST ORANGE, NJ 07052.	40,000
	EAST ORANGE HOUSING AUTHORITY	160 HALSTED STREET EAST ORANGE, NJ 07018.	42,500
Totals			604,066
PHILADELPHIA	DAUPHIN COUNTY	501 Mohn Street P.O. Box 7598 STEELTON, PA 17113.	35,561
	BERKS COUNTY	1803 Butter Lane READING, PA 19606	28,080
	HARRISBURG	PO BOX 3461 HARRISBURG, PA 17105	38,350
	MONTOUR COUNTY	One Beaver Place DANVILLE, PA 17821	42,500
	LANCASTER CITY	333 Church St. LANCASTER, PA 17602	40,134
	LUZERNE COUNTY	250 First Avenue KINGSTON, PA 18704	36,855
	WILMINGTON	400 Walnut Street WILMINGTON, DE 19801.	40,714
	ADAMS COUNTY	139–143 Carlisle St. GETTYSBURG, PA 17325.	34,300
	CUMBERLAND COUNTY	114 N. Hanover St. CARLISLE, PA 17013	13,500
	SUNBURY	705 Market St. P.O. Box 458 SUNBURY, PA 17801.	26,047
	WILKES-BARRE	50 Lincoln Plaza WILKES-BARRE, PA 18702.	39,180
	NORTHUMBERLAND COUNTY	50 Mahoning Street MILTON, PA 17847	26,047
Totals			401,268
BALTIMORE	ST. MARY'S COUNTY HOUSING AUTHORITY.	P.O. BOX 653 GOVERN. CENTER LEONARDTOWN, MD 20650.	42,500
	ANNE ARUNDEL COUNTY HOUSING AUTHORITY.	7885 GORDON COURT GLEN BURNIE, MD 21060–2817.	30,222
	HOUSING AUTHORITY OF CALVERT COUNTY.	150 MAIN STREET, SUITE 101 PRINCE FREDERICK, MD 20678.	25,000
	CECIL COUNTY HOUSING AGENCY	129 E. MAIN STREET ELKTON, MD 21921	39,042
	HOUSING AUTHORITY OF THE CITY OF HAVRE.	D129 E. MAIN STREET ELKTON, MD 21921.	26,336
	WASHINGTON COUNTY HOUSING AUTHORITY.	33 WEST WASHINGTON STREET HAGERSTOWN, MD 21740–4834.	21,541
	HOUSING AUTHORITY OF THE CITY OF HAGERST.	35 W. BALTIMORE STREET HAGERSTOWN, MD 21741–2859.	21,541
Totals			206,182

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
CHARLESTON	RALEIGH COUNTY HOUSING AUTHORITY.	P. O. BOX BD BECKLEY, WV 25801	26,957
	KANAWHA COUNTY HOUSING AUTHORITY.	P. O. BOX 3826 CHARLESTON, WV 25338	30,000
	BENWOOD HOUSING AUTHORITY	2200 MARSHALL STREET BENWOOD, WV 26031.	29,431
	HUNTINGTON HOUSING AUTHORITY	P. O. BOX 2183 HUNTINGTON, WV 25722	28,339
	WEIRTON HOUSING AUTHORITY	525 COVE ROAD WEIRTON, WV 26062	13,105
Totals			127,832
PITTSBURGH	Butler County Housing Authority	111 South Cliff Street BUTLER, PA 16003	42,500
	Altoona Housing Authority	2700 Pleasant Valley Blvd. ALTOONA, PA 16602.	42,500
Totals			85,000
RICHMOND	Albermarle County Office of Housing	401 McIntire Road CHARLOTTESVILLE, VA 22902.	29,124
	Lee County/Wise County RHAs	P.O. Box 665 JONESVILLE, VA 24263	29,012
	Cumberland Plateau Regional Hsg. Auth.	P. O. Box 1328 LEBANON, VA 24266	30,365
	Portsmouth Redevelopment and Hsg Auth.	P. O. Box 1098 PORTSMOUTH, VA 23705	34,511
Totals			123,012
WASHINGTON DC	Housing Authority of the City of Rockvil	14 MOOR DRIVE ROCKVILLE, MD 20850	42,500
	Virginia Redevelopment and Housing Autho	601 S. BELVIDERE RICHMOND, VA 23220	42,500
Totals			85,000
ATLANTA	BRUNSWICK HOUSING AUTHORITY	P.P. BOX 1118 BRUNSWICK, GA 31521–1118.	27,584
Totals			27,584
BIRMINGHAM	BESSEMER	P.O. BOX 1390 BESSEMER, AL 35021	29,599
	JEFFERSON COUNTY	3700 INDUSTRIAL PARKWAY BIRMINGHAM, AL 35217.	28,765
	FLORENCE	303 N. PINE STREET FLORENCE, AL 35630.	36,182
	OZARK	P.O. BOX 566 OZARK, AL 36361	30,500
Totals			125,046
CARIBBEAN/PUERTO RICO	MUNICIPALITY OF CAROLINA	P.O. BOX 8 CAROLINA, PR 00985–0008	18,945
	MUNICIPALITY OF HORMIGUEROS	P.O. BOX 97 HORMIGUEROS, PR 00660	42,500
	MUNICIPALITY OF PONCE	P.O. BOX 1709 PONCE, PR 00733	22,088
	MUNICIPALITY OF BAYAMON	P.O. BOX 2988 BAYAMON, PR 00620	17,330
	MUNICIPALITY OF AGUAS BUENAS	P.O. BOX 128 AGUAS BUENAS, PR 00767	16,483
Totals			117,346
COLUMBIA	Conway Housing Authority	2303 LEONARD AVENUE CONWAY, SC 29527.	15,066
	Greenwood Housing Authority	P.O. BOX GREENWOOD, SC 29648	30,000
	Myrtle Beach Housing Authority	P.O. BOX MYRTLE BEACH, SC 29578	36,594
	Anderson Housing Authority	1335 EAST RIVER STREET ANDERSON, SC 29624.	29,110
	Charleston Co. Housing & Redevelopment	P.O. BOX 6188 CHARLESTON, SC 29405	21,861
Totals			132,631
GREENSBORO	WESTERN CAROLINA COMM. ACTION	P.O. BOX 685, HENDERSONVILLE, NC 28793.	26,784
	MACON PROGRAM FOR PROGRESS	P.O. BOX 700, FRANKLIN, NC 28734	19,012
	STATESVILLE HOUSING AUTHORITY	433 S. MEETING ST., STATESVILLE, NC 28677.	37,905
	SANFORD HOUSING AUTHORITY	P.O. BOX 636, SANFORD, NC 27331	29,747
	SANDHILLS COMM. ACTION AGENCY	P.O. BOX 937, CARTHAGE, NC 28327	42,500
	TWIN RIVERS OPPORTUNITIES, INC.	P.O. BOX 1482, NEW BERN, NC 28563	32,500
	LAURINBURG HOUSING AUTHORITY	P.O. BOX 1437, LAURINBURG, NC 28353	36,549
	ROCKY MOUNT HOUSING AUTHORITY	P.O. BOX 4717, ROCKY MOUNT, NC 27803.	28,506
	HIGH POINT HOUSING AUTHORITY	P.O. BOX 1779, HIGH POINT, NC 27261	27,990
	GREENSBORO HOUSING AUTHORITY	P.O. BOX 21287, GREENSBORO, NC 27420.	42,500
	ASHEBORO HOUSING AUTHORITY	P.O. BOX 609, ASHEBORO, NC 27204	29,805
	TOWN OF EAST SPENCER	P.O. BOX 367, EAST SPENCER, NC 28039	33,864
	GRAHAM HOUSING AUTHORITY	P.O. BOX 88, GRAHAM, NC 27253	20,000
	GREENVILLE HOUSING AUTHORITY	P.O. BOX 1426, GREENVILLE, NC 27835	26,105
Totals			433,767
JACKSON	MS REGIONAL HOUSING AUTHORITY #VII.	P.O. BOX 886 MCCOMB, MS 39648–0886	22,557
	MS REGIONAL HOUSING AUTHORITY #VIII.	P.O. BOX 2347 GULFPORT, MS 39505–2347.	34,923
	MS REGIONAL HOUSING AUTHORITY #V	P.O. BOX 419 NEWTON, MS 39345–0419	25,700
Totals			83,180

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
JACKSONVILLE	BOCA RATON HA	201 W. PALMETTO PARK RD BOCA RATON, FL 33432.	26,208
	DELAND HA	300 SUNFLOWER CIRCLE DELAND, FL 32734.	38,806
	DAYTONA BEACH HA	118 CEDAR STREET DAYTONA BEACH, FL 32114.	34,895
	RIVIERA BEACH HA	2014 WEST 17TH COURT RIVIERA BEACH, FL 33404.	33,809
	PASCO COUNTY HA	14517 7TH ST. DADE CITY, FL 33523	34,900
	HERNANDO COUNTY HA	820 KENNEDY BLVD BROOKSVILLE, FL 34601.	34,849
	GAINESVILLE HA	1900 S.E. 4TH STREET GAINESVILLE, FL 32602.	34,250
	WALTON COUNTY HA	161 E. SLOSS AVENUE DEFUNIAK SPRINGS, FL 32433.	33,892
	VOLUSIA COUNTY HA	123 W. INDIANA AVENUE DELAND, FL 32720.	27,116
Totals			298,725
KNOXVILLE	CROSSVILLE HOUSING AUTHORITY	P.O. BOX 425 202 IRWIN AVENUE CROSSVILLE, TN 38557.	30,000
	KINGSPORT HOUSING AUTHORITY	P.O. BOX 44 KINGSPORT, TN 37662	35,395
Totals			65,395
NASHVILLE	JACKSON HOUSING AUTHORITY	P.O. BOX 3188 JACKSON, TN 38303–0188	35,630
Totals			35,630
LOUISVILLE	BOONE COUNTY ASST HOUSING DEPT	P.O. BOX 536 BURLINGTON, KY 41005	31,167
	HSG AUTH OF FLOYD COUNTY	P.O. BOX 687 PRESTONBURG, KY 41653	24,628
	HSG AUTH OF GREENUP CO (JOINT)	1448 DIEDERICH BLVD. RUSSELL, KY 41169.	39,997
	CITY OF BOWLING GREEN HSG & CD	1017 COLLEGE STREET BOWLING GREEN, KY 42102.	35,530
	HSG AUTH OF SOMERSET	P.O. BOX 449 SOMERSET, KY 42502	29,700
	HSG AUTH OF CYNTHIANA (JOINT)	P.O. BOX 351 CYNTHIANA, KY 41031	26,976
	CUMBERLAND VALLEY REG HSG AUTH	P.O. BOX 806 BARBOURVILLE, KY 40906	20,850
	HSG AUTH OF GEORGETOWN	139 SCROGGIN PARK GEORGETOWN, KY 40324.	22,000
	CITY OF PADUCAH SECT 8 (JOINT)	P.O. BOX 2267 PADUCAH, KY 42001	29,844
	KENTUCKY HOUSING CORPORATION	1231 LOUISVILLE ROAD FRANKFORT, KY 40601.	33,745
Totals			294,437
CHICAGO	WAUKEGAN HA	200 UTICA STREET WAUKEGAN, IL 60085	40,000
	BLOOMINGTON HA	104 E. WOOD BLOOMINGTON, IL 61701	37,509
	MADISON COUNTY HA	1609 OLIVE STREET COLLINSVILLE, IL 62234.	33,915
	CHAMPAIGN HA	P.O. BOX 183 URBANA, IL 61801	26,600
	EAST ST LOUIS HA	700 N. 20TH STREET EAST ST. LOUIS, IL 62205.	36,723
Totals			174,747
CLEVELAND	JEFFERSON METROPOLITAN HOUSING AUTHORITY.	815 NORTH SIXTH STREET STEUVENVILLE, OH 43952.	40,357
	MEDINA METROPOLITAN HOUSING AUTHORITY.	860 WALTER ROAD MEDINA, OH 44256	28,451
	TUSCARAWAS METROPOLITAN HOUSING AUTHORITY.	125 EAST HIGH NEW PHILADELPHIA, OH 44663.	42,354
	PORTAGE METROPOLITAN HOUSING AUTHORITY.	2832 STATE ROUTE 59 RAVENNA, OH 44266.	34,980
	BOWLING GREEN HOUSING AGENCY	304 NORTH CHURCH STREET BOWLING GREEN, OH 43402.	28,100
Totals			174,242
COLUMBUS	Morrow Housing Authority	9 WEST HIGH STREET MT. GILEAD, OH 43338.	28,800
	Logan Housing Authority	116 NORTH EVERETT STREET BELLEFONTAINE, OH 43311.	32,240
	Vinton Housing Authority	P.O. BOX 487 MCARTHUR, OH 45661	29,952
	Marietta Housing Authority	301 PUTNAM STREET MARIETTA, OH 45750.	32,448
	Springfield Housing Authority	437 EAST JOHN STREET SPRINGFIELD, OH 45505.	42,500
	Delaware Housing Authority	P.O. BOX 1292 DELAWARE, OH 43105	36,000
	Pickaway Housing Authority	176 RUSTIC DRIVE CIRCLEVILLE, OH 43113.	22,048
Totals			223,988

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
CINCINNATI	Warren Housing Authority	990 EAST RIDGE DRIVE LEBANON, OH 45036.	26,946
	Middletown Housing Authority	435 CITY CENTRE MALL MIDDLETOWN, OH 45402.	20,280
Totals			47,226
DETROIT	Plymouth Housing Commission	1160 SHERIDAN PLYMOUTH, MI 48170	38,339
	Redford Township Housing Comm.	12121 HEMINGWAY REDFORD, MI 48239	27,000
	Saginaw Housing Commission	2811 DAVENPORT SAGINAW, MI 48602	42,500
	Wayne County Housing Commission	600 RANDOLPH DETROIT, MI 48226	32,703
	Westland Housing Commission	32715 DORSEY ROAD WESTLAND, MI 48185.	28,000
Totals			168,542
GRAND RAPIDS	WYOMING HOUSING COMMISSION	2450 36TH STREET, SW WYOMIN, MI 49509.	33,529
	LANSING HOUSING COMMISSION	310 SEYMOUR LANSING, MI 48933	32,160
	MUSKEGON HOUSING COMMISSION	1080 TERRACE STREET MUSKEGON, MI 49442.	37,428
	KENT COUNTY HOUSING COMMISSION	741 E. BELTLINE AVE, NE GRAND RAPIDS, MI 49505.	38,610
Totals			141,727
INDIANAPOLIS	Delaware County Housing Authority	2401 SOUTH HADDIX AVENUE MUNCIE, IN 47302.	28,074
	Goshen Housing Authority	302 SOUTH FIFTH STREET GOSHEN, IN 46526.	31,817
	Hammond Housing Authority	7329 COLUMBIA CIRCLE WEST HAMMOND, IN 46324.	31,838
	Peru Housing Authority	701 EAST MAIN STREET PERU, IN 46970	25,326
	Kokomo Housing Authority	210 EAST TAYLOR STREET KOKOMO, IN 46903.	18,156
	Gary Housing Authority	578 BROADWAY GARY, IN 46402	28,769
	Vincennes Housing Authority	501 HART STREET VINCENNES, IN 47591	17,500
Totals			181,480
MILWAUKEE	Kenosha HA	625—52ND STREET, ROOM 98 KENOSHA, WI 53140.	36,402
	Dunn County HA	1424 STOUT ROAD MEMOMONIE, WI 54751.	31,024
	Green Bay HA	100 N. JEFFERSON STREET, ROOM 608, GREEN BAY, WI 54301.	39,608
	Eau Claire County HA	COURTHSE, ROOM 1590, 731 OXFORD AVE EAU CLAIRE, WI 54703.	30,056
	Walworth County HA	COURTHOUSE ANNEX, W3929 COUNTY NN, ELKHORN, WI 53121.	30,550
Totals			167,640
MINNEAPOLIS	SE MN MULTI-COUNTY HRA	134 EAST SECOND STREET WABASHA, MN 55981.	27,830
	BRAINERD HRA	410 EAST RIVER ROAD BRAINERD, MN 56401.	38,209
	BLOOMINGTON HRA	2215 W. OLD SHAKOPEE ROAD BLOOMINGTON, MN 55431.	26,047
	SCOTT COUNTY HRA	16049 FRANKLIN TRAIL SE 104 PRIOR LAKE, MN 55372.	14,590
	SOUTHCENTRAL MN MULTI-COUNTY HRA.	410 JACKSON P.O. BOX 3464 MANKATO, MN 56002.	29,246
	NW MN MULTY-COUNTY HRA	P.O. BOX 128 MENTOR, MN 56736	30,000
	SOUTH ST PAUL HRA	125 THIRD AVE N SOUTH ST. PAUL, MN 55075.	36,680
	KANDIYOHI COUNTY HRA	P.O. BOX 1359 WILLMAR, MN 56201	40,614
	WASHINGTON COUNTY HRA	321 BROADWAY AVE ST. PAUL PARK, MN 55071.	22,004
Totals			265,220
FT. WORTH	SAN ANGELO HOUSING AUTHORITY	PO BOX 1751 SAN ANGELO, TX 76902	28,206
	PLANO HOUSING AUTHORITY	1581 AVENUE K PLANO, TX 75074	29,502
	MIDLAND COUNTY HOUSING AUTH	600 B NORTH BAIRD MIDLAND, TX 79701	32,812
Totals			90,520
ALBUQUERQUE	Bernalillo County	620 Lomas Blvd. NW ALBUUERQUE, NM 87102.	37,361
	Santa Fe County	P.O. Box 276 SANTA FE, NM 87504–0276	35,500
	Dona Ana County	2407 W. Picacho, Suite A–2 LAS CRUCES, NM 88005.	32,947
	Clovis	P.O. Box 1240 CLOVIS, NM 88102	27,900
	Truth or Consequences	108 South Cedar St. TRUTH OR CONSEQUENCES, NM 87901.	42,500

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
	Alamogordo Housing Authority/	C/O P.O. BOX 336 ALAMOGORDO, NM 88310.	42,500
	Las Cruces	926 S. San Pedro St. LAS CRUCES, NM 88001.	27,073
	Region IV	104 W. 2nd CLOVIS, NM 88101	30,000
Totals			275,781
HOUSTON	CITY OF BEAUMONT	P.O. BOX 1312 BEAUMONT, TX 77708	30,276
	CITY OF BAYTOWN	805 NAZRO ST. BAYTOWN, TEXAS 77520	33,372
Totals			63,648
LITTLE ROCK	Housing Authority of Conway	335 S. Mitchell CONWAY, AR 72032	23,400
	Hope Housing Authority	720 Texas Street HOPE, AR 71801	15,514
	Mississippi County Pub. Fac. Board	808 West Keiser OSCEOLA, AR 72370	28,500
	Harrison Housing Agency	P.O. Box 1715 HARRISON, AR 72601	32,500
	Northwest Regional Housing Authority	P.O. Box 699 HARRISON, AR 72601	32,500
	Housing Authority of Siloam Springs	P.O. Box 280 SILOAM SPRINGS, AR 72761.	27,970
	Housing Authority of North Little Rock	P.O. Box 516 NORTH LITTLE ROCK, AR 72115.	25,000
Totals			185,384
NEW ORLEANS	TERREBONNE PARISH	P.O. BOX 2768 HOUMA, LA 70361	19,000
	WEBSTER PARISH POLICE JURY	P.O. BOX 876 MINDEN, LA 71058	21,770
Totals			40,770
OKLAHOMA CITY	NORMAN HA	700 N. BERRY RD. NORMAN, OK 73069	33,581
	STILLWATER	807 S. LOWRY STILLWATER, OK 74074	30,000
Totals			63,581
SAN ANTONIO	Corpus Christi Public Housing Authority	3701 Ayers Street CORPUS CHRISTI, TX 78415.	27,040
	Travis County Housing Authority	P.O. Box 1748 AUSTIN, TX 78767	31,500
	Hidalgo County Housing Authority	1800 N. Texas Blvd. WESLACO, TX 78596	33,665
	Harlingen Public Housing Authority	P.O. Box 1669 HARLINGEN, TX 78551	29,515
	Cameron County Housing Authortiy	P.O. Box 5806 BROWNSVILLE, TX 78520	34,290
	Pharr Public Housing Authority	211 West Audrey PHARR, TX 78577	37,700
	Kingsville Public Housing Authority	P.O. Box 847, 100 West Corral KINGSVILLE, TX 78363.	41,677
	Edinburg Public Housing Authority	P.O. Box 295 EDINBURG, TX 78540	32,000
Totals			267,387
KANSAS CITY	Fort Scott Housing Authority	P.O. Box 269, 315 Scott Avenue FORT SCOTT, KS 66701.	11,200
	Ray County Housing Authority	302 N. Camden St. RICHMOND, MO 64085	9,516
	Manhattan Housing Authority	P.O. Box 1024 MANHATTEN, KS 66505–1024.	29,950
	Jasper County Housing Authority	305 Virginia, P.O. Box 207 JOPLIN, MO 64802–0270.	21,526
	Liberty Housing Authority	101 E. Kansas, P.O. Box 159 LIBERTY, MO 64068.	30,281
	NEK–CAP, Inc	Pleasant View, RR# 4, P.O. Box 380 HIAWATHA, KS 66434.	28,858
	Missouri Housing Development	3435 Broadway KANSAS CITY, MO 64111	33,280
	ECKAN, Inc	602 Maple, P.O. Box 100 OTTAWA, KS 66067.	26,557
	Southwest Kansas Area Agency	Central and Gunsmoke, P.O. Box 1636 DODGE CITY, KS 67801.	27,600
Totals			218,768
DES MOINES	Sioux City	Box 447	35,000
	Council Bluffs	505 South Sixth St. COUNCIL BLUFFS, IA 51501.	29,936
	Ft. Dodge	700 South 17th Street FT. DODGE, IA 50501.	42,486
	Dubuque	1805 Central Avenue DUBUQUE, IA 52001	28,050
	Central IA Regional HA	1111 9th Street, Suite 390 DES MOINES, IA 50314.	42,500
	Iowa Northland Regional HA	2530 University Avenue, Suite #5 WATERLOO, IA 50701.	35,000
	Southern IA Regional HA	219 N. Pine Street	30,015
	Northwest IA Regional HA	919 2nd Avenue, SW, Box 446 SPENCER, IA 51301.	32,490
	North IA Regional HA	217 Second Street, SW MASON CITY, IA 50401.	42,500
	Upper Explorerland Regional HA	134 W. Greene St., Box 219	36,300
	Eastern IA Regional HA	Suite 330, Nesler Centre, Box 1140 DUBUQUE, IA 52004.	39,280
	Waterloo	620 Mulberry St., Suite 102, Box 120	26,040

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
	Ottumwa/Albia PHAs (Joint Apps)	102 W. Finley Avenue OTTUMWA, IA 52501.	31,880
Totals			451,477
OMAHA	CENTRAL NEBRASKA JT HA	P.O. BOX 509 LOUP CITY, NE 68853	23,264
	GOLDENROD JOINT HA	P.O. BOX 280 WISNER, NE 68791	25,922
	NORFOLK HA	111 SOUTH 1ST STREET NORFOLK, NE 68701.	30,000
	KEARNEY HA	2715 AVENUE I KEARNEY, NE 68847	26,513
	NORTHEAST NEBRASKA JT HA	507 7TH STREET, SUITE 401 SIOUX CITY, IA 51102.	27,170
Totals			132,869
ST. LOUIS	St. Charles HA	1041 Olive Street ST. CHARLES, MO 63301.	28,176
	Ripley County PHA	3019 Fair Street POPLAR BLUFF, MO 63902.	23,714
	Franklin County PHA	P.O. Box 920 HILLSBORO, MO 63050	27,500
	Phelps County PHA	101 West Tenth Street ROLLA, MO 65401	21,504
Totals			100,894
DENVER	ARVADA HOUSING AUTHORITY	P.O. BOX 8101 ARVADA, CO 80002	32,400
	FORT COLLINS HOUSING AUTHORITY	1715 W. MOUNTAIN AVE. FORT COLLINS, CO 80521.	32,625
Totals			65,025
DENVER (ONAP)	UTAH PAIUTE HOUSING AUTHORITY	665 NORTH 100 EAST CEDAR CITY, UT 84720.	38,610
Totals			38,610
SAN FRANCISCO	MADERA HOUSING AUTHORITY	205 NORTH "G" ST. MADERA, CA 93637	31,147
	BENICIA HOUSING AUTHORITY	28 RIVERHILL DR. BENICIA, CA 94510	42,500
	NAPA HOUSING AUTHORITY	1115 SEMINARY ST. NAPA, CA 94559	42,500
	KINGS HOUSING AUTHORITY	P.O. BOX 355 HANFORD, CA 93232	38,166
	VACAVILLE HOUSING AUTHORITY	40 ELDRIDGE AVE, SUITES 1–5 VACAVILLE, CA 95687.	42,500
	FAIRFIELD HOUSING AUTHORITY	823–B JEFFERSON ST. FAIRFIELD, CA 94533.	28,610
Totals			225,423
LOS ANGELES	City of Carlsbad HRA	2965 ROOSEVELT STREET, "B" CARLSBAD CA 92008.	24,180
	Housing Authority City of Norwalk	12700 NORWALK BLVD. P.O. BOX 1030 NORWALK, CA 90651.	38,171
	City of Oceanside Housing Dept	NEVADA ST. ANNEX 300 N. COAST HIGHWAY OCEANSIDE, CA 92504.	46,422
	City of Pomona Housing Authority	CITY HALL 505 S. GAREY AVE P.O. BOX 660 POMONA, CA 91769.	33,446
	Lakewood Housing Authority	5050 N. CLARK AVE LAKEWOOD, CA 90712.	39,986
Totals			182,205
PHOENIX	Housing Authority of the City of Yuma	1350 W. Colorado St. YUMA, AZ 85364	18,230
	City of Mesa Housing Authority	415 N. Pasadena MESA, AZ 85201	40,000
Totals			58,230
SACRAMENTO	Dept of Housing & Community Development	P.O. Box 952054 SACRAMENTO, CA 95814.	20,930
	El Dorado County	937 Spring Street PLACERVILLE, CA 95667.	36,148
	Shasta County	1670 Market Street, Suite 300 REDDING, CA 96001.	35,334
	City of Roseville	405 Vernon Avenue, Suite 1 ROSEVILLE, CA 95678.	40,688
	City of Redding	760 Parkview Avenue REDDING, CA 96001	42,500
Totals			175,600
SEATTLE	KITSAP COUNTY	9265 BAYSHORE DRIVE, NW SILVERDALE, WA 98383.	40,147
	BELLINGHAM	208 UNITY STREET, LOWER LEVEL BELLINGHAM, WA 98225.	32,854
	PASCO & FRANKLIN COUNTY	820 NO. 1ST AVENUE PASCO, WA 99301	29,921
	THURSTON COUNTY	503 W 4TH AVENUE OLYMPIA, WA 98501	37,123
	JEFFERSON COUNTY	802 SHERIDAN, 3RD FLOOR PORT TOWNSEND, WA 98368.	25,585
	SPOKANE (MULTI-COUNTY PHA)	55 WEST MISSION, 104 SPOKANE, WA 99201.	42,500
	KENNEWICK	421 SO. TACOMA STREET KENNEWICK, WA 98336.	42,000
	CLALLAM COUNTY	2603 SO. FRANCIS ST. PORT ANGELES, WA 98362.	36,594

FY 1996 SECTION 8 FAMILY SELF-SUFFICIENCY COORDINATORS FUNDING (CDBG FUNDS)—Continued

Field office	Housing agency name	Address	Amount
	RICHLAND	650 GEORGE WASHINGTON WAY RICHLAND, WA 99352.	19,500
	ISLAND COUNTY	7 NW 6TH ST. COUPEVILLE, WA 98239	35,228
Total			341,452
PORTLAND	SOUTHWESTERN IDAHO COOPERATIVE HA.	1108 West Finch Drive NAMPA, ID 83651	26,496
	MID-COLUMBIA HOUSING AGENCY	506 East Second Street THE DALLES, OR 97058.	27,007
	CENTRAL OREGON REGIONAL HA	2445 SW Canal Blvd REDMOND, OR 97756.	27,840
	IDAHO HOUSING & FINANCE ASSOCIATION.	565 W. Myrtle Street, PO Box 7899 BOISE, ID 83707.	37,633
	YAMHILL COUNTY HA	414 North Evans Street, PO Box 865 MCMINNVILLE, OR 97128.	30,364
	LINCOLN COUNTY HA	1039 NW Nye Street, PO Box 1470 NEWPORT, OR 97365.	26,515
	NORTHWEST OREGON HA	1508 Exchange Street ASTORIA, OR 97103	25,100
Totals			200,955
National Total			9,316,949

[FR Doc. 96–33164 Filed 12–27–96; 8:45 am]

BILLING CODE 4210–335–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Gas Pipeline Right-of-Way Permit Application Crossing Fish and Wildlife Service National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: The U.S. Fish and Wildlife Service (Service) advises the public that Peoples Natural Gas Company of Rochester, Minnesota has applied for the installation of a 2″ O.D. plastic natural gas pipeline across Service land tract H–2b in Houston County, Minnesota. The project will temporarily impact .10 of an acre.11This Notice informs the public that the Service will be proceeding with the processing of the application, the compatibility determination and the approval processing which includes the preparation of the terms and conditions of the permit. The natural gas pipeline will provide reliable and cost-effective energy to the residents of the Shore Acre subdivision of La Crescent, Minnesota.

DATES: Written comments should be received on or before January 29, 1997 to receive consideration by the Service.

ADDRESSES: Comments should be addressed to: Regional Director; U.S. Fish and Wildlife Service, Bishop Henry Whipple Federal Building, 1 Federal Drive, Fort Snelling, Minnesota; 55111–4056. Attention: John Connors, Realty Specialist.

FOR FURTHER INFORMATION CONTACT: John Connors, Realty Specialist, at the above Fort Snelling Regional Office address (612/725–3564 or FAX 612/725–3557).

SUPPLEMENTARY INFORMATION: The refuge manager, for the Upper Mississippi River National Wildlife and Fish Refuge, has approved the route of the pipeline that lies within a strip of land 20 feet wide and 213.5 feet long. It will be located in that part of the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section 14, Township 104 North, Range 4 West, of the Fifth Principal Meridian, Houston County, Minnesota.

Right-of-way applications for pipelines are to be filed in accordance with section 28 of the Mineral Leasing Act of 1920 (30 U.S.C.), as amended by the Act of November 16, 1973 (37 Stat. 576, Pub. L. 93–153).

Dated: December 18, 1996.

William F. Hartwig,

Regional Director.

[FR Doc. 96–33038 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–55–M

Geological Survey

Request for Public Comments on Proposed Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposed information collection described below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). Copies of the proposed collection instrument may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Public comments on the proposal should be made within 30 days directly to: Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503; and the Bureau of Clearance Officer, U.S. Geological Survey, 208 National Center, Reston, Virginia 20192, Telephone (703) 648–7313.

As required by OMB regulations at 5 CFR 1320.8(d)(1), the U.S. Geological Survey solicits specific public comments regarding the proposed information collection as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the bureau, including whether the information will have practical utility;
2. The accuracy of the bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
3. The utility, quality, and clarity of the information to be collected; and,
4. How 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 forms of information technology.

Title: On-Demand System for Printing USGS Maps.

OMB approval number: New Collection.

Abstract: Customers for USGS maps will be invited to indicate their satisfaction with an experimental, on-demand version of a USGS topographic map as compared to the standard printed edition of the same map. Potential respondents will be mailed an evaluation package consisting of sample maps and a short questionnaire. Those electing to respond will then use the postage-paid questionnaire to answer specific questions about the experimental map and to submit additional comments they may wish to offer. Information from respondents will be used to evaluate a point-of-sale map printing system the USGS intends to develop under a cooperative research and development agreement with private industry. The proposed collection is limited in scope to the on-demand printing system and its output products, and to the suitability of these experimental products to meet respondent applications for USGS maps.

Bureau form number: None.

Frequency: An estimated 2–3 surveys per year as indicated by technical milestones reached during the course of the on-demand development project and by customer reaction to initial map products generated from the on-demand system.

Description of respondents: General public USGS map purchasers; dealers of USGS maps.

Estimated completion time: 0.1 hours per response.

Annual responses: 1,000.

Annual burden hours: 100 hours.

Bureau clearance officer: John Cordyack, 703–648–7313.

Dated: November 26, 1996.

Richard E. Witmer,

Acting Chief, National Mapping Division.

[FR Doc. 96–33170 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–31–M

Bureau of Indian Affairs

National Tribal Consultation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of tribal consultation meeting—tribal trust account holders and allottees.

SUMMARY: Notice is hereby given that the Bureau of Indian Affairs, will conduct four (4) consultation meetings with any Indian Tribe, band, nation, allottee group, individual allottee, other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), which is recognized as eligible for the trust programs and services provided by the United States to Indians because of their status as Indians.

The purpose of these consultation meetings is to obtain oral and written comments regarding the options presented in the ‘‘Proposed Legislative Options in Response to Tribal Trust Fund Reconciliation Project Results’’ (Options Paper), delivered to the U.S. Congress and mailed to 554 tribal governments, as well as tribal account holders on December 11, 1996. The options were developed by the Department of the Interior as a preliminary proposal for settling disputed balances in the Tribal trust fund accounts based on the result of a five-year reconciliation project.

The report contains the settlement proposals of the Advisory Board as an attachment. The Options Paper was submitted to Congress in accordance with Section 304 of the American Indian Trust Fund Management Reform Act of 1994 (the Act).

DATES: Four consultation sessions will be conducted:

January 6, 1997, Portland, OR, Red Lion—Lloyd Center 1000 N.E. Multnomah, Portland, OR, 97232, 800–733–5466, or 503–281–6111. The session will begin at 9:30 am and adjourn at 5:00 pm.

January 8, 1997, Denver, CO, The Renaissance Hotel, 3801 Quebec St., Denver, CO, 80207, 303–399–7500. The session will begin at 8:30 am and adjourn at 5:00 pm.

January 10, 1997, Phoenix, AZ, Hyatt Regency, 122 North Second Street, Phoenix, AZ, 85004, 602–257–1110, 800–228–9000. The session will begin at 8:30 am and adjourn at 5:00 pm.

January 24, 1997, Washington, DC, Grand Hyatt Washington at Washington Center, Washington, DC, 202–582–1234. The session will begin at 1:00 pm and adjourn at 5:00 pm.

Public attendance may be limited to the space available.

FOR FURTHER INFORMATION CONTACT: Michael Chapman, Special Assistant, Deputy Commissioner, Bureau of Indian Affairs, Department of the Interior, 1849 C Street, N.W., Washington, DC, 20240, 202–208–5116, FAX 202–208–5320.

SUPPLEMENTARY INFORMATION: The purpose of these consultation meetings is to provide Indian Tribal trust account holders and allottees an opportunity for participation in the development of final options for the U.S. Congress to resolve Tribal trust fund claims. The objectives of the consultation meeting are:

- Achieve a settlement that is fair.
- Achieve the most resource-efficient settlement of claims (in terms of conserving federal government and Tribal time, money, and staff, including attorneys' and expert witness fees).
- Encourage settlement by providing incentives to settle and by providing disincentives to litigation.
- Use the most informal settlement processes available rather than litigation to encourage Tribal participation.
- Obtain funding for the settlement without reducing appropriations for the BIA budget and Tribal programs.
- Achieve final agreement on account balances through September 30, 1995, as required by the Act.

The Options Paper presented to Congress incorporates many of the settlement recommendations of the Special Trustee's Advisory Board, which was created by Section 306 of the Act. The Advisory Board's settlement proposals were submitted to the Secretary on September 24, 1996, and were the result of a series of consultations between the Special trustee, his Advisory Board and several Tribes. As requested by the Special Trustee, the Advisory Board's recommendations were appended to the Options Paper. The Options Paper describes where there was agreement or disagreement with the Advisory Board's recommendations.

All oral and written comments presented by Tribes and individuals at these consultation meetings will be recorded, transcribed and taken into consideration by the agency.

Summaries of the meetings will be available for public inspection and copying ten days following the meeting.

Written comments must be submitted on or before February 12, 1997 to: U.S. Department of the Interior, Bureau of Indian Affairs, Public Information Office, Attn: Ralph Gonzales, Room 4546, M.S. MIB–4542, 1849 C Street, N.W., Washington, D.C. 20240.

Dated: December 23, 1996.

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 96–33132 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–02–M

Bureau of Land Management

[AK–962–1410–00–P; AA–9265]

Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of Sec. 14(h)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(h)(1), will be issued to Calista Corporation for approximately 21.9 acres. The lands involved are in the vicinity of Nunivak Island, Alaska.

Seward Meridian, Alaska

T. 2 S., R. 98 W.,
Sec. 18.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the *Anchorage*

Daily News. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599 ((907) 271–5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until January 29, 1997 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

Patricia A. Baker,

Land Law Examiner, ANCSA Team, Branch of 962 Adjudication.

[FR Doc. 96–33193 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–$$–P

[AK–962–1410–00–P]

Notice for Publication; AA–9253, Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of Sec. 14(h)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(h)(1), will be issued to Calista Corporation for approximately 3.0 acres. The lands involved are in the vicinity of Nunivak Island, Alaska.

Seward Meridian, Alaska

T. 3 S., R. 96 W.,
Sec. 29.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the Anchorage Daily News. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599 ((907) 271-5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until January 29, 1997 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

Patricia A. Baker,

Land Law Examiner, ANCSA Team, Branch of 962 Adjudication.

[FR Doc. 96–33194 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–$$–P 4510–29–P

[AZ–054–07–7122–14–X218: AZ–054–97–01]

Arizona, Temporary Closure of Selected Public Lands in La Paz County, Arizona

AGENCY: Bureau of Land Management, Interior.

ACTION: Temporary closure of selected public lands in La Paz County, Arizona, during the Operation of the 1997 SCORE Parker 400 Desert Race.

SUMMARY: The Lake Havasu Field Office Manager announces the temporary closure of selected public lands under its administration. This action is being taken to help ensure public safety and prevent unnecessary environmental degradation during the official permitted running of the 1997 SCORE Parker 400 Desert Race.

DATES: January 23, 1997, through January 26, 1997.

SUPPLEMENTARY REGULATIONS: Specific restrictions and closure periods are as follows:

Designated Course

1. The portion of the course comprised of BLM lands, roads and ways south of the Bill Williams River. East and north of AZ Highway 72 and west of Wenden Road is closed to public vehicle use from 6:00 p.m. Thursday, January 23, 1997, to 12:00 noon Sunday, January 26, 1997 (Mountain Standard Time).

2. Vehicles are prohibited from the following four Wilderness Areas and one Wilderness Study Area (WSA):

a. AZ–054–12 (Gibraltar Mountain)
b. AZ–054–15A (Swansea)
c. AZ–054–71 (Buckskin Mountains)
d. AZ–054–17 (East Cactus Plain)
e. AZ–054–14A/B (Cactus Plain WSA)

3. The entire area encompassed by the designated course and all areas within 1 mile outside the designated course are closed to all vehicles except authorized and emergency vehicles. Access routes leading to the course are closed to vehicles.

4. Vehicle parking or stopping along Bouse Road, Shea Road, and Swansea Road is prohibited except for the designated spectator areas.

5. Spectator viewing is limited to two designated spectator areas located at:

a. South and North of Shea Road as signed, app. 7 miles east of Parker, Arizona.

b. Bouse Road, also known as Swansea Road as signed, app. 2 miles and 5 miles north of Bouse, Arizona.

6. The following regulations will be in effect for the duration of the closure:

Unless otherwise authorized, no person shall:

a. Camp in any area outside of the designated spectator areas.

b. Enter any portion of the race course or any wash located within the race course, including all portions of Osborne Wash.

c. Spectate or otherwise be located outside of the designated spectator areas.

d. Cut or collect firewood of any kind, including dead and down wood or other vegetative material.

e. Be in possession of any alcoholic beverage unless that person has reached the age of 21 years.

f. Possess, discharge, or use firearms, other weapons, or fireworks.

g. Park, stop, or stand any vehicle outside of the designated spectator areas.

h. Operate any vehicle, including an off-highway vehicle (OHV), which is not legally registered for street and highway operation, including operation of such a vehicle in spectator viewing areas, along the race course, and in designated pit areas.

i. Park any vehicle in violation of posted restrictions, or in such a manner as to obstruct or impede normal or emergency traffic movement or the parking of other vehicles, create a safety hazard, or endanger any person, property or feature. Vehicles so parked are subject to citation, removal and impoundment at the owner's expense.

j. Take any vehicle through, around or beyond a restrictive sign, recognizable barricade, fence or traffic control barrier.

k. Fail to keep their site free of trash and litter during the period of occupancy or fail to remove all personal equipment, trash, and litter upon departure.

l. Violate quiet hours by causing an unreasonable noise as determined by the authorized officer between the hours of 10 pm and 6 am Arizona time.

m. Allow any pet or other animal in their care to be unrestrained at any time.

Signs and maps directing the public to the designated spectator areas will be provided by the Bureau of Land Management and the event sponsor.

The above restrictions do not apply to emergency vehicles and vehicles owned by the United States, the State of

Arizona or to La Paz County. Vehicles under permit for operation by event participants must follow the race permit stipulations. Operators of permitted vehicles shall maintain a maximum speed limit of 35 on all La Paz County and BLM roads and ways. Authority for closure of public lands is found in 43 CFR Part 8340, Subpart 8341; 43 CFR Part 8360, Subpart 8364.1, and 43 CFR Part 8372. Persons who violate this closure order are subject to arrest and, upon conviction, may be fined not more than $100,000 and/or imprisoned for not more than 12 months.

FOR FURTHER INFORMATION CONTACT: Mark Harris, BLM Ranger, or Myron McCoy, Outdoor Recreation Planner, Lake Havasu Field Office, 2610 Sweetwater Avenue, Lake Havasu City, Arizona 86406, (520) 505–1200.

Dated: December 16, 1996.

MarLynn D. Spears,

Acting Field Manager.

[FR Doc. 96–33087 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–32–M

[WO–230–1150–00–24 A]

Proposed Decision Record and Finding of No Significant Impact for the Continuation of Interim Strategies for Managing Anadromous Fish-Producing Watersheds in Eastern Oregon and Washington and Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (40 CFR 1502.2), and the Federal Land Policy and Management Act of 1976, (43 CFR 1610.3–2 and 1610.5–3), the Department of the Interior, Bureau of Land Management (BLM), provides notice of availability of the Proposed Decision Record and Finding of No Significant Impact for the Extension of the Interim Strategies for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington and Idaho. This program has generally been known as the PACFISH strategy. The proposed continuation of the interim PACFISH strategies will provide the framework to guide supplemental protective measures and analysis procedures for all applicable land and resource allocations and management direction until the long term strategy of the Interior Columbia Basin Ecosystem Management Project (ICBEMP) is complete. This is expected to be for the next 1 to 2 years in the applicable portions of the Prineville, Vale and Spokane Districts in eastern Oregon and Washington and all Bureau managed lands in Idaho. This proposed decision extends the original PACFISH strategy originally approved for an 18 month period in early 1995.

ADDRESSES: Copies of the proposed decision are available upon request by contacting the Oregon State Office, Bureau of Land Management, 1515 SW 5th Avenue, PO Box 2965, Portland, Oregon 97298 or the Idaho State Office, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho 83709. This document has been sent to all those individuals and groups who were on the mailing list for the related environmental assessment for the PACFISH extension. The full supporting record for the proposed PACFISH strategy extension, including the environmental assessment, is also available for inspection in the Oregon and Idaho State Offices, at the addresses shown above in the respective public rooms or land offices during normal office hours.

FOR FURTHER INFORMATION CONTACT: Michael Crouse, Oregon State Office, Bureau of Land Management, 1515 SW 5th Avenue, PO Box 2965, Portland, Oregon 97208. He can be reached at telephone 503–952–6068 or facsimile machine at 503–952–6021. Information is also available from Ervin Cowley, Idaho State Office, 1387 South Vinnell Way, Boise, ID 83709. He can be reached at telephone 208–373–3810 or facsimile machine 208–373–3805.

SUPPLEMENTARY INFORMATION: The proposed strategy is the same as the original PACFISH interim strategy, except that the interim period has been extended beyond the original 18 month period due to delays in the ICBEMP.

Virtually no changes to the proposed decisions have been made, however, some clarifying language has been made in response to concerns about monitoring and coordination with interested State and local governments and tribal interests.

The proposed decision will become effective 30 days from this notice unless appealed and successfully stayed under 43 CFR Part 4. Unless such an action occurs, the proposed decision will be implemented without further notice.

Dated: December 23, 1996.

Mat Millenbach,

Deputy Director, Bureau of Land Management.

[FR Doc. 96–33032 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–84–P

[UT–940–1430–01; UTU 74938]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Utah

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management proposes to withdraw 38,102.78 acres of public surface/mineral estate and 6,675.20 acres of public mineral estate in Washington County to protect a desert tortoise reserve and a Washington County watershed. This notice closes the lands for up to 2 years from surface entry and mining. The lands will remain open to public land sale, exchange, recreation and public purpose and mineral leasing. An additional 17,210.01 acres of non-federal surface/mineral estate and 6,675.20 acres of non-federal surface estate would also be segregated if acquired by the United States during the 2 year period.

DATES: Written Comments must be received by March 31, 1997. An open house is scheduled for Wednesday, January 22, 1997 at the Dixie Resource Area Office, 345 Riverside Drive, St. George, Utah 84770. Interested parties may visit the open house beginning at 3:00 pm with public comment at 3:30 pm and also beginning at 7:00 pm with public comment at 7:30 pm.

ADDRESSES: Comments should be sent to the Utah State Director, BLM, P.O. Box 45155, Salt Lake City, Utah 84145–0155.

FOR FURTHER INFORMATION CONTACT: Michael Barnes, Salt Lake District Office, (801) 977–4372.

SUPPLEMENTARY INFORMATION: On November 4, 1996, a petition/application was approved allowing the Bureau of land Management to file an application to withdraw the following described public land from settlement, location, or entry under the general land laws, including the mining laws, subject to valid existing rights:

Salt Lake Meridian

T. 41 S., R. 13 W.,
- Sec. 17, Lots 3, 5, thru 8, SE¼NW¼, NE¼SW¼, S½SW¼, SE¼;
- Sec. 18, Lots 2, 7, 8, 10, 11, 13, and 15 thru 23, W½NE¼, E½NW¼, W½SE¼, SE¼SE¼;
- Sec. 19, Lots 1 thru 11, 13 thru 18, N½NE¼, SW¼NE¼;
- Sec. 20, Lots 1 and 2, E½, E½W½, NW¼NW¼,SW¼SW¼;
- Sec. 21, Lots 1 thru 4, W½E½, W½;
- Sec. 22, Lots 2, 3, 8, and 9, SW¼SW¼;
- Sec. 27, W½NW¼;,
- Sec. 28, NE¼NE¼, NW¼NW¼, NW¼SE¼;,
- Sec. 29, N½NE¼, N½S½N½, N½S½SW¼NE¼, SE¼SE¼SW¼NE¼,

S½SE¼NE¼, NE¼NW¼, N½SW¼SW¼NW¼, NE¼NE¼SE¼, N½NW¼NE¼SE¼;,
Sec. 30, Lots 2, 3, 4, and 15 thru 19, NE¼SE¼.
T. 41 S., R. 14 W.,
Sec. 13, SE¼NE¼, S½S½, NE¼SE¼;
Sec. 15, Lots 1 thru 8, W½E½, W½;
Sec. 17, E½, SE¼NW¼, SW¼;
Sec. 18, Lots 7 and 8, SE¼SW¼, S½SE¼;
Sec. 19, Lots 1 thru 8, E½, E½W½;
Sec. 20, All;
Sec. 21, All;
Sec. 22, Lots 1 thru 8, W½E½, W½;
Sec. 23, W½,SW¼, embracing that portion of land west of I–15 corridor;
Sec. 24, All;
Sec. 25, Lots 1 thru 10, SW¼NE¼, NE¼SW¼NW¼, E½SE¼NW¼, NW¼SE¼NW¼, E½NE¼SW¼, E½W½NE¼SW¼, SE¼SW¼, W½SE¼;
Sec. 26, Lot 4, embracing that portion of land west of I–15 corridor;
Sec. 27, Lots 1 thru 9, N½NE¼, SE¼NE¼, SE¼SW¼, SW¼SW¼, embracing that portion of land west of I–15 corridor;
Sec. 28, All;
Sec. 29, All;
Sec. 30, Lots 1 thru 8, E½, E½W½;
Sec. 34, N½NW¼, SW¼NW¼, embracing that portion of land north and west of I–15 corridor.
T. 41 S., R. 15 W.,
Sec. 13, W½, SE¼;
Sec. 14, All;
Sec. 15, Lots 1 thru 4, E½, E½W½;
Sec. 16, Lots 1 thru 4, S½S½;
Sec. 17, Lots 1 thru 4, N½, S½S½;
Sec. 18, Lots 1 thru 9, NE¼, E½NW¼, NE¼SW¼;
Sec. 19, Lots 1 thru 4, E½, E½W½;
Sec. 20, E½, NW¼, N½SW¼, SW¼SW¼SW¼, E½SE¼SW¼SW¼, W½SW¼SE¼SW¼;
Sec. 21, All;
Sec. 22, All;
Sec. 23, All;
Sec. 24, All;
Sec. 25, All;
Sec. 26, N½, SE¼;
Sec. 27, N½, SW¼;
Sec. 28, E½, E12W½, SW¼SW¼;
Sec. 29, SE¼SE¼;
Sec. 30, Lots 1 thru 4, W½E½, E½W½;
Sec. 31, Lots 1 thru 4, E½, E½W½;
Sec. 32, NE¼, NW¼SW¼, SE¼SW¼, E½SE¼, SW¼SE¼;
Sec. 33, All;
Sec. 34, NW¼.
T. 41 S., R. 16 W.,
Sec. 5, Lots 1 thru 11, SW¼NE¼, S½NW¼, SW¼, W½SE¼;
Sec. 6, Lots 1 thru 11, S½NE¼, SE¼NW¼,E½SW¼, SE¼;
Sec. 7, Lots 1 thru 4, E½, E½W½;
Sec. 8, Lots 1 thru 4, W½E½, W½;
Sec. 10, Lot 4;
Sec. 11, Lots 1 and 4, E½, SE¼NW¼;
Sec. 12, All;
Sec. 13, Lots 1 thru 8, S½N½, S½;
Sec. 14, Lots 1, 2, 7, 8, S½N½, NE¼SE¼;
Sec. 15, E½NE¼;
Sec. 17, Lots 1 thru 4, W½E½, W½;
Sec. 18, Lots 1 thru 4, E½, E½W½;
Sec. 19, Lots 1 thru 4, E½, E½W½;
Sec. 20, All;
Sec. 21, W½;
Sec. 24, E½, E½W½;
Sec. 25, E½, E½W½;
Sec. 29, All;
Sec. 30, Lot 1, NE¼, E½SE¼;
Sec. 31, NE¼NE¼;
T. 41 S., R. 17 W.,
Sec. 1, Lots 1 thru 12, S½;
Sec. 12, All;
Sec. 13, All;
Sec. 24, N½N½, SW¼NE¼, SE¼NW¼;
T. 42 S., R. 15 W.,
Sec. 6, Lots 3 thru 7, SE¼NW¼, E½SW¼;
Sec. 7, Lots 1 thru 4, E½W½;
Sec. 20, NW¼SW¼.
T. 42 S., R. 16 W.,
Sec. 1, Lots 1 thru 4, S½N½, S½;
Sec. 3, Lot 1, SE¼NE¼, NE¼SE¼;
Sec. 12, N½, E½SW¼, SE¼;

The reserved Federal mineral interest proposed to be withdrawn is described as follows:

Salt Lake Meridian

T. 41 S., R. 15 W.,
Sec. 28, W½NW¼, NW¼SW¼;
Sec. 29, NE¼, S½N½SW¼SW¼, S½SW¼SW¼, SE¼SW¼, N½SE¼, SW¼SE¼;
Sec. 30, E½E½;
Sec. 32, NW¼, NE¼SW¼, NW¼SE¼; (reserved Federal minerals)
T. 41 S., R. 16 W.,
Sec. 4, S½;
Sec. 9, All;
Sec. 10, W½;
Sec. 14, Lots 3 thru 6;
Sec. 15, W½;
Sec. 21, E½;
Sec. 22, W½;
Sec. 25, E½SE¼SW¼SW¼;
Sec. 27, SW¼NE¼, NW¼NW¼, S½NW¼, SW¼, W½SE¼;
Sec. 28, E½, N½NW¼, SE¼NW¼, NE¼SW¼;
Sec. 30, Lot 2, E½W½, W½SE¼;
Sec. 31, NW¼NE¼, SE¼NE¼;
Sec. 33, N½NE¼, SE¼NE¼;
Sec. 34, W½NE¼, NW¼, E½SW¼, SE¼;
Sec. 35, E½SE¼SE¼.
T. 41 S., R. 17 W.,
Sec. 24, SE¼NE¼, SW¼NW¼, S½.
T. 42 S., R. 15 W.,
Sec. 17, Lots 7, 9, and 10;
Sec. 18, Lots 1 thru 4;
Sec. 19, Lot 1, NE¼, E½NW¼;
Sec. 20, W½NW¼;
T. 42 S., R. 16 W.,
Sec. 3, Lots 3 and 4;
Sec. 13, NE¼, E½NW¼, SE¼SE¼SW¼NW¼, S½NE¼SE¼SW¼NW¼, E½SW¼SE¼SW¼NW¼, NE¼SW¼, N½SE¼, SE¼SE¼;
Sec. 24, N½NE¼.

The following described non-federal lands, if subsequently acquired by the United States, will be subject to the terms and conditions of the temporary segregation:

Salt Lake Meridian

T. 41 S., R. 13 W.,
Sec. 17, Lot SW¼SE¼, NW¼SW¼;
Sec. 19, Patented Mining Claims;
Sec. 27, N½NE¼, SW¼NE¼, W½SE¼NE¼, E½W½. W½SW¼, W½E½SW¼, W½SE¼;
Sec. 28, S½NE¼, N½NW¼NE¼, NE¼NW¼, E½SW¼, NE¼SE¼, S½SE¼;
Sec. 29, NW¼NW½;
Sec. 30, Lots 13, and 14, SE¼NE¼.
T. 41 S., R. 14 W.,
Sec. 16, All;
Sec. 31, Lots 1 thru 8, E½, E½W½;
Sec. 32, All;
Sec. 33, Lots 1 thru 8, S½NE¼, NE¼SW¼, N½NW¼SE¼, embracing that portion of land north and west of 1–15 corridor.
T. S., R. 15 W.,
Sec. 16 N½;
Sec. 20, N½S½SW¼, W½SE¼SW¼SW¼, E½SW¼SE¼SW¼, SE¼SE¼SW¼;
Sec. 26, SW¼;
Sec. 27, SE¼;
Sec. 29, NW¼, N½SW¼, N½N½SW¼SW¼;
Sec. 32, SW¼SW¼;
Sec. 34, E½,SW¼;
Sec. 35 All;
Sec. 36, All.
T. 41 S., R. 16 W.,
Sec. 15,W½W½SE¼;
Sec. 16 All;
Sec. 22, W½E½;
Sec. 28 SE¼SW¼;
Sec. 30, Lot 3;
Sec. 32, N½;
Sec. 33, SW¼NE¼, NE¼NW¼, NE¼NW¼NW¼, S½NW¼NW¼, S½NW¼, N½N½N½SW¼, E½SE¼;
Sec. 34, E½NE¼, W½SW¼;
Sec. 36, All.
T. 42 S., R. 14 W.,
Sec. 5, Lots 2, 3, 4, SW¼NW¼, embracing that portion of land north west of 1–15 corridor;
Sec. 6, Lots 1 thru 6, S½NE¼, SE¼NW¼, NE¼SW¼, N½N½SE¼, embracing that portion of land north west of 1–15 corridor;
Sec. 7, Lot 7, embracing that portion of land north west of 1–15 corridor
T. 42 S., R. 15 W.,
Sec. 1, Lots 1 thru 11, S½NE¼, SE¼NW¼, N½SE¼;
Sec. 2, Lots 1 thru 10, S½NW¼, N½SW¼;
Sec. 3, Lots 1 thru 5, S½NE¼, SE¼NW¼, N½NW¼SW¼;
Sec. 4, Lots 1 thru 15, SE¼SE¼;
Sec. 5, Lots 1 thru 16;
Sec. 6, Lots 1 thru 2, S½NE¼, SE¼;
Sec. 7, E½;
Sec. 8, Lots 1 thru 16;
Sec. 9, Lots 1 thru 8, E½;
Sec. 12, NW¼NE¼NE¼, NW¼NE¼, NW¼SW¼NE¼, N½NW¼, N½SE¼,NW¼;
Sec. 16, Lots 1 thru 5, W½E½NE¼, W½NE¼, NE¼SW¼, NW¼SE¼;
Sec. 17, Lots 1 thru 6, 8, 11 thru 16;
Sec. 18, Lots 5 thru 14, SE¼SW¼, SW¼SE¼;
Sec. 19, Lots 2, NE¼SW¼, N½SE¼, N½N½S½SE¼.
T. 42 S., R. 16 W.,
Sec. 2, Lots 1 thru 4, S½N½, S½;

Sec. 3, Lot 2, SW¼NE¼, NW¼SE¼, SE¼SE¼;
Sec. 11, N½, NE¼SW¼, E½SE¼SW¼, SE¼;
Sec. 12, W½SW¼;
Sec. 13, NW¼NW¼, NE¼SW¼NW¼, W½SE¼SW¼NW¼, E½SW¼SE¼;
Sec. 14, N½NE¼, NE¼NE¼NW¼;
Sec. 24, NE¼SE¼NE¼.

The area described contains 61,987.99 acres in Washington County. Of that acreage the Bureau of Land Management manages the public surface/mineral estate of 38,102.78 acres, and the public mineral estate of 6,675.20 acres. The remaining 17,210.01 acres are non-Federal lands.

The purpose of the withdrawal is to protect a desert tortoise reserve and a Washington County watershed. The reserve is to protect the habitat of the desert tortoise, bald eagle, peregrine falcon, Mexican spotted owl, ferruginous hawk, southwestern willow fly catcher, Merriams kangaroo rat, woundfin minnow and the Virgin River chub. All of the species have been designated as sensitive, threatened or endangered by the United States Fish and Wildlife Service.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Utah State Director of the Bureau of Land Management.

The application will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 2 years from the date of publication of this notice in the Federal Register, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. The uses which may be permitted during the segregative period are uses such as leases, licenses, permits, rights-of-way, land sales, recreation and public purpose and land exchanges.

G. William Lamb,
State Director.

[FR Doc. 96–33102 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–DQ–M

National Park Service

30 Day Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: National Park Service, The Department of the Interior.

ACTION: Notice of submission to OMB and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Public Law 104–13), this notice announces the National Park Service's (NPS) intention to request an extension for a currently approved information collection request used in the Historic Preservation Tax Incentives Program administered by the NPS.

The Primary Purpose of the Information Collection Request: Section 47 of the Internal Revenue Code requires that the Secretary of the Interior certify to the Secretary of the Treasury upon application by owners of historic properties for Federal tax benefits, (a) the historic character of the property, and (b) that the rehabilitation work is consistent with that historic character. The National Park Service administers the program in partnership with the Internal Revenue Service. The Historic Preservation Certification Application is used by the National Park Service to evaluate the condition and historic significance of buildings undergoing rehabilitation for continued use, and to evaluate whether the rehabilitation work meets the Secretary of the Interior's Standards for Rehabilitation.

DATES: Comments on this notice must be received by January 29, 1997 to be assured of consideration.

The bureau solicits public comments as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the bureau, including whether the information will have practical utility;
2. The accuracy of the bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
3. The quality, utility, and clarity of the information to be collected; and,
4. How 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 forms of information technology.

ADDRESSES: Send comments to: Desk Officer, Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Also send a copy of your comments to: Michael Auer, National Park Service, P.O. Box 37127, Washington, D.C. 20013; 202–343–9578.

All responses to this notice will be summarized and given to OMB. All comments will become a matter of public record. Copies of the proposed Information Collection Request can be obtained from Michael J. Auer, Ph.D., Heritage Preservation Services, National Park Service, P.O. Box 37127, Washington, D.C. 20013–7127.

FOR FURTHER INFORMATION CONTACT: Michael Auer, 202–343–9578.

SUPPLEMENTARY INFORMATION:

1. *Title:* Historic Preservation Certification Application.
2. *Summary:* Request for an extension for a currently approved information collection request used in the Historic Preservation Tax Incentives Program administered by the National Park Service.
3. *Need for information and proposed use:* To enable the Secretary of the Interior to make certifications to the Secretary of the Treasury concerning historic buildings undergoing rehabilitation for the purposes of a Federal income tax credit.
4. Respondents are owners of historic buildings, or qualified long-term lessees. The number of respondents is estimated to be 3,000 per year. The frequency of response is on occasion, as requested by owners of buildings (one response per respondent).
5. The total annual reporting and recordkeeping burden is estimated to be 7,500 hours.
6. Comments may be submitted to the Office of Management and Budget (OMB).
7. 30 days from date of publication of this notice.

Dated: December 23, 1996.

Terry N. Tesar,
Information Collection Clearance Officer.

[FR Doc. 96–33039 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–70–P

Draft Environmental Impact Statement/General Management Plan National Park of American Samoa Territory of American Samoa; Notice of Availability

SUMMARY: Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), the National Park Service (NPS), Department of the Interior, has prepared a Draft Environmental Impact Statement identifying and evaluating potential impacts of a proposed General Management Plan (DEIS/GMP) for the National Park of American Samoa, Territory of American Samoa. When approved, the plan will guide management actions during the next 15–20 years.

PROPOSAL: The DEIS/GMP identifies and analyzes management strategies necessary for the long-term preservation of the national park's natural, cultural, and subsistence resources and the development of an interpretive services program. The NPS proposes (Alternative A) to operate this national park in a manner that is consistent with *fa'asamoa,* the traditional Samoan way. The DEIS/GMP also proposes the development of facilities needed to operate this new national park. Developments identified within the national park are to be limited; all major visitor use facilities proposed are to be developed outside of national park boundaries. Samoan villages located near the national park are to be encouraged to provide traditional kinds of services for visitors to the national park.

ALTERNATIVES: In addition to the proposed action, three alternatives are identified. Alternative B (''no action'') is a continuation of the existing situation, with no additional facilities developed to operate the national park. Under this alternative, there would be inadequate management of natural and cultural resources, and visitor services would be substandard. This alternative would not achieve the purposes of this national park's authorizing legislation. Alternative C identifies ''minimum requirements'' and would limit developments and management actions to those needed to meet legislative requirements to make this national park operational in such a manner that provides for primary visitor use and resource protection. Alternative D proposes the development of a visitor center within the national park and the retention of the existing park administrative headquarters, but is otherwise the same as the proposed action.

INFORMATION: The Superintendent will arrange traditional meetings with each of the village chief councils in the villages of Afono, Fagasa, Pago Pago, and Vatia on the island of Tutuila; Faleasao, Fitiuta, and Ta'u on the island of Ta'u; and Ofu and Olosega on the islands of Ofu and Olosega.

In addition, general public information meetings will be scheduled in Pago Pago on the island of Tutuila—details on the dates, time, and location of these information meetings will be published in local newspapers several weeks in advance. National park management and planning officials will be present at all sessions to present the DEIS/GMP and the alternatives, to receive oral and written comments, and to answer questions.

COMMENTS: Review copies of the DEIS/GMP are available at park headquarters in the Pago Plaza in Pago Pago, American Samoa; at the Pacific Island System Support Office in Honolulu, Hawaii; and at the American Samoa Community College library in Mapusaga.

Written comments must be submitted not later than 60 days after publication of a notice of filing of the DEIS/GMP in the Federal Register by the Environmental Protection Agency. Comments on the DEIS/GMP may be sent to the Superintendent, National Park of American Samoa, Pago Pago, American Samoa, 96799 (or to the Park Planner, National Park Service, Pacific Island System Support Office, 300 Ala Moana Blvd., Box 50165, Honolulu, Hawaii 96850). The Park's telephone number is (011–684) 633–7082 and the fax number is (011–684) 633–7085. The System Support Office telephone number is (808) 541–2693 and the fax number is (808) 541–3696.

Dated: December 20, 1996.

Bruce M. Kilgore,

Acting Field Director, Pacific West Area.

[FR Doc. 96–33137 Filed 12–27–96; 8:45 am]

BILLING CODE 4310–70–P

Office of Surface Mining Reclamation and Enforcement

Abandoned Mine Land Reclamation Program Guidelines

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

ACTION: Notice of revised guidelines for abandoned mine land reclamation programs and projects.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) has revised the Abandoned Mine Land Reclamation Program Guidelines which were published March 6, 1980 (45 FR 14810). Comments were requested in the Notice of Intent to revise these guidelines published May 22, 1995 (45 FR 27123). Based on comments received, amendments to the Surface Mining Control and Reclamation Act of 1977 and policies adopted by OSM since 1980, the guidelines have been revised and are printed below.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Gene Krueger, Chief, Division of Reclamation Support, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W. Washington, D.C. 20240. Telephone: (202) 208–2937.

SUPPLEMENTARY INFORMATION: The Abandoned Mine Land (AML) Reclamation Program Guidelines are issued to provide general guidance to States, Indian Tribes, the U.S. Department of Agriculture, and OSM in the administration of reclamation activities carried out under programs authorized by Title IV of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.) (SMCRA). These guidelines are considered to be statements of policy and do not establish new legal requirements or obligations on the public and are subject to change at the discretion of OSM.

The term ''as amended'' was added to the revised guidelines to indicate that guidelines reflect all amendments to SMCRA.

The definition of eligible lands has been expanded to include certain lands abandoned after August 3, 1977, in accordance with amendments to Section 404 of SMCRA and that definition has been included in Section A of these guidelines. The definition coincides with the definition of eligible lands found at 30 CFR 870.5.

Reference to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and its relationship to AML reclamation has been included in these guidelines at section C.5., Toxic Materials.

A new subpart, B.3.a.(1)(d), was added to allow special consideration for AMD sites and the utilization of the Appalachian Clean Streams Initiative (ACSI).

A new subpart, B.5.e., was added to indicate that coal seams left in place were deemed unrecoverable during reclamation and any future attempts to mine such seams would have to comply with permit requirements in place at the time of new mining.

The entire section titled ''Experimental and Demonstration Practices'' was eliminated because the Act, as amended, no longer provides for funding experimental and demonstration practices. However, new language was included in item B.3.b.(2) to allow for test plots and/or field trials when necessary to determine which technology is best suited to a particular problem area.

Incorrect regulatory cites, brought about by statutory and/or regulatory changes, were corrected.

Some portions of the proposed guidelines were edited for clarification or to eliminate redundant and verbose language.

Comments were requested on the proposed guidelines and a total of seven comments were received. Six were from State authorities and one from the Navajo Nation. All comments received were considered in the process of drafting the final guidelines and are available for inspection at the address listed above. A ''response to comments'' document has been prepared by OSM and is available on request by contacting the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Availability of Copies

Additional copies of the revised guidelines are available for inspection and may be obtained at the following offices:

OSM, Department of the Interior, Room 120 South Interior Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, (202) 208–5365.
OSM, Appalachian Regional Coordinating Center, Three Parkway Center, Pittsburgh, Pennsylvania 15220, (412) 937–2828.
OSM, Mid-Continent Regional Coordinating Center, 501 Belle Street, Alton, Illinois 62002, (618) 463–6460.
OSM, Western Regional Coordinating Center, 1999 Broadway, Suite 3320, Denver, Colorado 80202, (303) 672–5500.

Dated: December 23, 1996.

Kathrine Henry,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

Abandoned Mine Land (AML) Reclamation Program Guidelines for Reclamation Programs and Projects

Contents

A. Definitions

1. *Abandoned Property*—Real and personal property, associated with past mining activities, that has been forsaken or deserted by an owner. This includes real estate, structures, and equipment.

a. Abandoned Structures—Abandoned permanent improvements or fixtures firmly attached to the land and considered as part of real property. Abandoned structures include but are not limited to coal tipples, coal washers, storage and grading facilities, loading docks, rail spurs, concrete foundations, dams, reservoirs, and bridges. Other items such as crushers, elevators, bins, loaders, conveyors and similar equipment are within this definition if firmly affixed to the land.

b. Abandoned Equipment—Abandoned movable items not affixed to the land. Such items are considered as personal property and include equipment and dismantled machinery not affixed to the land and which could be moved. These items include but are not limited to shovels, scrapers, tires, machinery parts, trailers, trucks, electrical substations on skids, feeders, and loaders.

c. Disposal—The act of sale, federal utilization, demolition, removal, and the burning and burial of scrap or other debris resulting from abandoned structures and equipment.

2. *Act*—The Surface Mining Control and Reclamation Act of 1977 enacted as Public Law 95–87 (30 U.S.C. 1201 et seq.), as amended.

3. *Administering Agency*—The agency that has the responsibility for carrying out a reclamation program or project. This includes OSM for federal reclamation projects; U.S.D.A., Natural Resources Conservation Service (NRCS) for the Rural Abandoned Mine Program; designated State reclamation agencies for projects carried out under an approved State Reclamation Plan; and Indian tribes for projects carried out under an approved Indian Reclamation Plan.

4. *Eligible Lands*—Lands and water which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes and left or abandoned in either an unreclaimed or inadequately reclaimed condition prior to August 3, 1977, and for which there is no continuing reclamation responsibility. Provided, however, that lands and water damaged by coal mining operations after that date and on or before November 5, 1990, may also be eligible for reclamation if they meet the requirements specified in 30 CFR 874.12 (d) and (e). Eligible lands and water for noncoal reclamation purposes are those sites that meet the eligibility requirements specified in Section 409 of the Act or, following certification of the completion of all known coal problems, those in 30 CFR 875.14. For additional eligibility requirements for water projects, see 30 CFR 874.14, and for lands affected by remining operations, see Section 404 of the Act.

5. *Emergency*—A sudden danger condition or impairment that constitutes

a situation with a high probability of substantial physical harm to the health, safety, or general welfare of people before the danger can be abated under normal program procedures.

6. Hydrologic Balance—The relationship between the quality and quantity of water inflow to water outflow from an abandoned mine land site. The relationship includes water storage and transfer within hydrologic units as they now exist or may have existed.

7. Toxic Materials—Earth materials or wastes resulting from mining operations which, if acted upon by air, water, or micro-biological processes are likely to produce chemical or physical conditions in soils or water that are detrimental to the biota or water use.

B. Program Considerations

1. Land, Water, or Mineral Rights Required for Reclamation

a. Consent Requirements and Responsibility

In addition to the rights of entry required by 30 CFR 877, other consents required by the specific type of reclamation program should be obtained. In water limited areas reclamation programs that propose to restore or alter water quality or quantity should not be undertaken until the appropriate water right consents are obtained. If the mineral estate is severed from the surface estate, consents should be obtained from both parties. All necessary consents should be obtained for a time period sufficient to complete the reclamation activities. The administering agency has the responsibility to assure that no reclamation work is carried out without such consents.

b. Written Consent Versus Police Power

Written consent from the owner of record and lessee or his authorized agent should be the preferred means for obtaining agreements to enter lands in order to carry out reclamation work. Entry by use of police power is restricted to those reclamation projects that will protect public health, safety, and general welfare as authorized under Sections 407(a), 407(b), 409(c), and 410 of the Act, as amended, and should be undertaken only after due care and deliberation has exhausted all possibilities of obtaining written consents.

c. Monitoring and Maintenance

Written consent by the landowner should include considerations for monitoring and maintenance, including rights of entry as necessary.

d. Property Acquisition

Acquisition of property may be undertaken only under the conditions specified in Sections 407 and 409 of the Act, as amended.

2. Jurisdictional Responsibilities

a. Reclamation Program Legal Requirements

The administering agency should ensure compliance with all applicable Federal, State, Tribal, and local laws and coordination with the appropriate agencies as necessary.

b. Environmental Evaluation Requirements

Appropriate steps to achieve compliance with the National Environmental Policy Act of 1969 (NEPA) must be undertaken for every proposed AML reclamation project. Authorization by the Council on Environmental Quality (CEQ) at 40 CFR 1506.11 to abate emergency conditions without preparing an environmental document does not relieve OSM or the States/Tribes of the responsibility to complete consultation duties or obtain necessary permits in accordance with other Federal, State and local laws.

(1) Where emergency circumstances at the site require immediate abatement action, and the environmental document cannot be completed prior to the initiation of action, OSM and the States are authorized to act, but the action taken must be limited to that necessary to control the immediate impacts of the emergency.

(2) Actions which remain to be taken at the site of an emergency after the abatement of the immediate impacts require the preparation of an environmental document.

c. Interstate Coordination Requirements

Where reclamation is proposed that may affect adjoining States or other jurisdictional authorities, the administering agency should coordinate planning and implementation of these projects with those entities.

3. Selection Criteria (Nonemergency)

a. Reclamation Site Ranking

Procedures for selecting nonemergency sites to carry out reclamation activities should incorporate weighting factors to rank the proposed sites in accordance with priorities established in Section 403 of the Act. General instructions for determining the AML priority of a site are contained in the OSM Abandoned Mine Land Inventory Manual. Noncoal sites must comply with Section 409 or 411 as appropriate. Negative weights should be considered for adverse impacts resulting from the proposed project. Generally, reclamation of lower priority projects should not be initiated until all known higher priority projects have been completed, are in the process of being reclaimed, or have been approved for funding by the Secretary. However, lower priority projects, or contiguous work may be undertaken in conjunction with high priority projects in accordance with these guidelines.

(1) The administering agency may give priority consideration to reclamation projects where:

(a) The landowner(s) consent to participate in post reclamation maintenance activities of the area;

(b) Reclamation provides multiple benefits to the landowner(s) and where those benefits have a greater cumulative value than other projects, and/or;

(c) Reclamation provides offsite public benefits.

(d) Acid Mine Drainage (AMD) is a major problem and/or the Appalachian Clean Streams Initiative (ACSI) can be utilized in restoration of streams polluted with AMD.

b. Reclamation Considerations

The following items should be considered in determining whether a nonemergency site should be reclaimed.

(1) The lands proposed for reclamation are eligible as defined by Section 404, 409, or 411 of the Act.

(2) Problems associated with the site can be abated by utilizing current available technology or horizon technology with a high probability of success to prevent or minimize present or future adverse effects. When necessary to determine which technology is best suited to a particular problem area, test plots and/or field trials are allowed. Such activities are appropriate and do not constitute ''research'' as prohibited by the Act, as amended.

(3) Reclamation can be carried out in a manner that minimizes maintenance to achieve a self-sustaining reclamation solution. Self-sustaining implies reclamation which is permanent and stable under the prevailing environmental and land-use conditions utilizing current technology. Projects which require continuous maintenance and/or operating costs should be undertaken only if a commitment exists to bear these indefinite costs.

(4) Reclamation activities can be planned in a manner that is cost effective and compatible with the proposed post reclamation land use as intended by the landowner(s).

(5) Reclamation activities and post reclamation land use is cost effective

and compatible with surrounding land uses, complies with local, State, tribal, and Federal requirements, and is acceptable to the community involved.

(6) If the project area is to be remined or developed in the foreseeable future and these activities will eliminate the adverse effects of past mining, reclamation should only be undertaken where the offsite adverse impacts from the affected area are so severe as to cause significant danger to public health and safety or to the environment if not abated before the proposed remining or development takes place.

c. Reclamation Extent

The amount of reclamation performed on a site depends upon the priority, funding available, and technology available for reclaiming the site. When it is cost effective to do so, consideration should be given to including lower priority problems in the reclamation plan when contracting for the elimination of a high priority problem. However, the primary purpose of the reclamation should be to address the higher priority problems. Factors that should be considered in determining the amount of reclamation to be done at a site include—

(1) The total area of affected land and water.

(2) Uniformity/diversity of the problem(s) over the entire site.

(3) Minimum reclamation needed to restore the site and additional low priority work needed, if any.

(4) Availability of funds.

(5) Cost effectiveness of the proposed work.

(6) Proposed post reclamation land use.

(7) Onsite, offsite, and multiple land use benefits.

(8) Post reclamation maintenance required and landowner participation in that maintenance.

(9) Accommodating landowner(s) land use and treatment requests, if possible without incurring additional costs above that required for the minimum reclamation needed.

(10) The possibility of remining.

d. Cooperative Efforts

In addition to the landowner consent requirements described in Section B Part 1 of these guidelines, a maintenance agreement between the administering agency and the landowner(s) may be incorporated as part of the reclamation plan to insure the continued success of the reclamation project. Estimated costs as well as financial and administrative responsibilities should be recognized in any agreement.

e. Joint Projects

Joint undertakings between the administering agency and the landowner(s) or other local, State, tribal, or Federal agencies are supported and encouraged.

4. Emergency Projects

a. Authority for Emergency Reclamation

Authorities and requirements for rights of entry to carry out emergency reclamation projects are contained in Section 410 of the Act.

b. Emergency Project Considerations.

(1) Emergencies are differentiated from Priority 1 projects by interpretation of the phrases ‘‘sudden danger’’ and ‘‘high probability of substantial physical harm’’ in the definition of ‘‘emergency’’ contained in these guidelines.

(2) Justification for emergency action must be based on whether immediate action is crucial to eliminate the danger of harm to persons. The time element referenced by the phrase ‘‘before the danger can be abated under normal program operation procedures’’ means that the danger is so imminent that time is not available for normal project contractual procedures.

(3) A limited amount of nonemergency work may be conducted in conjunction with emergency abatement if such work is cost effective in reclaiming the entire project site.

c. Emergency Project Examples

The following list illustrates examples of sudden situations with a high probability of causing substantial physical harm to the health, safety, and general welfare of people:

(1) Subsidence suddenly occurring in or near populated areas or roadways.

(2) Mine water ‘‘blow-outs’’ in or near highly used pubic areas.

(3) Landslides caused by movement of spoil material or mass movement due to drainage or seepage from abandoned coal mines threatening to destroy homes and businesses or block roads and stream channels.

(4) Actual or potential failure of unstable coal refuse impoundments, processing waste banks, or abandoned sediment control structures caused by unusual precipitation events significantly imperiling downstream populated areas.

(5) Mine or coal refuse fires that impair the health or safety of residents in populated areas.

d. Abatement Procedures

(1) Reclamation procedures are site specific and often cannot be determined until after onsite inspection and evaluation of the nature of the emergency, number of people affected, resources available, and existing time constraints.

(2) Emergency reclamation need not resemble final restoration. The objective of emergency reclamation is to stabilize the problem and eliminate the danger to the public. Additional reclamation, to fully reclaim the area, may be carried out under regular reclamation programs at a later date or, as noted above at Part 4.b.(3), may be performed in conjunction with emergency work if cost effective.

5. Incidental Recovery of Coal in Conjunction With Reclamation Activities

a. Resource Recovery Potential

Prior to conducting reclamation activities on land containing coal refuse piles, coal waste impoundments, or abandoned mine workings with remaining coal resources, the economic and technical feasibility of further coal recovery should be evaluated for that project area. The State administering agency determines if any coal can be recovered and may consult the State regulatory authority, as necessary, in making this determination.

b. Incidental Recovery of Coal

If coal is recovered during reclamation and is determined to be incidental to the reclamation activities, the associated coal recovery activity is exempt from Title V regulations, in accordance with Section 528 of the Act and 30 CFR Part 707. The State regulatory authority is responsible for determining the exemption and is responsible for enforcing the requirements of 30 CFR Part 707. Exemption criteria include:

(1) Coal recovery must be incidental to reclamation activities.

(2) The project must be government-financed as defined in 30 CFR Part 707.

(3) All coal recovered must be contained within the project area.

c. Active Mining Permit Requirements

If coal recovery is not incidental to the reclamation project or does not meet other requirements for exemption, the State regulatory authority will ensure that all permits required under Title V are obtained before reclamation activities commence.

d. Recovered Coal Disposition

Any revenues received from the sale of coal which was recovered incidental to reclamation should be deposited to the Fund pursuant to Section 401(b)(4) of the Act or otherwise used to offset the cost of reclamation. Applicable consents should clearly authorize the extraction of coal and communicate the disposition of the coal and associated revenues.

e. Future Coal Recovery

If the mineral estate under the area to be reclaimed contains unmined coal seams, reclamation activities should include reasonable and cost effective efforts to protect the future recoverability of those seams. However, coal seams left in place during reclamation will be deemed to be unrecoverable at the time of reclamation and any future attempts to mine such seams will have to comply with any permit requirements in place at the time the new mining is proposed.

6. Abandoned Structures and Equipment

a. Investigation

(1) The administering agency should perform an onsite investigation of abandoned structures or equipment and encourage the landowner(s) to recover any salvage value by disposal prior to the initiation of any reclamation project.

(2) The onsite investigation should be conducted by the administering agency and should address—

(a) The type, quantity, age, and apparent condition of all abandoned structures or equipment.

(b) The structural soundness, visual quality, historical significance, effect on proposed reclamation activities, and land uses in the area. The structural soundness of the structure should be evaluated in relation to public health, safety, general welfare, and the post reclamation use.

(c) The disposal or retention of the structures or equipment in accordance with local, State, tribal, and Federal laws.

(d) Methods to eliminate the safety hazards associated with structures or equipment that are retained on the reclaimed site.

b. Ownership Rights

The landowner(s) may recover any salvage value by disposal of the abandoned structures or equipment prior to the initiation of any reclamation project. The administering agency is responsible for securing consent to dispose of or modify the abandoned structures or equipment not disposed of by the landowner(s).

c. Disposal Revenues or Benefits

Any revenues or benefits received from the sale or use of abandoned structures or equipment as a result of reclamation should be used to offset the cost of reclamation or deposited to the Fund pursuant to Section 401(b)(4) of the Act. All such revenues or benefits should be documented in the project file.

7. Borrow and Disposal Areas

a. Site Selection

The borrow and disposal areas created by reclamation activities should be subject to and conducted in accordance with applicable local, State, tribal, or Federal reclamation requirements. Borrow and disposal areas should be located on the site of the reclamation project if possible. Offsite borrow and disposal areas should be utilized only when no onsite area is available and it is necessary to protect the health and safety of the public, provide an area more suitable for reclamation and less prone to constitute a hazard in itself, produce an improved land use, or protect the environment.

b. Adverse Impacts

Adverse impacts of the selected areas should be minimized by disturbing the smallest possible area; providing adequate drainage, dust, and erosion control measures; protecting historic and cultural values; protecting visual esthetics; protecting fish and wildlife values; protecting the health and the safety of the community and the public; and reclaiming the borrow and disposal area after termination of the project.

8. Program and Project Evaluation

a. General Evaluation Considerations

Reclamation activities are to be evaluated on a regular basis to determine the effectiveness of the program/project in reclaiming abandoned lands. The objective is to identify those abatement/control methodologies that have been effective over time as well as those with demonstrated deficiencies that need to be improved or changed. Project evaluation measures the success or failure of the applied techniques while program evaluation determines the effectiveness of the overall program, including regulations and policies. Evaluation efforts include, but are not limited to, recording accomplishments, making onsite reviews before, during, and after reclamation, and analyzing fund management.

b. Evaluation Report

The administering agency will prepare a report on its findings and recommendations. Recommendations should be used to modify program operations on future reclamation activities so that deficiencies will not reoccur. If requested, the report should be made available to other agencies in order to share information and improve the AML program nationwide.

9. Maintenance of Reclamation Work

a. Planned Maintenance

Reclamation should be done in a manner to minimize or eliminate continued long-term maintenance. When long-term maintenance is required, it should be identified during the planning and design stages and should be developed in cooperation with the landowner(s) and/or appropriate agencies through formal agreement. Maintenance plans should include maintenance requirements, inspection schedules, technical assistance needed, and funding requirements.

b. Unplanned Maintenance

AML projects often involve conditions unforeseen during the design period, that may affect the achievement of permanent reclamation and long term stability. Reclamation programs should develop and implement general policies for performing post construction monitoring to address unanticipated maintenance needs. The plan should include, at a minimum:

(1) A plan for post construction monitoring of sites to determine maintenance needs;

(2) A procedure for determining when and when not to perform additional maintenance when problems are identified in the field;

(3) A procedure to determine when a site has reached long term stability, and that future monitoring is unneeded, including a landowner notification policy;

(4) A method for dealing with situations where landowner practices make future maintenance unproductive.

10. Noncoal Projects

a. Guideline Applicability

States with approved reclamation plans may undertake noncoal reclamation projects under the specific provisions in Section 409 of the Act or after certification that all coal related problems have been reclaimed, as authorized in Section 411 of the Act.

b. Priorities Under Section 409

Noncoal projects to be reclaimed under Section 409 of the Act must be at the request of the Governor of the State or the governing body of an Indian tribe and must comply with the priorities stated in Section 403(a)(1), except that the term ‘‘coal’’ does not apply. The reclamation must be for the protection of public health, safety, general welfare, and property from extreme danger of adverse mining practices.

c. Priorities Under Section 411

Noncoal projects to be reclaimed under Section 411 of the Act may not proceed until the State has certified that all coal problems have been resolved. Planning and design work for reclamation of noncoal projects may commence prior to completion of all coal projects.

C. Site Considerations

1. Mine Drainage

a. General Considerations

The reclamation plan should attempt to minimize or control mine drainage and include procedures to treat impounded waters containing toxic materials prior to release. At-source control measures are preferred over long-term treatment methods to eliminate or minimize maintenance.

b. At-Source Control Measures

Controlling or minimizing mine drainage at its source can be accomplished by—

(1) Mine-sealing techniques, including grout curtains and slurry trenching. Factors to be considered when planning to seal mines are the potential to develop hydrostatic heads, the accessibility of the area, and the integrity of the surrounding geologic formations.

(2) Infiltration control and water diversion. Factors to be considered include topography, control of surface water, effects on ground water, the control of water passage through openings, and the storm event design.

(3) Daylighting, the surface mining procedures and excavation processes utilized to expose underground mine works for partial or complete removal of the remaining material underlying the surface. Factors to be considered include the depth of overburden, marketability of the mineral, and safety measures.

c. Treatment Measures

Secondary treatment of mine drainage can be carried out by the addition of neutralizing agents. Permanent treatment facilities should be designed to minimize operation and maintenance costs and should only be considered if no other means exists to abate the problem. Written assurance, from the landowner or any other interested party, should be obtained that the treatment facilities will be maintained after appropriations for the abandoned mine land program cease.

d. Coal Refuse Piles and Coal Waste Embankments

Methods of reclaiming land containing coal refuse, coal wastes, or abandoned workings include, but are not limited to—

(1) Removing the coal refuse or coal waste to an environmentally acceptable site, subject to all appropriate approvals;

(2) Burying the refuse or waste, diverting water away from or around the reclaimed area whenever possible or layering the reuse material with clay or other impervious material, when practical, to prevent water infiltration and contamination;

(3) Treating the refuse pile in place by—

(a) Diverting water around the coal refuse and/or waste,

(b) Collecting and conveying drainage from the refuse pile for safe disposition (an approved water pollution control facility should be used if needed to meet quality standards),

(c) Grading and contouring waste structures to drain water off the disposal site,

(d) Covering the refuse with a suitable thickness of nontoxic or nonacid-forming material or treating the refuse with lime or other material to prevent acid or other toxic drainage, or

(e) Any combination of the above treatments.

2. Active Slides and Slide-Prone Areas

a. Site Evaluation Factors

Factors that should be considered on a case-by-case basis in the evaluation of slides or slide-prone areas include—

(1) The topography of the ground surface as an indication of past landslide activity and potential instability. Topographic data collected should include contour maps at 2- to 5-foot intervals, surface drainage characteristics, locations of ponded surface water, and slope profiles.

(2) The geology of the subsurface. Rock formations and geologic structure including folds, faults, joints, and shear zones should be identified whenever possible. This information may be useful in comparing the landslide potential of various areas.

(3) The soil or spoil material. Description of the slide-prone material should include its texture, permeability, and engineering properties as well as the related soil-rock ratios.

(4) Ground water sources. Springs and seeps, dump areas, adits, auger holes, drill holes, and coal seams should be identified.

(5) Vegetative cover. Vegetation will affect the stability of the slide or slide-prone area. Deep masses of roots may provide sufficient reinforcement to distort the geometry of the slide and trees with deep tap roots may curtail severe movement. Vegetative cover within a landslide area should be compared to that within the surrounding area and with that present at known landslide areas.

(6) Other physical factors. These include timber coverage or lack of it on slopes, parent material and volume of spoil, proximity to other slides, or other data specific to the slide area which may be helpful in designing the best structural specifications for stabilizing the area.

(7) U.S. Geological Survey slide-prone maps, U.S. Department of Agriculture soil maps, and other related data.

b. Remedial Measures

Reclamation and stabilization of slide areas may be achieved by one or more of the following methods, typically a combination of—

(1) Removing unstable material or by terracing.

(2) Installing surface and/or subsurface drainage such as rip-rap channels, french drains, pumping wells, etc.

(3) Installing support and reinforcement systems such as retaining walls, gabions, vertical pilings, etc.

(4) Revegetation.

3. Erosion and Sedimentation

a. Erosion and Sediment Control Considerations

Erosion and sediment control measures should be designed in accordance with Federal, State and local laws and should—

(1) Minimize erosion from the reclamation site and adjacent lands, minimize water pollution from sediment, acid drainage, and other toxic materials, and provide conditions suitable for the planned land use.

(2) Maintain the soil resource within acceptable soil loss limits. Allowable sheet and rill erosion rates should be commensurate with the soil resulting from reclamation. Information relative to allowable soil loss limits may be obtained from local NRCS Office.

(3) Expose the least amount of land at any one time, with the more hazardous areas exposed for the shortest time and during the season when extreme rainfall is least likely to occur.

(4) Complete reclamation activities so Revegetation can take place at the most advantageous time of year.

(5) Control foot and vehicular traffic and grazing until vegetation is established.

b. Erosion Control Practices

Well established vegetation is generally the most cost-effective means of erosion control. Other methods may include one or more of the following, in conjunction with vegetation, to achieve temporary and/or permanent erosion control.

(1) Mulches may be used for temporary erosion control and in some cases stabilizing agents such as gravel, stone, and concrete blocks may be used for permanent protection.

(2) Permanent structural measures may be used to divert runoff, reduce slope length, and provide for an effective runoff disposal system.

(3) Temporary vegetation and/or structural measures may be needed for erosion control during reclamation. Provisions should be made to remove the temporary control measures and stabilize the area when they are no longer needed.

c. Sediment Trapping Practices

When erosion controls are incapable of preventing excessive sediment buildup, either during reclamation or permanently, the excess sediment should be controlled to prevent offsite contamination.

(1) Temporary sediment control measures such as filter strips, sediment traps, and sediments basins, should be stabilized and maintained during their planned life.

(2) Permanent sediment basins should be maintained and the sediment removed when it accumulates to the design level. The use of permanent sediment basins should be minimized because of the continuing maintenance responsibility.

4. Vegetation

a. Existing Vegetation Inventory and Evaluation

The administering agency should complete an inventory and evaluation of existing vegetation and site conditions prior to developing the design and specifications for a project. The permanent vegetation selected to cover the reclaimed mine land should be compatible with the site characteristics and the intended land use of the reclaimed and surrounding land and provide adequate erosion control.

b. Vegetative Requirements

The vegetation portion of the project design and specifications should be developed considering requirements itemized for each of the following cases:

(1) In areas where the present plant species are inadequate or undesirable and only a change in vegetation is needed—

(a) Necessary erosion and sediment control structures should be installed to protect the area from excessive erosion and sedimentation during the vegetation establishment period. Temporary vegetation may be used alone or in combination with a mulch or other stabilizing agent in accordance with the needs of the site.

(b) The newly planted area should be protected from excessive use, especially livestock grazing, during the establishment period.

(2) In areas where changes in topography and vegetation are needed—

(a) Changes in topography should be made to improve esthetics aspects of the site, permit establishment of desirable vegetative cover, and insure compatibility with the planned land use;

(b) Temporary vegetation should be used to protect stockpiles of soil materials for a short time or to provide temporary cover until the permanent vegetation is established.

(3) In areas where the present spoil material is unsuited for vegetation the spoil material should be covered or replaced with material that will support the desired vegetation. If covering or replacement costs are prohibitive, attempts should be made to create a suitable plant growth medium upon which vegetation may be established.

(4) In areas where alteration of the site to support vegetation is impractical sediment should be confined to the immediate area if feasible. Surface runoff should be treated to an acceptable level of quality before discharging offsite if necessary.

5. Toxic Materials

a. Sampling and Analysis Consideration

The administering agency should sample sites suspected of containing administering agency should sample sites suspected of containing toxic materials. Chemical and/or physical analyses may include, but are limited to;

(1) pH (paste).

(2) SMP Buffer (tests pH of solution prior to weathering).

(3) Net acidity or alkalinity, or potential acidity.

(4) Total sulfur (sulfate and sulfide).

(5) Electrical conductivity (mmhos/cm).

(6) N,K,P and USDA texture class when material is to be used as post-reclamation plant growth medium.

(7) Organic matter (quantity and type).

(8) Visual and/or microscopic identification of potential toxic or acid forming materials.

b. Planning Considerations

The administering agency should consider the following items in their planning efforts on projects containing toxic materials:

(1) Critical toxic limits.

(2) Containment or segregation of toxic materials using sealed pits or embankments and/or covering the toxic materials with compacted clay or some other suitable material.

(3) Site preparation, including grading, backfilling, scarification, and application of appropriate growing medium, chemical fertilizers, lime gypsum, mulches, or sludge.

(4) Water management control, including surface and subsurface drainage, sediment control, and soluble toxic elements.

(5) Necessary monitoring and required maintenance, if any.

c. Sites Eligible Under CERCLA. AML sites containing AMD or other toxic material may be eligible for clean-up under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) if included on the national priority list (NPL). Listing of a site on MPL makes the site ineligible for AML funding.

6. Hydrologic Balance

a. Planning Considerations

After identification of areas needing restoration of the hydrologic balance, the administering agency should consider the following items in their planning.

(1) Evaluation of procedures needed to reduce or eliminate pollution to receiving surface and subsurface waters, including technical and economic constraints.

(2) Potential beneficial and/or adverse effects of proposed restoration activities on offsite hydrologic systems.

(3) Post reclamation land use of the site and surrounding area.

b. Surface-Water Considerations

Restoration of surface drainage should maximize erosional and ecological stability. Factors to be considered include, but are not limited to:

(1) Type of reconstruction materials to be used, stream gradient, fish and wildlife habitat, and compatibility with adjoining undisturbed surface drainage.

(2) Use of the reclaimed area as a source of ground-water recharge and the potential for downstream flooding.

(3) Feasibility of long-term, self-maintaining erosion control measures to enhance stream and flood plain stability.

(4) Construction of water impoundments which do not adversely

affect the restoration of the hydrologic balance and are in accordance with applicable local, State, tribal, or Federal requirements.

c. Ground-Water Considerations

Restoration of ground water should be done in a manner that will not diminish or degrade water leaving the site. Factors to be considered include, but are not limit to:

(1) Evaluation of the re-established water table, relative to the reclaimed land surface.

(2) Evaluation of the ground-water recharge capacity, considering the underlying aquifers and backfill materials.

(3) Identification of toxic and/or acid forming materials and procedures to eliminate or minimize contamination of the water table.

7. Public Health and Safety

a. Dump Sites

Abandoned mine sites used as dumps are usually excellent breeding places for insect and vermin and could pose a hazard to public health. The presence of a dump in an abandoned mine site should not be considered the primary reason for reclamation, but may be considered in raising the site priority in the same objective category. Prior to any reclamation work on dumps, the local, State and/or tribal agency should be encouraged to abate the problem under other existing authorities and consulted regarding proper disposal methods.

b. Highwall Danger

Highwalls may create a significant danger to public health or safety when there is public use of the area above the highwall and/or there is evidence of sloughing that may damage structures or block roads and stream channels. Reclamation techniques include, but are not limited to:

(1) Reducing the highwall height,

(2) Backfilling and grading the highwall to a stable slope, or

(3) Providing a physical barrier to limit accessibility and material movement.

c. Mine Opening and Subsidence

(1) The administering agency should consider the following items when planning for subsidence control projects:

(a) Exploratory drilling to determine the locations, size, and condition of abandoned underground mine openings with the potential to subside (except in emergencies).

(b) Proximity to populated areas with high public use.

(c) Notification to all local, State, and tribal land use planning agencies of potential subsidence areas.

(2) Restricting entry to mine openings by constructing physical barriers and/or fencing for emergency situations until the opening can be properly reclaimed.

d. Radiation Emission

Where radiation constitutes a potential public health or safety problem, the administering agency should coordinate with other pertinent agencies prior to reclamation activity. Normally, this coordination is done during the development of the State reclamation standards for radiation.

e. Domestic Water Supplies

Control measures designed to protect or restore domestic water supplies should consider the number of people affected, the type and concentration of pollutant(s), and the type and cost of control technology. Clean-up or restoration of domestic water supplies should be restricted to source control where possible.

f. Surface and Underground Mine Fires

Only fires associated with abandoned mines or in virgin seams associated with other abandoned mine reclamation problems are eligible for Title IV funding.

(1) Prior to initiating control or extinguishment efforts, geologic investigations should be carried out to determine the extent of the fire and the amount of remaining combustible material.

(2) Reclamation design and procedures should include method to control or eliminate hazardous gases, fumes, and other types of air pollution associated with the fire.

g. Hazardous/Explosive Gases

Toxic gases, other than those associated with mine fires, may require site specific control or treatment procedures. For example, methane seeking into a residence must be vented and should be monitored for a reasonable amount of time to ensure the area is safe. Whenever possible gases should be vented or sealed off at their source.

8. Esthetics and Visual Values

Reclaimed lands should, to the extent that it is feasible, conform to the visual aspects of the surrounding landscape. The reclamation design and procedures should take into consideration the proximity to public high use areas and the visual impact within the context of the viewing distance.

a. Visual Degraders

The administering agency determines what conditions are visually degrading and should be considered for visual improvement. Visual degraders may include, but are not limited to, highwalls, erosion, discolored water, haul roads, refuse piles, slurry ponds, spoil piles, abandoned mining equipment and structures, garbage and refuse dumps, open pits, and deforestation.

b. Esthetics Problem Solutions

Solutions for esthetics problems may involve removal of offensive material or condition, strategic placement of screening materials, and/or the use of appropriate plant species. Guidelines and standard to evaluate visual resources developed by the U.S. Forest Service, NRCS, U.S. Bureau of Land Management, National Park Service, and other agencies should be adapted for use in evaluating and planning visual solutions.

9. Fish and Wildlife Values

a. Project Identification Requirements

The administering agency should periodically provide a list of proposed and on-going abandoned mine land activities to the conservation or land management agencies with responsibilities for fish and wildlife or their habitats and should request pertinent information and suggestions from these agencies.

b. Determining Fish and Wildlife Values and Goals

The administering agency should review information provided by the conservation and land management agencies with responsibilities for fish and wildlife or their habitats to determine the pre-reclamation fish and wildlife values of abandoned mine land sites. The administering agency should then determine the fish and wildlife goals for each project, in relation to that project's determined fish and wildlife values and the program priority objectives.

c. Planning Considerations

The administering agency should encourage the consideration of fish and wildlife values in all reclamation activities, including those whose primary purposes for reclamation are related to public health, safety, or general welfare. If fish and wildlife values are determined to be among the goals of the reclamation efforts, the administering agency should incorporate them into the reclamation plan.

d. Installing and Maintaining Established Fish and Wildlife Habitat Values

The administering agency should insure that all fish and wildlife measures contained in the selected plan are implemented and should encourage the landowner(s) to maintain them at or above the planned level.

10. Air Quality

a. Air Quality Standards

All reclamation activities should be conducted in accordance with applicable local, State, tribal, or Federal air quality standards.

b. Coordination Requirements

Local, State, tribal, or Federal air quality officials should be contacted prior to reclamation planning activities for requirements concerning air quality permit procedures, applicable standards, and possible control measures.

c. Air Quality Degradation and Improvement

Long-term air quality improvements which will result from reclamation should have priority over possible short-term air quality degradation caused by reclamation construction.

[FR Doc. 96–33108 Filed 12–27–96; 8:45 am]
BILLING CODE 4310–05–M

DEPARTMENT OF JUSTICE

National Institute of Corrections

Solicitation for a Cooperative Agreement

SUMMARY: The Department of Justice (DOJ), National Institute of Corrections (NIC) announces the availability of funds in FY'97 for a cooperative agreement to fund a ''Criminal Justice System Project: A Program of Training and Technical Assistance for Selected State and Local Jurisdictions.''

PURPOSE: The National Institute of Corrections is seeking proposals for a cooperative agreement to help criminal justice policy teams in five state and local jurisdictions develop and implement purposeful, informed policies on the design, use, capacity, and cost of selected components of their system of correctional options for pre-trial and sentenced offenders. The Criminal Justice System Project team will be a collaborative effort between NIC program staff and the cooperative agreement recipient.

AUTHORITY: Public Law 93–415.

FUNDS AVAILABLE: Funding for the project is limited to a maximum total amount of $305,000 (direct and indirect costs) for one cooperative agreement for the first twelve months of a three-year effort. Based on the availability of funds, funding for the two, subsequent, one-year phases are projected at roughly the same level ($305,000 per year). The approval for the second and third years will be made to the successful applicant from this solicitation—provided the recipient performs satisfactorily in the first 12-month period. Funds may not be used for construction, or to acquire or build real property.

DEADLINE FOR RECEIPT OF APPLICATIONS: Applications must be received in NIC's Washington Offices by 4:00 p.m., Eastern time on Friday, January 31, 1997.

ADDRESSES AND FURTHER INFORMATION: Requests for the application kit, which includes further details on the project's objectives, etc., should be directed to Judy Evens, Grants Control Office, National Institute of Corrections, 320 First Street, N.W., Room 5007, Washington, D.C. 20534 or by calling 800–995–6423, ext. 159 or 202–307–3106, ext. 159.

All technical and/or programmatic information on this announcement should be directed to Ms. Phyllis Modley at the above address or by calling 800–995–6423, ext. 133 or 202–307–3106, ext 133, or by E-mail at: pmodley@bop.gov.

Eligible Applicants

An eligible applicant is any private, non-profit organization or institution, or individual.

Review Consideration

Applications received under this announcement will be subjected to an NIC 3 to 5 member Peer Review Process.

Number of Awards

One (1).

NIC Application Number

97DO1. This number should appear as a reference line in your cover letter and also in box 11 of Standard Form 424.

Other Information

Applicants are advised that the narrative description of their program, not including the budget justification or Standard Form 424, attachments and appendices should not exceed forty (40), double-spaced typed pages.

Executive Order 12372

This program is subject to the provisions of Executive Order 12372. Executive Order 12372 allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. Applicants (other than Federally-recognized Indian tribal governments) should contact their State Single Point of Contact (SPOC), a list of which is included in the application kit, along with further instructions on proposed projects serving more than one State.

The Catalog of Federal Domestic Assistance number is: 16.603.

Dated: December 23, 1996.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. 96–33167 Filed 12–27–96; 8:45 am]
BILLING CODE 4410–36–M

Solicitation for a Cooperative Agreement

SUMMARY: The Department of Justice (DOJ), National Institute of Corrections (NIC) announces the availability of funds in FY'97 for a cooperative agreement to fund a ''Structured Release and Violation Guidelines for Paroling Authorities'' project.

PURPOSE: The National Institute of Corrections is seeking proposals for a cooperative agreement to assist selected paroling authorities in establishing consistent, responsible, and objective parole release decision making processes and procedures—and consistent violation response guidelines—at the state level. Examples of types of needs identified during earlier initiatives include data and risk assessment issues; dissatisfaction with current parole release and violation policies and procedures; and lack of written policy regarding release or violation responses. Release and violation concerns require paroling authorities to articulate their goals; and to develop consistent and explicit policies. To address these issues assistance will be provided to approximately five state paroling authorities, with the precise number receiving assistance to be determined by resource allocation as proposed by the awardee. The ''Structured Release and Violation Guidelines for Paroling Authorities'' project will be a collaborative effort between NIC program staff and the cooperative agreement recipient.

AUTHORITY: Public Law 93–415.

FUNDS AVAILABLE: The award will be limited to a maximum total amount of $150,000 (direct and indirect costs) and project activity must be completed within 18 months of award.

Funds may not be used for construction, or to acquire or build real property.

DEADLINE FOR RECEIPT OF APPLICATIONS: Applications must be received in NIC's Washington office by 4:00 p.m., Eastern time on Friday, January 31, 1997.

ADDRESSES AND FURTHER INFORMATION: Requests for the application kit, which includes further details on the project's objectives, etc., should be directed to Judy Evens, Grants Control Office, National Institute of Corrections, 320 First Street, N.W., Room 5007, Washington, D.C. 20534 or by calling 800–995–6423, ext. 159 or 202–307–3106, ext. 159.

All technical and/or programmatic information on this announcement should be directed to Mr. Kermit Humphries at the above address or by calling 800–995–6423, ext. 136 or 202–307–3995, ext. 136, or by E-Mail via khumphrie@bop.gov.

Eligible Applicants

An eligible applicant is any private, non-profit organization or institution, or individual.

Review Consideration

Applications received under this announcement will be subject to an NIC 3 to 5 member Peer Review Process.

Number of Awards

One (1).

NIC Application Number

97C03. This number should appear as a reference line in your cover letter and also in box 11 of Standard Form 424.

Other Information

Applicants are advised that the narrative description of their program, not including the budget justification or Standard Form 424, attachments and appendixes should not exceed forty (40), double-spaced typed pages.

Executive Order 12372

This program is subject to the provisions of Executive Order 12372. Executive Order 12372 allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. Applicants (other than Federally-recognized Indian tribal governments) should contact their State Single Point of Contact (SPOC), a list of which is included in the application kit, along with further instructions on proposed projects serving more than one State.

The Catalog of Federal Domestic Assistance number is: 16,603

Dated: December 23, 1996.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. 96–33168 Filed 12–27–96; 8:45 am]

BILLING CODE 4410–36–M

Solicitation for a Cooperative Agreement

SUMMARY: The Department of Justice (DOJ), National Institute of Corrections (NIC) announces the availability of funds in FY 97 for a cooperative agreement to fund a ''Responding to Probation and Parole Violations At the Local Level'' project.

PURPOSE: Regardless of whether probation and parole agencies are administered at the state or local level, their response to violations significantly impact the demand for and use of jail beds and resources in local communities. Judicious use of intermediate responses—both while processing the violation and at disposition—can provide swift and appropriate responses for certain types of probation and parole violation behavior; while responsibly considering public safety, offender needs, institutional crowding, and resource allocation.

The Institute's Community Corrections Division will provide financial assistance in the form of a cooperative agreement to an agency or organization. This initiative emphasizes policy development by local teams including key decision makers and administrators like judges, county commissioners, local sheriffs, and probation and/or parole executives. Up to eight local jurisdictions from each of two states will be invited to participate in this project. Components of the initiative include, in part:

The awardee (organization receiving the cooperative agreement) will work with NIC in announcing the opportunity and selecting the states and local jurisdictions that will participate; they will work with the local jurisdictions on-site for the purpose of data and policy analysis before the seminar, as well as providing post-seminar technical assistance. Teams from local jurisdictions will attend a three to five day seminar with other jurisdictions from their state, and the awardee will be responsible for all seminar costs except participant transportation. A monograph will be prepared by the awardee to assess and document the impact of changes in probation and parole violation practices on participating jurisdictions. Use of video conferencing is encouraged to augment on-site activities when the technology satisfies project needs and is cost effective.

The ''Responding to Probation and Parole Violations At the Local Level'' project will be a collaborative effort between NIC program staff and the cooperative agreement recipient.

AUTHORITY: Public Law 93–415.

FUNDS AVAILABLE: The award will be limited to a maximum total amount of $225,000 (direct and indirect costs) and project activity must be completed within 18 months of award.

Funds may not be used for construction, or to acquire or build real property.

DEADLINE FOR RECEIPT OF APPLICATIONS: Applications must be received in NIC's Washington office by 4:00 p.m., Eastern time on Friday, January 31, 1997.

ADDRESSES AND FURTHER INFORMATION: Requests for the application kit, which includes further details on the project's objectives, etc., should be directed to Judy Evens, Grants Control Office, National Institute of Corrections, 320 First Street NW., Room 5007, Washington, DC 20534 or by calling 800–995–6423, ext. 159 or 202–307–3106, ext. 159.

All technical and/or programmatic information on this announcement should be directed to Mr. Kermit Humphries at the above address or by calling 800–995–6423, etc. 136 or 202–307–3995, ext. 136, or by E-Mail via khumphrie@bop.gov.

Eligible Applicants

An eligible applicant is any private, non-profit organization or institution, or individual.

Review Consideration

Applications received under this announcement will be subjected to an NIC 3 to 5 member Peer Review Process.

Number of Awards

One (1).

NIC Application Number

97C04. This number should appear as a reference line in your cover letter and also in box 11 of Standard Form 424.

Other Information

Applicants are advised that the narrative description of their program, not including the budget justification or Standard Form 424, attachments and appendices should not exceed forty (40), double-spaced typed pages.

Executive Order 12372

This program is subject to the provisions of Executive Order 12372. Executive Order 12372 allows States the option of setting up a system for reviewing applications from within their States for assistance under certain Federal programs. Applicants (other than Federally-recognized Indian tribal governments) should contact their State Single Point of Contact (SPOC), a list of which is included in the application kit, along with further instructions on proposed projects serving more than one State.

The Catalog of Federal Domestic Assistance number is: 16.603.

Dated: December 23, 1996.

Morris L. Thigpen,

Director, National Institute of Corrections.

[FR Doc. 96–33169 Filed 12–27–96; 8:45 am]

BILLING CODE 4410–36–M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 96-93; Exemption Application No. D-10240, et al.]

Grant of Individual Exemptions; Beall Corporation 401l(k) Profit Sharing 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.

Beall Corporation 401(k) Profit Sharing Plan (the Plan), Located in Portland, OR

[Prohibited Transaction Exemption 96–93; Exemption Application No. D–10240]

Exemption

The restrictions of sections 406(a) and 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 sections 4975(c)(1)(A) through (E) of the Code shall not apply to the cash sale (the Sale) by the Plan of four acres of unimproved real property (the Land) to the Diamond Beall Development Corporation, an Oregon general partnership and party in interest with respect to the Plan, provided that the following conditions are satisfied: (1) the Sale is a one-time transaction for cash; (2) the Plan experiences no losses nor incurs any expenses as a result of the Sale; (3) the Plan receives in cash the greater of $479,160, or the fair market value of the Land as determined at the time of the Sale; and (4) the terms of the Sale are no less favorable to the Plan than those it would have received in similar circumstances when negotiated at arm's length with unrelated third parties.

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 25, 1996 at 61 FR 55321.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

First Chicago NBD Corporation (FCNBD) Located in Chicago, Illinois

[Prohibited Transaction Exemption 96-94; Exemption Application No. D–10361]

Exemption

I. Transactions

A. Effective October 8, 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.[1]

B. Effective October 8, 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

[1] 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).

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.[2] 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 October 8, 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.[3]

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 October 8, 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 Co. (D&P) or Fitch Investors Service, L.P. (Fitch);

(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—

[2] 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.

[3] 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.

(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 FCNBD 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 limited 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); [4]

(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 be 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) FCNBD;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with FCNBD; or

(3) Any member of an underwriting syndicate or selling group of which FCNBD 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 behalf of the master servicer, services receivables contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services receivables 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

[4] 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.

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. *FCNBD* means First Chicago NBD Corporation 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 13, 1996 at 61 FR 58244.

WRITTEN COMMENTS: The Department received one written comment, which was submitted by the applicant to make two corrections or clarifications with respect to the proposed exemption. The first correction pointed out name changes for D&P and Fitch, two 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 FCNBD has agreed to represent that any trust issuing securities in reliance on the exemption will be maintained as an essentially passive entity.

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.)

Zions Bancorporation and Affiliated Companies (Zions), Located in Salt Lake City, Utah

[Prohibited Transaction Exemption 96-95; Exemption Application No. L–10338]

Exemption

The restrictions of sections 406(a) and (b) of the Act shall not apply to the reinsurance of risks and the receipt of premiums therefrom by Zions Life Insurance Company (ZLIC) in connection with an insurance contract sold by American Bankers Life Insurance Company to provide group life and accidental death and dismemberment insurance to employees of Zions (the Plan), provided the following conditions are met:

(a) ZLIC—

(1) Is a party in interest with respect to the Plan by reason of a stock or partnership affiliation with Zions that is described in section 3(14)(E) or (G) of the Act,

(2) Is licensed to sell insurance or conduct reinsurance operations in at least one State as defined in section 3(10) of the Act,

(3) Has obtained a Certificate of Authority from the Insurance Commissioner of its domiciliary state which has neither been revoked nor suspended, and

(4)(A) Has undergone an examination by an independent certified public accountant for its last completed taxable year immediately prior to the taxable year of the reinsurance transaction; or

(B) Has undergone a financial examination (within the meaning of the law of its domiciliary State, Arizona) by the Insurance Commissioner of the State of Arizona within 5 years prior to the end of the year preceding the year in which the reinsurance transaction occurred.

(b) The Plan pays no more than adequate consideration for the insurance contracts;

(c) No commissions are paid with respect to the direct sale of such contracts or the reinsurance thereof; and

(d) For each taxable year of ZLIC, the gross premiums and annuity considerations received in that taxable year by ZLIC for life and health insurance or annuity contracts for all employee benefit plans (and their employers) with respect to which ZLIC is a party in interest by reason of a relationship to such employer described in section 3(14)(E) or (G) of the Act does not exceed 50% of the gross premiums and annuity considerations received for all lines of insurance (whether direct insurance or reinsurance) in that taxable year by ZLIC. For purposes of this condition (d):

(1) the term ''gross premiums and annuity considerations received'' means as to the numerator the total of premiums and annuity considerations received, both for the subject reinsurance transactions as well as for any direct sale or other reinsurance of life insurance, health insurance or annuity contracts to such plans (and their employers) by ZLIC. This total is to be reduced (in both the numerator and the denominator of the fraction) by experience refunds paid or credited in that taxable year by ZLIC.

(2) all premium and annuity considerations written by ZLIC for plans which it alone maintains are to be excluded from both the numerator and the denominator of the fraction.

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 57477.

FOR FURTHER INFORMATION CONTACT: Gary H. 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 24th day of December, 1996.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor

[FR Doc. 96–33182 Filed 12–27–96; 8:45 am]

BILLING CODE 4510–29–P

[Application No. D–10253, et al.]

Proposed Exemptions; The Retirement Plan for Salaried and Certain Hourly Employees of Keebler Company (the Plan)

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.

The Retirement Plan for Salaried and Certain Hourly Employees of Keebler Company (the Plan), Located in Elmhurst, Illinois

[Application No. D-10253]

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, 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 (1) the leasing by the Plan of certain improved real property (the Property) to Keebler Company (the Employer), a party in interest with respect to the Plan, (2) the potential future purchase of the Property by the Employer pursuant to the Employer's right of first refusal, as stipulated in the lease, and (3) the ''make whole agreement,'' and any payments thereunder, whereby the Employer will make the Plan whole, in the event that the Plan sells the Property to an unrelated party at a net loss.

This proposed exemption is subject to the following conditions:

(1) The Plan is represented for all purposes with respect to the lease by a qualified, independent fiduciary;

(2) The terms and conditions of the lease are and continue to be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party;

(3) The rent paid to the Plan under the lease is and continues to be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser;

(4) The rent is adjusted, at a minimum, every three years (upwards only), based upon an updated independent appraisal;

(5) The lease is a net lease, under which the Employer as the tenant is obligated for all operating expenses, including maintenance, taxes, insurance, and utilities;

(6) The independent fiduciary for the Plan represents that it has reviewed the terms and conditions of the lease on behalf of the Plan and believes the lease is in the best interests of and appropriate for the Plan;

(7) The independent fiduciary monitors and enforces compliance with the terms and conditions of the lease and of the exemption for the duration of the lease;

(8) The independent fiduciary expressly approves any improvements by the Employer over $100,000 to the Property and any renewal of the lease beyond the initial term;

(9) In the event that the Employer exercises its right of first refusal under the lease, the Employer purchases the Property from the Plan for an amount which is the greater of: (a) the original acquisition cost of the Property, plus the cost of any improvements, paid by the Plan, or (b) the fair market value of the Property as of the date of the sale, as established by a qualified, independent appraiser selected by the independent fiduciary;

(10) In the event that the Plan sells the Property to an unrelated party at a net loss (taking into account the cost of any improvements and all selling expenses paid by the Plan), the Employer makes the Plan whole, within 15 days after the date of such sale, by paying the Plan cash in an amount equal to the difference between: (a) the original acquisition cost of the Property, plus the cost of any improvements and all selling expenses, paid by the Plan, and (b) the amount of the sale proceeds received by the Plan; and

(11) At all times, the fair market value of the Property represents no more than 25 percent of the total assets of the Plan.

EFFECTIVE DATE: This exemption, if granted, will be effective as of April 15, 1996.

Summary of Facts and Representations

1. The Plan is a defined benefit plan sponsored by the Employer. The Employer, a Delaware corporation, is engaged in the business of making cookies, crackers, ice cream cones, and snacks and is located in Elmhurst, Illinois. The Plan had total assets of $200,697,537, as of December 31, 1994. The Plan had 7,496 participants and beneficiaries, as of April 1, 1996. The trustee of the Plan is the Northern Trust Company (Northern Trust). The Chicago Trust Company (Chicago Trust), the successor to the Chicago Title & Trust company, is the Subtrustee with respect to the Plan's investment in employer real property by virtue of a Subtrust Agreement with Northern Trust, entered into as of January 5, 1981 and amended as of April 10, 1985.

2. Among the assets of the Plan is the Property, which is currently being leased to the Employer. The Property consists of a land area of 7.36 acres and a one-story multi-purpose warehouse and manufacturing facility of 100,676 sq. ft. The Property is located at 2201 Cabot Boulevard West, Langhorne, Pennsylvania. It is represented that the Property is not near any other real property owned or used by the Employer. It is further represented that the Property is not subject to any debt.

3. The Property was appraised by Messrs. Christopher J. Hall and L. Edward Klein, M.A.I., of Binswanger Real Estate Appraisal, both independent general real estate appraisers certified in the State of Pennsylvania. Messrs. Hall and Klein employed all three basic valuation methodologies (cost, sales comparison, and income) utilized in the appraisal field and concluded that the fair market value of the fee simple interest of the Property was $2,550,000, as of December 1, 1995. Messrs. Hall and Klein also examined four other comparable leases and concluded, as of that same date, that the Property had a fair market rental value of $3.25 per sq. ft. ($327,200 per annum, rounded), if leased on a net basis. Finally, Messrs. Hall and Klein concluded that the fair market value of the leased fee interest of the Property, which is being leased to the Employer pursuant to a 15-year lease at above market rent, was $4,100,000, as of December 1, 1995.

The appraisal states that the zoning of the Property is M–1, Light Manufacturing, which restricts its use to various industrial and office uses. The highest and best use of the Property, if vacant, is as an industrial building. The highest and best use of the Property, as improved, is its continued use as a warehouse/distribution facility.

4. As previously noted, the Property is being leased to the Employer pursuant to a 15-year lease, whose term commenced on September 13, 1991. Until recently, the Plan was also leasing to the Employer a second parcel of real property located in Valencia, California (the California Property) for an 11-year term expiring on March 31, 1996. It is represented that together such leases, because they involved ''qualifying employer real property,'' were statutorily exempt under section 408(e) of the Act.[1] However, on April 15, 1996, the California Property was sold by the Plan to the Employer for $2,350,000, again, pursuant to a statutory exemption under section 408(e) of the Act.[2] Prior

[1] Section 408(e) of the Act provides an exemption from sections 406 and 407 of the Act for certain transactions involving ''qualifying employer real property,'' as that term is defined in section 407(d)(4) of the Act. However, the Department expresses no opinion herein as to whether the leasing of either the Property or the California Property to the Employer complied with the requirements of section 408(e) of the Act.

[2] The Department expresses no opinion herein as to whether the sale of the California Property complied with the requirements of section 408(e) of the Act. Further, the Department expresses no

to that date, the applicant submitted a request for an administrative exemption from the Department for the continued leasing to the Employer of the sole remaining parcel of real property in the Plan, retroactive to the date of the sale of the California Property.

5. The interests of the Plan with respect to the lease are represented by the Subtrustee Chicago Trust, acting as an independent fiduciary for the Plan. Chicago Trust, whose fees are paid by the Plan, represents that it is unrelated to and independent of the Employer. Chicago Trust represents that it has extensive experience as a fiduciary under the Act, that it is knowledgeable as to the subject transactions, and that it acknowledges and accepts its duties, responsibilities, and liabilities in acting as a fiduciary with respect to the Plan.

6. The lease provides for a primary term of 15 years, which may be extended at the option of the lessee for three successive terms of five years each, upon the express approval of the independent fiduciary. It is represented that the Employer currently pays to the Plan rent in the amount of $5.12 per sq. ft. ($515,497 per annum), which significantly exceeds the fair market rental value of $327,200 per annum established for the Property. The lease provides for annual rent increases based upon a return of income as a percentage of the Plan's original disbursement of $4.3 million for the Property (with such percentage ranging from 10.0% in 1992 to 14.01% in 2006, the final lease year). The fair market rental value of the Property is to be redetermined every three years, based upon an updated independent appraisal. If the appraised fair market rental value exceeds the rent being paid by the Employer, the rent will be increased to a level that is not less than the appraised fair market rental value. If the appraised value is less than the rent being paid by the Employer, the then current rent will remain in effect.

The lease is a net lease, under which the rent is an absolutely net return to the Plan as landlord and is not subject to deductions for any expenses relating to the Property. The Employer as tenant is obligated for all operating expenses, including maintenance, taxes, insurance, and utilities. The lease permits the Employer to remodel and make structural changes and additions to the Property at the Employer's expense, so long as such improvements comply with all applicable governmental regulations. Any expense over $100,000 must be expressly approved by the independent fiduciary. Any improvements or renovations of the property will belong to the Plan upon termination of the lease. The Employer will indemnify and hold the Plan harmless for all claims and demands arising from or in any way relating to the Property.

7. In the event that the independent fiduciary determines it is in the best interests of the Plan to sell the Property, the lease grants the Employer the right of first refusal. If the Employer exercises its right of first refusal, the Employer will purchase the Property from the Plan for an amount which is the greater of: (a) the original acquisition cost of the Property, plus the cost of any improvements, paid by the Plan, or (b) the fair market value of the Property as of the date of the sale, as established by a qualified, independent appraiser selected by the independent fiduciary. Any such sale would be a one-time transaction for cash, and the Plan would incur no expenses relating to the sale.

If the Plan sells the Property to an unrelated party during the term of the lease, the Employer will continue to be bound as tenant under the lease for the duration of the lease. Further, if the Plan sells the Property to an unrelated party at a net loss (taking into account the cost of any improvements and all selling expenses paid by the Plan), the Employer will make the Plan whole, within 15 days after the date of such sale, by paying the Plan cash in an amount equal to the difference between: (a) the original acquisition cost of the Property, plus the cost of any improvements and all selling expenses, paid by the Plan, and (b) the amount of the sale proceeds received by the Plan.

8. Chicago Trust, acting as an independent fiduciary for the Plan, represents that it has reviewed the terms and conditions of the lease on behalf of the Plan and determined that such terms and conditions are at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party. Chicago Trust further represents it believes that the lease is in the best interests of and appropriate for the Plan and that it will monitor and enforce compliance with the terms and conditions of the lease and of the exemption for the duration of the lease.

The initial decision to invest a portion of the Plan's assets in real estate was made by the Employer. In its role as Subtrustee, Chicago Trust has the exclusive authority to hold and manage the Plan's employer real property. Accordingly, Chicago Trust made the decisions to sell the California Property and to retain the Property for the Plan. With respect to the latter, Chicago Trust took into account the fact that a forced sale of the Property to an unrelated party would have caused the Plan to incur a substantial loss, as well as depriving the Plan of rental income at an above market rate (yielding a net investment return not less than 10.0% in the first year and not less than 14.01% in the final lease year). Chicago Trust has also examined the financial viability of the Employer, determined that the Employer's past performance under the lease has been in accordance with its contractual obligations, and concluded that the Employer will continue to be a good tenant.

9. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (1) the Plan is represented for all purposes with respect to the lease by a qualified, independent fiduciary; (2) the terms and conditions of the lease are and will continue to be at least as favorable to the Plan as those the Plan could obtain in a comparable arm's length transaction with an unrelated party; (3) the rent charged by the Plan under the lease is and will continue to be no less than the fair market rental value of the Property, as established by a qualified, independent appraiser; (4) the rent will be adjusted, at a minimum, every three years (upwards only), based upon an updated independent appraisal; (5) the lease is a net lease, under which the Employer as the tenant is obligated for all operating expenses, including maintenance, taxes, insurance, and utilities; (6) the independent fiduciary for the Plan represents that it has reviewed the terms and conditions of the lease on behalf of the Plan and believes the lease is in the best interests of and appropriate for the Plan; (7) the independent fiduciary will monitor and enforce compliance with the terms and conditions of the lease and of the exemption for the duration of the lease; (8) the independent fiduciary will expressly approve any improvements by the Employer over $100,000 to the Property and any renewal of the lease beyond the initial term; (9) in the event that the Employer exercises its right of first refusal under the lease, the Employer will purchase the Property from the Plan for an amount which is the greater of: (a) the original acquisition cost of the Property, plus the cost of any improvements, paid by the Plan, or (b) the fair market value of the Property as of the date of the sale, as established by

opinion herein as to whether the acquisition and holding of either the Property or the California Property by the Plan violated any of the provisions of Part 4 of Title I in the Act.

a qualified, independent appraiser selected by the independent fiduciary; (10) in the event that the Plan sells the Property to an unrelated party at a net loss (taking into account the cost of any improvements and all selling expenses paid by the Plan), the Employer will make the Plan whole, within 15 days after the date of such sale, by paying the Plan cash in an amount equal to the difference between: (a) the original acquisition cost of the Property, plus the cost of any improvements and all selling expenses, paid by the Plan, and (b) the amount of the sale proceeds received by the Plan; and (11) at all times, the fair market value of the Property will represent no more than 25 percent of the total assets of the Plan.

Notice to Interested Persons

Notice of the proposed exemption shall be given to all interested persons by first-class mail or by posting the required information at the Employer's offices within 30 days of the date of publication of the notice of pendency 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/or request a hearing with respect to the proposed exemption. Comments and requests for a hearing are due within 60 days of the date of publication of this notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Travelers Group Inc. 401(k) Savings Plan (the Plan), Located in New York, New York

[Exemption Application No. D–10269]

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, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a)(1) (A) through (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1) 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 [3] shall not apply, as of the effective date of this exemption: (1) to the in-kind contribution by Travelers Group Inc. (TGI) of certain options (the Stock Option or Stock Options) into the accounts in the Plan of eligible employees of TGI and its subsidiaries and affiliates (the Employees or Employee); (2) to the holding of the Stock Options by such accounts; and (3) to the exercise of such Stock Options by Employees in order to purchase shares of common stock of TGI (the Stock), provided that: (a) all Employees will be treated in the same manner for the purpose of the allocation of Stock Options to the accounts of such Employees, except that certain highly-paid officers of TGI who are subject to the reporting requirements of section 16(a) of the Securities and Exchange Act of 1934 will not be eligible to receive such contributions of Stock Options; (b) the allocation of the Stock Options to the Plan and the acquisition of such options by the accounts of Employees will occur automatically each year on a uniform basis without any action required by such Employees, and the determination of the number of Stock Options granted to the accounts of each such Employee will be based solely on the compensation earned by such Employee; (c) contributions of Stock Options by TGI to Employees' accounts in the Plan will not be contingent upon contributions by Employees to such Plan; (d) Employees acquire TGI Stock without using cash balances from the Plan or selling assets of the Plan, other than selling a portion of the TGI Stock acquired from the exercise of such Stock Options; (e) no party, other than the individual Employee with respect to his or her own account, or upon the death of such Employee, his or her beneficiary(ies), or in the event of an assignment under a qualified domestic relations order the alternative payee, will have any discretion over the decision to exercise the Stock Options held in such account; (f) the price at which the Stock Options can be exercised will be established by the market value of the TGI Stock as listed on the New York Stock Exchange (NYSE) at the close of the business day prior to the date each Stock Option is granted; (g) the terms and conditions of each of the Stock Options contributed by TGI into Employees' accounts in the Plan will be no less favorable to the Plan than terms obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties; (h) an independent trustee (the Trustee) will facilitate the sale of the Stock in connection with the exercise of the Stock Options under ''sell to cover'' transactions, as described herein; (i) the Plan incurs no fees, commissions, or other charges or expenses as a result of its acquisition, holding, or exercise of the Stock Options, other than brokerage fees payable to an unrelated third party broker; and (j) the terms and conditions described herein are at all times satisfied.

EFFECTIVE DATE: This proposed exemption will be effective, as of the beginning of the 1997 plan year.[4]

Summary of Facts and Representations

1. The applicant is TGI, a Delaware corporation. TGI is a diversified financial services holding company engaged, through its subsidiaries, principally in four business segments: (a) investment services; (b) consumer finance services; (c) life insurance services; (d) property and casualty insurance services. TGI is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act. The principal subsidiaries of TGI may also be parties in interest with respect to the Plan. These subsidiaries include but are not limited to, Smith Barney Inc. (Smith Barney), Commercial Credit Company, Primerica Financial Services, Travelers Insurance Company, and Travelers/Aetna Property Casualty Corporation (TAP).

2. The Plan is sponsored and maintained by TGI for its Employees and those of its participating affiliates and subsidiaries. The Plan is an employee benefit plan qualified under section 401(a) of the Code and 401(k) of the Code and is a trust exempt from taxation under section 501(a) of the Code. The administrator of the Plan is a committee (the Plan Administration Committee) appointed by the Board of Directors of TGI.

It is represented that the proposed transactions will only affect those individuals who are actively employed by TGI and its subsidiaries and affiliates. As of April 30, 1996, it is represented that there were 60,000 active Employees of which approximately 70 percent (70%) contributed to the Plan. Further, it is represented that there are 13,265 beneficiaries and participants in the Plan who are not actively employed by TGI and its subsidiaries and affiliates.

It is represented that the Plan is invested in common stock and preferred shares issued by TGI or its subsidiaries and affiliates, fixed income contracts and certain mutual funds and collective trust funds. Several of the fixed income contracts and mutual funds are issued

[3] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

[4] It is represented that the plan year is the calendar year.

and distributed by certain subsidiaries of TGI. As of January 31, 1996, the date of the most recent Plan valuation, the approximate aggregate fair market value of the assets of the Plan was $2,256,356,498. Of this $2.3 billion in assets of the Plan, approximately $600 million is invested in TGI Stock, $45 million is invested in common stock of TAP, and $168 million is invested in preferred shares of TGI.

3. TGI requests an exemption from the prohibitions of the Act in order to permit the contribution to the Plan of the Stock Options, the holding by the Plan of such contributed Stock Options, and the subsequent exercise of such Stock Options by eligible Employees under certain conditions which are discussed below. The Stock Options contributed to the Plan may not be sold, exchanged, assigned, or otherwise transferred. In this regard, all or a portion of the Stock Options contributed to the Plan either: (a) will be exercised by the Employees; or (b) if unexercised, will expire at the end of the option term, as discussed more fully below.

4. It is represented that Stock Options will be contributed annually into the Plan beginning in the 1997 plan year. It is represented that, in order to facilitate the proposed in-kind contribution of the Stock Options to the Plan, the Plan Administration Committee will create an account in the Plan for each Employee who is eligible to participate in the Plan and is active on the date of each grant of such Stock Options. An eligible Employee is one who had at least one (1) year of service on December 31, of the plan year prior to the year in which the Stock Options are granted, regardless of whether such Employee is otherwise participating in the Plan. However, it is represented that certain highly-paid officers who are subject to the reporting requirements of section 16(a) of the Securities and Exchange Act of 1934 will not be eligible to receive in-kind contributions of Stock Options.

5. The Stock Options will permit each Employee to purchase TGI Stock at the closing price of such Stock (the Exercise Price) on the NYSE on the business day immediately preceding the date of the grant of such Stock Option. The term of each Stock Option will be ten (10) years. In this regard, each Stock Option will expire, if it has not previously been exercised, on the tenth (10th) anniversary of the date upon which such Stock Option was granted.

6. It is anticipated that the number of shares of TGI Stock permitted to be purchased with each Stock Option contributed to an Employee's account will be based on the compensation earned by such Employee in the plan year prior to the year in which the Stock Option is granted, regardless of whether such Employee is otherwise actively participating in the Plan. In this regard, it is anticipated that the number of shares of TGI Stock in a Stock Option contributed to an Employee's account will equal ten percent (10%) of such Employee's eligible pay, divided by the option price. For purposes of this exemption, ''eligible pay'' is defined as an Employee's base pay and/or commissions for the prior year, plus any bonus accrued by such Employee for the prior year, which is paid in the plan year in which the Stock Option is granted, not to include compensation in excess of $40,000.

For example, assume an Employee is employed on December 31, 1996, and is otherwise eligible to participate in the Plan. Further, assume the price of TGI Stock on the NYSE on March 28, 1997, at the close of business is $60. If such Employee's compensation was $30,000, then 10 percent (10%) of such compensation would equal $3,000. Accordingly, TGI would contribute to the Employee's account a Stock Option which would entitle that Employee upon exercise of such Stock Option to purchase fifty (50) shares of TGI Stock ($3,000 ÷ $60 per share).

7. It is represented that Stock Options will vest immediately upon issuance to the Plan, but will not be immediately exercisable. In this regard, it is represented that an Employee may exercise the Stock Options only in accordance with certain conditions. Generally, once a Stock Option has been contributed to the account of an Employee in the Plan, such Stock Option may only be exercised while such Employee is actively employed by TGI or by any of its subsidiaries or affiliates. While actively employed, an Employee can exercise a Stock Option at a rate of 20 percent (20%) a year, beginning as of the first anniversary of the grant date of such Stock Option. It is represented that an Employee can exercise eligible Stock Options at any time thereafter until the end of the ten (10) year option term, as long as he or she is employed by TGI or employed by any of TGI's subsidiaries or affiliates. In the event of an Employee's separation from service for reasons other than by disability, death, or retirement, all Stock Options which are unexercised and unexpired shall remain in the Employee's account until the *later of:* (a) the normal retirement age of 65 of the Employee; (b) the tenth (10th) anniversary of such Employee's participation in the Plan; or (c) the separation from service of the Employee with an employer participating in the Plan; at which time the Stock Option shall be distributed upon the request of such Employee, in accordance with section 401(a)(14) of the Code.

After terminating employment with TGI or its subsidiaries or affiliates, Employees may not exercise Stock Options, except in the circumstances, as described below. In the event an Employee terminates service by reason of his or her disability, any Stock Options that have not expired and are exercisable immediately before disability shall continue to be exercisable during the period of disability, until such Stock Option expire. In the event of an involuntary termination of employment of an employee, for a period of thirty days following their involuntary termination, participants may exercise options that were exercisable immediately before they were involuntarily terminated. Upon the death of an Employee, prior to his or her termination of employment, all Stock Options that have not expired and were exercisable before such Employee's death continue to be exercisable by the beneficiary(ies) of such Employee until such Stock Options expire. However, the Stock Options will not continue to accrue exercisability after death. In the event an Employee retires at the age of 55 with 5 years of service, all Stock Options that have not expired shall remain exercisable in accordance with the exercisability percentage achieved at the termination of service for a period of three (3) years, or until such Stock Options expire, whichever is shorter. In the event an Employee terminates service on or after attaining normal retirement age of 65 or terminates service after attaining age 59½ with ten (10) of service, all Stock Options that have not expired will continue to accrue exercisability and can be exercised by such Employee for a period of four (4) years or until such Stock Options expire, whichever is shorter.

8. TGI believes that Employees will have the opportunity to exercise eligible Stock Options on a daily basis, where all exercise elections are received before a set time each day. However, should the requirements imposed by the recordkeeper of the Plan prevent the daily exercise of the Stock Options, then it is represented that the frequency of the Employee's ability to exercise Stock Options will be limited to a period of not more often than weekly and not less often than monthly.

9. It is represented that the Employee's decision to exercise a Stock Option will be carried out in the following manner. TGI will designate an

agent to receive the exercise instructions from Employees. In this regard, TGI anticipates that the recordkeeper for the Stock Options will serve as its agent for this purpose. In order to exercise a Stock Option, the Employee will contact the recordkeeper for the Stock Options. Upon receipt of election requests from Employees, it is represented that the recordkeeper intends to aggregate all exercise requests.

It is represented that if an Employee contacts the recordkeeper by the recordkeeper's deadline for aggregation, the entire transaction from exercise request to settlement and receipt of the Stock by the Plan, will require three (3) business days from such deadline. However, if an Employee with an election request contacts the recordkeeper after the recordkeeper's deadline for aggregation, it is represented that the entire process will require, respectively, one (1), five (5), or twenty (20) additional business day(s) for completion, depending on whether the recordkeeper for the Plan establishes a daily, weekly, or monthly deadline for aggregation.

10. After aggregating the Employees' requests to exercise Stock Options, the recordkeeper will contact the Trustee to arrange for the exercise of such Stock Options. Typically, when an option holder exercises his or her right under an option to purchase shares of stock, he or she must pay in cash the exercise price, as set forth in such option. However, if this exemption is granted, Employees will only be allowed to exercise contributed Stock Options through a cashless form of exercise known as a ''sell to cover'' transaction and may not use any other funds to exercise the Stock Options. Therefore, no other assets that are in the accounts of Employees prior to the ''sell to cover'' transactions will be used to exercise the Stock Options. In this regard, a ''sell to cover'' transaction would permit any Employee who decides to exercise one of the Stock Options contributed by TGI to his or her account to authorize the Trustee of the Plan to sell the appropriate number of shares received upon the exercise of such Stock Option in order to obtain cash to pay the Exercise Price to TGI. In this regard, the shares of Stock necessary to be sold to pay for the exercise of Stock Options would be sold on the open market. TGI would receive payment equal to the Exercise Price for the shares of such Stock, and the Plan would receive from TGI the incremental shares of Stock representing the gain realized from the exercise of the Stock Option. In this regard, it is represented that TGI is the source of the Stock transferred to the Plan as a result of the exercise of a Stock Option, and that such Stock will be either treasury stock or previously unissued stock of TGI.

For example, suppose an Employee has a Stock Option to purchase 100 shares of Stock from TGI at $60 per share, and the current market price for such Stock is $75 per share. A ''sell to cover'' transaction would involve the Employee's exercise of such Stock Option for an Exercise Price of $6,000 (100 shares times $60 per share). To cover this Exercise Price, the Employee would authorize the Trustee to sell on the market eighty (80) of the 100 shares of Stock which were acquired by the Employee from TGI through the exercise of the Stock Option at the current market price of $75 per share ($6,000 ÷ $75). TGI would receive cash in the amount of $6,000 (80 shares times $75 per share), and the Employee's account in the Plan would retain twenty (20) of the 100 shares of Stock acquired from TGI through the exercise of such Stock Option (100 shares minus 80 shares).

11. It is represented that all sales of Stock in connection with ''sell to cover'' transactions will be executed through a broker either on the NYSE or other nationally recognized exchange on which shares of TGI Stock are traded. In this regard, it is represented that the exclusive purpose of the broker in the ''sell to cover'' transactions will be to effect sales of the appropriate number of shares of the Stock in order to obtain the Exercise Price in connection with the exercise of Stock Options by the Plan.

It is represented that Smith Barney, a related broker, may be selected by TGI to provide brokerage services to the Plan in connection with the exercise of Stock Options and the sale of Stock to cover the Exercise Price. If brokerage services are provided to the Plan by Smith Barney or other related brokers, it is represented that such brokerage services will be provided without the receipt of commissions, fees, or other compensation by Smith Barney or such related brokers.[5]

In the event that Smith Barney is not chosen by TGI to effect sales of TGI Stock in connection with the exercise of Stock Options by the Plan and the sale of Stock to cover the Exercise Price, it is represented that TGI will authorize the Trustee of the Plan to select a broker, either related or unrelated, to execute such sales of Stock. Once such authorization is given to the Trustee by TGI with respect to a particular ''sell to cover'' transaction, such authorization will be irrevocable. In this regard, it is represented that under no circumstances will TGI or its subsidiaries and affiliates have the ability to direct the Trustee's selection of which broker will receive the brokerage business of the Plan.

If brokerage services are provided to the Plan by an independent, unrelated broker, it is represented that the Plan will incur expenses for the commission due to such broker. It is further represented that brokerage commissions associated with such execution will be deducted from the gross proceeds of the trade. In this regard, the amount of commission expense incurred will depend on the number of shares of Stock involved in a ''sell to cover'' transaction, as negotiated between such independent, unrelated broker and the Trustee.

12. It is represented that the shares of TGI Stock realized by an Employee through the exercise of the Stock Options in his or her individual account in the Plan will be tradable at the direction of such Employee and will not be subject to any restriction on the length of time such shares of TGI Stock must be held before such shares are sold and the proceeds invested in an alternative investment choice within the Plan. In this regard, it is represented that at least monthly Employees will have an opportunity to sell Stock acquired through the exercise of the Stock Options in accordance with the terms of the Plan.

13. TGI believes that the transactions which are the subject of this proposed exemption may be prohibited, pursuant to sections 406(a)(1) (A) through (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a)(1) of the Act and section 4975(c)(1) (A) through (E) of the Code, and, accordingly, requests exemptive relief. In this regard, TGI believes that its contribution of Stock Options to the Plan and the holding of the Stock Options by the Plan may constitute violations of section 407(a)(1), section 406(a)(1)(E), and section 406(a)(2) of the Act, because the definition of a ''qualifying employer security,'' as set forth in section 407(a) of the Act, includes stock, but does not include stock options or other stock rights. In addition, because TGI may be a fiduciary with respect to the Plan, TGI

[5] TGI maintains that the statutory exemption, pursuant to section 408(b)(2) of the Act, is available to provide exemptive relief for the provision of brokerage services to the Plan by Smith Barney or other related brokers, where Smith Barney or such related brokers do not receive commissions, fees, or other compensation for such services. The Department is offering no view, herein, as to whether the provision of brokerage services to the Plan by Smith Barney or other related brokers, as described, is covered by the statutory exemption provided in section 408(b)(2), nor is the Department providing any relief herein with respect to such brokerage services.

believes that the exercise of the Stock Options contributed to the Plan and the concurrent transfer of cash to TGI to pay for the exercise of such Stock Options may violate section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code, for which relief is requested. With respect to section 406(b)(2) of the Act, TGI does not believe that there is a potential for conflicts of interest to occur with respect to the proposed transactions, as the exercise of the Stock Options will be transacted only at the direction of Employees and the necessary sales of TGI Stock to cover the Exercise Price will occur on the open market. Nevertheless, TGI requests relief from the prohibitions imposed by section 406(b)(2) of the Act, in the event it is determined that a transaction may occur with a party whose interests are adverse to the interests of the Plan and of its participants and beneficiaries.

14. TGI maintains that the proposed transactions are in the interest of the Plan and its participants and beneficiaries in that the contribution of the Stock Options will enhance the value of the assets of the Plan. Further, it is represented that the exercise of the Stock Options by the accounts of Employees in the Plan offers an opportunity for economic gain in that the Employees could exercise the Stock Options and purchase Stock from TGI at favorable prices. In this regard, it is represented that during the past nine (9) years TGI Stock has appreciated at a compounded annual rate of nearly 23 percent (23%), excluding dividends.

TGI believes that ownership of TGI Stock by Employees is desirable. In this regard, it is represented that the proposed transactions facilitate the acquisition of TGI Stock into the accounts of lower paid Employees who otherwise would not have the resources to buy such Stock. In addition, Employees acquire TGI Stock without using cash balances in the Plan or the sale of assets of the Plan, other than the sale of the Stock acquired from the exercise of the Stock Options. Further, in the opinion of TGI the ‘‘leveraging’’ effect of the Stock Options, is such that increases in the price of the Stock would create larger increases in the values of the accounts of Employees’ than the current match formulas used by TGI in other programs that provide opportunities for Employees to own shares of TGI Stock. In addition, the proposed transactions would encourage long term retirement savings and would permit an Employee to defer paying taxes on the appreciation of the value of the Stock, thus, increasing his or her retirement savings.

15. It is represented that the exemption is protective of the rights of participants and beneficiaries. In this regard, the timing of the decision to exercise the Stock Options is at the discretion of the Employee into whose account such Stock Options have been contributed or is at the discretion of such Employee’s beneficiary(ies) or alternative payee, and is only subject to the restrictions on exercisability imposed by TGI, the issuer.

It is further represented that the price at which the Stock Options are exercised will be based on an objective third party source. In this regard, the Exercise Price for the Stock Options will be established by using the closing price for TGI Stock from the NYSE on the business day prior to the grant of such Stock Option. All transactions with respect to the exercise of the Stock Options and the subsequent sale of the TGI Stock realized from such exercise will be executed through the NYSE or other nationally recognized stock exchange.

TGI maintains that additional protection for the Plan and its participants is provided by the appointment of an independent qualified party to be responsible for certain aspects of the proposed transactions. In this regard, as of December 31, 1994, TGI retained Citibank, N.A., an independent party, to serve as the Trustee for the Plan. It is represented that the Trustee’s role with respect to the proposed transactions will be to facilitate the sale of shares of Stock in ‘‘sell to cover’’ transactions in connection with the exercise of the Stock Options. In this regard, it is represented that the Trustee will be responsible for selecting and retaining a broker to execute such transactions, unless Smith Barney, a related broker, is selected by TGI to provide brokerage services for the ‘‘sell to cover’’ transactions.

16. TGI maintains that the proposed transactions are administratively feasible in that the level of monitoring required of the Department with respect to this exemption will be minimal. In addition, TGI will bear all of the costs of the exemption application, and TGI will be responsible for the costs associated with notifying interested persons.

17. In summary, TGI represents that the proposed transactions satisfy the criteria of section 408(a) of the Act because: (a) All Employees will be treated in the same manner for the purpose of the allocation of Stock Options to the accounts of such Employees, except that certain highly-paid officers will not be eligible to receive such contribution of Stock Options; (b) lower paid Employees of TGI and its subsidiaries and affiliates will be able to take advantage of the opportunity to acquire TGI Stock; (c) contribution of Stock Options by TGI to the accounts of Employees in the Plan will not be contingent on contributions by Employees to such Plan; (d) the allocation of the Stock Options to the Plan and the acquisition of such options by the accounts of Employees will occur automatically each year on a uniform basis without any action required by such Employees, and the determination of the number of Stock Options granted to the accounts of each Employee will be based solely on the compensation earned by such Employee; (e) Employees will acquire TGI Stock without using cash balances from the Plan or the proceeds from the sale of assets of the Plan, other than the TGI Stock acquired from the exercise of the Stock Options; (f) the contribution of the Stock Options will enhance the value of the assets in the accounts of Employees in the Plan; (g) no party, other than the individual Employee with respect to his or her own account, or upon the death of such Employee his or her beneficiary or in the event of an assignment under a qualified domestic relations order the alternative payee, will have any discretion over the decision to exercise the Stock Options held in such account; (h) the price at which the Stock Options can be exercised will be established by the market value of the TGI Stock as listed on NYSE at the close of business on the day prior to the date each Stock Option is granted; (i) the terms and conditions of each of the Stock Options contributed by TGI into Employees’ accounts in the Plan will be no less favorable to the Plan than terms obtainable by the Plan under similar circumstances when negotiated at arm’s length with unrelated third parties; (j) the Trustee will facilitate the purchase and sale of the Stock in connection with the exercise of the Stock Options under ‘‘sell to cover’’ transaction, as described herein; (k) the Plan will incur no fees, commissions, or other charges or expenses as a result of its acquisition, holding, or exercise of the Stock Options, other than brokerage fees payable to the unrelated third party broker; (l) shares of TGI Stock realized by an Employee through the exercise of the Stock Options in his or her individual account in the Plan will be tradable at the direction of such Employee at least monthly and will not be subject to any restriction on the length of time such shares can be held before being sold and the proceeds

invested in alternative investment choices in the Plan; and (m) the terms and conditions described herein will at all times be satisfied.

Notice to Interested Persons

It is represented that the proposed transactions would affect only participants in the Plan who are actively employed by TGI and its subsidiaries and affiliates. Accordingly, all employees of TGI and its subsidiaries and affiliates may be considered interested persons. TGI represents that all interested persons will be provided with a copy of the Notice of Proposed Exemption (the Notice), plus a copy of the supplemental statement (Supplemental Statement), as required, pursuant to 29 CFR 2570.43(b)(2) within fifteen (15) calendar days of publication of the Notice in the Federal Register. Notification will be provided to all interested persons by posting at all worksites a copy of the Notice, plus a copy of the Supplemental Statement at those locations within the principal places of employment of employees of TGI which are customarily used for notices regarding labor-management matters for review.

It is further represented that if the exemption is granted, TGI, will, upon request, make available to all interested persons a copy of the final exemption.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 219–8883 (This is not a toll-free number.)

Consolidated Lumber Corp., Pension Plan (the Plan), Located in Clifton, New Jersey

[Application No. D–10344]

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, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406 (a) and 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 sale for cash (the Sale) by the Plan to Consolidated Lumber Corp. (the Employer), the sponsor of the Plan, of certain whole life insurance policies (the Policies) issued by Confederation Life Insurance Company of Canada (Confederation); provided the following conditions are satisfied: (A) All terms and conditions of the Sale are at least as favorable to the Plan as those which the Plan could obtain in arm's-length transactions with unrelated parties; (B) The Plan receives cash consideration from each Sale that is no less than the greater of (1) the fair market value of each of the Policies as of the date of the Sale, or (2) each of the Policies' net cash surrender value as of the date of the Sale; and (C) the Plan does not incur any expenses or suffer any losses with respect to the proposed transactions.

Summary of Facts and Representations

1. The Employer, a New Jersey corporation, is in the business of wholesale distribution of lumber and millwork products in the greater metropolitan area of New York, New York. Messrs. Jess Shirvan, Mark Shirvan, and Neil Shirvan each own 22.61 percent of the Employer and the remaining 32.17 percent of the Employer is owned by Mr. Stanley Shirvan.

The Plan was established by the Employer as of January 1, 1968. As of December 31, 1990, Consolidated Pine, Inc., an Oregon corporation, also became a sponsor of the Plan; and as of April 16, 1993, Consolidated Distribution, Inc., a New Jersey corporation became a sponsor of the Plan.[6]

The Plan is a defined benefit pension plan with 32 participants and total assets of approximately $218,551.44, as of December 16, 1996. The trustee of the Plan is the First Fidelity Bank, N.A., New Jersey located at Newark, New Jersey. The Boards of Directors of the three sponsoring employers of the Plan have investment discretion over the assets of the Plan and the trustee of the Plan expedites the instructions of the Directors of the sponsoring employers.[7]

2. The Plan, which provided for the investment of Plan assets in whole life insurance policies (the Policies), holds 32 Policies issued by Confederation. The purchasing of Policies by the Plan was discontinued as of December 31, 1990, and all existing Policies remain in the Plan. Each Policy provides for death benefits and an investment feature in the form of its cash surrender value.

On August 11, 1994, the Canadian insurance regulatory authorities placed Confederation in receivership. On August 12, 1994, the assets of Confederation in the United States were placed under the regulatory supervision of the insurance authorities of the State of Michigan. Rehabilitation proceedings (Proceedings) were instituted by Michigan in order to protect the interest of all policy owners in the United States, resulting in all Confederation Policies being subject to restrictions which prohibit access to the cash surrender value of the Policies. As a result of the restrictions imposed on Confederation, the Plan is unable to surrender the Policies to Confederation for their cash surrender value and make final distributions to Plan participants.

On August 10, 1995, the Plan notified its participants that the Plan was to terminate as of October 15, 1995. Filings were made on February 8, 1996, for approval of termination of the Plan with the Pension Benefit Guaranty Corporation (PBGC) and the Internal Revenue Service (IRS). The PBGC has a mandatory 60 day review period which expired April 9, 1996, and thereafter the Plan is required to make final distribution of its assets within 180 days unless an extension is obtained from the PBGC. The applicant represents that an extension of an additional six months until April 7, 1997, for final distribution of assets was obtained by the Plan from PBGC. The IRS issued an approval of termination of the Plan as of April 9, 1996.

3. Premium payments on Policies were discontinued by the Plan, causing the decline in cash surrender values of the Policies as charges are debited against the cash surrender values. As of November 7, 1996, the 32 Policies involved in the proposed Sale had a cash surrender value of $103,485.10 less the debits of $23,017.66 leaving a net cash value of $80,467.44.

The Employer proposes to purchase the 32 Policies for not less than the greater of their fair market value on the date of the Sale, or for their net cash surrender value on the date of the Sale.

The Employer proposes this Sale because the Plan is unable to determine when or to what extent it will be able to have access to the net cash surrender values of the Policies under the Michigan Proceedings. As stated above, the Employer and the affiliated corporations that sponsor the Plan are in the process of terminating the Plan and distributing the participants accrued benefits. In order to accomplish this termination and distribution the Plan needs to liquidate the Policies. Therefore the Employer is requesting the proposed exemption in order to liquidate the Policies as soon as possible. The Employer represents that the proposed transactions are necessary

[6] Consolidated Pine, Inc. is wholly owned by Mr. Stanley Shirvan. Five percent of Consolidated Distribution, Inc. is owned by Mr. Stanley Shirvan and Messrs. Neil Shirvan, Jess Shirvan, and Mark Shirvan, each own 31.667 percent.

[7] Mr. Stanley Shirvan is the sole director of the sponsoring employers of the Plan. He is also a shareholder and president of the sponsoring employers.

in order for the participants to avoid any risk associated with the Plan continuing to hold the Policies. The applicant represents that the Employer will bear all expenses which may be incurred with respect to the Sale or the proposed exemption.

4. In summary, the applicant represents that the proposed transaction will satisfy the criteria of section 408(a) of the Act because (a) the Plan will not incur any expenses with respect to the proposed transaction; (b) the Plan will receive on the date of Sale the greater of either the net cash surrender value or the fair market value of the Policies, and (c) the proposed transaction will enable the Plan to avoid the possible losses associated with the continued holding of the Policies.

FOR FURTHER INFORMATION CONTACT: Mr. C.E. Beaver of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

The Chase Manhattan Bank, N.A. (Chase), Located in New York, New York

[Application No. D-10348]

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, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(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 (1) the proposed granting to Chase, as the representative of lenders (the Lenders) participating in a credit facility, of security interests in limited partnership interests in LF Strategic Real Estate Investors, L.P. (the Partnership) owned by certain employee benefit plans (the Plans) with respect to which some of the Lenders are parties in interest; and (2) the proposed agreements by the Plans to honor capital calls made by Chase in lieu of the Partnership's general partner; provided that (a) the proposed grants and agreements are on terms no less favorable to the Plans than those which the Plans could obtain in arm's-length transactions with unrelated parties; and (b) the decisions on behalf of each Plan to invest in the Partnership and to execute such grants and agreements in favor of Chase are made by a fiduciary which is not included among, and is independent of, the Lenders and Chase.

Summary of Facts and Representations

1. The Partnership is a limited partnership the general partner of which is LF Strategic Realty Investors L.L.C. (the General Partner). The General Partner is a New York limited liability company, and all outstanding membership interests in the General Partner are owned by Lazard Freres and Company, L.L.C. (Lazard) or its affiliates; the managers of the General Partner are individuals employed by the General Partner. The General Partner (or an affiliate) will contribute not less than $20,000,000 to the Partnership. The Partnership has been created specifically to invest in a select portfolio of leading real estate companies (the Selected Companies) which are diversified as to property type and geographic location, and which have established track records, experienced management, and large portfolios of high quality real estate assets. The Partnership will have a maximum term of 10 years, but it is intended that each real estate investment (an Investment) will be liquidated within five to seven years.

2. The General Partner intends to raise a maximum of $650,000,000 of subscriptions for limited partnership interests. The minimum capital commitment (or subscription amount) for each investor in the Partnership (an Investor) is $25,000,000. Capital committed by an Investor pursuant to a subscription agreement (the Subscription Agreement) will be called (a Called Contribution) by the General Partner from time to time as needed to be invested in Investments. Investors will be obligated to fund their subscription amounts pursuant to calls during a three- year period; the General Partner may extend this period for an additional year, but at the end of the period, the subscription agreements will be terminated and no further capital calls may be made thereunder. There are currently 10 Investors having irrevocable, unconditional capital commitments of at least $645,000,000.

3. It is contemplated that the General Partner will incur indebtedness to pay the Partnership's general costs and expenses incurred in connection with many of its investments. In addition, the Partnership may utilize borrowings from third parties (a) for the acquisition of particular investments and for working capital purposes (with the expectation that such acquisition indebtedness will be repaid from the Investors' capital commitments and/or from mortgage debt), and (b) financing and/or credit enhancement in connection with proposed Investments, including providing financing to or on behalf of Selected Companies. This indebtedness will take the form of a credit facility (the Credit Facility) secured by a pledge and assignment of each Investor's capital commitments and by a security in the Investors' Partnership interests. This type of facility will allow the General Partner to consummate Investments quickly without having to finalize the debt/equity structure for an Investment or having to arrange for interim or permanent financing prior to making an Investment. In connection with this Credit Facility, each of the Investors is required to execute documents customarily required in secured financings, including an agreement to unconditionally honor capital calls.

4. Chase will become agent for a group of Lenders providing the Credit Facility to the Partnership. Chase will also be a participating Lender. Repayments will be made generally by the Partnership from Called Contributions, the Investors' capital commitments, proceeds from mortgage financings and proceeds from liquidation of the Partnership's Investments. The Credit Facility is intended to be a 32-month revolving credit with restricted availability levels. The Partnership can use its credit under the Credit Facility either by direct or indirect borrowings or by requesting that letters of credit be issued. All Lenders will participate on a pro rata basis with respect to all cash loans and letters of credit. All such loans and letters of credit will be issued to the Partnership or an entity in which the Partnership owns an interest (a Qualified Borrower), and not to any individual Investor. All payments of principal and interest made by the Partnership or a Qualified Borrower will be allocated pro rata among all Lenders. The applicant represents that the aggregate capital commitments to be pledged will be at least three times the maximum amount of the credit available under the Credit Facility.

5. The stated maturity date for the Credit Facility will be September 30, 1998. Until that time, interest only is payable on the Facility. At the maturity date, the entire unpaid principal balance of the Credit Facility will be due and payable, unless the Credit Facility is extended. The Credit Facility will be a limited recourse obligation of the Partnership, the repayment of which is secured primarily by the assignment by the Partnership of a security interest in both the Investors' capital commitments and the General Partner's right to make capital calls. The capital commitments are fully recourse to all the Investors and the General Partner.

The General Partner's right to make capital calls will be assigned by the Partnership and General Partner to Chase, as agent under the Credit Facility for the benefit of the Lenders. In the event of default under the Credit Facility, the agent has the right to unilaterally make capital calls on the Investors to pay their unfunded capital commitments, and will apply cash received from such capital calls to any outstanding debt.

6. Under the Credit Facility, it is contemplated that each Investor will execute a security agreement (the Security Agreement) pursuant to which it grants to Chase, for the benefit of each Lender, a security interest and a lien in its Partnership interest. In addition, each Investor will covenant with Chase for the benefit of the Lenders that such Investor will unconditionally honor any capital call made by Chase in accordance with the Subscription Agreement up to the unfunded capital commitment of such Investor.

7. The trusts which hold assets of the Plans (the Trusts) own limited partnership interests as Limited Partners in the Partnership. Some of the Lenders may be parties in interest with respect to some of the Plans in the Trusts by virtue of such Lenders' (or their affiliates') provisions of fiduciary services to such Plans with respect to Trust assets other than the Partnership interests. Chase is requesting an exemption to permit the Trusts to enter into the Security Agreements under the terms and conditions described herein. The Plans and the other Limited Partners with the largest interests in the Partnership and the extent of their respective capital commitments to the Partnership are described as follows:

(a) *Alcoa Master Trust.* The Alcoa Master Trust holds the assets of 13 defined benefit plans (the Alcoa Plans). The total number of participants is approximately 33,000, and the approximate fair market value of the total assets of the Alcoa Plans held in the Master Trust as of December 31, 1995 is $3.6 billion. The fiduciary of the Alcoa Plans generally responsible for investment decisions is the Benefit Investment Committee, which is responsible for reviewing and authorizing the investment in the Partnership to which this proposed exemption relates. The Alcoa Master Trust has made a capital commitment of $25 million to the Partnership.

(b) *Polaroid Pension Trust.* The Polaroid Pension Trust holds the assets of the Polaroid Pension Plan, a defined benefit plan with 13,775 participants and assets of approximately $760 million. The fiduciary of the Polaroid Pension Trust responsible for reviewing and authorizing the investment in the Partnership to which this proposed exemption relates is Polaroid Fund Manager. The Polaroid Pension Trust has undertaken a $25 million capital commitment to the Partnership.

(c) *NYNEX Master Pension Trust.* The NYNEX Master Pension Trust holds the assets of the NYNEX Pension Plan and the NYNEX Management Pension Plan, both defined benefit plans. As of December 31, 1994, the NYNEX Pension Plan had 97,498 participants and approximately $6.6 billion in total assets. The NYNEX Management Pension Plan had 49,880 participants and approximately $7 billion in assets as of December 31, 1994. The fiduciary of the NYNEX Master Pension Trust generally responsible for investment decisions is Mr. Frederick V. Salerno, (Chief Financial Officer/Business Development of NYNEX Corporation). Mr. Salerno is the fiduciary responsible for reviewing and authorizing the investment in the Partnership to which this proposed exemption relates. The NYNEX Master Pension Trust has undertaken a $25 million capital commitment to the Partnership.

(d) *General Motors.* General Motors Corporation has established the Third Plaza Trust (the TP Trust) of which Mellon Bank, N.A. is the trustee, and the Fourth Plaza Trust (the FP Trust), of which Mellon Bank, N.A. is also the trustee, to hold, manage and invest funds for various Plans (the GM Plans). The GM Plans are as follows:

(1) The General Motors Hourly Plan (the GM Hourly Plan), a defined benefit plan with 609,669 participants as of September 30, 1995, and assets with a total value of approximately 37.8 billion dollars on that date. Assets of the GM Hourly Plan are held in the TP Trust. Assets of the Saturn Individual Retirement Plan for Represented Team Members (a defined benefit plan with 7,138 participants as of September 30, 1995), the Saturn Personal Choices Retirement Plan for Non-Represented Team Members (a defined benefit plan with 1,977 participants as of September 30, 1995), the Employees' Retirement Plan for GMAC Mortgage Corporation (a defined benefit plan with 3,106 participants as of December 31, 1995), the National Car Rental System Inc. Hourly Paid Employees Pension Plan (a defined benefit plan with 3,106 participants as of December 31, 1994) and the National Car Rental System Inc. Salaried Employees Pension Plan (a defined benefit plan with 1,439 participants as of December 31, 1994) are also held in the TP Trust. The TP Trust has undertaken a $75 million commitment to the Partnership.

(2) The General Motors Retirement Program for Salaried Employees (the Salaried Plan), a defined benefit pension plan with 218,299 participants as of September 30, 1995, and assets with a total value of approximately 21.7 billion dollars as of that date. Assets of the GM Salaried Plan are held in the FP Trust. The FP Trust has undertaken a total capital commitment of $75,000,000 to the Partnership.

The fiduciary responsible for authorizing and overseeing the GM Plans' investment in the Partnership and, subsequently, for monitoring such investment, is the General Motors Investment Management Corporation (GMIMC). GMIMC is a separately incorporated, wholly owned subsidiary of General Motors Corporation.

(e) The applicant represents that as of the date of the filing of its application for the exemption proposed herein, the only Plans which are Investors are described in paragraphs (a) through (d) above, or are eligible for relief under Prohibited Transaction Exemption 96–23 (PTE 96–23, 61 FR 15975, April 10, 1996), the class exemption for transactions determined by in-house asset managers.[8] The applicant represents that it is possible that one or more other Plans may become Investors at some time in the future, and requests relief for any such Plan under the exemption proposed herein, provided the Plan meets the standards and conditions set forth herein.

8. Investors which are not ERISA-covered plans:

(a) California State Teachers Retirement System, which has undertaken a total capital commitment of $150,000,000;

(b) Commonwealth of Pennsylvania Public School Employees' Retirement System, which has undertaken a total capital commitment of $150,000,000;

(c) New York State Common Retirement Fund, which has undertaken a total capital commitment of $50,000,000;

(d) Public Employees' Retirement Association of Colorado, which has undertaken a total capital commitment of $50,000,000; and

(e) Lazard Freres Real Estate Investors, which has undertaken a total capital commitment of $20,000,000.

9. Chase represents that the Partnership has obtained an opinion of counsel that the Partnership will constitute a ''venture capital operating

[8] The Department expresses no opinion herein with respect to the applicability of PTE 96–23 to any such Plans.

company'' under the Department's plan asset regulations [29 CFR 2510.3-101(c)] if the Partnership is operated in accordance with the Subscription Agreement and the private placement memorandum distributed in connection with the private placement of the limited partnership interests.[9]

10. Chase represents that the Security Agreement constitutes a form of credit security which is customary among financing arrangements for real estate limited partnerships, wherein the financing institutions do not obtain security interests in the real property assets of the partnership. Chase also represents that the obligatory execution of the Security Agreement by the Investors for the benefit of the Lenders was fully disclosed in the Offering as a requisite condition of investment in the Partnership during the private placement of the limited partnership interests. Chase represents that the only direct relationship between any of the Investors and any of the Lenders is the execution of the Security Agreements. All other aspects of the transaction, including the negotiation of all terms of the Facility, are exclusively between the Lenders and the Partnership. Chase represents that the proposed executions of the Security Agreements will not affect the abilities of the Trusts to withdraw from investment and participation in the Partnership. The only Plan assets to be affected by the proposed transaction are each Plan's limited partnership interests in the Partnership and the related Plan obligations as Investors to respond to drawdowns up to the total amount of each Plan's capital commitment to the Partnership.

11. Chase represents that neither it nor any Lender acts or has acted in any fiduciary capacity with respect to any Trust's investment in the Partnership and that Chase is independent of and unrelated to those fiduciaries (the Trust Fiduciaries) responsible for authorizing and overseeing the Trusts' investments in the Partnership. Each Trust Fiduciary represents independently that its authorization of Trust investment in the Partnership was free of any influence, authority or control by the Lenders. The Trust Fiduciaries represent that the Trust's investments in and capital commitments to the Partnership were made with the knowledge that each Investor would be required subsequently to grant a security interest in the Partnership to the Lenders and to honor drawdowns made on behalf of the Lenders without recourse to any defenses against the General Partner. Each Trust Fiduciary individually represents that it is independent of and unrelated to Chase and the Lenders and that the investment by the Trust for which that Trust Fiduciary is responsible continues to constitute a favorable investment for the Plans participating in that Trust and that the execution of the Security Agreement is in the best interests and protective of the participants and beneficiaries of such Plans.

12. In summary, the applicants represent that the proposed transactions satisfy the criteria of section 408(a) of the Act for the following reasons: (1) The Plans' investments in the Partnership were authorized and are overseen by the Trust Fiduciaries, which are independent of the Lenders; (2) None of the Lenders have any influence, authority or control with respect to the Plans' investments in the Partnership or the Plans' executions of the Security Agreements; and (3) The Trust Fiduciaries invested in the Partnership on behalf of the Plans with the knowledge that the Security Agreements are required of all Limited Partners investing in the Partnership.

FOR FURTHER INFORMATION CONTACT: Gary H. 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 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 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 24th day of December, 1996.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 96–33183 Filed 12–27–96; 8:45 am]

BILLING CODE 4510–29–P

INTERNATIONAL BOUNDARY AND WATER COMMISSION

Notice of Public Meeting

AGENCY: Border Environment Cooperation Commission (BECC).

SUMMARY: This notice announces the 11th public meeting of the BECC Board of Directors on Tuesday, February 11, 1997, from 9:00 am–1:00 pm, at the Camino Real Hotel, located at 101 S. El Paso St., in downtown El Paso, Texas.

FOR FURTHER INFORMATION CONTACT: M.R. Ybarra, Secretary, United States Section, International Boundary and Water Commission, telephone: (915) 534–6698; or Tracy Williams, Public Outreach Coordinator, Border Environment Cooperation Commission, P.O. Box 221648, El Paso, Texas 79913, telephone: (011–52–16) 29–23–95; fax: (011–52–16) 29–23–97; e-mail: becc@cocef.interjuarez.com.

SUPPLEMENTARY INFORMATION: The U.S. Section, International Boundary and

[9] The Department expresses no opinion herein as to whether the Partnership will constitute a venture capital operating company under the regulations at 29 CFR 2510.3–101.

Water Commission, on behalf of the Border Environment Cooperation Commission (BECC), cordially invites the public to attend the 11th Public Meeting of the Board of Directors on Tuesday, February 11, 1997, from 9:00 am–1:00 pm, at the Camino Real Hotel, located at 101 S. El Paso St., in downtown El Paso, Texas.

Proposed Agenda

9:00 am—Opening of Public Meeting
—Approval of Minutes (Action Item)
—Approval of Proposed Agenda (Action Item)
Managers Report
—Status of Project Certification Criteria
Presentation of Project Development Assistance Program
—Public Comment
—Board Consideration (Action Item)
Presentation of Policy on Build, Operate, Transfer Projects
—Public Comment
—Board Consideration (Action Item)
Presentation on the Proposed Procedures Regarding Complaints
—Public Comment
—Board Consideration (Action Item)

General Comments

1:00 pm—Adjourn

Anyone interested in submitting written comments to the Board of Directors on any agenda item should send them to the BECC 15 days prior to the public meeting. Anyone interested in making a brief statement to the Board may do so during the public meeting.

Dated: December 23, 1996.

M.R. Ybarra,

Secretary, U.S. IBWC.

[FR Doc. 96–33101 Filed 12–27–96; 8:45 am]

BILLING CODE 4710–03–P

NATIONAL CREDIT UNION ADMINISTRATION

Community Development Revolving Loan Program for Credit Unions; Notice

AGENCY: National Credit Union Administration.

ACTION: Notice of application period.

SUMMARY: The National Credit Union Administration (NCUA) will accept applications for participation in the Community Development Revolving Loan Program for Credit Unions throughout calendar year 1997, subject to availability of funds. Application procedures for qualified low-income credit unions are set forth in Part 705, NCUA Rules and Regulations.

ADDRESSES: Applications for participation may be obtained from and should be submitted to: NCUA, Office of Community Development Credit Unions, 1775 Duke Street, Alexandria, VA 22314–3428.

DATES: Applications may be submitted throughout calendar year 1997.

FOR FURTHER INFORMATION CONTACT: The Office of Community Development Credit Unions at the above address or telephone (703) 518–6610.

SUPPLEMENTARY INFORMATION: Part 705 of the NCUA Rules and Regulations implements the Community Development Revolving Loan Program for Credit Unions. The purpose of the Program is to assist officially designated ‘‘low-income’’ credit unions in providing basic financial services to residents in their communities which result in increased income, ownership and employment. The Program makes available low interest loans and deposits in amounts up to $300,000 to qualified participating ‘‘low-income’’ credit unions. Program participation is limited to existing credit unions with an official ‘‘low-income’’ designation.

This notice is published pursuant to Part 705.9 of the NCUA Rules and Regulations which states that NCUA will provide notice in the Federal Register when funds in the program are available.

By the National Credit Union Administration Board on December 19, 1996.

Becky Baker,

Secretary, NCUA Board.

[FR Doc. 96–33044 Filed 12–27–96; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The National Endowment for the Arts, 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. 3506(c)(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 collect requirements on respondents can be properly assessed. Currently, the National Endowment for the Arts is soliciting comments concerning the proposed information collection of: Blanket Justification for NEA Funding Application Guidelines FY 1998–FY 2001. A copy of the current information collection request can be obtained by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before February 289, 1997. The National Endowment for the Arts is particularly interested in comments which:

- 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;
- 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: A.B. Spellman, National Endowment for the Arts, 1100 Pennsylvania Avenue, N.W., Room 516, Washington, DC 20506–0001, telephone (202) 682–5421 (this is not a toll-free number), fax (202) 682–5049.

Murray Welsh,

Director, Administrative Services.

[FR Doc. 96–33055 Filed 12–27–96; 8:45 am]

BILLING CODE 7536–01–M

NATIONAL SCIENCE FOUNDATION

Submission for OMB Review: Comment Request

Title of Proposed Collection: National Survey of Recent College Graduates

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 National Science Foundation (NSF) will publish periodic summaries of proposed projects. Such a notice was published at

Federal Register 51723. No comments were received.

The materials are now being sent to OMB for review. Send any written comments to Desk Officer, OMB, 3145–0177, OIRA, OPMB, Washington, DC 20503. Comments should be received by February 8, 1997.

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

The National Survey of Recent College Graduates (NSRCG), formerly called the New Entrants Survey, has been conducted biennially since 1974. For the 1997 cycle, bachelor's and master's degree recipients in science and engineering from the academic years 1994–95 and 1995–96 will be surveyed. The purpose of the study is to provide national estimates describing the relationship between education and employment for new science and engineering graduates. The study is one of three components of the Scientists and Engineers Statistical Data System (SESTAT), formerly called the Scientific and Technical Personnel Data System (STPDS). In 1997, the NSRCG survey effort will also include a Follow-up panel survey of graduates that received their degrees between 1991 and 1994, inclusive. The purpose of the Follow-up panel survey is to create a historical data set on the same individual permitting longitudinal analysis.

The National Science Foundation Act of 1950, as subsequently amended, includes a statutory charge to ''. . . provide a central clearinghouse for the collection, interpretation, and analysis of data on scientific and engineering resources, and to provide a source of information for policy formulation by other agencies of the Federal Government.'' The National Survey of Recent College Graduates is designed to comply with these mandates by providing information on the supply and utilization of newly qualified scientists and engineers. Collected data will be used to produce estimates of the characteristics of new graduates entering the science and engineering labor force. They will also provide necessary input into the SESTAT labor force model, which produces national estimates of the size and characteristics of the country's science and engineering population. The Foundation uses this information to prepare congressionally mandated reports such as *Women and Minorities in Science and Engineering* and *Science and Engineering Indicators*. A public release file of collected data, designed to protect respondent confidentiality, will be made available to researchers on CD–ROM and on the World Wide Web.

To conduct the study, lists of 1994–95 and 1995–96 science and engineering bachelor's and master's degree recipients will be collected from a nationally representative sample of 275 institutions awarding such degrees. The United States Department of Education's Family Policy Compliance Office has reviewed the study's goals and procedures and concluded that postsecondary institutions may provide these lists without violating the Family Education Rights and Privacy Act of 1976 (FERPA). From the collected lists, a sample of approximately 13,500 graduates will be selected for the NSRCG and 14,000 graduates will be selected for the Follow-up panel survey. The sample design includes oversampling of minority graduates and varying sampling rates to represent specific fields of science and engineering. Sample members will be requested to complete a 30 minute interview conducted by telephone and/or mail. The survey will be collected in conformance with the Privacy Act of 1974. Each graduate's participation will be entirely voluntary. NSF will insure that all information collected will be kept strictly confidential and will be used only for research or statistical purposes, analyzing data, and preparing scientific reports and articles.

The graduate sample size for the NSRCG for two academic years covered by this survey cycle (1994–95 and 1995–96) is estimated to be 13,500. An unweighted graduate response rate of 85 percent is anticipated (86 percent was obtained on the previous cycle). The graduate sample size for the Follow-up panel survey is estimated to be 14,000. An unweighted graduate response rate of 95 percent is anticipated for the Follow-up panel survey. The amount of time required to complete the questionnaire is estimated to be 30 minutes for both the NSRCG and the Follow-up panel survey.

Dated: December 23, 1996.

Herman G. Fleming,

NSF Clearance Officer.

[FR Doc. 96–33042 Filed 12–27–96; 8:45 am]

BILLING CODE 7555–01–M

SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC—22414; 812—10448]

PIMCO Advisors Funds, et al.; Notice of Application

December 20, 1996.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANTS: PIMCO Advisors Funds (''PAF''), Cash Accumulation Trust (''CAT''), PIMCO Funds, and PIMCO Funds: Equity Advisors Series (''PFEAS'') (collectively, the ''Funds''), PIMCO Advisors L.P. (''PALP'').

RELEVANT ACT SECTIONS: Order requested under section 6(c) of the Act for an exemption from sections 13(a)(2), 13(a)(3), 17(a)(1), 18(f)(1), 22(f) and 22(g) of the Act and rule 2a–7 thereunder and pursuant to section 17(d) of the Act and rule 17d–1 thereunder.

SUMMARY OF APPLICATION: Applicants request an order to amend a prior order (the ''Order'') [1] that permitted certain entities to enter into deferred fee arrangements with certain of their trustees. The requested order would extend the relief granted in the Order to PALP, PIMCO, Funds, PFEAS and other open-end investment companies in the same ''group of investment companies'' as the Funds, as that term is defined under Rule 11a–3 under the Act, or any other registered open-end investment company for which PALP, or any entity controlling, controlled by, or under common control with PALP, serves as investment adviser.[2]

FILING DATE: The application was filed on November 27, 1996 and amended on December 19, 1996.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be

[1] *Thompson Fund Group*, Investment Company Release Nos. 18894 (Aug. 14, 1992) (notice) and 18939 (Sept. 9, 1992) (order).

[2] All currently existing investment companies that currently intend to rely on the amended order are named as applicants herein.

received by the SEC by 5:30 p.m. on January 14, 1997, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Newton B. Schott, Jr., PIMCO Advisors L.P. 2187 Atlantic Street, Stamford, CT 06902.

FOR FURTHER INFORMATION CONTACT: Suzanne Krudys, Senior Attorney, at (202) 942–0641, or Mercer E. Bullard, Branch Chief, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

Applicants' Representation

1. PAF, CAT, PIMCO Funds and PFEAS are registered as open-end management series investment companies and organized as Massachusetts business trust currently consisting of 16, 1, 19 and 14 separate investment portfolios, respectively.

2. PALP is organized as a Delaware limited partnership and is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''). PALP serves as investment adviser to PAF, CAT and PFEAS. The general partner of PALP is Pimco Partners G.P., a general partnership between an indirect wholly owned subsidiary of Pacific Mutual Life Insurance Company and PIMCO Partners, LLC, a limited liability company controlled by the managing directors of Pacific Investment Management Company (''PIMCO''). PIMCO, an affiliate and subsidiary partnership of PALP, is registered as an investment adviser under the Advisers Act and serves as investment adviser to PIMCO Funds.

3. On September 9, 1992, the SEC issued the Order pursuant to section 6(c) exempting Thomson Fund Group (''TFG'') (predecessor of PAF), CAT, and Thomson Advisory Group L.P. (''TAG'') (predecessor of PALP) and any registered investment companies for which TAG subsequently serves as adviser from the provisions sections 13(a)(2), 17(a)(1), 18(f)(1), 22(f) and 22(g) and rule 2a–7 and, with respect to the Thomson U.S. Government Fund only (predecessor of PAF U.S. Government Fund), from Section 13(a)(3), and under section 17(d) and rule 17d–1 to permit TFG and CAT to offer deferred compensation arrangements to their trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act.

4. In November 1994, the investment advisory businesses of TAG and its affiliates were consolidated with the investment advisory businesses of Pacific Financial Asset Management Corporation (''PFAMCo''), then a wholly owned subsidiary of Pacific Mutual, which included the investment advisory businesses of PIMCO (the ''Consolidation''). The Consolidation involved the transfer of the investment advisory operations of PFAMCo and its subsidiaries to TAG in return for units of limited partnership interest of TAG and the substitution of PIMCO Partners G.P. for the former general partner of TAG. TAG as a legal entity survived the Consolidation and was subsequently renamed PIMCO Advisors L.P. (''PALP'').

5. In order to ensure that PALP, PIMCO Funds, PFEAS and all funds advised by PALP, of any entity controlling, controlled by, or under common control with PALP may rely on the Order, applicants request that the Order be amended to make the relief available not only to investment companies advised by PALP, but also to any open-end investment company in the same ''group of investment companies'' as the Funds, within the meaning of Rule 11a–3 under the Act and any other open-end investment company for which PALP, or any entity controlling, controlled by, or under common control with PALP, serves as investment adviser. The immediate effect of the amendment would be to render the relief granted in the Order available to PIMCO Funds, should its trustees elect to participate in the deferred compensation plan.

Applicants Legal Analysis

1. Section 6(c) of the Act provides that the SEC may exempt a person, transaction or class of transactions from any provision of the Act or any rule thereunder, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

2. Section 17(d) of the Act and rule 17d–1 thereunder prohibit an affiliated person of an investment company, acting as principal, from participating in or effecting any transaction in connection with any joint enterprises or joint arrangement in which the investment company participates. Rule 17d–1 permits the SEC to approve a proposed joint transaction. In determining whether to approve a transaction, the SEC is to consider whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the participation of the investment companies is on a basis different from or less advantageous than that of the other participants.

3. Applicants confirm the arguments made in the original application under the Order and confirm that the terms of applicants' request for an amended order are consistent with the provisions, policies and purposes of the Act, that the requested exemption are necessary or appropriate in the public interest and consistent with the protection of investors, and that each Fund's participation in the proposed arrangements is on a basis no different from or less advantageous than that of any other participant.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. With respect to the requested relief from rule 2a–7, any money market series of a Fund that values its assets using the amortized cost method or the penny rounding method will buy and hold the Underlying Securities that determine the performance of Deferred Fee Accounts to achieve an exact match between such series' liability to pay deferred fees and the assets that offset that liability.[3]

2. If a fund purchases Underlying Securities issued by an affiliated Fund, the Fund will vote such shares in proportion to the votes of all other shareholders of such affiliated Fund.

3. Any Fund that enters into a deferred fee arrangement will comply with all of the terms of the Order.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–33057 Filed 12–27–96; 8:45 am]

BILLING CODE 8010–01–M

[3] The terms Underlying Securities and Deferred Fee Arrangement have the same meaning as under the Order.

[Release No. 34–38071; File No. SR-Amex-96–49]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange, Inc. Relating to Amendments to Rule 117 (Circuit Breakers)

December 20, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 16, 1996, the American Stock Exchange, Inc. (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Amex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to amend Exchange Rule 117 to increase circuit breaker parameters. The Exchange proposes to implement the revised parameters. The Exchange proposes to implement the revised parameters on a one-year pilot basis.

The text of the proposed rule change is available at the Office of the Secretary, the Amex, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of the basis for the proposed rule change and discussed any comments in received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In conjunction with other major exchanges, the Amex filed a proposal (SR-Amex-88–24 and 88–31) in October 1988 to implement trading halts during significant market declines (generally referred to as ''circuit breakers''). Exchange circuit breaker procedures under Amex Rule 117 have been extended most recently by the Commission until April 30, 1997.[1] Amex Rule 117, as amended [2] provides for temporary halts in the trading of all stocks, stock options and index options on the Exchange for one-half hour if the Dow Jones Industrial Average [3] (''DJIA'') declines 250 points or more form the previous day's closing value and for one hour if the DJIA declines 400 points from the previous close. The Exchange proposes to amend Rule 117 to increase the parameters that would trigger the 30 minute and one hour halt in trading to 350 points and 550 points, respectively. The Exchange believes these parameters constitute significant market declines, and represent appropriate levels at which to halt trading. The Amex proposes that these changes be implemented on a one-year pilot basis.

The adoption of amendments to Exchange Rule 117 would be contingent upon the adoption of amended rules or procedures substantively identical to Rule 117 by:

(1) All United States stock exchanges and the National Association of Securities Dealers, Inc. with respect to the trading of stocks, stock options and stock index options; and,

(2) All United States futures exchanges with respect to the trading of stock index futures and options on such futures.

The Exchange believes that a trading halt requirement at appropriate levels across all markets will promote stability and investor confidence during periods of significant stress by providing market participants with a reasonable opportunity to become aware of and respond to significant price movements, thereby facilitating in an orderly manner the maintenance of an equilibrium between buying and selling interest.

2. Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and furthers the objectives of Section 6(b)(5) in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

[1] *See* Securities Exchange Act Release No. 37890 (October 29, 1996), 61 FR 56983 (November 5, 1996).

[2] *See* Securities Exchange Act Release No. 37460 (July 19, 1996), 61 FR 39169 (July 26, 1996).

[3] ''Dow Jones Industrial Average'' is a service mark of Dow Jones & Company, Inc.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–96–49 and should be submitted by January 21, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

[4] 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 96–33060 Filed 12–27–96; 8:45 am]
BILLING CODE 8010–01–M

[Release No. 34–38069; File No. SR–NASD–96–44]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by National Association of Securities Dealers, Inc. Extending the Pilot Injunctive Relief for an Additional Year

December 20, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 9, 1996, NASD Regulation, Inc., (''NASD Regulation'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II and III, below, which Items have been prepared by NASD Regulation. On December 17, 1996, NASD Regulation submitted an amendment (''Amendment No. 1'') to the proposed rule change.[2] On December 18, 1996, NASD Regulation submitted a second amendment (''Amendment No. 2'') to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation is herewith filing a proposed rule change to extend for one year the pilot injunctive relief rule, Rule 10335 (formerly Section 47) of the Code of Arbitration Procedure (''Code'').

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD Regulation 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 III below. NASD Regulation has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

NASD Regulation's injunctive relief rule, Rule 10335 of the Code, provides a procedure for obtaining injunctive relief in arbitration and for expediting proceedings for injunctive relief in intra-industry disputes. Rule 10335 took effect on January 3, 1996, for a one-year pilot period. In its filing with the Commission, the NASD stated that at the end of the one-year pilot program it would evaluate the efficacy of the Rule to determine if the Rule should be made permanent, the pilot should be extended, or the Rule should be permitted to terminate by its terms.

Between January 3 and December 5, 1996, 237 cases were filed with the NASD seeking injunctive relief under Rule 10335. All of the cases under Rule 10335 involved disputes between member firms and their former registered representative employees (often referred to as ''raiding'' cases). Of those, 147 settled, 21 were withdrawn, and 56 are pending. The remaining cases were either not eligible for resolution in the NASD's forum (2), closed after a hearing (6) , inactive (4), or could not be processed because of deficiencies in the claim that were not corrected (1). The details concerning cases filed up to September 19, 1996, and the comments solicited by NASD Regulation from some users of the procedures, are set forth in a report from NASD Regulation to the Commission submitted on October 11, 1996. Additional comments were received after October 11, 1996. The report and additional comments may be examined at the places specified in Item III below.

On the basis of NASD Regulation's experience and the comments of the participants, NASD Regulation believes that the procedures set forth in Rule 10335 represent a significant improvement to the procedures for resolving intra-industry disputes; however, NASD Regulation also believes that additional experience with the Rule is necessary to evaluate adequately how the Rule could be improved to meet the needs of the participants more effectively.

Accordingly, NASD Regulation is proposing to extend the injunctive relief Rule as a pilot program for another year. During the next year NASD Regulation will review the comments solicited, will solicit additional comments in a Notice to Members, and will develop modifications or interpretations of the Rule in response thereto.

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[4] in that extending the effectiveness of the injunctive relief procedures will serve the public interest by enhancing the satisfaction with the arbitration process afforded by expeditious resolution of certain disputes.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NASD Regulation did not solicit comments with respect to extending the pilot program. Instead, comments have been solicited in order to aid NASD Regulation in developing changes to the Rule in anticipation of seeking permanent adoption. Those comments are contained in Exhibits 2 and 3 to the filing. Accordingly, NASD Regulation will address these comments, and any additional comments that may be received, in connection with any rule filing seeking to make the Rule a permanent addition to the Code.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room Copies of such filing will also be

[1] 15 U.S.C. § 78s(b)(1).

[2] Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, Inc., to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated December 13, 1996 (indicating final action on the proposed rule change by the NASD Board of Governors).

[3] Letter from Alden S. Adkins, Vice President and General Counsel, NASD Regulation, Inc., to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated December 17, 1996 (amending filing to: (1) set forth the language of Rule 10335; (2) amend paragraph (i) of the Rule to show the effective date of the Rule; (3) request accelerated approval of the proposed rule change).

[4] 15 U.S.C. § 78*o–3*.

available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR–N–NASD–96–44, and should be submitted by January 21, 1997.

IV. The Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has reviewed carefully the proposed rule change of NASD Regulation, and concludes that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities association, and particularly with Section 15A(b)(6) of the Act.

Rule 10335 is intended to provide a pilot system within the NASD arbitration forum to process requests for temporary injunctive relief. The Rule is intended principally to facilitate the disposition of employment disputes and related disputes concerning whether registered representatives who move to other firms may transfer their accounts to their new firms. The Commission finds that it is appropriate to extend the pilot for one year. During that time, the Commission and NASD Regulation will be able to evaluate the success of the Rule, to solicit additional comments, to develop modifications or interpretations of the Rule in response to these comments, and to determine whether to extend the pilot further or to make the Rule permanent.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the Federal Register. The Commission believes that it is appropriate to approve the proposed rule change on an accelerated basis so that members can continue to have the benefit of injunctive relief in arbitration without interruption. The Rule was previously available through the pilot, and the Commission is extending the pilot only for one year. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is appropriate and consistent with Section 15A of the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that File No. SR–NASD–93–44, as amended, be, and hereby is, approved on a one-year pilot basis, effective January 3, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–33058 Filed 12–27–96; 8:45 am]

BILLING CODE 8010–01–M

[5] 17 CFR 200.30–3(a)(12).

[Release No. 34–38070; File No. SR–OCC–96–19]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Expiration Time and Assignment Processing Procedures for Certain Flexibly Structured Foreign Currency Options

December 20, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 17, 1996, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (File No. SR–OCC–96–19) as described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to change the expiration time and assignment processing procedures for certain flexibly structured foreign currency options.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments that it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change will change the expiration time and assignment processing procedures for certain flexibly structured foreign currency options, including certain flexibly structured cross-rate foreign currency options. Specifically, flexibly structured foreign currency options and flexibly structured cross-rate foreign currency option (collectively referred to as ''flexibly structured FCOs'') listed for trading after January 14, 1997, and expiring on or after April 1, 1997, will expire at 10:15 a.m. Eastern Time (''ET'') instead of 11:59 p.m. ET. Furthermore, OCC propose that all flexibly structured FCOs will be subject to pro rata assignment.

The Philadelphia Stock Exchange (''PHLX'') presently trades two types of flexibly structured FCO contracts. They are (1) flexibly structured FCOs for which market participants do not specify an expiration date (''standard flex FCOs'') which expire on standard mid-month and end-of-month expiration dates at 11:59 p.m. ET (expiration time is consistent with standard foreign currency option); and (2) custom dated flexibly structured FCOs (''custom dated flex FCOs'') for which market participants specify the expiration date and which expire at 10:15 a.m. ET on that expiration date. Exercise notices regarding standard flex FCOs are subject to random assignment processing while pro rata assignment processing is applied to exercise notices regarding custom dated flex FCOs.

PHLX has requested that OCC modify its rules to provide that the expiration time for both types of flexibly structured FCOs be 10:15 a.m. ET on their expiration date, and that exercises in respect thereof be assigned pursuant to OCC's pro-rata procedures.[3] PHLX also has requested that this change be effective for any standard flex FCOs listed for trading after January 14, 1997, with an expiration on or after April 1, 1997. Accordingly, any standard flex FCO contract established on or before January 14, 1997, will expire at 11:59 p.m. ET and be subject to a random assignment process. Currently, there is open interest in standard flex FCO contracts expiring mid-month and end-of-month for the months of March, April, July, September, and October 1997.[4] Since existing standard flex

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries submitted by OCC.

[3] The Commission has already approved a proposed rule change by PHLX regarding the expiration time and assignment procedures for flexibly structured FCOs. Securities Exchange Act Release No. 37718 (September 24, 1996), 61 FR 51479 [File No. SR–PHLX–96–13] (order approving a proposed rule change concerning the trading hours and expiration times for customized foreign currency options).

[4] Notwithstanding the above, PHLX has indicated that it may ask holders of existing series to direct OCC to adjust the expiration time so that such

Continued

FCOs will be exempt from the new proposed procedures, OCC may be required to run two separate processing cycles, one in the morning and one in the evening. OCC has represented to the Commission that running two separate processing cycles will not adversely affect OCC. Additionally, OCC believes that the change in assignment processing is merely a change in OCC's procedures and does not affect the methodologies of either the random or pro rata assignment process.

OCC is proposing to amend certain definitions in its by-laws to accommodate PHLX's request.[5] The proposed changes to Section 1 of Articles I, XV, and XX of the by-laws should more accurately define the distinction between standard foreign currency options and flexibly structured foreign currency options with respect to expiration dates and times and should clarify that, but for flexibly structured FCOs established on or before January 14, 1997, all flexibly structured FCOs, whether standard flex FCOs or custom dated flex FCOs, will expire at 10:15 a.m. on the expiration date and be subject to a pro rata assignment process. In addition, Section 1.E(4)(iii) is being added to Articles XV and XX of OCC's by-laws as a transitional rule to govern the expiration time and assignment process to be used for existing standard flex FCO contracts and to exempt such standard flex FCO contracts from the proposed rule change. OCC believes that these proposed changes will create uniformity in the expiration time and assignment processing procedure for all flexibly structured FCOs.

OCC believes the proposed rule change is consistent with the requirements of Section 17A of the Act[6] because it is designed to promote the prompt and accurate clearance and settlement of securities transactions.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will impose any burden on competition.

contracts will expire at 10:15 a.m. ET with pro rata assignment. If the holders and the writers direct OCC to make these adjustments, OCC will act accordingly provided that OCC receives the proper authorizations from all parties involved.

[5] The specific changes to OCC's by-laws are set forth in OCC's proposed rule change, which is unavailable for review through OCC and the Commission's Public Reference Room.

[6] 15 U.S.C. 78q–1(b)(3)(F).

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which OCC consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the file number SR–OCC–96–19 and should be submitted by January 21, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 96–33059 Filed 12–27–96; 8:45 am]

BILLING CODE 8010–01–M

[7] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Social Security Ruling SSR 96–10p

Electronic Service Delivery

AGENCY: Social Security Administration.

ACTION: Notice of Social Security Ruling.

SUMMARY: In accordance with 20 CFR 422.406(b)(1), the Commissioner of Social Security gives notice of Social Security Ruling SSR 96–10p. This Policy Interpretation Ruling represents the Social Security Administration's (SSA) policy for allowing our customers to communicate with us electronically by our acceptance of reports, requests, applications, and other information through access methods such as the Internet, video conferencing, and dial-up phone systems. By such methods, we will be able to accept reports, requests, applications, and other information. The Ruling also sets out our policy making electronic and digital signatures the functional equivalent of traditional handwritten signatures in certain situations which will be separately specified by SSA. We call these efforts to provide electronic service options to our customers electronic service delivery (ESD).

This Ruling facilitates our attempts to better serve our customers through the use of electronic service delivery technologies. It is not our intention that customers must conduct business with us electronically. Rather, we are providing our customers with an optional way of doing business while ensuring that the information communicated through ESD methods is as secure and reliable as it is technologically possible and feasible to make it for SSA's activities.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Joanne K. Castello, Division of Regulations and Rulings, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965–1711.

SUPPLEMENTARY INFORMATION: Although we are not required to do so pursuant to 5 U.S.C. 552(a)(1) and (a)(2), we are publishing this Social Security Ruling in accordance with 20 CFR 422.406(b)(1).

Social Security Rulings make available to the public precedential orders, opinions, and statements of policy and interpretations adopted by SSA relating to the Federal old-age, survivors, disability, supplemental security income, and black lung benefits programs. Social Security Rulings may be based on case decisions made at all administrative levels of adjudication, Federal court decisions, Commissioner's decisions, opinions of the Office of the General Counsel, and other policy interpretations of the law and regulations.

Although Social Security Rulings do not have the force and effect of the law or regulations, they are binding on all components of the Social Security Administration, in accordance with 20 CFR 422.406(b)(1), and are to be relied upon as precedents in adjudicating cases.

If this Social Security Ruling is later superseded, modified, or rescinded, we will publish a notice in the Federal Register to that effect.

(Catalog of Federal Domestic Assistance, Program Nos. 96.001 Social Security—Disability Insurance; 96.002 Social Security—Retirement Insurance; 96.003 Social Security—Special Benefits for Persons Aged 72 and Over; 96.004 Social Security—Survivors Insurance; 96.005 Special Benefits for Disabled Coal Miners; 96.006 Supplemental Security Income)

Dated: December 19, 1996.

Shirley S. Chater,

Commissioner of Social Security.

Policy Interpretation Ruling Electronic Service Delivery

Purpose: This Policy Interpretation Ruling represents the Social Security Administration's (SSA) policy for allowing our customers to communicate with us electronically through access methods such as the Internet, video conferencing, and dial-up phone systems. By such methods, we will be able to accept reports, requests, applications, and other information. The Ruling also sets out our policy making electronic and digital signatures the functional equivalent of traditional handwritten signatures in certain situations which will be separately specified by SSA. We call these efforts to provide electronic service options to our customers electronic service delivery (ESD).

ESD includes the use of the specific technologies noted above, other current technologies, and future and as yet unidentified technologies which allow SSA's customers to transact business with us via Agency-approved methods. By expanding our service delivery options, we are continuing our efforts to provide world class service to our customers.

Information submitted by our customers using ESD technologies which are consistent with the principles described below and meet:

- Accepted industry standards; and
- SSA privacy, security, fraud detection and prevention, and authentication standards will be considered by SSA to be the functional equivalent of information submitted using traditional paper-based methods.

Determination of the appropriate ESD technologies for a given service will be based upon our evaluation of the sensitivity of the information, potential service impacts on our customers, and the risk factors including fraud detection, prevention, and prosecution, and cost/benefit considerations.

Authority: This Ruling is published under the authority of the Commissioner of Social Security in accordance with 20 CFR 422.406.

Part I

Introduction: As noted in the Agency's Strategic Plan [1] and described in more detail in our Business Plan,[2], SSA is expanding the service options available to our customers in new and innovative ways as technological advances allow. Agency ESD initiatives, based on proven secure technology, will provide our customers with access to SSA to conduct their business in new ways which are convenient for them and efficient for both them and SSA.

SSA has historically relied upon paper-based systems of information collection. Technological advances have reached the point where the use of electronic information collection is efficient, cost-effective, and frequently our customers' preferred method of doing business.

Paper-based information collection systems are perceived as being secure largely because they are the only information collection systems with which most individuals are familiar. The following excerpt from a law journal article provides a historical perspective of the security features of paper-based information collection:

Traditional paper-based communications accompanied by handwritten signatures provide three essential security characteristics: message integrity, originator authentication, and non-repudiation. Depending on the nature of the communication, an additional security characteristic, confidentiality, may be desired. The efficacy of the various techniques used to ensure the desired level of security in turn depends on the adequacy of the administrative controls associated with their use.

- Message integrity is the assurance that the content of a communication is complete and has not been changed prior to receipt.
- Originator authentication provides assurance that the communication originated from the named source. This is most commonly provided by the handwritten signature, or historically, by the seal of the author.
- Non-repudiation is a stronger form of authentication which relates to the ability of a disinterested third party to reasonably conclude that the identified originator intended to be bound by the substance of the communication. This function is most commonly performed by the original autograph signature affixed to a document having facially adequate message integrity.
- Confidentiality is the ability to limit access to the information contained in a communication. This has generally been accomplished with some combination of security markings, envelopes, seals, trusted messengers, and by the use of codes and ciphers.[3]

The transfer of information in traditional paper-based systems is known as ''writing.'' ESD technologies allow the transfer of information by other than traditional paper-based methods. SSA is adopting a definition of writing which is consistent with modern legal usage and includes electronic information transfer. For example, the U.S. Code includes a definition of writing which is consistent with SSA's purposes:

''[W]riting'' includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.[4]

The Federal Rules of Evidence, which apply to many of the proceedings in the Courts of the United States, define writing as follows:

''Writings'' and ''recordings'' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.[5]

This SSA policy making electronic information collection and distribution the functional equivalent of traditional handwritten information collection and distribution is in accord with U.S. law and the Federal Rules of Evidence as shown in these definitions. Accordingly, as SSA approves the use of specific ESD technologies, the products of those technologies will be considered writings by us.

Policy Interpretation: It is the policy of SSA to treat information received and distributed via Agency-approved ESD technologies as the functional equivalent of information received and

[1] SSA Pub. No. 01–001 (September 1991).

[2] SSA Pub. No. 01–008 (April 1996).

[3] Peter N. Weiss, Security Requirements and Evidentiary Issues in the Interchange of Electronic Documents: Steps Toward Developing a Security Policy, The John Marshall Journal of Computer & Information Law, Vol. XII, No. 3, pp. 431–432 (October 1993).

[4] 1 U.S.C. § 1.

[5] Fed. R. Evid. 1001(1). The Advisory Committee notes to this rule make it clear that writings can be created by mechanical or electronic techniques or other forms of information compilation.

distributed using traditional paper-based methods.

SSA's approval of ESD technologies for use by our customers will mean that the approved technologies provide a sufficient level of security and reliability that they can be an acceptable substitute for traditional paper-based information collection systems as described above, for the purpose of conducting the business of the Agency. Decisions about which ESD technologies are suitable for use with SSA will be made with appropriate input from the SSA components involved in the proposed activity.

Part II

This Policy Interpretation Ruling also addresses the use of electronic and digital signatures. Electronic and digital signatures are an integral factor in many ESD initiatives. Just as technology makes possible the electronic transmission of information for which SSA requires a signature, other technologies provide the means for a document to be ''signed'' without a traditional handwritten signature.

SSA requires a handwritten signature in only a limited number of situations (e.g., applications for benefits). The circumstances where a signature is required is an issue that is beyond the scope of this Ruling. We are expanding the meaning of the term ''signature'' to include electronic and digital methods that serve the purpose of originator identification, authentication, and non-repudiation to the extent that is technologically possible and feasible for SSA's activities.

Policy Interpretation: It is the policy of SSA that information for which SSA requires a signature may be signed using SSA-approved signature methods including handwritten, electronic, or digital methods. Approved signature methods will reasonably ensure, to the extent technologically possible and feasible for SSA's activities, that the signer can be identified and that the signer cannot later repudiate the submission of the information.

Conclusion: The early paragraphs of this Policy Interpretation Ruling listed the four essential security characteristics of paper-based information collection. These two policy interpretations were developed to ensure that the four security characteristics described earlier are maintained in all ESD technologies approved by SSA. Originator authentication and non-repudiation are addressed as aspects of the electronic and digital signature policy. Message integrity and confidentiality, although not specifically described in the policy statement endorsing ESD, are implicitly contained in the limitation statement that all ESD technologies must be approved by SSA.[6]

SSA approval of a particular ESD technology will require assurance that the technology is consistent with all appropriate laws and directives. Since the appropriate technology and levels of security will vary based upon the sensitivity of the business application, SSA's selection of the appropriate technology or technologies for a given usage will be based upon consideration of the service impacts on our customers, a risk analysis including fraud detection, prevention, and prosecution concerns, and an analysis of the costs and benefits related to the technology.

In summation, it is SSA policy that all information received and distributed via Agency-approved ESD technologies is the functional equivalent of information received and distributed using traditional paper-based methods. It is also the policy of SSA that information for which a signature is required, can be signed using electronic or digital technologies approved by SSA, provided that the electronic or digital signature reasonably ensures that the signer can be identified and that the signer cannot later repudiate the submission of the information.

These two policy interpretations are being issued to facilitate the Agency's attempts to better serve our customers through the use of ESD technologies. It is not intended that our customers always must conduct business with SSA electronically. Rather, we are providing our customers with an optional way of doing business with us while ensuring that the information provided to, or distributed by, SSA through electronic methods is as secure and reliable as it must be for the purpose for which it is used.

Effective Date: This Policy Interpretation Ruling is effective upon publication in the Federal Register.

[FR Doc. 96–33034 Filed 12–27–96; 8:45 am]

BILLING CODE 4190–29–P

[6] For a detailed description of the security features of electronic information transfers in general and digital signatures in particular see generally, M. Baum, Federal Certification Authority Liability and Policy (U.S. Dept. of Commerce, NIST–GCR–94–654 (June 1994)).

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. 96–101; Notice No. 1]

Reports, Forms, and Record keeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for public comment on proposed collections of information.

SUMMARY: This notice solicits public comments that requires each tire manufacturer to collect and maintain records of the names and addresses of the first purchasers of new tires.

Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under new procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections.

This document describes the collection of data used by a tire manufacturer, when it determines that some of its tires either fail to comply with an applicable safety standard or contain a safety-related defect, for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before February 28, 1997.

ADDRESSES: Comments must refer to the docket and notice numbers cited at the beginning of this notice and be submitted to Docket Section, Room 5109, NHTSA, 400 Seventh St. S.W., Washington, D.C. 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB Clearance Number. It is requested, but not required, that 1 original plus 2 copies of the comments be provided. The Docket Section is open on weekdays from 9:30 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Complete copies of each NHTSA request for collection of information approval may be obtained at no charge from Mr. Ed Kosek, NHTSA Information Collection Clearance Officer, NHTSA, 400 Seventh Street, S.W., Room 6123, Washington, D.C. 20590. Mr. Kosek's telephone number is (202) 366-2589. Please identify the relevant collection of information by referring to its OMB Clearance Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the Federal Register providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How 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, e.g., permitting electronic submission of responses. In compliance with these requirements, NHTSA asks public comment on the following proposed collections of information:

49 CFR Part 574, Tire Identification and Record

Type of Request—Reinstatement, with change, of a previously approved collection for which approval has expired.

OMB Clearance Number—2127–0050.

Form Number—This collection of information uses no standard form.

Requested Expiration Date of Approval—Three years from the approval date.

Summary of the Collection of Information—NHTSA requires each tire manufacturer to collect and maintain records of the names and addresses of the first purchasers of new tires. To carry out this mandate, 49 CFR Part 574 requires tire dealers and distributors to record the names and addresses of retail purchasers of new tires and the identification number(s) of the tire sold.

Description of the need for the information and proposed use of the information—The information is used by a tire manufacturer, when it determines that some of its tires either fail to comply with an applicable safety standard or contain a safety-related defect. With the information on the registration form, the tire manufacturer can notify the first purchaser of the tire and provide the purchaser with any necessary information or instructions.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)—Estimated number is 3,750,000; Frequency of response—occurs each time a tire is sold.

Estimate of the Total Annual Reporting and Record keeping Burden Resulting from the Collection of Information—747,500 hours.

NHTSA estimates that small businesses will need to spend the same 45 seconds per tire sale to register the tires as the larger businesses. It is not possible to reduce this burden further because Congress mandated that the same forms and the same procedures used to register each manufacturer's tires (49 U.S.C. 30117(b)). However, since these small businesses make fewer sales than larger dealers, they will spend less time on tire registrations. The amount of time per sale spent to register tires does not impose an undue burden on the small businesses involved.

Authority: 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Dated: December 13, 1996.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 96–33119 Filed 12-27–96; 8:45 am]

BILLING CODE 4910–59–P

[Docket No. 96–109; Notice 1]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for public comment on proposed collections of information.

SUMMARY: Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under new procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections.

This document describes a collection of information for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before February 28, 1997.

ADDRESSES: Comments must refer to the docket and notice numbers cited at the beginning of this notice and be submitted to Docket Section, Room 5109, NHTSA, 400 Seventh Street, SW, Washington, DC 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB Clearance Number. It is requested, but not required, that 1 original plus 2 copies of the comments be provided. The Docket Section is open on weekdays from 9:30 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Complete copies of each request for collection of information may be obtained at no charge from Mr. Ed Kosek, NHTSA Information Collection Clearance Officer, NHTSA, 400 Seventh Street, SW, Room 6123, Washington, DC 20590. Mr. Kosek's telephone number is (202) 366-2589. Please identify the relevant collection of information by referring to its OMB Clearance Number.

SUPPLEMENTARY INFORMATION:

Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the Federal Register providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) how to enhance the quality, utility, and clarity of the information to be collected; and

(iv) how 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, e.g., permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks public comment on the following proposed collection of information:

Insurer Reporting Requirement for 49 CFR Part 544

Type of Request—Reinstatement of clearance.

OMB Clearance Number—2127-0547.

Form Number—This collection of information uses no standard forms.

Requested Expiration Date of Approval—Three years from date of approval.

Summary of the Collection of Information—The Motor Vehicle Theft Law Enforcement Act of 1984 was amended by the Anti Car Theft Act (ACTA) of 1992 (P.L. 102–519) which mandated this information collection. One component of the comprehensive theft prevention package required the Secretary of Transportation (delegated to the National Highway Traffic Safety Administration (NHTSA)) to promulgate a theft prevention standard to provide for the identification of certain motor vehicles and their major replacement parts to impede motor vehicle theft. Section 615 of the ACTA requires insurance companies and rental/leasing companies to provide information to NHTSA on comprehensive insurance premiums which address motor vehicle theft.

Description of the need for the information and proposed use of the information—The insurer's report will be submitted by motor vehicle insurance companies and rental/leasing companies on an annual basis to NHTSA. All rental/leasing companies (which have a fleet of 50,000 or more units in its fleet and are not covered by theft insurance policies issued by motor vehicle insurers) are bound to comply. Specific motor vehicle insurance companies and subject rental and leasing companies are listed in Appendices A, B, and C of Part 544. These reports are required to be submitted in a specified format as shown in Parts 544.5 and 544.6, giving requirements and contents of the report.

The information will be used by NHTSA in exercising its statutory authority to help reduce comprehensive insurance premiums charged by insurers of motor vehicles due to motor vehicle thefts. The report will also show the rate of theft and recoveries of stolen vehicles that they insure by type and other categories.

Without this information, the agency cannot adequately assess the effectiveness of the ACTA as directed by Congress.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)—The respondents are specific vehicle insurance companies, and rental/leasing companies (which have a fleet size of 50,000 or more and are not covered by theft insurance policies issued by motor vehicle insurers). The agency estimates the number of respondents to total 30 vehicle insurance companies and 13 rental/leasing companies. The frequency of response to the collection of information is determined by the number of specific motor vehicle insurance companies, and rental/leasing companies listed in Appendices A, B, and C of Part 544. The lists are updated annually.

Estimate of the Total Annual Reporting and Recordkeeping Burden Resulting from the Collection of Information—The agency estimates that the reporting burden for this year will be $1,168,090 for 30 insurance companies and $99,840 for approximately 13 rental/leasing companies with a fleet size of 50,000 or more. The reporting burden is based on claim adjusters' salaries, clerical and technical expenses, and labor costs.

Authority: 440 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Dated: October 28, 1996.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 96–33120 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–59–P

[Docket No. 96–100; Notice No. 1]

Reports, Forms, and Recordkeeping Requirements

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Request for public comment on proposed collections of information.

SUMMARY: This notice solicits public comments that labeling requirements ensure that tires are mounted on the appropriate rims; and that the rims and tires are mounted on the vehicles for which they are intended.

Before a Federal agency can collect certain information from the public, it must receive approval from the Office of Management and Budget (OMB). Under new procedures established by the Paperwork Reduction Act of 1995, before seeking OMB approval, Federal agencies must solicit public comment on proposed collections of information, including extensions and reinstatements of previously approved collections.

This document describes the collection of data used by a tire manufacturer, when it determines that some of its tires either fail to comply with an applicable safety standard or contain a safety-related defect, for which NHTSA intends to seek OMB approval.

DATES: Comments must be received on or before February 28, 1997.

ADDRESSES: Comments must refer to the docket and notice numbers cited at the beginning of this notice and be submitted to Docket Section, Room 5109, NHTSA, 400 Seventh St. S.W., Washington, D.C. 20590. Please identify the proposed collection of information for which a comment is provided, by referencing its OMB Clearance Number. It is requested, but not required, that 1 original plus 2 copies of the comments be provided. The Docket Section is open on weekdays from 9:30 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Complete copies of each NHTSA request for collection of information approval may be obtained at no charge from Mr. Edward Kosek, NHTSA Information Collection Clearance Officer, NHTSA, 400 Seventh Street, S.W., Room 6123, Washington, D.C. 20590. Mr. Kosek's telephone number is (202) 366–2589. Please identify the relevant collection of information by referring to its OMB Clearance Number.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the Federal Register providing a 60-day comment period and otherwise consult with members of the public and affected agencies concerning each proposed collection of information. The OMB has promulgated regulations describing what must be included in such a document. Under OMB's regulations (at 5 CFR 1320.8(d)), an agency must ask for public comment on the following:

(i) 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;

(ii) 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;

(iii) How to enhance the quality, utility, and clarity of the information to be collected; and

(iv) How 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, e.g., permitting electronic submission of responses.

In compliance with these requirements, NHTSA asks public comment on the following proposed collections of information:

Tires and Rims Labeling

Type of Request—Reinstatement, with change, of a previously approved collection for which approval has expired.

OMB Clearance Number—2127–0053.

Form Number—This collection of information uses no standard form.

Requested Expiration Date of Approval—Three years from the approval date.

Summary of the Collection of Information—The labeling of motor vehicle tire and rims with information required by the regulations and standards to benefit motor vehicle manufacturers and consumers. Primarily, these labeling requirements (49 CFR Parts 569 & 574) help ensure that tires are mounted on appropriate rims; and that the rims and tires are mounted on vehicles for which they were intended.

Description of the need for the information and proposed use of the information—The agency has not considered methods of collecting the required information and providing it to consumers and tire dealers other than permanently labeling motor vehicles, tires, and rims. The safety information provided on the labels is needed throughout the useful life of the motor vehicle, tire, or rim. The permanent vehicle, tire, and rim labels are required by the federal standards for tires and rims. These standards are legal obstacles to reducing the burden of the labeling requirements.

Description of the Likely Respondents (Including Estimated Number, and Proposed Frequency of Response to the Collection of Information)—The estimated number of respondents totals 6,673; the frequency of response will be each time a tire or rim is manufactured;

Estimate of the Total Annual Reporting and Record keeping Burden Resulting from the Collection of Information. The yearly burden rate for new tire manufacturers, retreaders and rim manufacturers to label the motor vehicle tires and rims is 264,444 hours.

The labeling requirements apply to all motor vehicle tires and rims intended for use on the nation's highways regardless of the size of the manufacturer or retreader. The burden to small manufacturers and entities resulting from these labeling requirements cannot be adjusted or minimized since all tires and rims must be labeled with this information.

Authority: 44 U.S.C. 3506(c); delegation of authority at 49 CFR 1.50.

Dated: December 13, 1996.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

[FR Doc. 96–33121 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–59–P

Research and Special Programs Administration

Second Quarterly Performance Review Meeting on the Contract ''Detection of Mechanical Damage in Pipelines'' (Contract DTRS–56–96–C–0010)

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of meeting.

SUMMARY: RSPA invites the pipeline industry, in-line inspection (''smart pig'') vendors, and the general public to the second quarterly performance review meeting of progress on the contract ''Detection of Mechanical Damage in Pipelines.'' This contract is being performed by Battelle Memorial Institute (Battelle), along with the Southwest Research Institute, and Iowa State University. The contract is a research and development contract to develop in-line inspection technologies using electromagnetic technology to detect and characterize mechanical damage and stress corrosion cracking. There will be a presentation on the status of work on the contract tasks, including a summary of the activity and progress during the past quarter and the projected activity for the next quarter.

DATES: The second quarterly performance review meeting will be held on January 14, 1997 beginning at 8:30 a.m. and ending around 12:30 p.m.

ADDRESSES: The quarterly review meeting will be conducted in the Venice I & II meeting rooms at the Doubletree Guest Suites, 5353 Westheimer Road, Houston, Texas. The hotel's telephone number is (713) 961–9000.

FOR FURTHER INFORMATION CONTACT: Lloyd W. Ulrich, Contracting Officer's Technical Representative, Office of Pipeline Safety, telephone: (202) 366–4556, FAX: (202) 366–4566, e-mail: lloyd.ulrich@rspa.dot.gov.

SUPPLEMENTARY INFORMATION:

I. Background

RSPA is holding quarterly public meetings on the status of its contract ''Detection of Mechanical Damage in Pipelines'' (Contract DTRS–56–96–C–0010) because it recognizes that in-line inspection research is of immediate interest to the pipeline industry and in-line inspection vendors. RSPA plans to make the results available on a quarterly basis throughout the two- or three-year period of the contract. The meetings will allow disclosure of the results to all interested parties at the same time and provide an opportunity for interested parties to ask Battelle clarifying questions concerning the research.

The first meeting was conducted on October 22, 1996, in Washington, DC. This, the second quarterly review meeting, is being held in Houston, Texas, in parallel with a meeting of the Gas Research Institute's (GRI) Nondestructive Evaluation Technical Advisory Group in order to enable significant participation by pipeline operators and inspection vendors. The research contract RSPA has with Battelle is a cooperative effort between GRI and DOT, with GRI providing technical guidance.[1] Future meetings may be conducted in Columbus, Ohio (Battelle); San Antonio, Texas (Southwest Research Institute); Ames, Iowa (Iowa State University); or Chicago, Illinois (Gas Research Institute). It is anticipated that every other meeting will be conducted in Washington, DC. Each of the future meetings will be announced in the Federal Register at least two weeks prior to the meeting.

We want the pipeline industry, and in particular, that segment of the industry involved with in-line inspection, to be aware of the status of this contract. To assure that the industry is well represented at these meetings, we have invited the major domestic in-line inspection company (Tuboscope-Vetco Pipeline Services) and the following pipeline industry trade associations: American Petroleum Institute, Interstate Natural Gas Association of America, and the American Gas Association to name an engineering/technical representative, to attend each meeting.

II. The Contract

The Battelle contract is a research and development contract to evaluate and develop in-line inspection technologies for detecting mechanical damage and cracking, such as stress-corrosion cracking (SCC), in natural gas transmission and hazardous liquid pipelines. Third-party mechanical damage is one of the largest causes of pipeline failure, but existing in-line inspection tools cannot always detect or accurately characterize the severity of some types of third-party damage that can threaten pipeline integrity. Although SCC is not very common on pipelines, it usually appears in high-stress, low-population-density areas and only when a limited set of environmental conditions are met. Several attempts have been made to develop an in-line inspection tool for

[1] See the notice of the first quarterly performance review meeting (61 FR 53484; Oct. 11, 1996) for information on the Memorandum of Understanding between DOT and GRI.

SCC, but there is no commercially successful tool on the market.

Under the contract, Battelle will evaluate and advance magnetic flux leakage (MFL) inspection technology for detecting mechanical damage and two electromagnetic technologies for detecting SCC. The focus is on MFL for mechanical damage because experience shows MFL can characterize some types of mechanical damage and can be successfully used for metal-loss corrosion under a wide variety of conditions. The focus for SCC is on electromagnetic technologies that can be used in conjunction with, or as a modification to, MFL tools. The technologies to be evaluated take advantage of the MFL magnetizer either by enhancing signals or using electrical currents that are generated by the passage of an inspection tool through a pipeline.

The contract includes two major tasks during the base two years of the contract, and one major task (Task 3) being considered for an option year to the contract:

Task 1 is to evaluate existing MFL signal generation and analysis methods to establish a baseline from which today's tools can be evaluated and tomorrow's advances measured. Then, it will develop improvements to signal analysis methods and verify them through testing under realistic pipeline conditions. Finally, it will build an experience base and defect sets to generalize the results from individual tools and analysis methods to the full range of practical applications.

Task 2 is to evaluate two inspection technologies for detecting stress corrosion cracks. The focus in Task 2 is on electromagnetic techniques that have been developed in recent years and that could be used on or as a modification to existing MFL tools. Three subtasks will evaluate velocity-induced remote-field techniques, remote-field eddy-current techniques, and external techniques for sizing stress corrosion cracks.

Task 3, if done, will verify the results from Tasks 1 and 2 by tests under realistic pipeline conditions. Task 3 will (1) extend the mechanical damage detection, signal decoupling, and sizing algorithms developed in the basic program to include the effects of pressure, (2) verify the algorithms under pressurized conditions in GRI's 4,700 foot, 24-inch diameter Pipeline Simulation Facility (PSF) flow loop, and (3) evaluate the use of eddy-current techniques for characterizing cold working within mechanical damage.

A drawback of present pig technology is the lack of a reliable pig performance verification procedure that is generally accepted by the pipeline industry and RSPA. The experience gained by the pipeline industry and RSPA with the use of the PSF flow loop in this project will provide a framework to develop procedures for evaluating pig performance. Defect detection reliability is critical if instrumented pigging is to be used as an in-line inspection tool in pipeline industry risk management programs.

The ultimate benefits of the project could be more efficient and cost-effective operations, maintenance programs to monitor and enhance the safety of gas transmission and hazardous liquid pipelines. Pipeline companies will benefit from having access to inspection technologies for detecting critical mechanical damage and stress-corrosion cracks. Inspection tool vendors will benefit by understanding where improvements are beneficial and needed. These benefits will support RSPA's long-range objective of ensuring the safety and reliability of the gas transmission and hazardous liquid pipeline infrastructure.

Issued in Washington, DC on December 24, 1996.

Richard B. Felder,

Associate Administrator for Pipeline Safety.

[FR Doc. 96–33165 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–60–P

Surface Transportation Board

[STB Finance Docket No. 33312]

Illinois Central Railroad Company—Trackage Rights Exemption—Norfolk Southern Railway Company

Norfolk Southern Railway Company has agreed to grant local trackage rights to Illinois Central Railroad Company over a total of approximately 4 miles of rail line located between the parties' trackage connection at Champaign, IL, and The Anderson's Inc., at Champaign, IL. The transaction was expected to be consummated on December 18, 1996.

This notice is filed under 49 CFR 1180.2(d)(7). If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33312, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423 and served on: Myles L. Tobin, Associate General Counsel, Illinois Central Railroad Company, 455 North Cityfront Plaza Drive, Chicago, IL 60611–5504.

As a condition to this exemption, any employees affected by the trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980).

Decided: December 20, 1996.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 96–33151 Filed 12–27–96; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCIES: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); and Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the OCC, the Board, and the FDIC (the ''agencies'') 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 Office of Management and Budget (OMB) control number. The Federal Financial Institutions Examination Council (FFIEC), of which the agencies are members, has recently approved the agencies' publication for public comment of proposed revisions to the Foreign Branch Report of Condition (Foreign Branch Report), which is currently an approved collection of information. At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the FFIEC should modify the

proposed revisions prior to giving its final approval. The agencies will then submit the revisions to OMB for review and approval. Comments are invited on: (a) whether the proposed revisions to the following collection of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility; (b) the accuracy of the agencies' 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 start-up costs and costs of operation, maintenance, and purchase of services to provide information.

DATES: Comments must be submitted on or before February 28, 1997.

ADDRESSES: Interested parties are invited to submit written comments to any or all of the agencies. All comments, which should refer to the OMB control number(s), will be shared among the agencies.

OCC: Written comments should be submitted to the Communications Division, Third Floor, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington, D.C. 20219; Attention: Paperwork Docket No. 1557–0099 [FAX number (202) 874–5274; Internet address: regs.comments@occ.treas.gov]. Comments will be available for inspection and photocopying at that address.

Board: Written comments should be addressed to Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551, or delivered to the Board's mail room between 8:45 a.m. and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M–P–500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

FDIC: Written comments should be addressed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to Room F–402, 1776 F Street, N.W., Washington, D.C. 20429, on business days between 8:30 a.m. and 5:00 p.m. Comments may be sent through facsimile to: (202) 898–3838 or by the Internet to: comments@fdic.gov. Comments will be available for inspection at the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C., between 9:00 a.m. and 4:30 p.m. on business days.

A copy of the comments may also be submitted to the OMB desk officer for the agencies: Alexander T. Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed revisions to the collection of information may be requested from the agency clearance officers whose names appear below.

OCC: Jessie Gates, OCC Clearance Officer, or Dionne Walsh, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington, D.C. 20219.

Board: Mary M. McLaughlin, Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD), Dorothea Thompson, (202–452–3544), Board of Governors of the Federal Reserve System, Washington, DC 20551.

FDIC: Steven F. Hanft, FDIC Clearance Officer, (202) 898–3907, Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street N.W., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

Proposal to Revise the Following Currently Approved Collection of Information

Title: Foreign Branch Report of Condition.

Form Number: FFIEC 030.

Frequency of Response: Annually, and quarterly for significant branches.

Affected Public: Business or other for profit.

For OCC

OMB Number: 1557–0099.

Estimated Number of Respondents: 234 annual respondents; 59 quarterly respondents.

Estimated Time per Response: 3.9 burden hours.

Estimated Total Annual Burden: 1833 burden hours.

For Board

OMB Number: 7100–0071.

Estimated Number of Respondents: 100 annual respondents; 33 quarterly respondents.

Estimated Time per Response: 3.9 burden hours.

Estimated Total Annual Burden: 904.80 burden hours.

For FDIC

OMB Number: 3064–0011.

Estimated Number of Respondents: 41 annual respondents; 1 quarterly respondent.

Estimated Time per Response: 3.9 burden hours.

Estimated Total Annual Burden: 175.50 burden hours.

General Description of Report: This information collection is mandatory: 12 U.S.C. 321, 324, and 602 (Board); 12 U.S.C. 602 (OCC); and 12 U.S.C. 1828 (FDIC). This information collection is given confidential treatment (5 U.S.C. 552 (b)(8)). Small businesses (that is, small banks) are not affected.

Abstract: This report contains asset and liability information for foreign branches of insured U.S. commercial banks and is required for regulatory and supervisory purposes. The information is used to analyze the foreign operations of U.S. commercial banks. All foreign branches of U.S. banks regardless of charter type file this report with the appropriate Federal Reserve District Bank. The Federal Reserve collects this information on behalf of the U.S. bank's primary federal bank regulatory agency.

Current Actions: New items would be added to the Foreign Branch Report to enhance the agencies' ability to monitor asset quality and the usage of off-balance sheet transactions and to conform the reporting of securities to generally accepted accounting principles (GAAP). The Foreign Branch Report's instructions reference the reporting standards used in the Consolidated Reports of Condition and Income (FFIEC 031; OMB No. 7100–0036 for Board; 3064–0052 for FDIC; 1557–0081 for OCC). The FFIEC 031 instructions are being revised by eliminating instructions that differ from GAAP, effective with the March 1997 report date. Thus, the Foreign Branch Report's instructions would conform to GAAP by reference to the FFIEC 031 instructions. In addition, the criteria used to determine whether a respondent files this report on a quarterly basis would be revised.

Type of Review: Revision.

The FFIEC has approved the agencies' publication of this notice's proposed revisions to the Foreign Branch Report.

Implementation of these revisions would take place as of the June 30, 1997, report date for quarterly respondents, and as of the December 31, 1997, report date for annual respondents. As is customary for Foreign Branch Report changes, quarterly respondents are advised that, for the June 30, 1997, report date, reasonable estimates may be provided for any new or revised item for which the requested information is not readily available. The specific wording of the captions for the new or revised items discussed below should be regarded as preliminary.

Asset Quality

The Foreign Branch Report currently does not collect information on past due and nonaccrual loans and lease financing receivables. For more than ten years, such information has been collected for the consolidated banking entity as a whole on the FFIEC 031, Consolidated Reports of Condition and Income. The FFIEC 031 form's disclosures have proven to be a valuable source of information about the asset quality of the consolidated banking entity's loan and lease portfolio. The disclosure of similar information on the Foreign Branch Report would identify potential asset quality problems in specific foreign branch operations sooner than would otherwise be possible and improve the agencies' ability to develop appropriate supervisory measures, including the agencies' targeting of examination resources to particular foreign branches.

Three new items would be added to collect information on past due and nonaccrual loans and leases of the foreign branch in a manner consistent with the reporting of such data in the FFIEC 031 form. The items would be ''Past due 30 through 89 days and still accruing,'' ''Past due 90 days or more and still accruing,'' and ''Nonaccrual.'' The collection would cover all loans and leases reported by the branch.

Off-Balance-Sheet Transactions

The Foreign Branch Report currently includes a minimal number of items that disclose a branch's involvement in off-balance-sheet transactions. The agencies propose to expand the number of disclosures on off-balance-sheet transactions to include information on the notional value of exchange swaps, the notional value of other swaps, the amount of unused securities underwriting commitments, the amount of unused commitments on loans and all other lines of credit, and the aggregate amount of all other off-balance-sheet liabilities. The FFIEC 031 form collects similar information on unused commitments and off-balance-sheet transactions; however, the FFIEC 031 form collects more detailed breakdowns for commitments and additional breakdowns for the underlying risk exposures related to swaps. The collection of information on off-balance-sheet activities in the Foreign Branch Report, although less extensive than the off-balance-sheet information collected from the consolidated banking entity on the FFIEC 031 form, would improve the agencies' overall ability to monitor risk exposures resulting from a foreign branch's involvement in off-balance-sheet activities.

In addition, a new item for trading liabilities, including amounts resulting from derivative transactions, would be added in a manner consistent with the reporting of such data in the FFIEC 031 form. The new item would improve the agencies' ability to monitor foreign branch trading operations involving third parties and would be a complement to the existing item for assets held in trading accounts (which is being recaptioned as trading assets to conform this item to the FFIEC 031 form caption).

Securities

The reporting for branch holdings of debt and equity securities would be revised to be consistent with the three GAAP categories as prescribed by Financial Accounting Standards Board Statement No. 115, ''Accounting for Certain Investments in Debt and Equity Securities'' (FASB 115). FASB 115 established three categories of securities: held-to-maturity securities, available-for-sale securities, and trading securities, each of which has its own basis of accounting. FASB 115 permits an entity to include debt securities in the held-to-maturity category only if it has the positive intent and ability to hold those debt securities to maturity. Under FASB 115, the accounting basis of held-to-maturity debt securities is amortized cost. Securities in the available-for-sale category under FASB 115 are those debt securities not acquired for trading purposes for which an entity does not have the positive intent and ability to hold to maturity and those equity securities with readily determinable fair values that it does not intend to trade as part of its trading account. Under FASB 115, available-for-sale securities are reported at fair value on the balance-sheet. Trading securities are those debt and equity securities that an entity buys and holds principally for the purpose of selling in the near term.

The two existing breakdowns for securities on the Foreign Branch Report would be amended to collect information on debt and equity securities in a manner consistent with the reporting of such data in the FFIEC 031 form which already conforms to FASB 115. Items 4.a. and 4.b. on the Foreign Branch Report would be revised into items for ''Held-to-maturity securities'' and ''Available-for-sale securities.'' Trading securities would continue to be reported on the Foreign Branch Report in item 5, Trading Assets.

Quarterly Reporting

The Foreign Branch Report is currently filed on a quarterly basis by significant branches, that is, branches with either: (1) total assets of $2 billion or more, or (2) commitments to purchase foreign currencies and U.S. dollar exchange (spot, forwards, and futures) of $5 billion or more. The agencies propose to revise the scope of off-balance-sheet transactions used in the quarterly filing criteria to include all those off-balance-sheet derivatives proposed herein to be covered by the Foreign Branch Report. Thus, the Foreign Branch Report would be filed quarterly by significant branches with either: (1) total assets of $2 billion or more, or (2) commitments to purchase foreign currencies and U.S. dollar exchange (spot, forwards, and futures), all other futures and forwards contracts, options contracts, and the notional value of interest rate swaps, exchange swaps and other swaps of $5 billion or more. The revised criteria are consistent with the expanded disclosures for off-balance-sheet transactions that are part of this proposed revision.

Request for Comment

Comments submitted in response to this notice will be shared among the agencies and will be summarized or included in the agencies' requests for OMB approval. All comments will become a matter of public record. Written comments should address the accuracy of the burden estimates and ways to minimize burden including the use of automated collection techniques or the use of other forms of information technology as well as other relevant aspects of the information collection request.

Dated: December 20, 1996.

Karen Solomon,

Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

Board of Governors of the Federal Reserve System, December 23, 1996.

William W. Wiles,

Secretary of the Board.

Dated at Washington, D.C., this 16th day of December, 1996.

Federal Deposit Insurance Corporation

Steven F. Hanft,

Assistant Executive Secretary (Regulatory Analysis).

[FR Doc. 96–33064 Filed 12–27–96; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

Office of Thrift Supervision

[No. 96-124]

Public Disclosure of Reports of Condition

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Notice.

SUMMARY: The Office of Thrift Supervision (OTS) revised its Thrift Financial Report (TFR), effective June, 1996. The revisions to the TFR format do not affect the availability of information contained in the TFR. Most information collected in the TFR will continue to be publicly available pursuant to section 5(v) of the Home Owners' Loan Act. Information in certain previously identified areas will continue to not be available to the public because the Director of OTS has determined that the disclosure of such items would not be in the public interest.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Patrick G. Berbakos, Director, Financial Reporting Division, (202) 906-6720, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: Pursuant to section 5(v) of the Home Owners' Loan Act, 12 U.S.C. 1464(v), each savings association is required to make reports of condition to OTS in a form established by OTS. Section 5(v) further requires that such reports and all the information they contain be available to the public unless the OTS Director determines that public disclosure of particular information would not protect the safety or soundness of a particular institution or institutions or the Savings Association Insurance Fund, or would not otherwise be in the public interest. If the Director restricts disclosure of any information for savings associations generally, that fact and the reason therefor are to be disclosed in the Federal Register.

On August 7, 1990, OTS gave notice that certain information collected on the TFR would not be publicly disclosed. 55 FR 32168 (August 7, 1990). Over the years, OTS has reviewed and revised the scope of the information not available for public disclosure.[1]

Last year, after public notice and comment, OTS substantially streamlined the TFR, effective June, 1996. This revised TFR format does not substantively impact the disclosure of TFR information, although some information that is not publicly available is now located in a different schedule. All other information collected by the TFR will continue to be made publicly available.

Information on interest-rate-risk data, loans 30-89 days past due, and classified assets will continue to be withheld for the reasons set forth in the August 1990 Notice. As noted in the February 1994 Notice, aggregate CMR data is publicly available for selected industry peer groups.

Interest-rate-risk data continues to be located in Schedule CMR. Schedule PD, Lines 10 and 115 to 150 continues to contain information on Loans 30-89 Days Past Due. Classified Assets, which was located in schedule TA, Lines 400-430 on the old TFR, is now found in schedule VA, Lines 960, 965, 970, and 975 in the streamlined TFR.

Dated: December 19, 1996.

By the Office of Thrift Supervision.

Nicolas P. Retsinas

Director.

[FR Doc. 96–33037 Filed 12–27–96; 8:45 am]

BILLING CODE 6720–01–P

[1] Some of this information, Specific Valuation Allowances and Debt Restructured During the Quarter, was later determined to be appropriate for disclosure. Those items were disclosed beginning with the March 1993 TFR. On February 28, 1994, OTS issued a notice that information used to measure interest rate risk originally contained in TFR schedule MR was now found in TFR schedule CMR and would continue to be withheld from disclosure except for aggregate CMR data for selected industry peer groups. 59 FR 9520 (February 28, 1994).

DEPARTMENT OF VETERANS AFFAIRS

Proposed Information Collection Activity; Public Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Veterans Benefits Administration (VBA) invites the general public and other Federal agencies to comment on this information collection. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). Comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

DATES: Written comments and recommendations on the proposal for the collection of information should be received on or before February 28, 1997.

ADDRESSES: Direct all written comments to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. All comments will become a matter of public record and will be summarized in the VBA request for Office of Management and Budget (OMB) approval. In this document VBA is soliciting comments concerning the following information collection:

OMB Control Number: 2900–0178.

Title and Form Number: Monthly Certification of On-the-Job and Apprenticeship Training, VA Form 22–6553d. (Note: A reference to VA Form 22–6553d also includes VA Form 22–6553d–1 unless otherwise specified. VA Form 22–6553d–1 contains the same information as VA Form 22–6553d.)

Type of Review: Extension of a currently approved collection.

Need and Uses: The form is used by trainees and employers to report the number of hours worked in on-the-job training programs and apprenticeships, and to report terminations of training in such programs. The information is used by the VA to determine whether a trainee's education benefits are to be continued, changed or terminated, and the effective date of such action.

Current Actions: The VA is authorized to pay education benefits to veterans and other eligible persons pursuing approved programs not leading to a standard college degree under Title 38, U.S.C., Chapters 32 and 35, Title 10, U.S.C., Chapter 1606, and Public Law 96–342, Section 903. Benefits are authorized monthly based upon the number of hours worked by the trainee and verified by the training establishment. The form is completed by the trainee and the training establishment to report to the VA the number of hours worked and/or to report the date of termination.

Affected Public: Individuals or households, Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal Government.

Estimated Annual Burden: 4,647 hours.

Estimated Average Burden Per Respondent: 5 minutes.

Frequency of Response: Monthly.

Estimated Annual Responses: 55,786.

Estimated Number of Respondents: 14,770.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Department of Veterans Affairs, Attn: Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, Telephone (202) 273–7079 or FAX (202) 275–4884.

Dated: December 16, 1996.

By direction of the Secretary.

Donald L. Neilson, Director,

Information Management Service.

[FR Doc. 96–33079 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Office of Management (OM) invites the general public and other Federal agencies to comment on this information collection. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). Comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

DATES: Written comments and recommendations on the proposal for the collection of information should be received on or before February 28, 1997.

ADDRESSES: Direct all written comments to Barbara Epps, Office of Management (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. All comments will become a matter of public record and will be summarized in the OM request for Office of Management and Budget (OMB) approval. In this document the OM is soliciting comments concerning the following information collection:

OMB Control Number: 2900–0078.

Title: Request to Correspondent for Identifying Information, VA Form Letter 70–2.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Need and Uses: The form letter is used to obtain additional information from a correspondent when the incoming correspondence does not provide sufficient information to identify a specific veteran. Failure to obtain this information may prevent VA from taking action on the correspondence.

Current Actions: The form letter is used by VA personnel to identify a specific veteran, determine the location of a specific file, and to accomplish the action requested by the correspondent such as, process a benefit claim or file material in an individual's claims folder. Completion of VA Form Letter 70–2 is voluntary and failure to furnish the requested information has no adverse effect on either the veteran or the correspondent.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,750 hours.

Estimated Average Burden Per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 45,000.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Department of Veterans Affairs, Attn: Barbara Epps, Office of Management (045A4), 810 Vermont Avenue, NW, Washington, DC 20420, Telephone (202) 273–8013 or FAX (202) 273–5981.

Dated: December 16, 1996.

By direction of the Secretary.

Donald L. Neilson,

Information Management Service.

[FR Doc. 96–33080 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Office of Management, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, the Office of Management (OM) invites the general public and other Federal agencies to comment on this information collection. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). Comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

DATES: Written comments and recommendations on the proposal for the collection of information should be received on or before February 28, 1997.

ADDRESSES: Direct all written comments to Barbara Epps, Office of Management (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. All comments will become a matter of public record and will be summarized in the OM request for Office of Management and Budget (OMB) approval. In this document the OM is soliciting comments concerning the following information collection:

OMB Control Number: 2900–0025.

Title: Request for Consent to Release of Information, VA Form 3288.

Type of Review: Reinstatement, without change, of a previously approved collection for which approval has expired.

Need and Uses: The form is completed by veterans or beneficiaries to provide the VA with a written consent to release records or information. Use of the form ensures an individual gives an informed written consent for the release of records or information about himself/herself that is consistent with the statutory requirements of the Privacy Act of 1974 and the VA's confidentiality statute.

Current Actions: Veterans and their beneficiaries regularly request that copies of documents or information contained in their benefits or medical records be released to third parties, such as insurance companies, physicians and other individuals. The Privacy Act of 1974 (5 U.S.C., 552a) and the VA's confidentiality statute (38 U.S.C., 5701) as implemented by 38 CFR 1.526(a) and 38 CFR 1.576(b) require individuals to provide written consent before documents or information can be disclosed to third parties not allowed to receive records or information under any other provision of law, i.e., routine use of a record in a system of records. VA Form 3288 contains the minimum information that must be provided in writing before a record or information is released.

Affected Public: Individuals or households.

Estimated Annual Burden: 18,875 hours.

Estimated Average Burden Per Respondent: 7.5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 151,000.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Department of Veterans Affairs, Attn: Barbara Epps, Office of Management (045A4), 810 Vermont Avenue, NW, Washington, DC 20420, Telephone (202) 273–8013 or FAX (202) 273–5981.

Dated: December 16, 1996.

By direction of the Secretary.

Donald L. Neilson,

Information Management Service.

[FR Doc. 96–33081 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Proposed Information Collection Activity; Public Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Veterans Benefits Administration (VBA) invites the general public and other Federal agencies to comment on this information collection. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). Comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

DATES: Written comments and recommendations on the proposal for the collection of information should be received on or before February 28, 1997.

ADDRESSES: Direct all written comments to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. All comments will become a matter of public record and will be summarized in the VBA request for Office of Management and Budget (OMB) approval. In this document VBA is soliciting comments concerning the following information collection:

OMB Control Number: 2900–0460.

Title and Form Number: Application for Assumption Approval and/or Release From Personal Liability to the Government on a Home Loan, VA Form 26–6381.

Type of Review: Extension of a currently approved collection.

Need and Uses: The form is completed by veterans who are selling their homes by assumption rather than requiring purchasers to obtain their own financing to pay off the loan. The information furnished is essential to determinations for assumption approval, release of liability, and substitution of entitlement.

Current Actions: Title 38, U.S.C., Section 3713(a) provides that when a veteran disposes of his or her interest in the property securing the loan, the VA may, upon request, release the original veteran-borrower from personal liability to the Government only if three requirements are fulfilled. First, the loan must be current. Second, the purchaser must assume all of the veteran's liability to the Government and the mortgage holder on the guaranteed loan. Third, the purchaser must qualify from a credit and income standpoint, to the same extent as if he or she were a veteran applying for a VA-guaranteed loan in the same amount as the loan being assumed.

Affected Public: Individuals or households and Business or other for-profit.

Estimated Annual Burden: 790 hours.

Estimated Average Burden Per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 4,740.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Department of Veterans Affairs, Attn: Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, Telephone (202) 273–7079 or FAX (202) 275–4884.

Dated: December 5, 1996.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 96–33083 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Proposed Information Collection Activity; Public Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Veterans Benefits Administration (VBA) invites the general public and other Federal agencies to comment on this information collection. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3506(c)(2)(A)). Comments should address the accuracy of the burden estimates and ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology, as well as other relevant aspects of the information collection.

DATES: Written comments and recommendations on the proposal for the collection of information should be received on or before February 28, 1997.

ADDRESSES: Direct all written comments to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. All comments will become a matter of public record and will be summarized in the VBA request for Office of Management and Budget (OMB) approval. In this document VBA is soliciting comments concerning the following information collection:

OMB Control Number: 2900–0098.

Title and Form Number: Application for Survivors' and Dependents' Educational Assistance (Under Provisions of Chapter 35, Title 38, U.S.C.), VA Form 22–5490.

Type of Review: Extension of a currently approved collection.

Need and Uses: The form serves as an application for Dependents' Educational Assistance (DEA). The information collection is necessary for the VA to determine the eligibility of a veteran's or serviceperson's children, spouse or surviving spouse to DEA.

Current Actions: Spouses, surviving spouses, and children of veterans must submit evidence to establish eligibility and entitlement to DEA under Title 38, U.S.C., 3513. The VA uses the information to determine if an individual claimant qualifies for DEA benefits.

Affected Public: Individuals or households.

Estimated Annual Burden: 8,700 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: Once—Initial Application.

Estimated Number of Respondents: 17,400.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Department of Veterans Affairs, Attn: Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, Telephone (202) 273–7079 or FAX (202) 275–4884.

Dated: December 5, 1996.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 96–33084 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Agency Information Collection: Submission for OMB Review; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted to the Office of Management and Budget (OMB) the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

OMB Control Number: 2900-0029.

Titles and Form Numbers:

a. Offer to Purchase and Contract of Sale, VA Form 26–6705.

b. Credit Statement of Prospective Purchaser, VA Form 26–6705b.

c. Addendum to VA Form 26–6705, VA Form 26–6705c.

d. Addendum to VA Form 26–6705 (Virginia), VA Form 26–6705d

Type of Review: Revision of a currently approved collection.

Needs and Uses:

a. VA Form 26–6705 is used by the private sector sales broker to submit an offer to the VA on behalf of a prospective purchaser of a VA-acquired property. The form will be prepared for each proposed contract submitted to the VA. If the VA accepts the offer to purchase, it then becomes a contract of sale. The form defines the terms of sale, provides the prospective purchaser with a receipt for his/her earnest money deposit, eliminates the need for separate transmittal of a purchase offer and develops the contract without such intermediate processing steps and furnishes evidence of the station decision with respect to the acceptance of the contract as tendered. Without this information, a determination of the best offer for a property cannot be made.

b. VA Form 26–6705b is used as a credit application to determine the creditworthiness of a prospective purchaser in those instances when the prospective purchaser seeks the VA vendee financing, along with VA Form 26–6705. In such sales, the offer to purchase will not be accepted until the purchaser's income and credit history have been verified and a loan analysis has been completed, indicating loan approval. Without this information, the creditworthiness of a prospective purchaser cannot be determined and the offer to purchase cannot be accepted.

c. VA Form 26–6705c, using the ''highest net return/cash equivalent value'' (EWCEV) procedure, is intended to simplify the selection process among competing offers and ensure that the offer selected provides the greatest value to the VA. The procedure requires one or more calculations on each offer in order to convert it to a ''net to VA'' basis which can easily be compared to other offers, and thus enable the VA to be sure that the highest real dollar offer is accepted. The sole purpose of the HNR/CEV is to determine which offer is the most financially advantageous to the VA and in turn, the taxpayers. This procedure is very similar to the calculation prepared on most private sector transactions in order to show the seller what he or she will receive as proceeds of sale.

d. VA Form 26–6705d is an addendum to VA Form 26–6705 for use in Virginia. It includes requirements of State law which must be acknowledged by the purchaser at or prior to closing. A few minor revisions were made to the form and caused no change in burden hours.

Affected Public: Individuals or households.

Estimated Annual Burden: 64,583 hours.

a. VA Form 26–7605–33,333 hours.

b. VA Form 26–6705b–33,500 hours.

c. VA Form 26–6705c–8,333 hours.

d. VA Form 26–6705d–417 hours.

Estimated Average Burden Per Respondent: 14 minutes (average).

a. VA Form 26-7605–20 minutes.

b. VA Form 26-6705b–20 minutes.

c. VA Form 26-6705c–5 minutes.

d. VA Form 26-6705d–5 minutes.

Frequency of Response: Generally one-time.

Estimated Number of Total Respondents: 272,500.

a. VA Form 26–7605—100,000.

b. VA Form 26–6705b—67,500.

c. VA Form 26–6705c—100,000.

d. VA Form 26–6705d—5,000.

ADDRESSES: A copy of this submission may be obtained from Ron Taylor, VA Clearance Officer (045A4), Department of Veterans Affairs, 8l0 Vermont Avenue, NW, Washington, DC 20420, (202) 273–8015.

Comments and recommendations concerning this submission should be directed to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–4650. DO NOT send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer within 30 days of this notice.

FOR FURTHER INFORMATION CONTACT: Ron Taylor, VA Clearance Officer (045A4), (202) 273-8015.

Dated: December 16, 1996.

By direction of the Secretary.

Donald L. Neilson,

Director, Information Management Service.

[FR Doc. 96–33078 Filed 12–27–96; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 61, No. 251
Monday, December 30, 1996

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF 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

Correction

In rule document 96–31971 beginning on page 66198 in the issue of Tuesday, December 17, 1996 make the following correction:

§381.129 [Corrected]

On page 66200, in the third column, in §381.129(b)(6)(i), in the seventh line, ‘‘never’’ should read ‘‘ever’’.

BILLING CODE 1505–01–D

DEPARTMENT OF EDUCATION

34 CFR Part 86

RIN 1810-AA83

Drug and Alcohol Abuse Prevention

Correction

In rule document 96-31874 beginning on page 66225 in the issue of Tuesday, December 17, 1996 make the following correction:

PART 86 [CORRECTED]

1. On page 66225, in the third column, in the ninth and tenth lines, remove the authority citation.

2. On the same page, in the same column, under amendatory instruction 1., insert ‘‘Authority: 20 U.S.C. 1145g, unless otherwise noted.’’

BILLING CODE 1505–01–D

ENVIROMENTAL PROTECTION AGENCY

40 CFR Part 76

[AD–FRL–5666–1]

RIN 2060–AF48

Acid Rain Program; Nitrogen Oxides Emission Reduction Program

Correction

In rule document 96–31839, beginning on page 67112, in the issue of Thursday, December 19, 1996, make the following correction:

§76.5 [Corrected]

On page 67162, in the third column, in amendatory instruction 3., ‘‘remaing’’ should read ‘‘removing’’.

BILLING CODE 1505–01–D

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 410

RIN 3206-AF99

Training

Correction

In rule document 96–31975 beginning on page 66189 in the issue of Tuesday, December 17, 1996, make the following correction:

§410.403 [Corrected]

On page 66197, in the second column, in §410.403(b), in the first line, ‘‘reduces’’ should read ‘‘reduced’’.

BILLING CODE 1505–01–D

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 581

RIN 3206–AH55

Processing Garnishment Orders for Child Support and/or Alimony

Correction

In rule document 96–32137, beginning on page 67378, in the issue of Friday, December 20, 1996, make the following correction:

Appendix A to Part 581 [Corrected]

On page 67378, in the second column, in Appendix A to part 581, insert ‘‘*Department of Agriculture*’’ under the heading I. Departments, and above the entry ‘‘Office of the Secretary’’.

BILLING CODE 1505–01–D

federal register

Monday
December 30, 1996

Part II

Department of the Treasury

Comptroller of the Currency

12 CFR Part 12

Federal Reserve System

12 CFR Parts 208 and 211

Federal Deposit Insurance Corporation

12 CFR Part 342

Qualification Requirements for Transactions in Certain Securities, Proposed Rule and Proposed Information Collection Comment Request; Notice

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 12

[Docket No. 96–29]

RIN 1557–AB42

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 211

[Docket No. R–0950]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 342

RIN 3064–AB85

Qualification Requirements for Transactions in Certain Securities

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation.

ACTION: Joint notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (banking agencies) propose to adopt a qualification regulation for those banks that engage in bank-direct retail sales or recommendations of certain securities through their employees. Because banks are not required to register as a broker-dealer under the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78 *et seq.* (Securities Exchange Act), the proposed regulation establishes requirements for banks and bank securities representatives that are consistent with the professional qualification requirements for broker-dealers and registered representatives under the Securities Exchange Act and rules thereunder and the rules of the securities self regulatory organizations (SSROs). The banking agencies invite comment on all aspects of the proposal as well as on the specific issues identified in the ''Section-by-Section Summary and Request for Comment.''

In a separate document published elsewhere in this separate part of the Federal Register as a companion Notice of Forms, the banking agencies are proposing to adopt four forms to be used in connection with the regulation: Form SB (Uniform Notice for Sponsoring Bank), Form SBW (Uniform Notice for Sponsoring Bank Withdrawal), Form U–4B (Uniform Application for Bank Securities Representative Registration or Transfer), and Form U–5B (Uniform Termination Notice for Bank Securities Representative Registration). The proposed forms are based on the uniform forms used in the securities industry for broker-dealers and their registered representatives. The use of these proposed forms, along with this proposed regulation, will promote the safe and sound operation of bank retail securities sales programs and customer protection by standardizing the qualification requirements of bank personnel engaged in the retail sale of certain securities.

DATES: Comments on the proposed regulation must be received by February 28, 1997.

ADDRESSES: Comments should be directed to:

OCC: Communications Division, Office of the Comptroller of the Currency, 250 E Street, S.W., Washington DC 20219, Attention: Docket No. 96–29. Comments will be available for public inspection and photocopying at the same location. In addition, comments may be sent by facsimile transmission to FAX number (202) 874–5274 or by Internet mail to REGS.COMMENTS@OCC.TREAS.GOV.

Board: William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and Constitution Avenue, N.W., Washington, D.C. 20551, Attention: Docket No. R–0950, or delivered to room B–2222 of the Eccles Building between 8:45 a.m. and 5:15 p.m. Comments may be inspected in room MP–500 between 9:00 a.m. and 5:00 p.m. weekdays, except as provided in § 261.8 of the Board of Governors' rules regarding availability of information, 12 CFR 261.8.

FDIC: Jerry L. Langley, Executive Secretary, Attention: Room F–402, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand delivered to Room F–402, 1776 F Street, N.W., Washington, DC 20429, on business days between 8:30 a.m. and 5:00 p.m. or transmitted by fax or the internet. The FDIC's fax number is (202) 898–3838 and its Internet address is: COMMENTS@FDIC.GOV. Comments will be available for inspection and photocopying in Room 100, 801 17th Street, NW, Washington, DC between 9:00 a.m. and 5:00 p.m. on business days.

FOR FURTHER INFORMATION CONTACT:

OCC: Joseph W. Malott, Examiner, Capital Markets (202) 874–5070, and Joel Miller, Senior Attorney, Securities and Corporate Practices (202) 874–5210.

Board: Howard Amer, Assistant Director, Division of Banking Supervision and Regulation (202) 452–2958, and Angela Desmond, Senior Counsel, Division of Banking Supervision and Regulation (202) 452–3497.

FDIC: William A. Stark, Assistant Director, Division of Supervision, (202) 898–6972; Lisa D. Arquette, Senior Capital Markets Specialist, Division of Supervision, (202) 898–8633; Ann Hume Loikow, Counsel, Regulations and Legislation Section, Legal Division, (202) 898–3796; and Patrick J. McCarty, Counsel, Regulations and Legislation Section, Legal Division, (202) 898–8708.

SUPPLEMENTARY INFORMATION:

Background

In recent years, sales of securities and other nondeposit investment products on bank premises have increased as banks have made these products available to retail customers either directly as brokers [1] or through third parties. As this business has evolved, both the banking agencies and the banking industry have identified the need for banks to manage the reputational and legal risks to banks that could result from customer confusion, to disclose that these investment products are not guaranteed by the bank or insured by the FDIC, and to ensure that banks are aware of the application of the antifraud provisions of the Federal securities laws if material misstatements or omissions occur in connection with sales of securities on bank premises. These concerns arise whether the bank is selling directly to customers or whether SEC-regulated broker-dealers are selling on bank premises.[2]

To address these needs, in 1994, the banking agencies and the Office of Thrift Supervision issued the Interagency Statement on Retail Sales of Nondeposit Investment Products (Interagency Statement), which sets forth guidelines for conducting sales of nondeposit investment products, consistent with principles of safety and

[1] Banks specifically are excluded from the definition of ''broker'' in section 3(a)(4) of the Securities Exchange Act, 15 U.S.C. 78c(a)(4), and may engage in brokerage transactions without having to register with the Securities and Exchange Commission (SEC).

[2] It is estimated that approximately 87 percent of all sales of securities on bank premises are effected by SEC-regulated broker-dealers. *See* U.S. General Accounting Office, Report to Congressional Requesters: *Bank Mutual Funds Sales Practices and Regulatory Issues* GAO/GGD–95–210, at p. 52 (September 1995); U.S. General Accounting Office, Report to Congressional Requesters: *Banks' Securities Activities—Oversight Differs Depending on Activity and Regulator, GAO/GGD–95–214, at p. 25 (September 1995).*

soundness and customer protection.[3] Among other things, the Interagency Statement provides that banks that engage in the retail recommendation or sale of securities should provide sales personnel with training that is the substantive equivalent of that provided to their securities industry counterparts.

Since adoption of the Interagency Statement, industry participants have commented that it is difficult to measure their compliance with the equivalent training requirement when there are no objective measures of a bank salesperson's training comparable to that provided by the securities industry professional qualifications examinations for broker-dealer sales personnel. To address this issue, the banking agencies approached the SSROs that own the examinations that pertain to the sale of mutual funds [4] and general securities products [5] and requested that the SSROs make the Investment Company/Variable Contracts Products Limited Representative Qualification Examination (Series 6 Examination) and the General Securities Registered Representative Examination (Series 7 Examination) available to bank personnel. The SSROs agreed on the condition that the banking agencies adopt regulations establishing registration and qualification requirements analogous to those applicable to the securities industry.

Adoption of a qualifications regulation for banks and their employees who 2make retail solicitations, recommendations, purchases, or sales of securities will provide a number of benefits in addition to ensuring compliance with the equivalent training requirements of the Interagency Statement. The regulation will ensure that bank sales representatives have adequate product and regulatory knowledge pertaining to those securities being recommended and sold at the retail level. This will promote the safe and sound operation of bank- sponsored sales programs and enhance customer protection. The regulation also will enhance the banking agencies' ability to identify and restrict individuals who are subject to a statutory disqualification and therefore not qualified under the securities laws from soliciting, recommending, purchasing, or selling securities at the retail level on behalf of banks.

Moreover, adoption of the proposed qualification requirements is likely to facilitate individuals seeking to move between banks and broker-dealers without losing their qualifications to sell certain securities in either industry.[6] This would create additional efficiencies for banks and securities firms and opportunities for their employees.

Accordingly, the banking agencies propose to adopt qualification regulations that establish filing requirements for banks and registration, testing, and continuing education requirements for bank securities representatives that are analogous to the professional qualification requirements for broker-dealers under the Securities Exchange Act, and rules thereunder, and the rules of the SSROs. Any filing required to be made to a banking agency will be made at the NASD, which will maintain all information in its Central Registration Depository (CRD), the national/state computer-based registry for broker-dealers and securities personnel.

The proposed use of securities industry qualification examinations and continuing education materials will not alter the statutory scheme for banks or their brokerage activities. No SSRO, including the NASD, obtains jurisdiction over any sponsoring bank or bank securities representative as a result of the proposed rule or the submission of filings to the appropriate Federal banking agency at the NASD. Legal and supervisory authority over banks remains vested exclusively with the appropriate Federal banking agency.

Authority to Issue Regulation

This rulemaking is authorized pursuant to the banking agencies' statutory authority under section 8 of the Federal Deposit Insurance Act (FDIA), 12 U.S.C. 1818, to prevent unsafe and unsound practices by, and to adopt regulations defining safe and sound practices for, banks under their respective jurisdictions.[7] In addition, the banking agencies have the authority to prescribe specific operational and managerial standards, as deemed appropriate, pursuant to section 39p–1(a)(2) of the FDIA, 12 U.S.C. 831p–1(a)(2).

Section-by-Section Summary and Request for Comment

Definitions

Appropriate Qualification Examination.

The proposal defines ''appropriate qualification examination'' as the Series 6 Examination or the Series 7 Examination, both of which are administered by the NASD.

The Series 6 Examination is the appropriate qualification examination for a bank employee engaged solely in covered transactions of open-end investment company shares, original distribution closed-end investment company shares, unit investment trusts, or variable contracts, including variable life insurance contracts and variable annuity contracts. The Series 7 Examination is the appropriate examination for a bank securities representative who effects transactions in other securities, such as equities and corporate bonds, in addition to the products covered by the Series 6 Examination. A person who passes the Series 7 Examination need not pass the Series 6 Examination.

Bank

The proposal defines ''bank'' as each institution regulated by the banking agencies, respectively, but does not include affiliates, subsidiaries, or foreign branches of such institutions. (''Foreign branches'' located in any Territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Virgin Islands, however, are included in the definition of ''bank.'') Bank subsidiaries and affiliates engaged in securities sales are already registered with the SEC and are subject to the rules and requirements of the SEC and SSROs.

Bank Securities Representative

The proposal defines ''bank securities representative'' as any bank officer, director, or employee (collectively, employee) who engages in covered transactions or is designated as the supervisor of a bank employee engaged

[3] 5 Fed. Bnkg. L. Rep. (CCH) PP 70–001, *et seq.;* Federal Reserve Supervisory Letter, SR 94–11(FIS) (February 17, 1994); Federal Reserve Supervisory Letter, 95–46 (SPE) (September 14, 1995), interpreting the Interagency Statement; OCC Bulletin 94–13 (Nondeposit Investment Sales Examination Procedures) (February 24, 1994); OCC Bulletin 95–52 (Clarification of Interagency Guidelines) (September 22, 1995); FDIC Financial Institutions Letter 9–94 (February 17, 1994); and FDIC Financial Institutions Letter 61–95 (September 13, 1995).

[4] The National Association of Securities Dealers, Inc. (NASD).

[5] The NASD, New York Stock Exchange, Inc. (NYSE), and Municipal Securities Rulemaking Board (MSRB).

[6] Under current SSRO rules, a bank securities representative seeking to move to a broker-dealer must request a waiver from the examination requirements from his or her designated SSRO. To the extent a bank securities representative seeks to engage in the recommendation or sale of municipal securities, the MSRB's 90-day apprenticeship requirement applies. *See* MSRB Rule G–3(a)(iii). To the extent a bank securities representative seeks to become a candidate for registration with an exchange, a training requirement may be required. *See, e.g.,* NYSE Rule 345.15(2).

[7] *Independent Bankers Association* v. *Heimann,* 613 F.2d 1164, 1168–69 (D.C. Cir. 1979), *cert. denied,* 449 U.S. 823; *see also National Petroleum Refiners Assoc.* v. *FTC,* 482 F.2d 672, 680–81 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1973).

in covered transactions. Each employee seeking to qualify as a bank securities representative must be sponsored by his or her employing bank. A sponsoring bank must file proposed Form U–4B on behalf of its employees. The Form U–4B includes an application for a bank employee to take either the Series 6 or Series 7 Examination.

Under the section captioned ''Optional Designation as a Bank Securities Representative,'' a bank also may choose to have legal, compliance, and audit personnel take a qualification examination. Even though those individuals are not engaged in retail sales or recommendations of securities, for purposes of this regulation, they will be deemed to be bank securities representatives if they pass a qualification examination and will be required to comply with all the other provisions of the regulation to maintain their registration.

Continuing Education

The proposal defines ''continuing education'' as the course of study specified in the section captioned ''Continuing Education and Training Requirements.'' These requirements correspond to SSRO continuing education requirements applicable to registered representatives.

Covered Product

The proposal defines ''covered product'' as having the same meaning as ''security'' as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The definition specifically excludes a government security as defined at section 3(a)(42) of the Securities Exchange Act, 15 U.S.C. 78c(a)(42), because the government securities markets already are subject to a comprehensive statutory and regulatory scheme that addresses the concerns underlying the proposed rule.[8] The definition specifically states that deposits, as defined in section 3(l) of the FDIA, 12 U.S.C. 1813(l), are not covered products.

Covered Transaction

The proposal defines ''covered transaction'' as a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employee regardless of the means through which the solicitation, recommendation, purchase, or sale occurs.[9] For instance, a transaction that takes place via telephone, mail, or other electronic means such as the Internet is included in the definition. Sales personnel in a bank's dealer department who engage in covered transactions (i.e., a retail solicitation, recommendation, purchase, or sale of securities other than government or municipal securities) must comply with this regulation. The term ''covered transaction'' does not differentiate between those banks that engage in only occasional or a limited number of covered transactions for a retail customer and those banks that establish programs for the retail sale of covered products. Therefore, consistent with the current requirements applicable to the securities industry, all banks that engage in covered transactions, regardless of frequency or volume, would be considered to be in the business of effecting covered transactions and would be required to comply with the regulation.[10]

Consistent with the scope of the Interagency Statement, the term does not include a sale to a fiduciary account administered by a bank, such as statutory and written trust accounts, employee benefit plans, and other types of pension plans normally administered by a trust department. Self-directed IRAs, certain types of Keogh accounts, and other accounts where the customer retains investment discretion are, however, included in the term. Sales of municipal securities by dealer banks registered under section 15B of the Securities Exchange Act, 15 U.S.C. 78o0044, also are excluded because the bank and its sales personnel already are subject to registration and professional qualifications requirements under the Securities Exchange Act and the rules of the MSRB.

Consistent with Rule 3a4–1 promulgated under the Securities Exchange Act, 17 CFR 240.3a4–1, equity and debt offerings by banks of their own securities, such as mutual-to-stock conversions, also are excluded from the definition of ''covered transaction'' if the securities offerings are consistent with the conditions set forth in that Rule.[11] These offerings tend to be infrequent and generally are subject to special oversight by the banking agencies. Banks engaged solely in the direct retail sale of their own securities are therefore not required to become sponsoring banks. However, if a bank has filed Form SB and becomes a sponsoring bank, it must use its bank securities representatives to solicit, recommend or sell its own securities.

Disciplinary Action

The proposal defines ''disciplinary action'' for purposes of this regulation as an action resulting in: (1) an employee being ''subject to disqualification;'' (2) a civil money penalty or fine of $5,000 or more by the SEC or an SSRO; (3) a civil money penalty of $5,000 or more by a banking agency pursuant to 12 U.S.C. 1818 for either a violation of a securities law or regulation, or an unsafe or unsound practice related to a covered transaction; (4) an agreement with the SEC, an SSRO, or a banking agency in connection with a disciplinary proceeding; or (5) an order by the SEC, an SSRO, or a banking agency to enter the continuing education program.

Disciplinary actions must be reported on the forms referred to in the companion Notice of Forms that is being published with this proposal. Information on disciplinary actions will be available to the public. Bank securities representatives that are subject to a disciplinary action as defined under the regulation will be subject to additional continuing education requirements that begin as of the date of the disciplinary action. The ''$5,000 or more'' figure used in the definition is consistent with the threshold used in the definition of ''disciplinary action'' in the SSRO rules.

NASD

The proposal defines ''NASD'' as the National Association of Securities Dealers, Inc., which is an SSRO

[8] See Section 15C of the Securities Exchange Act, 15 U.S.C. 78o-5, and SEC and Treasury rules adopted thereunder. In addition, the banking agencies recently issued a notice of proposed rulemaking, titled Government Securities Sales Practices, that would establish standards concerning the recommendations to customers and the conduct of business by a bank that is a government securities broker or dealer. 61 FR 18470 (April 25, 1996).

[9] Under the Interagency Statement, bank employees located in the routine deposit taking area are generally prohibited from soliciting or recommending nondeposit investment products. Such employees may, however, direct or refer bank customers to bank securities representatives and may receive a fee from the bank for such referral.

[10] The scope of the regulation is intended to be the same as that for SEC-regulated broker-dealers. If the SEC liberalizes the registration or other professional qualification requirements for such broker-dealers, the banking agencies will interpret the regulation in a similar manner.

[11] The bank employee must not be subject to a statutory disqualification under the Securities Exchange Act of 1934, may not receive a commission or other remuneration for selling bank securities, and may not be an associated person of a broker or dealer. In addition, the bank employee must restrict his or her offer and sale activities to certain groups or entities. Further, the bank employee must perform primarily other substantial duties on behalf of the bank, not be an associated person of a broker or dealer within the last 12 months or participate in selling an offering of any issuers securities more than once every 12 months. Finally, a bank employee must restrict his or her activities to preparing and delivering written communications or other means which do not involve oral solicitations, responding to inquiries initiated by a potential purchaser, and performing ministerial and clerical work in effecting any transaction.

registered under section 15A of the Securities Exchange Act, 15 U.S.C. 78o, and NASD Regulation, Inc., the regulatory subsidiary of NASD. The NASD will accept filings and maintain in the CRD information filed with the banking agencies under this regulation.

Sponsoring Bank

The proposal defines ''sponsoring bank'' as a bank that engages or seeks to engage in the business of effecting covered transactions. A bank that enters into an agreement with a registered broker-dealer enabling registered representatives of the broker-dealer to engage in covered transactions with bank customers, regardless of location, is not a ''sponsoring bank,'' even though the broker-dealer may use dual employees employed by both the bank and the broker-dealer.

Subject to Disqualification

The proposal defines the term ''subject to disqualification'' as having the same meaning as ''statutory disqualification'' in section 3(a)(39) of the Securities Exchange Act, 15 U.S.C. 78c(a)(39). Individuals who are subject to an order of removal, prohibition, or suspension by a Federal banking agency pursuant to section 8 (e) or (g) of the FDIA, 12 U.S.C. 1818 (e) or (g), or banks or individuals subject to an order or temporary order pursuant to section 8 (b) or (c) of the FDIA, 12 U.S.C. 1818 (b) or (c), that restricts their fiduciary or securities activities at a depository institution or are subject to a prohibition pursuant to section 19 of the FDIA, 12 U.S.C. 1829(a), are also subject to disqualification. The definition, therefore, makes a bank employee or sponsoring bank subject to disqualification if the employee or bank has been barred, suspended, or enjoined from the banking or securities industries; convicted of any felony in the past 10 years; convicted of a felony or misdemeanor involving the purchase or sale of a security, or other financial crime (such as theft, robbery, or misappropriation of funds); or restricted in his or her employment pursuant to Section 19(a) of the FDIA, 12 U.S.C. 1829(a).

Qualification Requirements

Disqualifications

The proposal sets forth the qualification requirements for both sponsoring banks and bank employees. A bank that is or becomes subject to disqualification shall not engage in a covered transaction unless the appropriate banking agency has granted the bank relief from being subject to disqualification and permits the bank to engage in covered transactions. This section also prohibits a bank employee who is, or becomes, subject to disqualification from engaging in covered transactions unless the employee's sponsoring bank has applied for and obtained the banking agency's approval for that employee to act as a bank securities representative.

Sponsoring Bank Notices

This section requires a bank seeking to engage in covered sales to file a notice. A bank is required to file a completed Form SB [12] with the appropriate Federal banking agency at the NASD containing the bank's name, address, bank identification number, and contact person. Upon receipt of a Form SB, the sponsoring bank will be assigned a unique CRD number for use on all of the filings required under the proposed regulation. Banks that choose to terminate their status as sponsoring banks must file the Form SBW with the appropriate banking agency at the NASD.

Sponsoring Bank Requirements

This section requires a bank sponsoring an employee to act as a bank securities representative to ensure that each employee engaged in a covered transaction is not subject to disqualification and has passed the appropriate qualification examination. A sponsoring bank also must make independent inquiry regarding the background of each sponsored employee. A sponsoring bank should, at a minimum, consult the employee's employers from the last three years and should investigate the good character, business repute, qualifications, and experience of any person the bank intends to sponsor. The sponsoring bank also must complete the designated portion of the Form U–4B and file it, along with a fingerprint card for the employee with the appropriate Federal banking agency at the NASD. The NASD in turn will submit the fingerprint record cards to the Federal Bureau of Investigation for review. A fingerprint card will be required each time an individual is hired by a bank to act as a bank securities representative and will be used to check whether the employee has a civil or criminal record that could subject the individual to disqualification.[13]

A bank may not sponsor an employee to become a bank securities representative if the individual is ''subject to disqualification'' unless the bank has applied for and received approval from the appropriate banking agency for the individual to engage in covered transactions. The banking agencies will consider, on a case-by-case basis, whether it is in the public interest to authorize either a sponsoring bank that, or a bank employee who, is, or becomes, subject to disqualification to engage in covered transactions. The banking agencies anticipate they will consider factors such as those detailed in SEC Rules of Practice, Rule 193, 17 CFR 201.193 (Applications by Barred Individuals for Consent to Associate), in their evaluation of the particular facts and circumstances. The banking agencies seek comment on whether additional factors should be considered for banks and persons who are, or become, ''subject to disqualification.'' The banking agencies may adopt various processes for considering these applications.

With the exception of those bank employees sponsored under the optional designation as a Bank Securities Representative provision, a bank may not sponsor an employee to become a bank securities representative if the bank does not intend for that individual to engage in the solicitation, recommendation, purchase, or sale of covered products or to supervise covered transactions.

A sponsoring bank is required to file a Form U–5B when a bank securities representative ceases to be an employee of the bank for any reason or ceases to engage in covered sales on behalf of the bank. A bank must provide a copy of Form U–5B and subsequent amendments to the employee.

A sponsoring bank is required to designate one or more individuals, as necessary, to supervise the activities of its bank securities representatives. A supervisor designated by a sponsoring bank need not engage in covered sales but must comply with the qualification requirements for bank securities representatives. Supervisors must take and pass the appropriate qualification examination (either the Series 6 or Series 7 Examination) for the bank securities representatives they supervise.

The banking agencies request comment on whether supervisors should be required to take one of the securities industry supervisor's (principal's) examinations. Commenters

[12] Form SB, Form SBW, Form U–4B, and Form U–5B are published elsewhere in this separate part of the Federal Register contemporaneously with the proposed regulation.

[13] The securities industry is subject to fingerprinting requirements under section 17f of the Securities Exchange Act, 15 U.S.C. 78q(f)(2), and Rule 17f–2 promulgated thereunder, 15 CFR 240.17f–2.

are requested to discuss whether the General Securities Principal's Examination (Series 24), which focuses on the management of an investment banking or securities business, including supervision, solicitation, conduct of business, and training of registered representatives, is relevant or whether one of the other supervisor's examinations (Series 26—Investment Company Products/Variable Contracts Limited Principal; Series 28—Introducing Broker/Dealer Financial and Operations Principal; or Series 8—General Securities Sales Supervisor Examination, for example) would be more appropriate for individuals supervising bank securities representatives whose activities and product offerings are likely to be more limited.

Bank Securities Representative Requirements

This section requires a bank employee seeking to qualify as a bank securities representative to complete designated portions of the Form U–4B and submit this form and a fingerprint card to his or her sponsoring bank. The employee then must pass the appropriate qualification examination and the sponsoring bank must receive approval from the appropriate Federal banking agency prior to the employee engaging in covered transactions. Fingerprint cards and completed Forms U–4B must be filed for employees transferring registration from another sponsoring bank or securities firm but the employee will not have to retake an examination. The Form U–4B requires disclosure of personal and employment information, including whether the employee has been the subject of any disciplinary action (as that term is defined in the proposed regulation) or certain types of customer complaints involving claims of greater than $5,000 or settlements of $10,000 or more. A bank securities representative must advise his or her sponsoring bank within 30 days of an event that renders any information filed on a Form U–4B or U–5B incomplete or inaccurate and must cooperate with the sponsoring bank in filing an amendment to the Form.

Any employee who fails an examination will be permitted to retake the test after a period of 30 days has elapsed from the date of the prior examination, except that any employee who fails to pass an examination three or more times in succession (and each additional time thereafter) must wait 180 days from the date of the last attempt before he or she may again retake the exam. A bank securities representative who has not engaged in covered transactions for a period of two years, or who has not supervised a bank sales representative for a period of two years, must pass the appropriate examination before engaging in covered transactions again. An employee engaged in legal, compliance, internal audit, or similar responsibilities related to covered transactions who has taken an examination pursuant to the optional designation provision and who does not perform any of those functions for a period of two years also must retake the examination before engaging in covered transactions.

Examination Exemptions

This section establishes two exemptions from the examination requirements. First, a bank employee who is qualified as a registered representative pursuant to the rules of an SSRO at the time he or she seeks to qualify as a bank securities representative will not have to retake the examination. As noted earlier, however, a bank securities representative seeking to transfer employment from a sponsoring bank to a broker-dealer will have to apply to the appropriate SSRO for a waiver from retaking any examinations required under applicable SSRO rules and policies.

Second, a sponsoring bank may apply in writing to its appropriate Federal banking agency on behalf of an employee for a waiver of the examination requirement. Applications will be approved only in exceptional cases where good cause is shown. In considering these requests, the banking agencies may accept other evidence of an employee's qualifications to act as a bank securities representative. Advanced age, physical infirmity, or experience in fields ancillary to the investment banking or securities business, would not individually of themselves constitute sufficient grounds to waive the examination requirement. The banking agencies intend to exercise their waiver authority in a manner consistent with the waiver policies of the SSROs.[14] Any bank employee who is eligible for the examination exemption under this paragraph still must satisfy all other qualification, reporting and continuing education requirements of the regulation. A bank securities representative who obtains an examination waiver from a banking agency under this section and who subsequently seeks to work in the securities industry may be required to take an examination or apply to the appropriate SSRO for a waiver of that examination requirement.

Approval of Bank Securities Representative Applications

This section prohibits a sponsoring bank from permitting an employee to act as a bank securities representative until the appropriate banking agency has notified the sponsoring bank that the bank employee's Form U–4B application has been approved. The appropriate banking agency will approve the registrations of bank employees whose applications do not disclose grounds for disqualification and who pass the appropriate qualification examination. Registration may be revoked if, for example, the fingerprint record identifies any action or item indicating that the individual is subject to disqualification.

Grace Period

This section establishes a one-year grace period following the adoption of the final rule for banks and bank employees to comply with the regulation. The grace period will permit banks to file the required notices and arrange for testing and registration of employees without unduly interrupting bank operations. Any bank that is not in compliance with the rule after the grace period expires must cease engaging in covered transactions until the rule's requirements are met. Similarly, any individual who engages in covered transactions who has not complied with all testing and registration requirements by the end of the grace period must cease all covered transaction activities until such requirements are met.

Filing Requirements, Amendments, and Record Retention

This section requires all filings made with the banking agencies under the regulation to be made at the NASD.[15] The NASD ultimately will maintain this filing information on its CRD, the computer-based registry for broker-dealers and securities personnel. Information on the CRD will be made available to the public on the same basis that the NASD makes information regarding broker-dealers and registered representatives available through its Public Disclosure Program.[16] The

[14] *See, e.g.,* NASD Membership and Registration Rule 1070 (Qualification Examinations and Waiver of Requirements), NASD Manual (CCH), p. 3291.

[15] Filings submitted by mail should be sent to the NASD address indicated on the Forms SB, SBW, U–4B and U–5B. When the NASD's CRD becomes available to sponsoring banks, banks will either be required to purchase personal computer software from the NASD to make and access filings directly or will be required to utilize a private service bureau or vendor to make electronic filings.

[16] This information includes disclosure of any investment-related consumer-initiated complaint or

banking agencies expect that members of the public will be able to inquire about the record of sponsoring banks and bank securities representatives using the NASD's toll free telephone number or other means that may become available for CRD inquiries.

The NASD charges cost-based fees for processing all filings, administering tests taken by bank employees, processing fingerprint cards, and for access to the CRD. While the exact fees the NASD will charge sponsoring banks have not yet been established, the banking agencies anticipate that these fees will be consistent with those levied by the NASD upon broker-dealers for comparable services.[17] The NASD may also charge sponsoring banks an initial software modification fee in order to provide banks access to the CRD.

This section also provides that all information submitted on any filing made under the regulation must be true, current, complete, and not misleading at the time and in light of the circumstances under which it is reported. A sponsoring bank must submit an amended filing within 30 days after it learns of any fact or circumstance that causes a filing to be inaccurate or incomplete.

This section further establishes record retention requirements for filings made under the regulation. A bank must retain copies of Forms U–4B and U–5B filed on behalf of any bank employee for at least three years after the employee ceases to act as a bank securities representative or terminates his or her employment with the sponsoring bank. A bank must retain copies of Forms SB and SBW and any applications for waiver of being subject to disqualification for at least three years after it files a Form SBW and terminates covered sales.

The banking agencies welcome comment regarding the timing and content of the proposed filing requirements, including the public availability of information regarding sponsoring banks and their bank securities representatives.

Optional Designation as a Bank Securities Representative

Consistent with SSRO rules, a bank may choose to sponsor an employee engaged in legal, compliance, internal audit, or similar responsibilities for covered transactions, or who provides administrative support functions for bank securities representatives, to take a qualification examination. Under these circumstances, the employee must meet the registration, testing, reporting, and continuing education requirements of a bank securities representative. As long as the individual fills one of the enumerated positions or engages in covered transactions for a sponsoring bank, the employee's registration will remain active.

Applications by Banks and Bank Employees Subject to Disqualification

A bank may file a written application with the appropriate banking agency seeking relief from a disqualification on behalf of itself or an employee. The appropriate banking agency may permit the bank or the employee to engage in covered transactions or act as a bank securities representative if the bank demonstrates to the banking agency why granting relief from a disqualification is consistent with safety and soundness, the public interest, and the protection of investors. In cases in which a disqualification results from an action brought under 12 U.S.C. 1818 or by operation of law under 12 U.S.C. 1829, applications for relief must be sought pursuant to those sections.

Relief granted under this section will not result in the permanent elimination of a disqualification but instead represents approval of a sponsoring bank, or employment as a bank securities representative with the sponsoring bank, under specified terms and conditions. For example, if a bank obtains relief for an employee under this section and the employee later becomes employed by another bank, that bank will have to seek relief from disqualification on behalf of the employee and agree to any special terms or conditions imposed by the appropriate Federal banking agency. Any material change in the terms or conditions under which relief is granted would require the sponsoring bank to seek appropriate relief on behalf of the employee.

Continuing Education and Training Requirements

This section imposes continuing education requirements upon bank securities representatives and sponsoring banks that are comparable to requirements for broker-dealers.

Bank Securities Representative Requirements

The first subsection requires a bank securities representative to complete the securities industry's computerized training program ''Regulatory Element'' covering securities regulation issues following the individual's second, fifth, and tenth anniversaries of passing the appropriate qualification examination. If an SSRO takes a disciplinary action against an individual based upon activities prior to that person becoming a bank securities representative, a banking agency takes a disciplinary action against a bank securities representative, or an individual is otherwise the subject of a disciplinary action, then the bank securities representative must take the continuing education training program within 120 days of the occurrence of a disciplinary action and following the second, fifth, and tenth anniversaries of the occurrence of a disciplinary action.[18] The proposed regulation requires a bank securities representative who does not comply with the continuing education requirements to cease activities until the representative meets the requirements.

Sponsoring Bank Requirements

The second subsection incorporates the requirements of the SSROs' ''Firm Element'' and requires sponsoring banks to develop in-house education programs appropriate to the size, structure, scope of products offered, and the bank's policies and procedures for covered transactions. These programs should address, at a minimum, the general investment features of the products and services being offered as well as associated risk factors, suitability and sales practice considerations, and applicable regulatory requirements (including the Interagency Statement). While a bank may choose to use commercial training material and outside vendors to assist in meeting this education requirement, the bank must ensure that the material or program meets the content standards of the proposed rule.

Confidentiality of Qualification Examinations

This section requires banks and bank employees to maintain the confidentiality of the professional qualification examinations and not to

---

proceeding that: (1) alleges compensatory damages of $5,000 or more, fraud, or wrongful taking of property; or (2) was settled or decided against a sponsoring bank or bank securities representative for $10,000 or more, or found fraud or the wrongful taking of property. *See* Form U–4 (Uniform Application for Securities Industry Registration or Transfer) Question 22I.

[17] *See generally* Schedule A (Section 2) to the NASD By-Laws, NASD Manual (CCH), pp. 1101–03. The NASD may also levy an initial fee to defray the cost of modifying the CRD database for banks. An additional nominal fee may also be collected by the NASD on behalf of the MSRB to defray the MSRB's cost of developing questions for the Series 7 Examination.

[18] This is consistent with comparable SSRO rules. *See, e.g.,* NASD Membership and Registration Rule 1120(a)(3), NASD Manual (CCH) pp. 3381–82.

act in a manner that could compromise the integrity of an examination.

Paperwork Reduction Act

The banking agencies invite comment on:

(1) Whether the proposed collection of information contained in this notice of proposed rulemaking is necessary for the proper performance of each agency's functions, including whether the information has practical utility;

(2) the accuracy of each agency's estimate of the burden of the proposed information collection;

(3) ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

Respondents/recordkeepers are not required to respond to this collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

OCC: The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1557–0142), Washington, DC 20503, with copies to the Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219.

The collection of information requirements in this proposed rule are found in § 12.12 (c)(1)(iii), (c)(3), and (e)(2), § 12.13 (c) and (d), § 12.15, and § 12.16 (a)(4) and (b)(3).[19] This information is required to identify national banks as sponsoring banks, to qualify bank employees to take the appropriate qualification examination, and to terminate the status as a sponsoring bank or licensed bank securities representative. The information also is required to evidence compliance with the registration and information collection requirements set forth in the proposed regulation. The OCC will use the information to monitor the securities activities in national banks and to assess the qualifications of a national bank employee that wishes to become a bank securities representative.

[19] The Paperwork Reduction Act analysis of the required forms appears in the companion Notice of Forms published by the banking agencies elsewhere in this separate part of the Federal Register.

The likely respondents/recordkeepers are national banks.

Estimated average annual burden hours per respondent/recordkeeper: 18 hours.

Estimated number of respondents: 120 national banks.

Estimated total annual reporting and recordkeeping burden: 2,184 hours.

Start-up costs to respondents: None.

Certain records pertaining to the sponsoring bank's filings are to be maintained for the period of time respondent/recordkeeper serves as a sponsoring bank, plus three years thereafter. Records pertaining to bank employees are to be retained for not less than three years after the employee terminates employment with the sponsoring bank or ceases to act as a bank securities representative.

Board: In accordance with section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 35; *see also* 5 CFR 1320 Appendix A Item 1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget. Send comments on the collections of information to: the Office of Management and Budget, Paperwork Reduction Project (7100–0282), Washington DC 20503, with copies of such comments to be sent to Mary M. McLaughlin, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 97, Board of Governors of the Federal Reserve System, Washington DC 20551.

The requirements in this proposed collection of information will be included in 12 CFR 208. This information collection is needed to register state member banks (Form SB), to qualify certain bank employees to take the appropriate qualification examination (Form U–4B), and to terminate the bank's status as a registered bank (Form SBW) or the employee's status as a licensed bank securities representative (Form U–5B). The Federal Reserve will use the information to monitor the securities sales activities of state member banks and to assess the qualifications of state member bank employees to become registered bank securities representatives. This information collection will be mandatory. The likely respondents are state member banks. Small businesses will not be affected.

The Federal Reserve may not conduct or sponsor, and an organization (or a person) is not required to respond to, any collection of information unless it displays a currently valid OMB control number. The OMB control number for this information collection is 7100–0282.

The reporting burden imposed by the proposed rule is estimated to be 18.2 hours per response. It is estimated that there will be 100 respondents/recordkeepers and a total of 1,820 hours of annual paperwork burden. This burden represents the time needed to complete the four proposed reporting forms: U–4B, U–5B, SB, and SBW. The estimated burden is averaged over the estimated number of filings during the first three years that the proposed rule will be in effect, with most of the filings presumed to occur in the first year, as qualification and registration programs are set up, and with the burden for the second and third years representing estimated turnover in registered bank securities representatives. The estimated burden is further averaged over the size distribution of the likely respondents. The burden associated with other requirements of the proposed rule is discussed in a separate notice published in this issue.

FDIC: The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Paperwork Reduction Project (1557–0142), Washington DC 20503, with copies of such comments to be sent to Steven F. Hanft, Office of the Executive Secretary, Room F–454, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, DC 20429.

The collection of information requirements in this proposed rule are found in 12 CFR 342.3(b), 342.3(c) (1) and (3), (e)(2), 342.4(c) and (d), 342.6 and 342.7. The collections consist of notice filings for the Sponsoring Bank as wells as registration applications on behalf of the Bank Securities Representative, 342.3 (b) and (c); examination exemption requests, 342.3(e); required amendments to Sponsoring Bank notices and Bank Securities Representative registrations, 342.4(c); records which the Sponsoring Bank must retain with respect to notice filings, Bank Securities Representative registrations, applications for relief from being ''subject to disqualification,'' and any amendments or other filings submitted, 342.4(d); applications by Sponsoring Banks for relief for itself or a Bank Securities Representative, from being ''subject to disqualification,'' 342.6; and continuing education training programs by Sponsoring Banks and attendance/compliance by Bank Securities Representatives with respect to such continuing education requirements, 342.7.

The likely respondents/recordkeepers are insured nonmember banks.

Estimated average annual burden hours per respondent/recordkeeper: 18 hours.

Estimated number of respondents and/or recordkeepers: 70 state nonmember banks.

Estimated total annual reporting and recordkeeping burden: 1260 hours.

Start-up costs to respondents: None.

Records are to be maintained for the period of time respondent/recordkeeper serves as a sponsoring bank.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), the initial regulatory flexibility analysis otherwise required under section 603 of the RFA (5 U.S.C. 603) is not required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and the agency publishes such certification and a succinct statement explaining the reasons for such certification in the Federal Register along with its general notice of proposed rulemaking.

The banking agencies hereby certify that the proposal will not have a significant economic impact on a substantial number of small entities. The proposal should result in a net benefit to all banks regardless of size that elect to engage in securities activities through licensed bank securities representatives, but the economic impact on small banks will not be significant. Most banks with total assets of under $100 million will not engage in securities activities in a manner covered by this regulation. Rather, a small bank typically will use either a registered broker/dealer who has rented space on the bank's premises or an ''introducing broker'' who will refer a customer to a dealer that can effect the desired transaction. The few banks with total assets under $100 million that choose to have employees licensed under the proposal will incur costs associated with the securities activities. However, a bank will incur these costs only if it elects to engage in securities activities through bank securities representatives.

Executive Order 12866

The OCC has determined that this proposal is not a significant regulatory action as defined in Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4, 109 Stat. 48 (1995) (Unfunded Mandates Act), requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that the proposal will not result in expenditures by State, local, and tribal governments, or by the private sector, of more than $100 million in any one year. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects

12 CFR Part 12

National banks, Reporting and recordkeeping requirements, Securities.

12 CFR Part 208

Accounting, Agriculture, Banks, banking, Confidential business information, Crime, Currency, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Securities.

12 CFR Part 211

Exports, Federal Reserve System, Foreign banking, Holding companies, Investments, Reporting and recordkeeping requirements.

12 CFR Part 342

Banks, banking, Reporting and recordkeeping requirements, Securities.

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons set forth in the joint preamble, part 12 of chapter I of title 12 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 12—RECORDKEEPING AND CONFIRMATION REQUIREMENTS FOR SECURITIES TRANSACTIONS; QUALIFICATION REQUIREMENTS FOR TRANSACTIONS IN CERTAIN SECURITIES

1. The part heading is revised to read as set forth above.

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

Authority: 12 U.S.C. 24, 92a, 93a, 1818, and 1831p–1(a)(2).

2. Sections 12.1 through 12.7 are designed as subpart A and a new subpart heading is added to read as follows:

Subpart A—Recordkeeping and Confirmation Requirements for Securities Transactions

3. In the first line of § 12.1(a), the word ''part'' is changed to ''subpart.''

4. In the introductory text to § 12.2, the word ''part'' is changed to ''subpart.''

5. In the introductory text to § 12.7, the word ''part'' is changed to ''subpart.''

6. A new subpart B, consisting of §§ 12.10 through 12.17, is added to read as follows:

Subpart B—Qualification Requirements for Transactions in Certain Securities

Sec.

Subpart B—Qualification Requirements for Transactions in Certain Securities

§ 12.10 Scope.

This subpart is issued by the Comptroller of the Currency pursuant to 12 U.S.C. 24, 93a, 1818 and 1831p–1(a)(2). It contains rules prescribing operational and managerial standards for national banks, and prescribes training and qualification requirements for bank employees making retail solicitations, recommendations, purchases, or sales of certain securities on behalf of a national bank. It applies to all national banks that engage through bank employees in bank-direct retail solicitations, recommendations, purchases, or sales of certain securities.

§ 12.11 Definitions.

For purposes of this subpart:

(a) *Appropriate qualification examination* means either the Investment Company/Variable Contracts Products Limited Representative Qualification Examination (Series 6 Examination) or the General Securities Registered Representative Examination (Series 7 Examination), both of which are administered by the NASD. The Series 6 Examination is the appropriate qualification examination for a bank employee engaged solely in covered transactions of open-end investment company shares, original distribution closed-end investment company shares, unit investment trusts, or variable contracts, including variable life insurance contracts and variable annuity contracts. The Series 7 Examination is the appropriate qualification examination for a bank employee soliciting, recommending, purchasing, or selling any other covered product.

(b) *Bank* means any national banking association, any District bank, or any Federal branch or agency of a foreign bank. The term ''bank'' shall not include a branch of a bank located outside of any State, as defined in section 3(a)(3) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1813(a)(3).

(c) *Bank securities representative* means any bank officer, director, or employee (collectively referred to as ''employee'') who engages in a covered transaction or is designated as the supervisor of a bank securities representative who engages in a covered transaction.

(d) *Continuing education requirements* means the course of study specified in § 12.16.

(e) *Covered product* has the same meaning as ''security'' as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The term shall not include any product that is a deposit as defined in section 3(l) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(l), or any ''government security'' as defined at section 3(a)(42) of the Securities Exchange Act, 15 U.S.C. 78c(a)(42).

(f) *Covered transaction means* a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employee regardless of the means through which the solicitation, recommendation, purchase, or sale occurs. The term shall not include a covered transaction involving a fiduciary account administered by a bank, a sale of a municipal security by a municipal securities dealer bank registered under section 15B of the Securities Exchange Act, 15 U.S.C. 78o–4, or a transaction by a bank in its own securities consistent with the conditions set forth in Securities Exchange Act Rule 3a4–1(a)(4), 17 CFR 240.3a4–1(a)(4).

(g) *Disciplinary action* means an action resulting in:

(1) An individual being ''subject to disqualification'' as defined in this subpart;

(2) A civil money penalty or fine of $5,000 or more by the Securities and Exchange Commission (SEC) or a securities self regulatory organization (SSRO) as defined in section 3(a)(26) of the Securities Exchange Act, 15 U.S.C. 78c(a)(26);

(3) A civil money penalty of $5,000 or more by a Federal banking agency pursuant to section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, for a securities law violation, or an unsafe or unsound practice related to a covered transaction;

(4) An agreement with the SEC, an SSRO, or Federal banking agency, in connection with a disciplinary proceeding; or

(5) An order by the SEC, an SSRO, or a Federal banking agency to enter the continuing education program.

(h) *NASD* means the National Association of Securities Dealers, Inc., which is an SSRO registered under section 15A of the Securities Exchange Act, 15 U.S.C. 78o, and NASD Regulation, Inc., the regulatory subsidiary of the NASD.

(i) *Sponsoring bank* means a bank that engages in or seeks to engage in the business of effecting covered transactions.

(j) *Subject to disqualification* means:

(1) Subject to a ''statutory disqualification'' as that term is used in section 3(a)(39) of the Securities Exchange Act, 15 U.S.C. 78c(a)(39);

(2) Subject to an order of removal, prohibition, or suspension by a Federal banking agency pursuant to 12 U.S.C. 1818(e) or (g);

(3) Subject to an order or temporary order pursuant to 12 U.S.C. 1818(b) or (c) that restricts the fiduciary or securities activities of a bank or individual; or

(4) Subject to a prohibition pursuant to 12 U.S.C. 1829(a).

§ 12.12 Qualification requirements.

(a) *Disqualifications.* (1) A bank shall not engage in a covered transaction if it is, or becomes, subject to disqualification, unless it has applied for and received approval to engage in covered transactions from the OCC pursuant to § 12.15.

(2) No bank securities representative shall engage in a covered transaction if he or she is, or becomes, subject to disqualification, unless the bank that employs the bank securities representative has applied for and received approval from the OCC pursuant to § 12.15 for that person to qualify as a bank securities representative.

(b) *Sponsoring bank notices.* (1) A bank seeking to engage in covered transactions shall file a completed Uniform Notice for Sponsoring Bank (Form SB).

(2) A bank seeking to terminate its status as a Sponsoring Bank shall file a Uniform Request for Sponsoring Bank Withdrawal (Form SBW).

(c) *Sponsoring bank requirements.* (1) A bank seeking to sponsor an employee as a bank securities representatives shall:

(i) Make independent inquiry into the individual's employment history, including contacting the employee's previous employers for the past three years and investigating the character, business reputation, qualifications, and experience of the individual;

(ii) Review, complete as appropriate, and file the Uniform Application for Bank Securities Representative Registration or Transfer (Form U–4B) and amendments thereto on behalf of the employee; and

(iii) File a fingerprint record for the employee.

(2) A bank may not sponsor an employee to qualify as a bank securities representative or permit a previously qualified bank securities representative to engage in covered transactions if the individual is, or becomes, subject to disqualification unless the sponsoring bank has applied and received approval for the individual to engage in covered transactions from the OCC under § 12.15. A bank shall not sponsor an employee to qualify as a bank securities representative if it does not intend for the employee to engage in or supervise covered transactions or participate in one of the activities enumerated in § 12.14.

(3) A sponsoring bank shall file a Uniform Termination Notice for Bank Securities Representative Registration (Form U–5B) when the employment of a bank securities representative terminates or when a bank securities representative ceases to engage in covered transactions on behalf of the bank. The Form U–5B shall be filed within 30 days of such termination or cessation and a copy of the Form U–5B, and of any amendments to the Form U–5B, shall be provided concurrently to

the former bank securities representative.

(4) A sponsoring bank shall designate one or more bank securities representatives, as necessary, to supervise the sponsoring bank's covered transactions. A supervisor designated under this subpart shall pass the appropriate qualification examination for any bank securities representative(s) under his or her supervision.

(d) *Bank securities representative requirements.* (1) A bank employee seeking to qualify as a bank securities representative shall complete the Form U–4B, provide a fingerprint record, and pass the appropriate qualification examination.

(2) A bank employee who is eligible for an examination exemption under paragraph (e) of this section must complete a Form U–4B and receive approval under paragraph (f) of this section prior to being qualified as a bank securities representative.

(3) A bank employee who fails to pass the appropriate qualification examination may take the examination again after a period of 30 calendar days has elapsed from the date of the prior examination. However, any bank employee who fails to pass an examination three or more times in succession may not take the examination until 180 days has elapsed from the date of his or her last attempt to pass the examination.

(4) A bank employee shall advise the sponsoring bank within 30 days of any event or occurrence that causes any information on the Form U–4B or Form U–5B to become inaccurate or incomplete and shall cooperate with the sponsoring bank in filing an amendment to the relevant form.

(5) A bank securities representative who does not engage in or supervise covered transactions for a period of two years must retake and pass the appropriate qualification examination prior to acting as a bank securities representative. A bank securities representative is deemed to be engaging in covered transactions if the employee acts in one of the capacities listed in § 12.14.

(e) *Examination exemptions.* (1) A bank employee is not required to take the appropriate qualification examination if he or she already has qualified by taking that examination pursuant to the rules of an SSRO and remains qualified as a registered representative.

(2) Upon written request from a sponsoring bank, the OCC may, in exceptional cases and where good cause is shown, waive the appropriate qualification examination requirement for a bank employee and may accept other evidence of the employee's qualifications to act as a bank securities representative. Advanced age, physical infirmity, or experience in fields ancillary to the investment banking or securities business generally are insufficient for the OCC to waive the examination requirement.

(f) *Approval of bank securities representative qualifications.* No sponsoring bank may permit any bank employee to, and no bank employee shall, act as a bank securities representative until the OCC has approved the bank employee's application for registration or transfer on Form U–4B.

(g) *Grace period.* These qualification requirements apply to all banks and bank employees with respect to covered transactions transacted after [Date One Year After Effective Date of the Final Rule]. Any bank or bank employee that is not in compliance with this subpart after the grace period shall cease engaging in covered transactions until the requirements are met.

§ 12.13 Filing requirements, amendments, and record retention.

(a) All filings required under this subpart shall be filed with the OCC at the NASD.

(b) All information submitted on any filing required under this subpart must be true, current, complete, and not misleading at the time and in light of the circumstances under which it is reported.

(c) A bank shall file an amendment no later than 30 days after learning of facts or circumstances causing a filing to be inaccurate or incomplete.

(d)(1) A bank shall retain copies of all filings made on Forms U–4B and U–5B, including amendments, for not less than three years after the employee terminates employment with the sponsoring bank or ceases to act as a bank securities representative.

(2) A bank shall retain copies of all filings made on Forms SB and SBW and any applications under § 12.15, including amendments, for not less than three years after the bank terminates its status as a sponsoring bank.

§ 12.14 Optional designation as a bank securities representative.

A bank may sponsor an employee who is engaged in legal, compliance, internal audit, or similar responsibilities related to covered transactions or who provides administrative support functions for a bank securities representative, and who is not subject to disqualification (unless a waiver is granted pursuant to § 12.15), to take either the Series 6 or Series 7 Examination. Such sponsored employee must meet all filing and continuing education requirements in order to be deemed to be a bank securities representative for purposes of this subpart.

§ 12.15 Applications by banks and bank employees ''subject to disqualification.''

A sponsoring bank may seek, by written application to the OCC on behalf of itself or an employee, relief from being subject to disqualification and permission to engage in covered transactions or to qualify as a bank securities representative, as appropriate. The OCC may, consistent with safety and soundness, the public interest, and the protection of investors, grant such relief consistent with its enforcement powers and on such terms and conditions as the OCC considers necessary or appropriate.

§ 12.16 Continuing education and training requirements.

A bank securities representative and a sponsoring bank shall comply with the following continuing education requirements:

(a) *Bank securities representative requirements.* (1) Each bank securities representative shall complete, within 120 days of the second, fifth, and tenth anniversaries of passing the appropriate qualification examination, the Continuing Education Program administered by the NASD.

(2) The required training intervals for bank securities representatives who were registered with an SSRO prior to being employed by the sponsoring bank are measured from the date of SSRO registration. The bank securities representative requirements of the continuing education requirement will be met as of the tenth anniversary of a bank securities representative's registration with a banking agency and/or SSRO, provided the bank securities representative is not subject to paragraph (a)(4) of this section.

(3) If a bank securities representative has been subject to a disciplinary action within the ten years prior to the effective date of this subpart, or at any time since that effective date, the bank securities representative must complete the Continuing Education Program administered by the NASD within 120 days of the disciplinary action and no later than the second, fifth, and tenth anniversaries of the disciplinary action.

(4) Unless otherwise determined by the OCC, any bank securities representative who does not complete the requirements within the prescribed time frames may not perform any bank

securities representative duties. The OCC may, upon application and a showing of good cause, allow additional time for a bank securities representative to satisfy the Continuing Education program requirements.

(b) *Sponsoring bank requirements.* (1) A sponsoring bank shall not permit any employee to act as a bank securities representative unless the employee has complied with the requirements set forth in paragraphs (a)(1) through (a)(4) of this section.

(2) A sponsoring bank shall maintain a continuing education program for its bank securities representatives. A sponsoring bank, at least annually, shall evaluate and prioritize its training needs and develop or update, as appropriate, a written training plan. The plan must take into consideration the bank's size, organizational structure, and scope of business activities. Programs used to implement a sponsoring bank's training plan must be appropriate for the business of that bank and, at a minimum, must cover the following matters concerning securities products, services, and strategies offered by the bank:

(i) General investment features and associated risk factors;

(ii) Suitability and sales practice considerations;

(iii) Applicable regulatory requirements; and

(iv) Bank policies and procedures for covered transactions.

(3) A sponsoring bank shall administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by its bank securities representatives.

§ 12.17 Confidentiality of qualification examinations.

Every bank and bank employee shall maintain the confidentiality of qualification examinations and shall not remove from an examination center, reproduce, disclose, receive from or pass to any person, or use for study or any other purposes, any portion of an examination, whether of a present or past series, that would compromise the integrity of the examinations, or use in any manner and at any time the questions or answers to the examination.

Dated: December 10, 1996.

Eugene A. Ludwig,

Comptroller of the Currency.

Federal Reserve System

12 CFR Part 208

For the reasons set forth in the preamble, the Board proposes to amend 12 CFR Parts 208 and 211 as follows:

PART 208—MEMBERSHIP OF STATE BANKING INSTITUTIONS IN THE FEDERAL RESERVE SYSTEM (REGULATION H)

1. The authority citation for part 208 is revised to read as follows:

Authority: 12 U.S.C. 36, 248, 321–338a, 371d, 461, 481–486, 601, 611, 1814, 1816, 1818, 1823(j), 1828(o), 1831p–1, 1831p–1(a)(2), 1831r–1, 2901–2907, 3105, 3310, 3331–3351, and 3906–3909; 15 U.S.C. 78b, 78l(b), 78l(g), 78l(I), 78o–4(c)(5), 78q, 78q–1, and 78w; 31 U.S.C. 5318; 42 U.S.C. 4012a, 4104a, 4104b, 4106, and 4128.

2. A new § 208.25 is added at the end of Subpart A to read as follows:

§ 208.25 Qualification requirements for transactions in certain securities.

(a) *Scope.* This section contains rules prescribing operational and managerial standards for state member banks, prescribes training and qualification requirements for bank employees making retail solicitations, recommendations, purchases, or sales of certain securities on behalf of a state member bank. It applies to all state member banks that engage through bank employees in bank-direct retail solicitations, recommendations, purchases, or sales of certain securities.

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

(1) *Appropriate qualification examination* means either the Investment Company/Variable Contracts Products Limited Representative Qualification Examination (Series 6 Examination) or the General Securities Registered Representative Examination (Series 7 Examination), both of which are administered by the National Association of Securities Dealers, Inc. (NASD). The Series 6 Examination is the appropriate qualification examination for a bank employee engaged solely in covered transactions of open-end investment company shares, original distribution closed-end investment company shares, unit investment trusts, or variable contracts, including variable life insurance contracts and variable annuity contracts. The Series 7 Examination is the appropriate qualification examination for a bank employee soliciting, recommending, purchasing, or selling any other covered product.

(2) *Bank* means any state member bank. The term *bank* shall not include a branch of a bank located outside of any State, as defined in section 3(a)(3) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1813(a)(3).

(3) *Bank securities representative* means any bank officer, director, or employee (collectively referred to as employee) who engages in a covered transactions or is designated as the supervisor of a bank securities representative who engages in a covered transaction.

(4) *Continuing education requirements* means the course of study specified in paragraph (g) of this section.

(5) *Covered product* has the same meaning as ''security'' as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The term shall not include any product that is a deposit as defined in section 3(l) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(l), or any ''government security'' as defined at section 3(a)(42) of the Securities Exchange Act, 15 U.S.C. 78c(a)(42).

(6) *Covered transaction* means a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employee regardless of the means through which the solicitation, recommendation, purchase, or sale occurs. The term shall not include a such a transaction in a covered product to a fiduciary account administered by a bank, a sale of a municipal security by a municipal securities dealer bank registered under section 15B of the Securities Exchange Act, 15 U.S.C. 78o–4, or a transaction by a bank in its own securities consistent with the conditions set forth in Securities Exchange Act Rule 3a4–1(a)(4), 17 CFR 240.3a4–1(a)(4).

(7) *Disciplinary action* means an action resulting in:

(i) An individual being *subject to disqualification* as defined in paragraph (b)(10) of this section;

(ii) A civil money penalty or fine of $5,000 or more by the Securities and Exchange Commission (SEC) or a securities self-regulatory organization (SSRO) as defined in section 3(a)(26) of the Securities Exchange Act, 15 U.S.C. 78c(a)(26);

(iii) A civil money penalty of $5,000 or more by a Federal banking agency pursuant to section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, for a securities law violation, or an unsafe or unsound practice related to a covered transaction;

(iv) An agreement with the SEC, an SSRO, Federal banking agency, in connection with a disciplinary proceeding; or

(v) An order by the SEC, an SSRO, or a Federal banking agency to enter the continuing education program.

(8) *NASD* means the National Association of Securities Dealers, Inc., which is an SSRO registered under section 15A of the Securities Exchange Act, 15 U.S.C. 78o, and NASD Regulation, Inc., the regulatory subsidiary of the NASD.

(9) *Sponsoring bank* means a bank that engages in or seeks to engage in the business of effecting covered transactions.

(10) *Subject to disqualification* means subject to:

(i) A ''statutory disqualification'' as that term is used in section 3(a)(39) of the Securities Exchange Act, 15 U.S.C. 78c(a)(39);

(ii) An order of removal, prohibition, or suspension by a Federal banking agency pursuant to 12 U.S.C. 1818 (e) or (g);

(iii) An order or temporary order pursuant to 12 U.S.C. 1818 (b) or (c) that restricts the fiduciary or securities activities of a bank or individual; or

(iv) A prohibition pursuant to 12 U.S.C. 1829(a).

(c) *Qualification requirements*—(1) *Disqualifications.* (i) A bank shall not engage in a covered transaction if it is, or becomes, subject to disqualification, unless it has applied for and received approval to engage in covered transactions from the Board pursuant to paragraph (h) of this section.

(ii) No bank securities representative shall engage in a covered transaction if he or she is, or becomes, subject to disqualification, unless the bank that employs the bank securities representative has applied for and received approval from the Board pursuant to paragraph h of this section for that person to qualify as a bank securities representative.

(2) *Sponsoring bank notices.* (i) A bank seeking to engage in covered transactions shall file a completed Uniform Notice for Sponsoring Bank (Form SB).

(ii) A bank seeking to terminate its status as a Sponsoring Bank shall file a Uniform Request for Sponsoring Bank Withdrawal (Form SBW).

(3) *Sponsoring bank requirements.* (i) A bank seeking to sponsor an employee as a bank securities representative shall:

(A) Make independent inquiry into the individual's employment history, including contacting the employee's previous employers for the past three years and investigating the character, business reputation, qualifications and experience of the individual;

(B) Review, complete as appropriate, and file the Uniform Application for Bank Securities Representative Registration or Transfer (Form U–4B) and amendments thereto on behalf of the employee; and

(C) File a fingerprint record for the employee.

(ii) A bank may not sponsor an employee to qualify as a bank securities representative or permit a previously qualified bank securities representative to engage in covered transactions if the individual is, or becomes, subject to disqualification unless the sponsoring bank has applied and received approval for the individual to engage in covered transactions from the Board under paragraph (h) of this section. A bank shall not sponsor an employee to qualify as a bank securities representative if it does not intend for the employee to engage in or supervise covered transactions or participate in one of the activities enumerated in paragraph (e) of this section.

(iii) A sponsoring bank shall file a Uniform Termination Notice for Bank Securities Representative Registration (Form U–5B) when the employment of a bank securities representative terminates or when a bank securities representative ceases to engage in covered transactions on behalf of the bank. The Form U–5B shall be filed within 30 days of such termination or cessation and a copy of the Form U–5B, and of any amendments to the Form U–5B, shall be provided to the former bank securities representative.

(iv) A sponsoring bank shall designate one or more bank securities representatives to supervise the sponsoring bank's covered transactions. A supervisor designated under this section shall pass the appropriate qualification examination for any bank securities representative(s) under his or her supervision.

(4) *Bank securities representative requirements.* (i) A bank employee seeking to qualify as a bank securities representative shall complete the designated sections of the Form U–4B, provide a fingerprint record, and pass the appropriate qualification examination.

(ii) A bank employee who is eligible for an examination exemption under paragraph (c)(5)(i) of this section must complete a Form U–4B and receive approval under paragraph (c)(6) of this section prior to being qualified as a bank securities representative.

(iii) A bank employee who fails to pass the appropriate qualification examination may take the examination again after a period of 30 calendar days has elapsed from the date of the prior examination. However, any bank employee who fails to pass an examination three or more times in succession may not take the examination until 180 days has elapsed from the date of his or her last attempt to pass the examination.

(iv) A bank employee shall advise the sponsoring bank within 30 days of any event or occurrence that causes any information on the Form U–4B or Form U–5B to become inaccurate or incomplete and shall cooperate with the sponsoring bank in filing an amendment to the relevant form.

(v) A bank securities representative who does not engage in or supervise covered transactions for a period of two years must retake and pass the appropriate qualification examination prior to acting as a bank securities representative. A bank securities representative is deemed to be engaging in covered transactions if the employee acts in one of the capacities listed in paragraph (e) of this section.

(5) *Examination exemptions.* (i) A bank employee is not required to take the appropriate qualification examination if he or she already has qualified by taking that examination pursuant to the rules of an SSRO and remains qualified as a registered representative.

(ii) Upon written request from a sponsoring bank, the Board may, in exceptional cases and where good cause is shown, waive the appropriate qualification examination requirement for a bank employee and may accept other evidence of the employee's qualifications to act as a bank securities representative. Advanced age, physical infirmity, or experience in fields ancillary to the investment banking or securities business generally are insufficient for the Board to waive the examination requirement.

(6) *Approval of bank securities representative qualifications.* No sponsoring bank may permit any bank employee to, and no bank employee shall, act as a bank securities representative until the Board has approved the bank employee's application for registration or transfer on Form U–4B.

(7) *Grace period.* These qualification requirements apply to all banks and bank employees with respect to covered transactions transacted after Date One Year After Effective Date of the Final Rule. Any bank or bank employee that is not in compliance with this section after the grace period shall cease engaging in covered transactions until the requirements are met.

(d) *Filing requirements, amendments, and record retention.* (1) All filings required under this section shall be filed with the Board at the NASD.

(2) All information submitted under this section must be true, current, complete, and not misleading at the time and in light of the circumstances under which it is reported.

(3) A bank shall file an amendment no later than 30 days after learning of facts or circumstances causing a filing to be inaccurate or incomplete.

(4) A bank shall retain copies of all filings:

(i) Made on Forms U–4B and U–5B, including amendments, for not less than three years after the employee terminates employment with the sponsoring bank or ceases to act as a bank securities representative; and

(ii) Made on Forms SB and SBW and any applications under paragraph (f) of this section including amendments for not less than three years after the bank terminates its status as a sponsoring bank.

(e) *Optional designation as a bank securities representative.* A bank may sponsor an employee who is engaged in legal, compliance, internal audit, or similar responsibilities related to covered transactions or who provides administrative support functions for a bank securities representative, and who is not subject to disqualification (unless a waiver is granted pursuant to paragraph (f) of this section), to take the appropriate qualification examination. Such sponsored employee must meet all filing and continuing education requirements of this section in order to be deemed to be a bank securities representative for purposes of this section.

(f) *Applications by banks and bank employees ''subject to disqualification.''* A sponsoring bank may seek, by written application to the Board on behalf of itself or an employee, relief from being subject to disqualification and permission to engage in covered transactions or to qualify as a bank securities representative, as appropriate. The Board may, consistent with safety and soundness, the public interest, and the protection of investors, grant such relief consistent with its enforcement powers and on such terms and conditions as the Board considers necessary or appropriate.

(g) *Continuing education and training requirements.* A bank securities representative and a sponsoring bank shall comply with the following continuing education requirements:

(1) *Bank securities representative requirements.* (i) Each bank securities representative shall complete, within 120 days of the second, fifth, and tenth anniversaries of passing the appropriate qualification examination, the Continuing Education Program administered by the NASD.

(ii) The required training intervals for bank securities representatives who were registered with an SSRO prior to being employed by the sponsoring bank are measured from the date of SSRO registration. The bank securities representative requirements of the continuing education requirement will be met as of the tenth anniversary of a bank securities representative's registration with a banking agency and/or SSRO, provided the bank securities representative is not subject to paragraph (g)(1)(iv) of this section.

(iii) If a bank securities representative has been subject to a disciplinary action within the ten years prior to the effective date of this section, or at any time since that effective date, the bank securities representative must complete the Continuing Education Program administered by the NASD within 120 days of the disciplinary action and no later than the second, fifth, and tenth anniversaries of the disciplinary action.

(iv) Unless otherwise determined by the Board, any bank securities representative who does not complete the requirements within the prescribed time frames may not perform any bank securities representative duties. The Board may, upon application and a showing of good cause, allow additional time for a bank securities representative to satisfy the Continuing Education program requirements of the bank securities representative requirements.

(2) *Sponsoring bank requirements.* (i) A sponsoring bank shall not permit any employee to act as a bank securities representative unless the employee has complied with the requirements set forth in paragraph (g)(1) of this section.

(ii) A sponsoring bank shall maintain a continuing education program for its bank securities representatives. A sponsoring bank, at least annually, shall evaluate and prioritize its training needs and develop or update, as appropriate, a written training plan. The plan must take into consideration the bank's size, organizational structure, and scope of business activities. Programs used to implement a sponsoring bank's training plan must be appropriate for the business of that bank and, at a minimum, must cover the following matters concerning securities products, services, and strategies offered by the bank:

(A) General investment features and associated risk factors;

(B) Suitability and sales practice considerations;

(C) Applicable regulatory requirements; and

(D) Bank policies and procedures for covered transactions.

(iii) A sponsoring bank shall administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by its bank securities representatives.

(h) *Confidentiality of qualification examinations.* Every bank and bank employee shall maintain the confidentiality of qualification examinations and shall not remove from an examination center, reproduce, disclose, receive from or pass to any person, or use for study or any other purposes, any portion of an examination, whether of a present or past series, that would compromise the integrity of the examinations, or use in any manner and at any time, the questions or answers to the examination.

PART 211—INTERNATIONAL BANKING OPERATIONS (REGULATION K)

1. The authority citation for Part 211 continues to read as follows:

Authority: 12 U.S.C. 221 *et seq.*, 1818, 1841 *et seq.*, 3101 *et seq.*, 3901 *et seq.*

2. Section 211.28 is amended as follows:

a. The section heading is revised;

b. Paragraphs (a) and (b) are redesignated as paragraphs (a)(1) and (a)(2) respectively;

c. A heading is added to paragraph (a);

d. All references to ''paragraph (a)'' and ''paragraph (b)'' are revised to read ''paragraph (a)(1)'' and ''paragraph (a)(2)'' respectively; and,

e. A new paragraph (b) is added.

The revisions and additions read as follows:

§ 211.28 Provisions applicable to state branches and agencies.

(a) *Limitation on loans to one borrower*—(1) *Limitation.* * * *

* * * * *

(b) *Retail securities transactions*—(1) *Requirements.* To the extent that an uninsured state branch or a state agency is excluded from the definition of ''broker'' under section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) and engages in an activity that would constitute a covered transaction as defined in § 208.25 of the Board's Regulation H (12 CFR 208.25) for a state member bank, the state branch or agency shall be subject to the requirements of 12 CFR 208.25 in the same manner that such requirements apply to a state member bank.

(2) *Exception*. Nothing in paragraph (b)(1) of this section is intended to apply the requirements of 12 CFR 208.25 to the lawful deposit-taking activities of an uninsured state branch or state agency.

By order of the Board of Governors of the Federal Reserve System, December 11, 1996.

William W. Wiles,

Secretary of the Board.

Federal Deposit Insurance Corporation

12 CFR Part 342

Authority and Issuance

For the reasons set forth in the joint preamble, part 342 of title 12 of the Code of Federal Regulations is proposed to be added as follows:

PART 342—QUALIFICATION REQUIREMENTS FOR TRANSACTIONS IN CERTAIN SECURITIES

Sec.

Authority: 12 U.S.C. 1818 and 1831p–1(a)(2)

§ 342.1 Scope.

This part is issued by the Federal Deposit Insurance Corporation (the Corporation) pursuant to 12 U.S.C. 1818 and 1831p–1(a)(2). It contains rules prescribing operational and managerial standards for state nonmember insured banks (except a District bank) or a foreign bank having an insured branch, and prescribes training and qualification requirements for bank employees making retail solicitations, recommendations, purchases, or sales of certain securities on behalf of a state nonmember insured bank (except a District bank) or a foreign bank having an insured branch. It applies to all state nonmember insured banks (except a District bank) or a foreign bank having an insured branch that engage through bank employees in bank-direct retail solicitations, recommendations, purchases, or sales of certain securities.

§ 342.2 Definitions.

For purposes of this part:

(a) *Appropriate qualification examination* means either the Investment Company/Variable Contracts Products Limited Representative Qualification Examination (Series 6 Examination) or the General Securities Registered Representative Examination (Series 7 Examination), both of which are administered by the NASD. The Series 6 Examination is the appropriate qualification examination for a bank employee engaged solely in covered transactions of open-end investment company shares, original distribution closed-end investment company shares, unit investment trusts, or variable contracts, including variable life insurance contracts and variable annuity contracts. The Series 7 Examination is the appropriate qualification examination for a bank employee soliciting, recommending, purchasing, or selling any other covered product.

(b) *Bank* means any State nonmember insured bank (except a District bank) or a foreign bank having an insured branch. The term ''bank'' shall not include a branch of a bank located outside of any State, as defined in section 3(a)(3) of the Federal Deposit Insurance Act, as amended, 12 U.S.C. 1813(a)(3).

(c) *Bank securities representative* means any bank officer, director, or employee (collectively referred to as ''employee'') who engages in a covered transaction or is designated as the supervisor of a bank securities representative who engages in a covered transaction.

(d) *Continuing education requirements* means the course of study specified in § 342.7.

(e) *Covered product* has the same meaning as ''security'' as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The term shall not include any product that is a deposit as defined in section 3(l) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(l), or any ''government security'' as defined at section 3(a)(42) of the Securities Exchange Act, 15 U.S.C. 78c(a)(42).

(f) *Covered transaction* means a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employee regardless of the means through which the solicitation, recommendation, purchase, or sale occurs. The term shall not include a covered transaction involving a fiduciary account administered by a bank, a sale of a municipal security by a municipal securities dealer bank registered under section 15B of the Securities Exchange Act, 15 U.S.C. 78o-4, or a transaction by a bank in its own securities consistent with the conditions set forth in Securities Exchange Act Rule 3a4–1(a)(4), 17 CFR 240.3a4–1(a)(4).

(g) *Disciplinary action* means an action resulting in:

(1) An individual being ''subject to disqualification'' as defined in this part;

(2) A civil money penalty or fine of $5,000 or more by the Securities and Exchange Commission (SEC) or a securities self-regulatory organization (SSRO) as defined in section 3(a)(26) of the Securities Exchange Act, 15 U.S.C. 78c(a)(26);

(3) A civil money penalty of $5,000 or more by a Federal banking agency pursuant to section 8 of the Federal Deposit Insurance Act, 12 U.S.C. 1818, for a securities law violation, or an unsafe or unsound practice related to a covered transaction;

(4) An agreement with the SEC, an SSRO, or Federal banking agency, in connection with a disciplinary proceeding; or

(5) An order by the SEC, an SSRO, or a Federal banking agency to enter the continuing education program.

(h) *NASD* means the National Association of Securities Dealers, Inc., which is an SSRO registered under section 15A of the Securities Exchange Act, 15 U.S.C. 78o, and NASD Regulation, Inc., the regulatory subsidiary of the NASD.

(i) *Sponsoring bank* means a bank that engages in or seeks to engage in the business of effecting covered transactions.

(j) *Subject to disqualification* means:

(1) a ''Statutory disqualification'' as that term is used in section 3(a)(39) of the Securities Exchange Act, 15 U.S.C. 78c(a)(39);

(2) An order of removal, prohibition, or suspension by a Federal banking agency pursuant to 12 U.S.C. 1818(e) or (g);

(3) An order or temporary order pursuant to 12 U.S.C. 1818 (b) or (c) that restricts the fiduciary or securities activities of a bank or individual; or

(4) A prohibition pursuant to 12 U.S.C. 1829(a).

§ 342.3 Qualification requirements.

(a) *Disqualifications*. (1) A bank shall not engage in a covered transaction if it is, or becomes, subject to disqualification, unless it has applied for and received approval to engage in covered transactions from the Corporation pursuant to § 342.6.

(2) No bank securities representative shall engage in a covered transaction if he or she is, or becomes, subject to disqualification, unless the bank that employs the bank securities representative has applied for and received approval from the Corporation

pursuant to § 342.6 for that person to qualify as a bank securities representative.

(b) *Sponsoring bank notices.* (1) A bank seeking to engage in covered transactions shall file a completed Uniform Notice for Sponsoring Bank (Form SB).

(2) A bank seeking to terminate its status as a Sponsoring Bank shall file a Uniform Notice for Sponsoring Bank Withdrawal (Form SBW).

(c) *Sponsoring bank requirements.* (1) A bank seeking to sponsor an employee as a bank securities representative shall:

(i) Make independent inquiry into the individual's employment history, including contacting the employee's previous employers for the past three years and investigating the character, business reputation, qualifications, and experience of the individual;

(ii) Review, complete as appropriate, and file the Uniform Application for Bank Securities Representative Registration or Transfer (Form U–4B) and amendments thereto on behalf of the employee; and

(iii) File a fingerprint record for the employee.

(2) A bank may not sponsor an employee to qualify as a bank securities representative or permit a previously qualified bank securities representative to engage in covered transactions if the individual is, or becomes, subject to disqualification unless the sponsoring bank has applied and received approval for the individual to engage in covered transactions from the Corporation under § 342.6. A bank shall not sponsor an employee to qualify as a bank securities representative if it does not intend for the employee to engage in or supervise covered transactions or participate in one of the activities enumerated in § 342.5.

(3) A sponsoring bank shall file a Uniform Termination Notice for Bank Securities Representative Registration (Form U–5B) when the employment of a bank securities representative terminates or when a bank securities representative ceases to engage in covered transactions on behalf of the bank. The Form U–5B shall be filed within 30 days of such termination or cessation and a copy of the Form U–5B, and of any amendments to the Form U–5B, shall be provided concurrently to the former bank securities representative.

(4) A sponsoring bank shall designate one or more bank securities representatives, as necessary, to supervise the sponsoring bank's covered transactions. A supervisor designated under this part shall pass the appropriate qualification examination for any bank securities representative(s) under his or her supervision.

(d) *Bank securities representative requirements.* (1) A bank employee seeking to qualify as a bank securities representative shall complete the Form U–4B, provide a fingerprint record, and pass the appropriate qualification examination.

(2) A bank employee who is eligible for an examination exemption under paragraph (e) of this section must complete a Form U–4B and receive approval under paragraph (f) of this section prior to being qualified as a bank securities representative.

(3) A bank employee who fails to pass the appropriate qualification examination may take the examination again after a period of 30 calendar days has elapsed from the date of the prior examination. However, any bank employee who fails to pass an examination three or more times in succession may not take the examination until 180 days has elapsed from the date of his or her last attempt to pass the examination.

(4) A bank employee shall advise the sponsoring bank within 30 days of any event or occurrence that causes any information on the Form U–4B or Form U–5B to become inaccurate or incomplete and shall cooperate with the sponsoring bank in filing an amendment to the relevant form.

(5) A bank securities representative who does not engage in or supervise covered transactions for a period of two years must retake and pass the appropriate qualification examination prior to acting as a bank securities representative. A bank securities representative is deemed to be engaging in covered transactions if the employee acts in one of the capacities listed in § 342.5.

(e) *Examination exemptions.* (1) A bank employee is not required to take the appropriate qualification examination if he or she already has qualified by taking that examination pursuant to the rules of an SSRO and remains qualified as a registered representative.

(2) Upon written request from a sponsoring bank, the Corporation may, in exceptional cases and where good cause is shown, waive the appropriate qualification examination requirement for a bank employee and may accept other evidence of the employee's qualifications to act as a bank securities representative. Advanced age, physical infirmity, or experience in fields ancillary to the investment banking or securities business generally are insufficient for the Corporation to waive the examination requirement.

(f) *Approval of bank securities representative qualifications.* No sponsoring bank may permit any bank employee to, and no bank employee shall, act as a bank securities representative until the Corporation has approved the bank employee's application for registration or transfer on Form U–4B.

(g) *Grace period.* These qualification requirements apply to all banks and bank employees with respect to covered transactions transacted after Date one year after effective date of the Final Rule. Any bank or bank employee that is not in compliance with this part after the grace period shall cease engaging in covered transactions until the requirements are met.

§ 342.4 Filing requirements, amendments, and record retention.

(a) All filings required under this part shall be filed with the Corporation at the NASD.

(b) All information submitted on any filing required under this part must be true, current, complete, and not misleading at the time and in light of the circumstances under which it is reported.

(c) A bank shall file an amendment no later than 30 days after learning of facts or circumstances causing a filing to be inaccurate or incomplete.

(d)(1) A bank shall retain copies of all filings made on Forms U–4B and U–5B, including amendments, for not less than three years after the employee terminates employment with the sponsoring bank or ceases to act as a bank securities representative.

(2) A bank shall retain copies of all filings made on Forms SB and SBW and any applications under § 342.6, including amendments, for not less than three years after the bank terminates its status as a sponsoring bank.

§ 342.5 Optional designation as a bank securities representative.

A bank may sponsor an employee who is engaged in legal, compliance, internal audit, or similar responsibilities related to covered transactions or who provides administrative support functions for a bank securities representative, and who is not subject to disqualification (unless a waiver is granted pursuant to § 342.6), to take the appropriate qualification examination. Such sponsored employee must meet all filing and continuing education requirements in order to be deemed to be a bank securities representative for purposes of this part.

§ 342.6 Applications by banks and bank employees ''subject to disqualification.''

A sponsoring bank may seek, by written application to the Corporation on behalf of itself or an employee, relief from being subject to disqualification and permission to engage in covered transactions or to qualify as a bank securities representative, as appropriate. The Corporation may, consistent with safety and soundness, the public interest, and the protection of investors, grant such relief consistent with its enforcement powers and on such terms and conditions as the Corporation considers necessary or appropriate.

§ 342.7 Continuing education and training requirements.

A bank securities representative and a sponsoring bank shall comply with the following continuing education requirements:

(a) *Bank securities representative requirements.* (1) Each bank securities representative shall complete, within 120 days of the second, fifth, and tenth anniversaries of passing the appropriate qualification examination, the Continuing Education Program administered by the NASD.

(2) The required training intervals for bank securities representatives who were registered with an SSRO prior to being employed by the sponsoring bank are measured from the date of SSRO registration. The bank securities representative requirements of the continuing education requirement will be met as of the tenth anniversary of a bank securities representative's registration with a banking agency and/or SSRO, provided the bank securities representative is not subject to paragraph (a)(4) of this section.

(3) If a bank securities representative has been subject to a disciplinary action within the ten years prior to the effective date of this part, or at any time since that effective date, the bank securities representative must complete the Continuing Education Program administered by the NASD within 120 days of the disciplinary action and no later than the second, fifth, and tenth anniversaries of the disciplinary action.

(4) Unless otherwise determined by the Corporation, any bank securities representative who does not complete the requirements within the prescribed time frames may not perform any bank securities representative duties. The Corporation may, upon application and a showing of good cause, allow additional time for a bank securities representative to satisfy the program requirements.

(b) *Sponsoring bank requirements.* (1) A sponsoring bank shall not permit any employee to act as a bank securities representative unless the employee has complied with the requirements set forth in paragraphs (a)(1) through (a)(4) of this section.

(2) A sponsoring bank shall maintain a continuing education program for its bank securities representatives. A sponsoring bank, at least annually, shall evaluate and prioritize its training needs and develop or update, as appropriate, a written training plan. The plan must take into consideration the bank's size, organizational structure, and scope of business activities. Programs used to implement a sponsoring bank's training plan must be appropriate for the business of that bank and, at a minimum, must cover the following matters concerning securities products, services, and strategies offered by the bank:

(i) General investment features and associated risk factors;

(ii) Suitability and sales practice considerations;

(iii) Applicable regulatory requirements; and

(iv) Bank policies and procedures for covered transactions.

(3) A sponsoring bank shall administer its continuing education programs in accordance with its annual evaluation and written plan and must maintain records documenting the content of the programs and completion of the programs by its bank securities representatives. A bank may choose to use commercial training material and outside vendors to assist in meeting this education requirement if it ensures that the training material or program meets the content standards set forth in paragraph (b)(2) of this section.

§ 342.8 Confidentiality of qualification examinations.

Every bank and bank employee shall maintain the confidentiality of qualification examinations and shall not remove from an examination center, reproduce, disclose, receive from or pass to any person, or use for study or any other purposes, any portion of an examination, whether of a present or past series, that would compromise the integrity of the examinations, or use in any manner and at any time the questions or answers to the examination.

By Order of the Board of Directors.

Dated at Washington, D.C., this 11th day of December, 1996.

Federal Deposit Insurance Corporation.

Jerry L. Langley,

Executive Secretary.

[FR Doc. 96–32326 Filed 12–27–96; 8:45 am]

BILLING CODE 4810–33–P, 6210–01–P, 6714–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM

FEDERAL DEPOSIT INSURANCE CORPORATION

Proposed Collection; Comment Request

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; and Federal Deposit Insurance Corporation.

ACTION: Notice and request for comments.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), and the Federal Deposit Insurance Corporation (FDIC) (collectively, the Agencies), as part of their continuing efforts to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on proposed information collections, as required by the Paperwork Reduction Act of 1995. Currently, the Agencies are soliciting comments concerning an information collection titled (MA)—Financial Institutions Securities Qualifications Forms.

DATES: Written comments should be submitted by February 28, 1997.

ADDRESSES: Direct all written comments to:

OCC: Communications Division, Attention: 1557–FISQ, Third Floor, Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219. In addition, comments may be sent by facsimile transmission to (202) 874–5274, or by electronic mail to REGS.COMMENTS@OCC.TREAS.GOV.

Board: Mr. William W. Wiles, Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551, or delivered to the Board's mail room between 8:45 and 5:15 p.m., and to the security control room outside of those hours. Both the mail room and the security control room are accessible from the courtyard entrance on 20th Street between Constitution Avenue and C Street, N.W. Comments received may be inspected in room M–P–500 between 9:00 a.m. and 5:00 p.m., except as provided in section 261.8 of the Board's Rules Regarding Availability of Information, 12 CFR 261.8(a).

FDIC: Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Comments may be hand-delivered to room F–402, 1776 F Street, N.W., Washington, D.C. 20429, on business days between 8:30 a.m. and 5:00 p.m. Comments may be sent through facsimile to (202) 898–3838 or by the Internet to: COMMENTS@FDIC.GOV. Comments will be available for inspection at the FDIC Public Information Center, room 100, 801 17th Street, N.W., Washington, D.C., between 9:00 a.m. and 4:30 p.m. on business days.

A copy of the comments may also be submitted to the OMB desk officer for the agencies: Alexander Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 3208, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the collection may be obtained by contacting:

OCC: Jessie Gates or Dionne Walsh, (202) 874–5090, Legislative and Regulatory Activities Division (1557–FISQ), Office of the Comptroller of the Currency, 250 E Street, SW, Washington, DC 20219. Internet address: REGS.COMMENTS@OCC.TREAS.GOV.

Board: Mary M. McLaughlin, Board Clearance Officer, (202) 452–3829, Division of Research and Statistics, Board of Governors of the Federal Reserve System, 20th & C Streets, N.W., Washington, D.C. 20551. For the hearing impaired only, Telecommunications Device for the Deaf (TDD), Dorothea Thompson, (202) 452–3544, Board of Governors of the Federal Reserve System, 20th & C Streets, N.W., Washington, D.C. 20551.

FDIC: Steven F. Hanft, FDIC Clearance Officer, (202) 898–3907, Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, N.W., Washington, D.C. 20429. Internet address: COMMENTS@FDIC.GOV.

SUPPLEMENTARY INFORMATION:

Title: (MA)—Financial Institutions Securities Qualifications Forms OMB Number: Not yet assigned.

Form Number: Forms SB, SBW, U–4B, and U–5B.

Abstract: This information collection covers the securities qualifications forms for banks and bank employees involved in retail securities sales programs. This information will promote safe and sound operations of financial institution-sponsored securities sales programs and will enhance customer protection. Additionally, the collection will be instrumental in preventing unqualified or disqualified individuals from recommending or selling retail securities on behalf of financial institutions regulated by the OCC, Board, and FDIC.

Type of Review: New Collection.

Affected Public: Businesses or other for-profit.

OCC

Number of Respondents: 120.

Total Annual Responses: 1,248.

Frequency of Response: Occasionally.

Total Annual Burden Hours: 2,184.

Board

Number of Respondents: 100.

Total Annual Responses: 754.

Frequency of Response: Occasionally.

Total Annual Burden: 2,142.

FDIC

Number of Respondents: 70.

Total Annual Responses: 523.

Frequency of Response: Occasionally.

Total Annual Burden Hours: 1,483.

Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;

(b) The accuracy of the agency's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 16, 1996.

Karen Solomon,

Director, Legislative and Regulatory Activities Division.

By order of the Board of Governors of the Federal Reserve System, December 16, 1996.

William W. Wiles,

Secretary of the Board.

By Order of the Board of Directors.

Dated at Washington, D.C., this 11th day of December, 1996.

Federal Deposit Insurance Corporation

Jerry L. Langley,

Executive Secretary.

BILLING CODE 4810–33–P, 6210–01–P, 6714–01–P

FORM SB

OMB APPROVAL	
OMB Number:	XXXXX
Expires:	XXXXX
Estimated average burden hours per response	

UNIFORM NOTICE

FOR SPONSORING BANK

OCC (12/96)
FDIC (12/96)
FRB (12/96)

FORM SB INSTRUCTIONS

I. GENERAL INSTRUCTIONS

1. **FORM SB** - The Uniform Notice for Sponsoring Banks. Sponsoring Banks are required to file this form with their primary federal banking agency. Filing of the Form is to be made with the Central Registration Depository ("CRD") system which is operated by the National Association of Securities Dealers, Inc. ("NASD"). Sponsoring Banks will be assigned a unique CRD identification number which will be used to identify banks engaged in covered transactions and to identify bank securities representatives. The CRD is also used to track customer complaints and movement of bank securities representatives/registered representatives from one broker-dealer/sponsoring bank employer to the next.

   The NASD is acting as agent for each of the federal banking agencies for purposes of receiving filings from Sponsoring Banks. These instructions apply both to electronic filing with the CRD System as well as filing of paper copies with the NASD.

2. **UPDATING** - By regulation, the Sponsoring Bank must update promptly Form SB information by submitting amendments whenever the information on file becomes materially inaccurate or incomplete for any reason.

3. **CONTACT EMPLOYEE** - The individual listed as the contact employee must be authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the Sponsoring Bank.

4. **FEDERAL INFORMATION LAW AND REQUIREMENTS** - The information in this form is required by the federal banking agencies. See 12 CFR, Part 12 Subpart B (OCC); 12 CFR, Part 208 (FRB); and 12 CFR Part 342 (FDIC). The information is used for regulatory purposes, including deciding whether to grant registration. The federal banking agencies maintain files of the information on this form and, through the NASD, intend to make it publicly available. Sponsoring Banks are not required to file Form SB with the federal banking agencies if the form does not have a current OMB number.

   A. PAPER FILING INSTRUCTIONS

      1. FORMAT

         a. Attach the Execution Page (Page 5) with original manual signatures to the initial Form SB filing and each amendment to the Form. Complete all amended pages in full.

         b. Give the name of the Sponsoring Bank and date on each page.

         c. Use only the current version or photocopy of Form SB.

I. GENERAL INSTRUCTIONS (Cont'd)

B. ELECTRONIC FILING INSTRUCTIONS

Contact the NASD's CRD ((301) 590-6500) for information and software concerning electronic access to the CRD.

1. FORMAT

a. A full paper Form SB is required when the Sponsoring Bank is filing with the federal banking agency for the first time.

b. All items must be answered and all fields requiring a response must be completed before the filing will be accepted.

c. A Sponsoring Bank must complete the execution screen certifying that Form SB and amendments thereto have been executed properly and that the information contained therein is accurate and complete.

d. To amend information, the Sponsoring Bank must update the appropriate Form SB screens.

e. A paper copy, with original manual signatures, of the initial Form SB filing and amendments must be retained by the Sponsoring Bank and made available for inspection by the bank's federal banking agency.

The mailing address for the federal banking agencies for questions and correspondence regarding Form SB is:

Federal Deposit Insurance Corporation
Office of the Comptroller of the Currency, or
Board of Governors for the Federal Reserve System
c/o NASD Central Registration Depository
P.O. Box 9401
Gaithersburg, Maryland 20898-9401

II. DISCLOSURE REPORTING PAGE (DRP)

Information concerning the Sponsoring Bank that relates to the occurrence of an event reportable under Item 5 must be provided on the Sponsoring Bank's appropriate DRP (SB).

EXPLANATION OF TERMS

(The following terms are italicized throughout this form)

List of Defined Terms

1. GENERAL

Applicant - The Sponsoring Bank applying on or amending this form.

Bank - any insured depository institution, as defined at 12 U.S.C. 1813(c)(2). Bank shall not include a branch of a bank located outside of any state as defined at 12 U.S.C. 1813 (a)(3).

Central Registration Depository (CRD) - database operated by the NASD.

Covered Sale - means a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employees regardless of the means through which the solicitation, recommendation, purchase or sale occurs. The term shall not include a covered transaction involving a fiduciary account administered by a bank, a transaction involving a municipal security by a municipal securities dealer bank registered under section 15B of the Securities Exchange Act of 1934, 15 U.S.C. 78o-4, or a transaction by a bank of its own securities consistent with the conditions set forth in Securities Exchange Act Rule 3a4-1(a)(4), 17 CFR 240.3a4-1(a)(4).

Covered Transaction - has the same meaning as "security" as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The term shall not include any product that is a deposit as defined in section 3(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(1), or any "government security" as defined at section 3(a)(42) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(42).

Self-Regulatory Organization ("SRO") - means any national securities and commodities exchange, any national securities association (e.g., the NASD), or any registered clearing agency.

Sponsoring Bank - means a bank that engages in or seeks to engage in "covered transactions."

2. FOR THE PURPOSE OF ITEM 5 AND THE CORRESPONDING DISCLOSURE REPORTING PAGES (DRPs):

Charged - Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).

Enjoined - Includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction or a temporary restraining order.

II. FOR THE PURPOSE OF ITEM 5 AND THE CORRESPONDING DISCLOSURE REPORTING PAGES (DRPs): (Cont'd)

Felony - For *jurisdictions* that do not differentiate between a *felony* or *misdemeanor*, is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000.

Foreign Financial Regulatory Agency - Includes (1) a foreign securities authority; (2) other governmental body or foreign equivalent of a *self-regulatory organization* empowered by a foreign government to administer or enforce its laws relating to the regulation of *investment-related* activities; or (3) a foreign membership organization, a function of which is to regulate the participation of its members in *investment-related* activities listed above.

Found - Includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters.

Investment or Investment-Related - Pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting as or being associated with a broker-dealer, issuer, investment company, investment adviser, futures sponsor, bank or savings association).

Involved - Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

Jurisdiction - A state, the District of Columbia, any Territory of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, or any subdivision or regulatory body thereof.

Minor Rule Violation - A violation of a *self-regulatory organization* rule which has been designated as "minor" pursuant to a plan approved by the U.S. Securities and Exchange Commission. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of $2,500.00 or less, and if the sanctioned person does not contest the fine. Check with the appropriate *self-regulatory organization* to determine if a particular rule violation has been designated as "minor" for these purposes.

Misdemeanor - For jurisdictions that do not differentiate between a *felony* or *misdemeanor*, is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than $1,000.

Order - A written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an order.

Proceeding - Includes a formal administrative or civil action initiated by a governmental agency, *self-regulatory organization* or *foreign financial regulatory authority*, a *felony* criminal indictment or information (or equivalent formal charge), or a *misdemeanor* criminal information (or equivalent formal charge), but does not include an arrest or similar charge effected in the absence of a formal criminal indictment or information (or equivalent formal charge). NOTE: *Investment-related* civil litigation, other than that specified above, is reportable under Item 5H on Form U-4B. An *investigation* is reportable under Item 5G on Form U-4B.

EXECUTION:

The undersigned, states that he/she has executed this form on behalf of, and with the authority of, said Sponsoring Bank. The undersigned and the Sponsoring Bank represent that the information and statements contained herein, including exhibits attached hereto, and other information filed herewith, all of which are made a part hereof, are current, true and complete. The undersigned and Sponsoring Bank further represent that to the extent any information previously submitted is not amended such information is currently accurate and complete.

______________________________ ____
Date: (MM/DD/YYYY) Name of Sponsoring Bank

BY: ____________________________ ____
Signature Print Name and Title

FORM SB
PAGE 1
(Revised)
X-XX

Applicant Name: ______________________

Date: ______________ Bank CRD No.: ______________

OFFICIAL USE

official use only

WARNING: Intentional misstatements or omissions of facts may constitute criminal violations

1. (A) Full name of Sponsoring Bank:

(B) Sponsoring Bank CRD No.:

(C) Sponsoring Bank's main address:

(D) Mailing address, if different:

(E) Area Code/Telephone No.:

2. Contact employee for securities activities of Sponsoring Bank.

Name:

Title:

Address:

Suite:

City, State:

Phone:

3. Type of Charter

State ______________________ National ______________________

4. Federal Banking Agency Identification Number (answer one of the items below).

A. OCC Charter # ______________ (national banks)

B. FDIC Insurance Certificate # ______________ (state chartered, non-members banks); or

C. FRB ID# ______________ (state chartered, member banks)

5. Use the appropriate DRP for providing details to "yes" answers to the questions in Item 5. Refer to the Explanation of Terms section of Form SB Instructions for explanations of italicized terms.

CRIMINAL DISCLOSURE

A. In the past ten years has the *applicant*:

	Yes	No
(1) been convicted of or pled guilty or nolo contendere ("no contest")in a domestic or foreign court to any *felony*?	☐	☐
(2) been *charged* with any *felony*?	☐	☐

B. In the past ten years has the applicant:

(1) been convicted of or pled guilt or nolo contendere ("no contest")in a domestic or foreign court to a *misdemeanor involving*: investments or an *investment-related* business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?		
(2) been *charged* with a misdemeanor specified in 5B?	☐	☐

FORM SB
PAGE 2
(Revised)
X-XX

Applicant Name: ____________________

Date: ____________ Bank CRD No.: ____________

OFFICIAL USE

official use only

REGULATORY ACTION DISCLOSURE

	Yes	No
C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:		
(1) *found* the applicant to have made a false statement or omission?	☐	☐
(2) *found* the applicant to have been *involved* in a violation of its regulations or statutes?	☐	☐
(3) *found* the applicant to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) entered an *order* against the applicant in connection with *investment-related activity*?	☐	☐
(5) imposed a civil money penalty on the applicant, or *ordered* the applicant to cease and desist from any activity?	☐	☐
D. Has any other federal regulatory agency, any state regulatory agency, or *foreign financial regulatory authority*:		
(1) ever *found* the *applicant* to have made a false statement or omission or been dishonest, unfair, or unethical?	☐	☐
(2) ever *found* the *applicant* to have been *involved* in a violation of *investment-related* regulations or statutes?	☐	☐
(3) ever *found* the *applicant* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) in the past ten years, entered an *order* against the applicant in connection with an *investment-related* activity?	☐	☐
(5) ever denied, suspended, or revoked the *applicant's* registration or license or otherwise, by *order*, prevented it from associating with an investment-related business or restricted its activities?	☐	☐
E. Has any *self-regulatory organization* or commodities exchange:		
(1) *found* the *applicant* to have made a false statement or omission?	☐	☐
(2) *found* the *applicant* to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and Exchange Commission)?	☐	☐
(3) *found* the *applicant* to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) disciplined the *applicant* by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?	☐	☐
F. Has the applicant's or a control affiliate's authorization to act as an attorney, accountant, or federal contractor ever been revoked or suspended?	☐	☐
G. Is the applicant or a control affiliate now the subject of any regulatory proceeding that could result in a "yes" answer to any part of 11C, D, or E?	☐	☐

CIVIL JUDICIAL DISCLOSURE

	Yes	No
H. (1) Has any domestic or foreign court:		
(a) in the past ten years, enjoined the applicant or a control affiliate in connection with any investment-related activity?	☐	☐
(b) ever found that the applicant or a control affiliate was involved in a violation of investment-related statutes or regulations?	☐	☐
(c) ever dismissed, pursuant to a settlement agreement, and investment-related civil action brought against the applicant or control affiliate by a state or foreign financial regulatory authority?	☐	☐
(2) Is the applicant or a control affiliate now the subject of any civil proceeding that could result in a "yes" answer to any part of 11H(1)?	☐	☐

FORM SB
PAGE 3
(Revised)
X-XX

Applicant Name: ____________________

Date: ____________ Bank CRD No.: ____________

OFFICIAL USE

official use only

FINANCIAL DISCLOSURE

	Yes	No
I. In the past ten years has the applicant or a control affiliate of the applicant ever been a securities firm or a control affiliate of a securities firm that:		
(1) has been the subject of a bankruptcy petition?	☐	☐
(2) has had a trustee appointee or a direct payment procedure initiated under the Securities Investor Protection Act?	☐	☐
J. Has a bonding company ever denied, paid out on, or revoked a bond for the applicant?	☐	☐
K. Does the applicant have any unsatisfied judgements or liens against it?	☐	☐

EXECUTION:

I swear or affirm that all of the information I am filing is correct, that I am authorized to execute this form for the Sponsoring Bank, and that the Sponsoring Bank's books and records will be preserved and available for inspection as required by law.

Date: ____________ Name: ____________________

Telephone No.: (   ) ____________

By: (Signature and Title) ____________________

____

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (SB)

General Instructions

This Disclosure Reporting Page (DRP SB) is an ☐ initial or ☐ amended response used to report details for affirmative responses to Items 5H of Form SB:

Check item(s) being responded to:

5H(1) Has any domestic or foreign court:

☐ (a) in the past ten years, enjoined the applicant in connection with any investment-related activity?

☐ (b) ever found that the applicant was involved in a violation of investment-related statutes or regulations?

☐ (c) ever dismissed, pursuant to a settlement agreement, an investment-related civil action brought against the applicant by a state or foreign financial regulatory authority?

5H(2) ☐ Is the applicant now the subject of any civil proceeding that could result in a yes answer to any part of 5H?

One event may result in more than one affirmative answer within each of the above items. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

PART I

Name of Applicant

Applicant CRD Number

PART II

1. Court Action Initiated by: *(Name the regulator, foreign financial regulatory authority, SRO, commodities exchange, Agency, Firm, Private Plaintiff, etc.)*

2. Relief Sought: *(Temporary Restraining Order, Mandatory Injunction, Preliminary Injunction, etc.)*

3. Filing Date of Court Action: MM/DD/YY

4. Product Type(s):

5. Court formal action was brought in: *(Name of federal, military, state or foreign court)*

6. Location of Court: *(City or County and State or Country)*

7. Docket/Case Number:

8. Not Applicable

9. Describe allegations relating to this court action: *(use reverse side of this sheet for additional comments if necessary.)*

10. Is action currently: *(check one)* ☐ pending ☐ on appeal ☐ final

11. If pending, date notice was served: *(MM/DD/YY)*

12. If on appeal, action appealed to: *(provide name of court)*

13. If on appeal, date filed: *(MM/DD/YY)*

IF FINAL OR ON APPEAL, COMPLETE ALL ITEMS BELOW. FOR PENDING ACTIONS, COMPLETE ITEM 21 ONLY.

14. How was the matter resolved? *(Settled, Consent, Judgment Rendered, etc.)*

15. Resolution Date: *(MM/DD/YY)*

16. Sanctions: *(Suspended, Censured, etc.)*

17. If Suspended, Enjoined or Barred: Is suspension/injunction/bar of a fixed duration? *(If no, provide details in Item 21.)* ☐ Yes ☐ No | Suspension/Injunction/Bar Start Date: *(MM/DD/YY)* | Suspension/Bar Injunction/Duration: | Suspension/Injunction/Bar capacity affected: *(General Securities Principal, Financial & Operations Principal, Options Trading, etc.)*

18. If requalification by exam/retraining was a condition of the disposition: Is requalification/retraining time-related? | If yes, length of time given to requalify/retrain: *(If no, provide details in item 21.)* | Type of exam required for requalification: | Has condition been satisfied? ☐ Yes ☐ No

19. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation: *(Fill in amount on appropriate line)*

Penalty/Fine:	$	Date Paid *(MM/DD/YY)*
Restitution:	$	Date Paid *(MM/DD/YY)*
Disgorgement:	$	Date Paid *(MM/DD/YY)*
Other:	$	Date Paid *(MM/DD/YY)*

20. Not Applicable

21. Provide a brief summary of circumstances related to action(s), allegation(s), disposition(s) and/or finding(s) disclosed above. *(Use reverse side of this sheet for additional comments if necessary.)*

CRIMINAL DISCLOSURE REPORTING PAGE (SB)

General Instructions

This Disclosure Reporting Page (DRP SB) is an ☐ initial or ☐ amended response used to report details for affirmative responses to Items 5A or 5B of Form SB:

Check item(s) being responded to:

5A In the past ten years has the applicant:
- ☐ (1) been convicted or pled guilty or nolo contendere *("no contest")* in a domestic, foreign, or military court to any felony?
- ☐ (2) been charged with any felony?

5B In the past ten years has the applicant:
- ☐ (1) been convicted or pled guilty or nolo contendere *("no contest")* in a domestic, foreign or military court to a misdemeanor involving: investments or an investment-related business, or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?
- ☐ (2) been charged with a misdemeanor specified in 5B(1)?

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

Applicable court documents (i.e., criminal complaint, information or indictment as well as judgement of conviction or sentencing documents) must be provided to the CRD if not previously submitted.

PART I

Name of Applicant | Applicant CRD Number

PART II

1. Formal charge(s) were brought in:

Court: *(Name of Federal, Military, State or Foreign Court)* | Location of Court: *(City or County and State or Country)* | Docket / Case Number:

2. Charge Detail Disclosure: *(Continue on additional Criminal Disclosure Reporting Page SB if more than three charges arise out of the same event.)*

Formal Charge(s) Description:	Charge Date : *(MM/DD/YY)*	No. of counts	Charge Type *(Check one only)* Misdemeanor	Felony	Plea *(Guilty, Not Guilty, etc.)*	Charge is currently *(check one only)*	Appeal Date *(MM/DD/YY)*	Product Type *(if charge is investment related)*
1.						☐ Pending ☐ On Appeal ☐ Pre-trial Intervention ☐ Final		
2.						☐ Pending ☐ On Appeal ☐ Pre-trial Intervention ☐ Final		
3.						☐ Pending ☐ On Appeal ☐ Pre-trial Intervention ☐ Final		

IF FINAL, ON APPEAL, OR PRE-TRIAL INTERVENTION, COMPLETE ITEMS 3 AND 4. FOR EACH CHARGE THAT IS PENDING, COMPLETE ONLY ITEM 4.

3. Disposition Detail Disclosure: (Continue on another Criminal Disclosure Reporting Page SB if more than three charges.)

Disposition Type: *(Convicted, Acquitted, Dismissed, Pre-Trial Intervention, etc.)*	Disposition Date : *(MM/YY/DD)*	Disposition Detail: Sentence/Penalty *(if applicable)*	Duration: *(if sentence suspension, probation, etc.)*	Start Date: *(MM/DD/YY)*	Penalty/Fine Amount: *(if applicable)*	Date Paid: *(MM/DD/YY)*
1.						
2.						
3.						

4. Provide a brief summary of circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the charge(s) occurred. *(Use reverse side of this sheet for additional comments if necessary.)*

REGULATORY ACTION DISCLOSURE REPORTING PAGE (SB)

General Instructions

This Disclosure Reporting Page (DRP BD) is an ❑ initial or ❑ amended response used to report details for affirmative responses to Item 5A and 5B of Form SB:

Check items being responded to:

5c Has the US Securities and Exchange Commission or the Commodity Futures Trading Commission ever:
- ☐ (1) Found the applicant to have made a false statement or omission?
- ☐ (2) Found the applicant to have been involved in a violation of its regulations or statutes?
- ☐ (3) Found the applicant to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?
- ☐ (4) Entered an order against the applicant in connection with investment-related activity?
- ☐ (5) Imposed a civil money penalty on the applicant, or ordered the applicant to cease and desist from any activity?

5d Has any other federal regulatory agency, any state regulatory agency or foreign financial regulatory authority:
- ☐ (1) Ever found the applicant to have made a false statement, or omission, or been dishonest, unfair, or unethical?
- ☐ (2) Ever found the applicant to have been involved in a violation of investment-related regulations or statutes?
- ☐ (3) Ever found the applicant to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
- ☐ (4) In the past ten years, entered an order against the applicant in connection with an investment-related activity?
- ☐ (5) Ever denied, suspended or revoked the applicant's registration or license or otherwise, by order, prevented it from associating with an investment-related business or restricted its activities?

5e Has any self-regulatory organization or commodities exchange ever:
- ☐ (1) Found the applicant to have made a false statement or omission?
- ☐ (2) Found the applicant to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the US Securities and Exchange Commission)?
- ☐ (3) Found the applicant to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?
- ☐ (4) Disciplined the applicant by expelling or suspending it from membership, barring or suspending its association with other members, or otherwise restricting its activities?

5f Has the applicant's authorization to act as an attorney, accountant or federal contractor ever been revoked or suspended?

5g Is the applicant now the subject of any regulatory proceedings that could result in a yes answer to any part of 5C, D, or E?

One event may result in more than one affirmative answer within each of the above items. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details to each action on a separate DRP.

Part I

Name of Applicant

Applicant CRD Number

Part II

1. Regulatory action initiated by: *(Name the regulator, foreign financial regulatory authority, SRO or commodities exchange, etc.)*

2. Regulatory action type:

3. Date initiated: *(MM/DD/YY)*

4. Docket / Case Number:

5. Employing Firm when events occurred:

6. Product Type(s):

7. Describe the allegations related to this regulatory action: *(Use reverse side of this sheet for additional comments if necessary.)*

8. Is regulatory action currently: *(check one)* ❑ pending ❑ on appeal ❑ final

9. If on appeal, regulatory action appealed to: *(SEC, SRO, US Court of Appeals, etc.)*

10. If on appeal, date filed: *(MM/DD/YY)*

IF FINAL OR ON APPEAL, COMPLETE ALL ITEMS BELOW. FOR PENDING ACTIONS, COMPLETE ITEM 19 ONLY.

11. How was the matter resolved? *(settled, consent, etc.)*

12. Resolution date: *(MM/DD/YY)*

13. Sanctions: *(suspended, censured, barred, requalification, etc.)*

14. If Suspended, Enjoined or Barred:

Is suspension/injunction/bar of a fixed duration? *(If no, provide details in Item 19.)* ❑ Yes ❑ No

Suspension/Injunction/Bar Start Date: *(MM/DD/YY)*

Suspension/Bar Injunction/Duration:

Suspension/Injunction/Bar capacity affected: *(General Securities Principal, Financial & Operations Principal, Options Trading, etc.)*

15. If requalification by exam/retraining was a condition of the sanction:

Is requalification/retraining time-related?

If yes, length of time given to requalify/retrain: *(If no, provide details in item 19.)*

Type of exam required for requalification:

Has condition been satisfied? ❑ Yes ❑ No

16. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation: (Fill in amount on appropriate line)

Penalty/Fine:	$	Date Paid *(MM/DD/YY)*
Restitution:	$	Date Paid *(MM/DD/YY)*
Disgorgement:	$	Date Paid *(MM/DD/YY)*
Other:	$	Date Paid *(MM/DD/YY)*

17. Not Applicable.

18. Was payment of all or any part of a monetary award, penalty or fine waived? ❑ Yes ❑ No *(If yes, provide details of Waiver in 19 below.)*

19. Provide summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates. *(Use reverse side of this sheet for additional comments if necessary.)*

FORM SBW

OMB APPROVAL
OMB Number: XXXXX
Expires: XXXXX
Estimated average burden
hours per response .....

UNIFORM NOTICE

FOR SPONSORING BANK

WITHDRAWAL

OCC (12/96)
FDIC (12/96)
FRB (12/96)

GENERAL INSTRUCTIONS

Filing Requirements

File Form SBW when a Sponsoring Bank ceases to engage in covered sales. Form SBW is to be filed with the appropriate federal banking agency by submitting Form SBW to the NASD's CRD.

Written Submissions:

- Each copy of this Form must be manually signed by the contact employee.
- Type all information.
- Use only the Form SBW or a reproduction of it.
- The mailing address for the Federal Banking Agencies for questions and correspondence regarding Form SB is:

  Federal Deposit Insurance Corporation
  Office of the Comptroller of the Currency, or
  Board of Governors for the Federal Reserve System
  c/o NASD Central Registration Depository
  P.O. Box 9401
  Gaithersburg, Maryland 20898-9401

Electronic Submissions:

Contact the NASD's CRD ((301) 590-6500) for information and software concerning electronic access to the CRD.

- Each submission must be certified by Sponsoring Bank's contact employee.

Definitions

Contact Employee - The individual identified by the Sponsoring Bank on its Form SB who is authorized to receive all compliance information, communications, and mailings, and be responsible for disseminating it within the Sponsoring Bank.

Covered Sale - means a retail solicitation, recommendation, purchase, or sale of a covered product by a bank through its employees regardless of the means through which the solicitation, recommendation, purchase or sale occurs. The term shall not include a covered transaction involving a fiduciary account administered by a bank, a transaction involving a municipal security by a municipal securities dealer bank registered under section 15B of the Securities Exchange Act of 1934, 15 U.S.C. 78o-4, or a transaction by a bank of its own securities consistent with the conditions set forth in Securities Exchange Act Rule 3a4-1(a)(4), 17 CFR 240.3a4-1(a)(4).

Covered Transaction - has the same meaning as "security" as defined at section 3(a)(10) of the Securities Exchange Act, 15 U.S.C. 78c(a)(10). The term shall not include any product that is a deposit as defined in section 3(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(1), or any "government security" as defined at section 3(a)(42) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(42).

Sponsoring Bank - means a bank that engages in or seeks to engage in "covered transactions."

FORM SBW Revised X-XX	UNIFORM NOTICE FOR WITHDRAWAL FROM SPONSORING BANK REGISTRATION	OFFICIAL USE

WARNING: Intentional misstatements or omissions of facts may constitute criminal violations

1. (A) Full name of Sponsoring Bank: (B) Sponsoring Bank CRD No.:

   (C) Bank's main address: (D) Mailing address, if different:

   (E) Area Code/Telephone No.:

2. Date Sponsoring Bank ceased covered transactions:

3. Does the Sponsoring Bank owe any money or securities to any customer or broker-dealer? Yes___ No___
   If "yes":

   (A) Number of customers owned fund or securities ___________

   (B) Amount of money owed to: Customers $_______________ broker-dealer $ _______________

   (C) Market value of securities owned to: Customers $_______________ broker-dealer $ _______________

   (D) Arrangements made for payment:

4. Is Sponsoring Bank now the subject of any:
   (A) reportable complaint, investigation, or proceeding not reported on Form SB?..Yes____ No___
   (B) unsatisfied judgments or liens not reported on Form SB?..Yes____ No___
   (C) unsatisfied customer claims for funds or securities nor reported under item 3?......................................Yes____ No___

   Furnish full details for all "yes" answers on an attachment sheet. For any court or regulatory action, give: (1) the sponsoring bank and individual's name, (2) the title and date of the action, (3) the court or body taking the action, and (4) a description of the action.

5. (A) Name, address and telephone number of the person who will have custody of books and records:

   (B) Address where books and records will be located, if different:

6. EXECUTION: I swear or affirm that all of the information I am filing is correct, that I am authorized to execute this form for the Sponsoring Bank, and that the Sponsoring Bank's books and records will be preserved and available for inspection as required by law.

Date: Name: Telephone No.: ( )

By: (Signature and Title)

Attachment Sheet for Form SBW

Sponsoring Bank: ______________________________

CRD No.: ______________________ Date: ______________________

OMB No. xxxx–xxxx (OCC) Expires x/xx/xx
xxxx–xxxxx (FDIC) Expires x/xx/xx
xxxx–xxxx (FRS) Expires x/xx/xx
Average hours per response: x.xx

Form U-4B

Uniform Application for Bank Securities Representative Registration or Transfer

11/96

FORM U-4B

UNIFORM APPLICATION FOR BANK SECURITIES REPRESENTATIVE REGISTRATION OR TRANSFER

Public reporting burden for this information collection is estimated to vary from X.X to X,XXX hours per response, with an average of XX.XX hours per response, including time to gather and maintain data in the required form and to review instructions and complete the information collection. Comments regarding this burden estimated or any other aspect of this information collection, including suggestions for reducing the burden, amy be sent to:

Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551

and

Office of Management and Budget
Paperwork Reduction Project (7100-0XXX)
Washington, DC 20503.

GENERAL INSTRUCTIONS

The Form U-4B is the Uniform Application for Bank Securities Representatives Registration or Transfer. The Form is similar, but not identical to, the Form U-4 used to register representatives of broker-dealers, investment advisers or issuers of securities. The Form U-4B is to be used by employees of state and nationally chartered banks which are not required to register as broker/dealers under the Securities Exchange Act of 1934, but which have filed Form SB, Uniform Notice for Sponsoring Bank. These instructions apply to filing Form U-4B with the Federal Banking Agencies.

As noted below, the term "Federal Banking Agency", as used in the Form U-4B, means the Federal Deposit Insurance Corporation (FDIC), the Board of Governors of the Federal Reserve System (FRS) and the Office of the Comptroller of the Currency (OCC). In addition, the term "Sponsoring Bank" shall mean those banks which have filed Form SB, Uniform Notice for Sponsoring Bank.

Where applicable, applicants must complete Items 1–22 and all fields requiring a response must be completed before the filing is accepted. Enter "none" or "N/A" (not applicable) where appropriate.

A full, complete Form U-4B is required when filing for the first time.

Use the Disclosure Reporting Pages (DRPs U-4B) to provide details to "Yes" answers to Item 22.

An applicant and the Sponsoring Bank are under a continuing obligation to update information required by Form U-4B as changes occur. Sponsoring Banks are not required to submit a complete Form U-4B when submitting amendments. Rather, the Sponsoring Bank should update only the appropriate sections of Form U-4B and file the applicable pages. Amendments are to be filed promptly and normally no more than 30 days after the occurrence of the event which triggers the requirement to file an amendment.

Filings and amendments must be signed and submitted by the Sponsoring Bank on behalf of the applicant. A paper copy with original manual signatures of the initial Form U-4B and of amendments to the Disclosure Reporting Pages (DRPs U-4B) must be retained by the filing Sponsoring Bank and must be made available for inspection upon regulatory request.

The Federal Banking Agencies mailing address for Filings and correspondence relating to filings is:

Federal Deposit Insurance Corporation,
Federal Reserve System, or
Office of the Comptroller of the Currency (as appropriate)
c/o NASD Central Registration Depository
P.O. Box 9401
Gaithersburg, Maryland 20898-9401

EXPLANATION OF TERMS

The following terms are italicized throughout this form.

For purposes of filing this Form U-4B:

The term **Federal Banking Agency** means the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, or the Office of the Comptroller of the Currency, Department of the Treasury, as appropriate.

The term **Bank Securities Representative** means an employee of a state or nationally chartered bank who has, or will be, engaged in the retail solicitation, recommendation, purchase or sale of covered products as defined in the Federal Bank Agency regulations—12 CFR 342, 12 CFR 208, and 12 CFR 12.

The term **Sponsoring Bank** means a state or nationally chartered bank that engages in the retail solicitation, recommendation, purchase or sale of covered products without registering as a broker/dealer under the Securities and Exchange Act of 1934, and has filed a Form SB Uniform Notice for Sponsoring Bank with the appropriate Federal Banking Agency.

The term **Jurisdiction** means a state, the District of Columbia, the Commonwealth of Puerto Rico, or any subdivision or regulatory body thereof.

The term **Self-Regulatory Organization ("SRO")** means any national securities and commodities exchange, any national securities association (e.g., the NASD), or any registered clearing agency.

The term **Control** means the power to direct or cause the direction of the management or policies of a company, whether through ownership of securities, by contract, or otherwise. Any individual or firm that is a director, partner, or officer exercising executive responsibility (or having similar status or functions) or that directly or indirectly has the right to vote 25 percent or more of the voting securities or is entitled to 25 percent or more of the profits is presumed to control that company.

The term **Appropriate Signatory** means the individual designated by the Sponsoring Bank who is authorized to execute Form U-4B on its behalf. Such individual must meet the criteria, if any, for acting as the "appropriate signatory" as established by the Federal Banking Agency requiring this form to be filed.

The term **Investment-Related** pertains to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, issuer, investment company, investment adviser, futures sponsor, bank or savings association).

For purposes of Item 22:

The term **Charged** means being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge).

The term **Involved** means doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

The term **Foreign Financial Regulatory Authority** includes a foreign securities authority; other governmental body or foreign equivalent of a *self-regulatory organization* empowered by a foreign government to administer or enforce its laws relating to the regulation of *investment-related* activities; or membership organization, a function of which is to regulate the participation of its members in *investment-related* activities listed above.

The term **Order** means a written directive issued pursuant to statutory authority and procedures, including orders of denial, suspension, or revocation; does not include special stipulations, undertakings or agreements relating to payments, limitations on activity or other restrictions unless they are included in an order.

For the purposes of Items 22.A and 22.B and the corresponding DRP (U-4B):

The term **Felony**, for jurisdictions that do not differentiate between a *felony* or *misdemeanor*, is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000. The term also includes a general court martial.

The term **Misdemeanor**, for jurisdictions that do not differentiate between a *felony* or *misdemeanor*, is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than $1,000. The term also includes a special court martial.

For the purposes of Item 22.E and the corresponding DRP (U-4B):

A **Minor Rule Violation** is a violation of a *self-regulatory organization* rule which has been designated as "minor" pursuant to a plan approved by the U.S. Securities and Exchange Commission. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of $2,500.00 or less, and if the sanctioned person does not contest the fine. Check with the appropriate *self-regulatory organization* to determine if a particular rule violation has been designated as "minor" for these purposes.

For the purposes of Item 22.G and the corresponding DRP (U-4B):

The term **Investigation** includes grand jury investigations, U.S. Securities and Exchange Commission investigations after the

"Wells" notice has been given, formal investigations by *SROs* or actions or procedures designated as investigations by *jurisdictions*, but does not include subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, "blue sheet" requests or other trading questionnaires, or examinations.

The term **Proceeding** includes a formal administrative or civil action initiated by a *Federal Banking Agency*, governmental agency, *self-regulatory organization* or *foreign financial regulatory authority*, a *felony* criminal indictment or information (or equivalent formal charge), or a *misdemeanor* criminal information (or equivalent formal charge), but does not include an arrest or similar charge effected in the absence of a formal criminal indictment or information (or equivalent formal charge). NOTE: *Investment-related* civil litigation, other than that specified above, is reportable under Item 22.H on Form U-4B. An *investigation* is reportable under Item 22.G on Form U-4B.

For the purposes of Item 22.H and the corresponding DRP (U-4B):

The term **Enjoined** includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction or a temporary restraining order.

For the purposes of Item 22.J and the corresponding DRP (U-4B):

The terms **Resign** or **Resigned** relate to separation from employment with any employer and are not restricted to *investment-related* employment. Include any termination in which the allegations are a proximate cause of the separation, even if the separation was initiated by you.

SPECIFIC INSTRUCTIONS

1. **Last Name.** The applicant's last name will include punctuation(s) when and where appropriate. An entry is required for processing initial and amended Form U-4B filings.

First Name. Do not use nicknames, abbreviations, or modifications to the applicant's first name. An entry is required for processing initial and amended Form U-4B filings.

Middle Name. If the applicant does not have a middle name specify "NONE". Do not leave this field blank. Do not include nicknames, abbreviations, or modifications to the applicant's middle name. This term is required for processing initial and amended Form U-4B filings.

2. **Applicant's CRD #.** The Applicant's CRD number is assigned to the applicant by the Central Registration Depository (CRD) system. If the applicant's CRD number is not known, leave this item blank. New applicants will receive a unique CRD number that is permanently assigned and remains with the individual throughout his or her registration history, regardless of employment changes. It is not necessary to include leading zeros. An entry is not required for processing an initial Form U-4B filing but is required for amended U-4B filings.

Applicant's SS #. Enter the applicant's social security number. Completion of the applicant's SSN is voluntary. However, failure to complete the applicant's SSN may result in confusion regarding who the applicant is and may delay or prevent the processing of the Form U-4B. If the form is being filed on behalf of a foreigner who has not been issued a social security number, indicate "FOREIGNER" in this item. Entry is required in this field for processing of the initial and amended Form U-4B filings.

3. **Sponsoring Bank CRD #.** Sponsoring Banks are assigned a unique CRD number. This number is system generated and uniquely identifies the organization. An entry is required in this field for processing initial and amended Form U-4B filings.

4. **Sponsoring Bank.** This is the Sponsoring Bank's complete name as listed on Form SB. Do not abbreviate, shorten, or modify the name. An entry is required in this field for processing initial and amended Form U-4B filings.

5. **Employment Date.** The filing of the U-4B assumes that the individual is employed with your Sponsoring Bank; therefore, this item requires the month, day, and year of hire rather than the application for registration date. The format should be numeric (e.g., 01/01/1995 equals January 1, 1995). This is a required field for processing the initial Form U-4B filing.

6. **CRD Branch #.** Not applicable for Form U-4B filings.

7. **Billing Code.** The Billing Code is an alpha/numeric value consisting of up to eight characters. It is the responsibility of the Sponsoring Bank to establish and maintain its own set of unique billing codes. If your Sponsoring Bank doe not use CRD billing codes, leave this field blank. This is not a required field.

8. **Office of Employment Address.** Not applicable for Form U-4B filings.

9. **Dual Registration.** Check the appropriate "Yes" or "No" box regarding whether the applicant will maintain dual registration with another broker-dealer or another investment adviser that is not under common ownership or control with the Sponsoring Bank. If you choose "Yes", consult the rules and statutes of the appropriate *Self Regulatory Organization(s)* and *jurisdiction(s)* for prohibitions and liability provisions. Employment with other broker-dealers or investment advisers must be listed in the Employment and Personal History (Item 20.A) on Page 2 of the Form U-4B.

10. **Affiliated Firms.** Not applicable for Form U-4B filings.

11. **Federal Banking Agency.** Check the appropriate Federal Banking Agency box(es) with which the applicant wishes to register. Applicable fees should be submitted with the filing unless the Federal Banking Agency maintains sufficient funds in its CRD account. If an examination is required for registration, the exam will be automatically scheduled and fee(s) charged appropriately. Registration applications will not be processed unless the Sponsoring Bank has filed Form SB or has an application pending.

12. **Mark Registration Category(ies).** Check all appropriate registration categories desired. If the applicant is not qualified for a category of registration requested, the appropriate examination(s) will be scheduled automatically, and the examination fee(s) deducted from the firm's CRD account.

13. **Complete this section only if you are scheduling or rescheduling an exam or continuing education session.** The purpose of this item is to schedule or reschedule examinations or Continuing Education sessions. Checking an exam box will not generate a registration request/approval but will schedule the appropriate examination even if the applicant has previously passed the examination. Check the S101 (Continuing Education session) box will request an unscheduled session even if the applicant has previously satisfied the Continuing Education requirement. An unscheduled session will not fulfill the applicant's Continuing Education requirement.

Signatory Area

Date. This date represents the date the form was signed by the appropriate signatory. The correct format for the date entry is "MM/DD/YYYY." This is required field for U-4B Page 1 amended filings.

Signature of *Appropriate Signatory*. U-4B Page 1 need not be signed on initial or transfer filings. A signature is required when filing U-4B Page 1 as an amendment. If a U-4B Page 1 is being filed to schedule or reschedule an examination, complete Items 1, 2, 3, 4, and 13 only. (If any other items are completed, a signature is required.) NOTE: "Signature" includes a manual signature or an electronically transmitted equivalent.

Type or Print Name. The signatory's full legal name must be displayed under the signature. The name must be typed or printed as it appears in the signature form.

CRD Use Only. Do not mark inside this box. This area is used for administrative purposes only.

14. **Sponsoring Bank CRD #.** Sponsoring Banks are assigned a unique CRD number. This number is system generated and uniquely identifies the organization. An entry is required in this field for processing initial and amended Page 2 Form U-4B filings.

Applicant's Social Security #. Enter the applicant's social security number. Completion of the applicant's SSN is voluntary. However, failure to complete the applicant's SSN may result in confusion regarding who the applicant is and may delay or prevent the processing of the Form U-4B. If the form is being filed on behalf of a foreigner who has not been issued a social security number, indicate "FOREIGNER" in this item. Entry is required in this field for processing of the initial and amended Page 2 Form U-4B filings.

Applicant's CRD #. The Applicant's CRD is assigned to the applicant by the CRD system. If the applicant's CRD number is not known, leave this item blank. New applicants will receive a unique CRD number that is permanently assigned and remains with the individual throughout his or her registration history. It is not necessary to include leading zeros. An entry is required in this field for U-4B Page 2 amended filings.

Personal Data

The name inserted must be the applicant's full legal name.

15. **Last Name.** The applicant's last name will include punctuation(s) when and where appropriate. An entry is required for processing initial and Page 2 Form U-4B amended filings.

First Name. Do not use nicknames, abbreviations, or modifications to the applicant's first name. An entry is required for processing initial and amended Page 2 Form U-4B filings.

Middle Name. If the applicant does not have a middle name specify "NONE". Do not leave this field blank. This item is required for processing initial and amended Form U-4B filings. Do not include nicknames, abbreviations, or modifications to the applicant's middle name.

16. **Maiden/Other Name(s) Known By.** This item is used to record names used, currently or in the past, by the applicant other than the legal name. The field should include other names (maiden, married, alias, or nickname) used by the applicant since adulthood. This is not a required field.

17. **Date of Birth.** The date format should be MM/DD/YYYY. An entry must be in this field to process the initial Form U-4B.

State/Country of Birth. This field is used to record the applicant's place of birth. This is a required field for initial Form U-4B filings.

18. **Sex.** Indicate the appropriate box for gender. This is a required field for initial Form U-4B filings.

Height. The applicant's height must be measured in feet (ft) and inches (in). This is a required field for initial Form U-4B filings.

Weight. The applicant's weight must be measured in pounds (lbs). This is a required field for initial Form U-4B filings.

Hair Color. This is a two character item. This item is required for processing of the initial Form U-4B.

Eye Color. This is a two character item. This item is required for processing of the initial Form U-4B.

19. **Residential History**

Provide residential addresses for the past file years. The dates "From–To" must be such that there are no gaps greater than three months. Begin with your current residential address. Report changes as they occur. Do ot use Post Office boxes. Use attachment sheet if annitional space is needed.

From Month/Year. The month/year is MM/YYYY. This is a required field for each residence.

To Month/Year. The month/year is MM/YYYY. This is a required field for all residences except the current address.

Street. This item is used to capture the mailing description of the applicant's residence. P.O. Box addresses are not acceptable. Include street name, building #, unit #, apartment #, suite #, slip #, etc.

City. This item is used to capture the name of the city in which the applicant currently, or previously resided. This is a required field for all address history.

State/Country. This item identifies the state code where the applicant resides or resided in the past. Enter the two digit state abbreviation where the applicant resided for each address. If this is a foreign address indicate the country.

ZIP. Enter the applicant's residence nine digit ZIP Code or postal code if a foreign address.

20.A. **Employment and Personal History**

Provide the applicant's employment and personal history for the past ten years. The dates "From–To" must be such that there are no gaps greater than three months. Exclude the firm(s) noted in Items 4 and 10. Include all firm(s) in Item 9. Entries must include the start and end dates, the full name of the company, city and state/country. Account for all time including full and part-time employments, self employment, military service, and homemaking. Also include statuses such as unemployment, full-time education, or travel that lasted for at least one month.

From Month/Year. The month/year format is MM/YYYY. This is a required field for each employment.

To Month/Year. The month/year format is MM/YYYY. This is a required field for all employments.

Name. Enter employment/personal history. Do not abbreviate, shorten, or modify the name. Ten years of employment history is required. Exclude the firms noted in Items 4 and 10 on Page 1 of Form U-4B. This is a required field for each employment and personal history.

***Investment-Related* Business.** Indicate "Yes" or "No" as to whether employer is (was) an *investment-related* business, regardless of the position held by applicant.

City. This item is used to capture the name of the city in which the applicant was employed. This is a required field for all employment and personal history.

State/Country. This item identifies the state or country where the applicant was employed. Enter the two digit state abbreviation where the applicant was employed for each address. If this is a foreign address indicate the country.

Position Held. Provide the applicant's last title or position held with each employer. Provide both functional and administrative titles when possible (e.g., vice president and director).

20.B. **Other Business.** The "Yes" or "No" boxes refer to whether an applicant is currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent, or otherwise. Exclude non-*investment-related* activity which is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt. If "Yes", complete the Other Business Disclosure Reporting Page included in the Form U-4B.

Signatory Area

Date. This date represents the date the U-4B Page 2 was signed by the *appropriate signatory*. The correct format for the date entry is "MM/DD/YYYY". This is a required field for U-4B Page 2 amended filings.

Signature of *Appropriate Signatory*. Enter the applicant's signature. Signatures are required on Page 2 when the Form U-4B is an amended filing. U-4B Page 2 need not be signed for initial filings. NOTE: "Signature" includes a manual signature or an electronically transmitted equivalent.

Type or Print Name. The signatory's full legal name must be displayed under the signature. The name must be typed as it appears in signature form.

CRD Use Only. Do not mark inside this box. This space is used for administrative purposes only.

21r **Sponsoring Bank CRD #.** Sponsoring Banks are assigned a unique CRD number. This number is system generated and uniquely identifies the organization. An entry is required in this field for processing amended Page 3 Form U-4B filings.

Applicant's Social Security #. Enter the applicant's social security number. Completion of the applicant's SSN is voluntary. However, failure to complete the applicant's SSN may result in confusion regarding who the applicant is and may delay or prevent the processing of the Form U-4B. If the form is being filed on behalf of a foreigner who has not been issued a social security number, indicate "FOREIGNER" in this item. Entry is required in this field for processing of initial and amended Page 3 Form U-4B filings.

Applicant's CRD #. The Applicant's CRD number is assigned to the applicant by the CRD system. If the applicant's CRD number is not known, leave this item blank. New applicants will receive a unique CRD number that is permanently assigned and remains with the individual throughout his or her registration history. It is not necessary to include leading zeros. An entry is not required for processing an initial Form U-4B filing but is required for amended U-4B Page 3 filings.

22. **Disclosure Information.** Check the appropriate "Yes" or "No" response for each question. Complete details explaining any "Yes" answers must be provided on the appropriate Disclosure Reporting Pages (DRPs).

22.A.-M. **Disclosure**

Criminal Disclosure
22.A.—Felony Criminal Disclosure
22.B.—Misdemeanor Criminal Disclosure

Regulatory Action Disclosure
22.C.—Regulatory Action by SEC or CFTC
22.D.—Regulatory Action by Federal Banking Agency, other federal regulator, state regulatory, or foreign financial regulator
22.E.—Regulatory Action by *SRO* or commodities exchange
22.F.—Professional Suspension
22.G.—Formal Pending Action/Investigation

Civil Judicial Actions
22.H.—Civil/Judicial Actions

Customer Complaints
22.I.—Customer Complaints

Terminations
22.J.—Terminations for Cause

Financial Page 1
22.K.—Bankruptcy and SIPC

Financial Page 2
22.L.—Bonding Payouts or Revocations
22.M.—Unsatisfied Judgments and Liens

22.N. **Disclosure Certification (Optional).** The certification language contained in Item 22.N allows applicant to certify that all disclosable information on the individual's record has been previously reported on Form U-4B or Form U-5B DRPs. Certification should be used for full Form U-4B filings only, not amended filings. Applicants who have not been previously registered with the NASD, or who have not submitted DRPs for all disclosable information, may not take advantage of the certification option. Use of the certification is optional, and, if chosen, "Yes" answers to the appropriate questions in Items 22.A through M must be provided.

Signatory Area

"Signature" includes a manual signature or an electronically transmitted equivalent.

Date. This represents the date the form was signed by the *appropriate signatory*. The correct format for the date entry is "MM/DD/YYYY". Both the applicant and *appropriate signatory* must date this page only when it is being submitted as an amended filing.

Signature of Applicant. Page 3 need not be signed on initial or transfer filings. A signature is required when filing U-4B Page 3 as an amendment. Enter the applicant's full legal signature as it appears in typed or printed form.

Type or Print Name of Applicant. The applicant's full legal name must be displayed under the signature. The name must be typed or printed as it appears in signature form.

Signature of *Appropriate Signatory*. A signatory entry is not required for initial or transfer filings. This is a required field only when submitting as a U-4B Page 3 amendment.

Type or Print Name of *Appropriate Signatory*. The appropriate signatory's full legal name must be displayed under the signature. The name must be typed or printed as it appears in signature form.

Form U-4B
Page 1 of 15

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)

If amending, complete items 1,2,3,4 and items being amended.

1. Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))	2. Applicant's CRD No.	Applicant's SSN

3. Sponsoring Bank CRD No.	4. Sponsoring Bank or Issuer Name (Do not include this employment under Item 20.A, page 2.)

5. Employment Date (MM/DD/YYYY)	6. CRD Branch No.	7. Billing Code (optional)	8. Office of Employment Address
	Not Applicable		Not Applicable

9. Dual Registration

A. Will applicant maintain registrations with firm(s) **not under** common ownership or control with the Sponsoring Bank named in Item 4 above?
- ☐ Yes If Yes, list the firm(s) in Item 20.A on page 2.
- ☐ No

B. Will applicant maintain registration with an investment adviser **not under** common ownership or control with the Sponsoring Bank in item 4 above?
- ☐ Yes If Yes, list the firm(s) in Item 20.A on page 2.
- ☐ No

10. Affiliated Firms

Not Applicable

11. Federal Banking Agency

☐ OCC ☐ FRS ☐ FDIC

12. Registration Category Requested

Mark the registration category(ies) being requested. Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this item and complete Item 13.
- ☐ IR - (S6) Investment Company and Variable Contracts Products Rep.
- ☐ GS - (S7) Full Registration/General Securities Representative

13. Complete this item only if you are scheduling or rescheduling an exam or continuing education session.

☐ S6 ☐ S7 ☐ S101

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

The *appropriate signatory* area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

Date (MM/DD/YYYY) Signature of *appropriate signatory*

Print or type name of *appropriate signatory*

CRD Use Only

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 2 of 15

If amending page 2, complete Items 14, 15 and items being amended.

14. Sponsoring Bank CRD No.	Applicant's SSN	Applicant's CRD No.

PERSONAL DATA

15. Last Name (Jr., Sr., etc.)	First Name	Middle Name (Specify if none)	16. Maiden/Other Names Known By

17. Date of Birth (MM/DD/YYYY)	State/Country of Birth	18. Sex ☐ M ☐ F	Height (Ft.,In.)	Weight	Hair Color	Eye Color

RESIDENTIAL HISTORY

19. Starting with current address, give all addresses for the past 5 years. Report changes only when they occur. Use the Attachment Sheet if additional space is required.

From Month (MM)	From Year (YYYY)	To Month (MM)	To Year (YYYY)	Street (Do not use a P.O. Box)	City	State/ Country	ZIP Code
		PRESENT					

EMPLOYMENT AND PERSONAL HISTORY

20. A. Provide Complete employment history for the past 10 years, exclude the Sponsoring Bank noted in Item 4. Include all Firm(s) from Item 9. (Account for all time including full and part-time employments, self employment, military service, and homemaking. Also include statuses such as unemployed, full-time education, or travel that lasted for at least one month.) Report changes only when they occur, use Attachment Sheet if additional space is required.

From Month (MM)	From Year (YYYY)	To Month (MM)	To Year (YYYY)	Name	Investment-Related Business?	City	State/ Country	Position Held
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			
					☐ YES ☐ NO			

20. B. Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non investment-related activity which is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.)

☐ YES ☐ NO If "YES", please complete the Other Business Reporting Page of this form.

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

The *appropriate signatory* area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

Date (MM/DD/YYYY) Signature of *appropriate signatory*

Print or type name of *appropriate signatory*

CRD Use Only

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

If amending pages 3 and 4, complete Item 21 and items being amended.

21. Sponsoring Bank CRD No.	Applicant's SSN	Applicant's CRD No.

If the answer to any of the following questions is "YES" and you cannot utilize the certification in Item 22N below, Attach complete details of all events or proceedings on appropriate DRP(S).

22. REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U-4B INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

	YES	NO	
A. (1) Have you ever:			
(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic, foreign, or military court to any *felony*?			1
(b) been *charged* with any *felony*?			2
(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:			
(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic or foreign court to any *felony*?			3
(b) been *charged* with any *felony*?			4
B. (1) Have you ever:			
(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?			5
(b) been *charged* with a *misdemeanor* specified in 22.B.(1)(a)?			6
(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:			
(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic or foreign court to a *misdemeanor* specified in 22.B.(1)(a)?			7
(b) been *charged* with a *misdemeanor* specified in 22.B.(1)(a)?			8
Regulatory Disciplinary Actions			
C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) *found* you to have made a false statement or omission?			9
(2) *found* you to have been *involved* in a violation of its regulations or statutes?			10
(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?			11
(4) entered an *order* against you in connection with *investment-related* activity?			12
(5) imposed a civil money penalty on you or *ordered* you to cease and desist from any activity?			13
D. Has any Federal banking regulator or other Federal regulatory agency or any state regulatory agency or foreign *financial regulatory authority* ever:			
(1) *found* you to have made a false statement or omission or been dishonest, unfair or unethical?			14
(2) *found* you to have been *involved* in a violation of *investment-related* regulations(s) or statute(s)?			15
(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?			16
(4) entered an *order* against you in connection with *investment-related* activity?			17
(5) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted you activities?			18
E. Has any *self-regulatory organization* or commodities exchange ever:			
(1) *found* you to have made a false statement or omission?			19
(2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and Exchange Commission)?			20
(3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?			21
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?			22
F. Has your authorization to act as an attorney, accountant or federal contractor ever been revoked or suspended?			23
G. Have you been notified, in writing, that you are now the subject of any:			
(1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 22.C, D, or E? *(If yes, complete the Regulatory Action Disclosure Reporting Page.)*			24
(2) *investigation* that could result in a "yes" answer to any part of 22.A, B, C, D or E? *(If yes, complete the Investigation Disclosure Reporting Page.)*			25

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

22. Continued

	YES	NO	
Civil Judicial Actions			
H. (1) Has any domestic or foreign court ever:			
(a) *enjoined* you in connection with any *investment-related* activity?			26
(b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)			27
(c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?			28
(2) Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 22.H(1)?			29
Customer Complaints			
I. Have you ever been the subject of an *investment-related*, consumer initiated complaint or *proceeding* that:			
(1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?			30
(2) was settled or decided against you for $5,000 or more, or found fraud or the wrongful taking of property?			31
Terminations			
J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:			
(1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct?			32
(2) fraud or the wrongful taking of property?			33
(3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct?			34
Financial			
K. Within the past 10 years:			
(1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?			11 35
(2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?			36
(3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act?			37
L. Has a bonding company ever denied, paid out on, or revoked a bond for you?			38
M. Do you have any unsatisfied judgments or liens against you?			39

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in Item 22 must be answered, regardless of whether the certification is being utilized. Refer to the Form U-4B instructions for additional information on the utilization of the certification language.

N. I have received a copy of my disclosure file taken from the CRD system, I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:

(1) I have no new information to add to my disclosure file		40
(2) I have new information to add to my disclosure file which is reported on the appropriate DRP(s)		41
(3) I have updated information, reported on the appropriate DRP(s), which was previously reported		42

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

The applicant and *appropriate signatory* area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

Date (MM/DD/YYYY) ______ Signature of applicant ______

Print or type name of applicant ______

Date (MM/DD/YYYY) ______ Signature of *appropriate signatory* ______

Print or type name of *appropriate signatory* ______

CRD Use Only

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

21. Sponsoring Bank CRD No.	Applicant's SSN	Applicant's CRD No.

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

APPLICANT AFFIRMATION:

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil and/or criminal penalties if I give false or misleading answers.

2. I apply for registration with the Federal Banking Agency indicated in Item 11.

3. I authorize all my employers and any other person to furnish to any Federal Banking Agency, jurisdiction, SRO, employer, prospective employer, or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer, and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including information reported on the Uniform Termination Notice for Bank Securities Representatives Registration (Form U-5B). I recognize that I may be the subject of any investigative consumer report and waive any requirement of notification with respect to any investigative consumer report ordered by any Federal Banking Agency, jurisdiction, SRO, employer or prospective employer of the nature and scope of the requested investigative consumer report.

4. I authorize the Federal Banking Agency to give any information on the Central Registration Depository to any employer or prospective employer, any federal, state or municipal agency, or any other SRO and I release the Federal Banking Agency and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.

5. I authorize the Federal Banking Agency and any person acting on their behalf to give certain information on the Central Registration Depository concerning me to any person, including the general public. I specifically authorize the release of information regarding my name, CRD #, employment and personal history, and registration categories to any person. In addition, I specifically authorize the release of information regarding criminal and civil actions as well as consumer complaints (both resolved and unresolved), terminations and certain financial disclosure information to any person. I understand the Federal Banking Agency will not disclose social security numbers, residential information, date and location of birth, or gender, but will release all other information in the Central Registration Depository to any person. I release the Federal Banking Agency and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information to any person.

6. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Item 4 of the form. I agree to update this form by causing an amendment to be filed within 30 days of the event occurring which causes any information to become incomplete, misleading or inaccurate. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.

7. I authorize any employer or prospective employer to file on my behalf any information required in this form or any amendment thereto; I certify that I have reviewed and approved the information to be submitted to any Federal Banking Agency on this Form U-4B application; I agree that I will review and approve all disclosure information that will be filed on my behalf; I further agree to waive any objection to the admissibility of the filed records in any criminal, civil, or administrative proceeding.

(All applicants must execute this page.)

Date (MM/DD/YYYY) ____________

Signature of Applicant ____________

Print or type name of Applicant ____________

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 6 of 15

21. Sponsoring Bank CRD No.	Applicant's SSN	Applicant's CRD No.

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

THE SPONSORING BANK MUST COMPLETE THE FOLLOWING:

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statutes, rules, regulations, policies and supervisory guidance, and by-laws of the appropriate Federal banking agency with which this application is being filed, and the rules governing bank securities representatives, and will be fully qualified for the position for which application is being made herein. I agree that I will not permit the applicant to act as a bank securities representative without first receiving the approval of the appropriate Federal banking agency.

This Sponsoring Bank has communicated with all of the applicant's previous employers for the past three years and has documentation on file with the names of the persons contacted and the date of contact. In addition, I have taken appropriate steps to verify the accuracy and completeness of the information contained in and with this application.

I have provided the applicant an opportunity to review the information contained herein and the applicant has approved this information and signed the Form U-4B.

*The appropriate signatory area **must** be completed on all initial or amendment filings.*

Date (MM/DD/YYYY)

Signature of *appropriate signatory*

Print or type name of *appropriate signatory*

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

OTHER BUSINESS DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Other Business Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details in support of affirmative responses to ***Item 20.B*** on Page 2 of the Form U-4B.

20.B. Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent, or otherwise? ***(Please exclude non investment-related activity which is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.)***

Please provide the following information relevant to **each** other business disclosed.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Applicant's SSN	Sponsoring Bank CRD No.

1. Name of Other Business		Investment-Related Business? ☐ Yes ☐ No
2. Address of Other Business (Street, City, State/Country, ZIP Code)		
3. Nature of Other Business		
4. Your Position, Title or Relationship with Other Business	5. Start Date (MM/DD/YYYY)	End Date (MM/DD/YYYY)
6. Your Obligation to Other Business Approximate Number of Hours/Month:	How many during securities trading hours/month?	
7. Briefly describe your duties relating to other business		

1. Name of Other Business		Investment-Related Business? ☐ Yes ☐ No
2. Address of Other Business (Street, City, State/Country, ZIP Code)		
3. Nature of Other Business		
4. Your Position, Title or Relationship with Other Business	5. Start Date (MM/DD/YYYY)	End Date (MM/DD/YYYY)
6. Your Obligation to Other Business Approximate Number of Hours/Month:	How many during securities trading hours/month?	
7. Briefly describe your duties relating to other business		

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 8 of 15

CRIMINAL DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to *Items 22.A and 22.B* on Page 3 of the Form U-4B.

Check ☐ item(s) you are responding to:

22. A. (1) Have you ever:
- ☐ **(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic, foreign, or military court to any *felony*?**
- ☐ **(b) been charged with any *felony*?**

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:
- ☐ **(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic or foreign court to any *felony*?**
- ☐ **(b) been *charged* with any *felony*?**

22. B. (1) Have you ever:
- ☐ **(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?**
- ☐ **(b) been *charged* with a *misdemeanor* specified in 22.B.(1)(a)?**

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:
- ☐ **(a) been convicted of or pled guilty or nolo contendere (no contest) in a domestic or foreign court to a *misdemeanor* specified in 22.B.(1)(a)?**
- ☐ **(b) been charged with a *misdemeanor* specified in 22.B.(1)(a)?**

Use the DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs.

Applicable court document (i.e., criminal complaint, information or indictment as well as judgment of conviction or sentencing documents) must be provided to the CRD if not previously submitted.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. If charge(s) were brought against an organization over which you exercise(d) control:

Organization Name	Investment-Related Business? ☐ Yes ☐ No	Your Position, Title, or Relatonship

2. Formal charge(s) were brought in:

Court *(Name of Federal Military, State or Foreign Court)*	Location of Court *(City or County and State or Country)*	Docket/Case Number

3. Charge Detail Disclosure: (Continue on additional Criminal Disclosure Reporting Page U-4B if more than three charges arise out of the same event.)

Chg#	Formal Charge(s) Description	Charge Date (MM/DD/YYYY)	Number of Counts	Charge Type (check one only)		Plea (Guilty, Not Guilty, etc.)	Charge is Currently (check one only)	Appeal Date (MM/DD/YYYY)	Product Type (if charge is investment-related)
				Misdemeanor	Felony				
1.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		
2.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		
3.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		

IF FINAL, ON APPEAL, OR PRE-TRIAL INTERVENTION, COMPLETE ITEMS 4 AND 5. FOR EACH CHARGE THAT IS PENDING, COMPLETE ONLY ITEM

4. Disposition Detail Disclosure: (Continue on another Criminal Disclosure Reporting Page U-4B if more than three charges.)

Chg#	Disposition Type: (Convicted, Acquitted, Dismissed, Pre-Trail Intervention, etc.)	Disposition Date (MM/DD/YYYY)	Disposition Detail Sentence/Penalty (if applicable)	Duration (if sentence, suspension, probaton, etc.)	Start Date (MM/DD/YYYY)	Penalty/Fine Amount (if applicable)	DatePaid (MM/DD/YYYY)
1.							
2.							
3.							

5. Provide a brief summary of circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was subject of the charge(s) occurred. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 9 of 15

REGULATORY REPORTING DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to *Items 22.C, 22.D, 22.E, 22.F and 22.G(1)* on Page 3 of the Form U-4B.

Check ☐ item(s) you are responding to:

22. C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:
- ☐ (1) *found* you to have made a false statement or omission?
- ☐ (2) *found* you to have been *involved* in a violation of its regulations or statutes?
- ☐ (3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?
- ☐ (4) entered an *order* against you in connection with *investment-related* activity?
- ☐ (5) imposed a civil money penalty on you or ordered you to cease and desist from any activity?

D. Has any Federal banking agency or other Federal regulatory agency or any state regulatory agency or *foreign financial regulatory authority* ever:
- ☐ (1) *found* you to have made a false statement or omission or been dishonest, unfair or unethical?
- ☐ (2) *found* you to have been *involved* in a violation of *investment-related* regulations(s) or statute(s)?
- ☐ (3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?
- ☐ (4) entered an order against you in connection with *investment-related* activity?
- ☐ (5) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted you activities?

E. Has any *self-regulatory organization* or commodities exchange ever:
- ☐ (1) *found* you to have made a false statement or omission?
- ☐ (2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a *"minor rule violation"* under a plan approved by the U.S. Securities and Exchange Commission)?
- ☐ (3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?
- ☐ (4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?

F. ☐ Has your authorization to act as an attorney, accountant or federal contractor ever been revoked or suspended?

G. Have you been notified, in writing, that you are now the subject of any:
- ☐ (1) regulatory complaint or proceeding that could result in a "yes" answer to any part of 22.C, D, or E? *(If this matter has not yet reached a formal pending action, complete the Investigation Disclosure Reporting Page.)*

One event may result in more than one affirmative answer within each of the above items. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details to each action on a separate DRP.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. Regulatory Action Initiated by (Name the regulator, foreign financial regulatory authority, SRO or commodities exchange, etc.)	2. Regulatory Action Type	3. Date Initiated (MM/DD/YYYY)

4. Docket/Case Number	5. Employing Firm when events occurred	6. Product Type(s)

7. Describe the allegations related to this regulatory action (Use reverse side of this sheet for additional comments if necessary.)

8. Is regulatory action currenlty (check one) ☐ Pending ☐ On Appeal ☐ Final	9. If on appeal, regulatory action appealed to (SEC, SRO, U.S. Court of Appeals, etc.)	10. If on appeal, date filed (MM/DD/YYYY)

IF FINAL OR ON APPEAL, COMPLETE ALL ITEMS BELOW. FOR PENDING ACTIONS, COMPLETE ITEM 19 ONLY.

11. How was the matter resolved? (Settled, Consent, etc.)	12. Resolution Date (MM/DD/YYYY)	13. Sanctions (Suspended, Censured, Barred, Requalification, etc.)

14. If Suspended, Enjoined or Barred:

Is suspension/injunction/bar of a fixed duration? ☐ Yes ☐ No (If No, provide details in Item 19)	Suspension/Injunction Bar Start Date (MM/DD/YYYY)	Suspension/Injunction Bar Duration	Suspension/Injunction/Bar capacity affected (General Securities Principal, Financial, & Operations Prinicpal, etc.)

15. If requalification by exam/retraining was a condition of the sanction:

Is requalification/retraining time-related? ☐ Yes ☐ No	If yes, length of time given to requalify/retrain: (If No, provide details in Item 19)	Type of exam required for requalification	Has condition been satisfied? ☐ Yes ☐ No

16. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation: (Fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

17. Were you required to pay any part of the monetary items disclosed in 16: ☐ Yes ☐ No (if yes, fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

18. Was payment of all or any part of a monetary award, penalty or fine waived? ☐ Yes ☐ No If yes, provide details of Waiver in 19 below.

19. Provide summary of details related to the action status and(or) disposition and include relevant terms, conditions and dates. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY) Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 10 of 15

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to *Item 22.H* on Page 4 of the Form U-4B.

Check ☐ item(s) you are responding to:
22.H.(1) Has any domestic or foreign court ever:
☐ (a) *enjoined* you in connection with any *investment-related* activity?
☐ (b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)
☐ (c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?
(2) ☐ Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 22.H.(1)?

One event may result in more than one affirmative answer within each of the above items. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details to each action on a separate DRP.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))

Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. Court Action Initiated by (Name the regulator, foreign financial regulatory authority, SRO commodities exchange, Agency, Firm, Private Plaintiff, etc.)

2. Relief Sought (Temporary Restraining Order, Mandatory Injunction, Preliminary Injunction, etc.)	3. Filing Date of Court Action (MM/DD/YYYY)

4. Product Type(s)

5. Court formal action was brought in (Name of Federal, Military, State or Foreign Court)

6. Location of Court (City or County and State or Country)	7. Docket/Case Number

8. Employing Firm when events occurred

9. Describe the allegations related to this court action (Use reverse side of this sheet for additional comments if necessary.)

10. Is action currently (check one) ☐ Pending ☐ On Appeal ☐ Final	11. If pending, date notice was served (MM/DD/YYYY)	12. If on appeal, action appealed to (provide name of court)	13. If on appeal, date filed (MM/DD/YYYY)

IF FINAL OR ON APPEAL, COMPLETE ALL ITEMS BELOW. FOR PENDING ACTIONS, COMPLETE ITEM 19 ONLY.

14. How was the matter resolved? (Settled, Consent, Judgment Rendered, etc.)	15. Resolution Date (MM/DD/YYYY)	16. Sanctions (Suspended, Censured, etc.)

17. If Suspended, Enjoined or Barred:

Is suspension/injunction/bar of a fixed duration? ☐ Yes ☐ No (If No, provide details in Item 21)	Suspension/Injunction Bar Start Date (MM/DD/YYYY)	Suspension/Injunction Bar Duration	Suspension/Injunction/Bar capacity affected (General Securities Principal, Financial, & Operations Prinicpal, etc.)

18. If requalification by exam is/was a condition of the disposition:

Is requalification time-related? ☐ Yes ☐ No	If yes, length of time given to requalify (If No, provide details in Item 21)	Type of exam required for requalification	Has condition been satisfied? ☐ Yes ☐ No

19. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation: (Fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

20. Were you required to pay any part of the monetary items disclosed in 19: ☐ Yes ☐ No (if yes, fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

21. Provide a brief summary of circumstances related to the action(s), allegation(s), disposition(s) and/or finding(s) disclosed above. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 11 of 15

CUSTOMER COMPLAINT DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to *Item 22.I* on Page 4 of the Form U-4B.

Check ☐ item(s) you are responding to:
22. I. Have you ever been the subject of an *investment-related*, consumer initiated complaint or proceeding that:
☐ (1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?
☐ (2) was settled or decided against you for $5,000 or more, or *found* fraud or the wrongful taking of property?

One event may result in more than one affirmative answer to the above items; use only one DRP to report aal the details related to one customer complaint. Use a separate DRP for each customer complaint.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.
1. Customer Name(s)		2. Customer's State(s) of Residence (2-Letter Abbreviation)
3. Employing Firm or Sponsoring Bank when events giving rise to the complaint occurred		4. Date complaint was received (MM/DD/YYYY)
5. Allegation(s)		
6. Provide a brief summary of events related to the allegation(s) including dates when activities leading to the allegation(s) occurred		
7. Product Type(s)		8. Alleged Compensatory Damage Amount $
9. Is complaint currently pending ☐ Yes ☐ No	If No, how was complaint resolved (No Action, Withdrawn, Denied, Settled, Arbitrated, Litigated, CFTC Reparation, etc.)	If No Action, Denied, or Withdrawn, give date (MM/DD/YYYY)

IF STATUS IS SETTLED, ANSWER 10 AND 13; IF ARBITRATED OR CFTC REEPARATION, ANSWER 11 AND 13; IF LITIGATED, ANSWER 12 AND 13.

10. If SETTLED by you, or on your behalf, without Arbitration, Litigation or Reparation:

Settlement Date (MM/DD/YYYY)	Settlement Amount $	Your Contribution $

11. If ARBITRATED or CFTC REPARATION:

Arbitration/Reparation Claim was filed with (NASD, AAA, NYSE, CBOE, CFTC, etc.)		Date You Received Service (MM/DD/YYYY)
Case/Docket Number	Is Arbitration/Reparation currently pending? ☐ Yes ☐ No	

If Status if FINAL:

Disposition (Settled, Dismissed, Award, Withdrawn, etc.)				Date of Disposition (MM/DD/YYYY)
If disposition resulted in monetary compensation:				
Award Amount $	Settlement Amount $	Reparation Amount $	Your Contribution $	Date Paid (MM/DD/YYYY)

12. If CIVIL LITIGATION:

Court that case was filed in (Name of Federal, State or Foreign Court)	Location of Court (City or County and State or Country)	Docket/Case Number
Is Civil Litigationcurrently pending? ☐ Yes ☐ No		Date You Received Service (MM/DD/YYYY)

If Status if FINAL:

Disposition (Settled, Dismissed, Judgment, Withdrawn, etc.)				Date of Disposition (MM/DD/YYYY)
If disposition resulted in monetary compensation:				
Judgment Amount $	Restitution Amount $	Settlement Amount $	Your Contribution $	Date Paid (MM/DD/YYYY)
Is action currently on appeal? ☐ Yes ☐ No		If on appeal, date filed (MM/DD/YYYY)		

13. Provide details as to any other limits or conditions to disposition. (Use reverse side of tis sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 12 of 15

INVESTIGATION DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to ***Item 22.G*** on Page 3 of the Form U-4B.

22. G. (2) Have you been notified, in writing, that you are now the subject of any *investigation* that could result in a "yes" answer to any part of 22.A, B, C, D or E?

Complete this DRP only if you are answering "yes" to Item 22.G.(2). If you answered "yes" to Item 22.G.(1), complete the Regulatory Action DRP. If you have been notified that the *investigation* has been concluded without formal action, complete items 1, 2, 3 and 4 of this DRP to update.

One event may result in more than one *investigation*. If more than one authority is investigating you, use a separate DRP to provide details.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. Notice received from (Name of Regulator, Agency, SRO, etc. initiating the investigation)	2. Notice date (MM/DD/YYYY)
3. Describe briefly the nature of the investigation, if known, or details of the resolution (Use reverse side of this sheet for additional comments if necessary.)	
4. Date Resolved (MM/DD/YYYY)	

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

TERMINATION DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to ***Item 22.J*** on Page 4 of the Form U-4B.

Check ☐ item(s) you are responding to:

22. J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:
- ☐ **(1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct?**
- ☐ **(2) fraud or the wrongful taking of property?**
- ☐ **(3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct?**

One event may result in more than one affirmative answer to the above items. Use only one DRP to report details related to the same termination. Use a separate DRP for each termination reported.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.
1. Firm Name		
2. Termination Type (Discharged, Permitted to Resign, Voluntary, Other)		3. Termination date (MM/DD/YYYY)
4. Allegation Type (Excessive trading activity, misrepresentation, failure to supervise, etc.)		
5. Product Type(s)		
6. Describe circumstances relating to termination. Include event dates and facts to sufficiently describe conduct leading to termination. (Use reverse side of this sheet for additional comments if necessary.)		

Date (MM/DD/YYYY)

Signature of applicant

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

Form U-4B
Page 14 of 15

FINANCIAL DISCLOSURE REPORTING PAGE 1

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to ***Items 22.K.(1), 22.K.(2), and 22.K.(3)*** on Page 4 of the Form U-4B.

Check ☐ item(s) you are responding to:
22. K. Within the past 10 years:
☐ **(1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? (Please fill out SECTION I below.)**
☐ **(2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? (Please fill out SECTION I below.)**
☐ **(3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? (Please fill out SECTION II below.)**

If events result in affirmative answers to both 22.K.(1) and 22.K.(2), details to each must be provided on separate DRPs. You must complete Section I and/or Section II as well as Item 18 to complete this DRP.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

SECTION I

If within the past 10 years you have made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition or; if within the past 10 years based upon events that occurred while you exercised control over it, an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition:

1. Action Type (Compromise, Bankruptcy, Declaration, etc.)	2. Action Date (MM/DD/YYYY)

If the financial action relates to an organization over which you exercise(d) control:

3. Organization Name	4. Investment-Related Business? ☐ Yes ☐ No	5. Your Position, Title, Relationship (if applicable)
6. Court (Name of Federal, State, or Foreign Court)		7. Location of Court (City or County and State or Country)
8. Docket/Case Number	9. Chapter Number (If Federal Bankruptcy Filing)	10. Is action currently pending? ☐ Yes ☐ No
11. Disposition Type (Discharged, Released, Dismissed, etc.)		12. Disposition Date (MM/DD/YYYY)
13. Provide brief summary of events leading to action. If not dismissed or closed, explain (Use reverse side of this sheet for additional comments if necessary.)		

SECTION II

If within the past 10 years based upon events that occurred while you exercised control over it, a broker or dealer has been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act:

1. Action Type (Compromise, Bankruptcy, Declaration, etc.)		2. Action Date (MM/DD/YYYY)
3. Organization Name		4. Your Position, Title, Relationship (if applicable)
5. Court (Name of Federal, State, or Foreign Court)		6. Location of Court (City or County and State or Country)
7. Docket/Case Number	8. Chapter Number (If Federal Bankruptcy Filing)	9. Is action currently pending? ☐ Yes ☐ No
10. Disposition Type (Discharged, Released, Dismissed, etc.)		11. Disposition Date (MM/DD/YYYY)
12. Provide brief summary of events leading to action. If not dismissed or closed, explain (Use reverse side of this sheet for additional comments if necessary.)		

If a SIPA trustee was appointed, complete Items 13, 16, and 17. If a direct payment procedure was begun, complete Items 13, 14, and 15.

13. Currently Open? ☐ Yes ☐ No	14. The amount paid of agreed to be paid by you $	15. Date Initiated or Filed (MM/DD/YYYY)
16. Trustee Name		17. Trustee Appointment Date (MM/DD/YYYY)

18. Please provide details as to any status disposition. Include details as to creditors, terms, conditions, amounts due and settlement schedule (if applicable). (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY) ____________________

Signature of applicant ____________________

Uniform Application for Bank Securities Representative Registration or Transfer (Form U-4B)—continued

FINANCIAL DISCLOSURE REPORTING PAGE 2

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-4B) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to ***Items 22.L and 22.M*** on Page 4 of the Form U-4B.

Check ☐ item(s) you are responding to:
22. ☐ L. Has a bonding company ever denied, paid out on, or revoked a bond for you? (Please fill out SECTION I below.)
☐ M. Do you have any unsatisfied judgments on liens against you? (Please fill out SECTION II below.)

If multiple, unrelated events result in the same affirmative answer, details must be provided on separate DRPs.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

SECTION I

If a bonding company ever denied, paid out on, or revoked a bond for you:

1. Firm Name (Policyholder)	
2. Bonding Company Name	
3. Disposition Type (Denied, Revoked, Payout)	4. Disposition Date (MM/DD/YYYY)

5. If disposition resulted in Payout:

Payout Amount $	Date Paid (MM/DD/YYYY)
6. Summarize details of circumstances leading to the necessity of the bonding company action.	

SECTION II

If you have an unsatisfied judgment or lien: (Disclose details for only one judgment or lien per DRP.) When you satisfy or otherwise dispose of this judgment or lien, amend the Form U-4B Page 4 and this section to report the outcome.

1. Judgment/Lien Amount		2. Judgment or Lien Holder
3. Judgment/Lien Type (Tax, Civil, Default, Liquidated Damages, etc.)		4. Date Filed MM/DD/YYYY)
5. Is Judgment/Lien Ourstanding? ☐ Yes ☐ No	If No, provide status date (MM/DD/YYYY)	If No, how was matter resolved? (Released, Discharged, Removed, Satisfied)
6. Court (Name of Federal, State or Foreign Court)	7. Location of Court (City or County and State or Country)	8. Docket/Case Number
9. Provide brief summary of events leading to the action and any payment schedule details including current status (if applicable) (Use reverse side of this sheet for additional comments if necessary.)		

Date (MM/DD/YYYY)

Signature of applicant

OMB No. xxxx–xxxxx (OCC) Expires x/xx/xx
xxxx–xxxx (FDIC) Expires x/xx/xx
7100–0281 (FRS) Expires x/xx/xx
Average hours per response: x.xx

Form U-5B

Uniform Termination Notice for Bank Securities Representative Registration

11/96

FORM U-5B

UNIFORM TERMINATION NOTICE FOR BANK SECURITIES REPRESENTATIVE REGISTRATION

Public reporting burden for this information collection is estimated to vary from X.X to X,XXX hours per response, with an average of XX.XX hours per response, including time to gather and maintain data in the required form and to review instructions and complete the information collection. Comments regarding this burden estimated or any other aspect of this information collection, including suggestions for reducing the burden, amy be sent to:

Secretary
Board of Governors of the Federal Reserve System
20th and C Streets, NW
Washington, DC 20551

and

Office of Management and Budget
Paperwork Reduction Project (7100-0XXX)
Washington, DC 20503.

GENERAL INSTRUCTIONS

The Form U-5B is the Uniform Termination Notice for Bank Securities Representative Registration. The form is similar, but not identical, to the Form U-5 used by broker-dealers, investment advisers, and issuers of securities to terminatre registration of an individual in the various self-regulatory organizations and jurisdictions. These instructions apply to filing Form U-5B with the Federal Banking Agencies.

Items 1—18 must be answered and all fields requiring a response must be completed before the filing is accepted. Enter "none" or "N/A" (not applicable) where appropriate.

Use the Disclosure Reporting Page(s) (DRPs U-5B) to provide details to "yes" answers to items 14—18. Although documents are not required with the DRP (U-5B), you may wish to include them as the appropriate Federal banking agency may request them as part of the review process.

Former Bank Securities Representatives are under the continuing jurisdiction of the Federal banking regulators and mya hve to provide information about their activities while associated with the Sponsoring bank. Individuals are required to forward any residential address changes–item 8–for two years following termination or last Form U-5B filing.

Sponsoring Banks have a continuing obligation to amend and update items 14—18 until final disposition, reportable matters that occur and become known after initial submission of this form. A paper copy, with an original manual signature, of the Form U-5B and amendments to Disclosure Reporting Page (DRPs U-5B) may be required to be retained by the filing Sponsoring Bank and may be required to be made available for inspection upon regulatory request.

Amendments to items other than 5 and 14—18 are probilited.

To amend items 14—18, complete only items 1—4 and the item(s) being amended. If additional information relates to the amendment, submit the details on fully completed DRP(s) (U-5B).

The Federal banking agency's mailing address for questions and correspondence is:

Federal Deposit Insurance Corporation,
The Board of Governors of the Federal Reserve System,
and
Office of the Comptroller of the Currency
c/o NASD Central Registration Depository
P.O. Box 9401
Gaithersburg, Maryland 20898-9401

EXPLANATION OF TERMS

The following terms are italicized throughout this form.

For purposes of filing this Form U-5B:

The term **Federal Banking Agency** means the Federal Deposit Insurance Corporation for state nonmember banks, the Board of Governors of the Federal Reserve System for state member banks, and the Office of the Comptroller of the Currency, Department of the Treasury for national banks.

The term **Bank Securities Representative** means an employee of a Sponsoring Bank who is, or was, engaged in the solicitation recommendation purchase or sale of certain securities to retail bank customers.

The term **Sponsoring Bank** means a state or nationally chartered bank which is using the bank exemption in the Securities Exchange Act of 1934, as amended, to solicit, recommend, purchase or sell certain securities through Bank Securities Representatives to retail bank customers.

The term **Jurisdiction** means a state, the District of Columbia, the Commonwealth of Puerto Rico, or any subdivision or regulatory body thereof.

The term **Self-Regulatory Organization ("SRO")** means any national securities and commodities exchange, any national securities association (e.g., the NASD), or any registered clearing agency.

The term **Full Termination** means the terminatin of registration with the appropriate Federal banking agency.

For purposes of item 9:

The term **Misdemeanor**, for jurisdictions that do not differentiate between a felony or misdemeanor, is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than $1,000. The term also includes a special court martial.

The term **Investment-Related** pertains to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, investment comapny, investment banker, futures sponsor, bank, or savings association). Such term specifically includes actions taken by the Federal banking agencies pursuant to Sections 8 and 19 of the Federal Deposit Insurance Act. 12 U.S.C. § 1818 and 1829.

The term **Appropriate Signatory** means the individual designated by the Sponsoring bank who is authorized to execute Form U-5B on its behalf. Such individual must beem the criteria, if any, for acting as the "appropriate signatory" as established by the appropriate Federal banking agency.

For purposes of item 15 and the corresponding DRP (U-5B):

The term **Involved** means doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

The term **Disciplinary Action** includes a formal action such as a denial, revocation or suspension of a registration, or a censure, fine, cease and desist order, order of prohibition, temporary restraining order, injunction, bar or expulsion, but does not include a minor rule violation, defiicency letter, examination report, memorandum of understanding, letter of caution, admonishment, and similar informal resolutions or matters.

The term **Foreign Financial Regulatory Authority** includes a foreign securities authority; any other governmental body or foreign equivalent or a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or a membership organization a fanction of which is to regulate the participation of ites members in the activities listed above.

For purposes of item 12:

The term **Date Terminated** means the effective date of the termiantion of the registration or, in the case where registration has not yet been made effective, the date the withdrawal of the application for registration.

For purposes of item 14 and the corresponding DRP (U-5B):

The term **Charged** means being accused of a crime in a formal complaint, information, or indictment, (or equivalent formal charge).

The term **Felony**, for jurisdictions that do not differentiate between a felony or misdemeanor, is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000. The term also includes a general court martial.

A **Minor Rule Violation** is a violation of a self-regulatory organization rule which has been designated as "minor" pursuant to a plan approved by the U.S. Securities and Exchange Commission. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of $2,500.00 or less, and if the sanctioned person does not contest the fine. Check with the appropriate self-regulatory organization to determine if a particular rule violation has been designated as "minor" for these purposes.

For the purposes of Item 16 and the corresponding DRP (U-5B):

The term **Investigation** includes grand jury investigations, U.S. Securities and Exchange Commission investigations after the "Wells" notice has been given, formal investigations by SROs or actions or procedures designated as investigations by jurisdictions, but does not include subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, "blue sheet" requests or other trading questionnaires, or examinations.

The term **Proceeding** includes a formal administrative or civil action initiated by a Federal Banking Agency, governmental agency, self-regulatory organization or foreign financial regulatory authority, a felony criminal indictment or information (or equivalent formal charge), or a misdemeanor criminal information (or equivalent formal charge), but does not include an arrest or similar charge effected in the absence of a formal criminal indictment or information (or equivalent formal charge).

SPECIFIC INSTRUCTIONS

1. **Last Name.** The applicant's last name will include punctuation(s) when and where appropriate. An entry is required for processing initial and amended Form U-5B filings.

First Name. Do not use nicknames, abbreviations, or modifications to the applicant's first name. An entry is required for processing initial and amended Form U-5B filings.

Middle Name. If the applicant does not have a middle name specify "NONE". Do not leave this field blank. Do not include nicknames, abbreviations, or modifications to the applicant's middle name. This term is required for processing initial and amended Form U-5B filings.

2. **Applicant's CRD #.** The Applicant's CRD number is assigned to the applicant by the Federal banking agencies through the Central Registration Depository (CRD) system. It is not necessary to include leading zeros.

Applicant's SS #. Enter the applicant's social security number. Completion of the applicant's SSN is voluntary. However, failure to complete the applicant's SSN may result in confusion regarding who the applicant is and may delay or prevent the processing of the Form U-5B.

3. **Sponsoring Bank or Issuer Name.** This is the Sponsoring Bank's complete name as listed on Form SB, or the issuer's complete name. Do not abbreviate, shorten, or modify the name. An entry is required in this field for processing the initial and amended Form U-5B filings.

4. **Sponsoring Bank CRD #.** Sponsoring Banks are assigned a unique CRD number. An entry is required in this field for processing the initial and amended Form U-5B filings.

5. **Office of Employment Address.** Not applicable for Form U-5B filings.

6. **CRD Branch #.** Not applicable for Form U-5B filings.

7. **Billing Code.** The Billing Code is an alpha/numeric value consisting of up to eight characters. It is the responsibility of the Sponsoring Bank to establish and maintain its own set of unique billing codes. If your Sponsoring Bank doe not use CRD billing codes, leave this field blank. This is not a required field.

8. **Street.** This item is used to capture the physical location of the applicant's residence. Post office boxes are not acceptable. Include street name, building #, unit #, apartment #, suite #, slip #, etc. The applicant is required to update the information for two years after leaving the industry.

City. This item is used to capture the name of the city in which the applicant is currently residing. This is a required field for all address history.

State/Country. This item identifies the state code where the applicant resides or resided in the past. Enter the two digit state abbreviation for the street address provided above. If this is a foreign address indicate the country.

ZIP/Postal Code. Enter the applicant's residence nine digit ZIP Code or postal code if a foreign address.

9. **Affiliated Firms.** Not applicable for Form U-5B filings.

10. **Full Termination.** A "Yes" response will terminate the Bank Securities Representative's registration with the appropriate Federal banking agency.

11. **Federal Banking Agency Termination.** Check the appropriate Federal Banking agency box with which the individual is terminating registration categories.

12. **Date Terminated.** Enter the actual date the termination of registration is effective. The month, day and year are required.

13. **Reason for Termination.** Check the appropriate box. If "Permitted to Resign", "Discharged", or "Other" are checked, provide an explanation.

14.—18. **Disclosure.** Check the appropriate "Yes" or "No" response for each question. Refer to the Explanation of Terms at the front of these instructions. Complete details explaining any "Yes" answers must be provided on the appropriate Disclosure Reporting Pages (DRP U-5):

14 Criminal Disclosure
15 Regulatory Action Disclosure
16 Investigation/Internal Review Disclosure
17 Customer Complaint Disclosure
18 Investigation/Internal Review Disclosure

18. **Internal Review.** Generally, this item is used to report matters of a compliance nature, BUT NOT matters of a competitive nature. Responses should not include situations relating to disputes between the firm and the individual overownership or possession of information or records pertaining to business conducted by the individual.

If answered "Yes," the individual named in item 1 of this form is afforded the opportunity to respond by using Part II of the Investigation/Internal Review Disclosure Reporting Page (U-5B).

19. **Disclosure Certification (Optional).** This certification language contained in item 19 allows the firm to certify that all disclosable information on the individual's record has been previously reported on DRPs (U-4B) or DRPs (U-5B). Firms that have not filed DRPs (U-4B and DRPs (U-5B) for all disclosable information may not take advantage of the certification option. Use of the certification is optional, and, if chosen, "Yes" answers to the appropriate questions in Items 14—18 must be provided.

Signatory Area

"Signature" includes a manual signature or an electronically transmitted equivalent.

Date. This date represents the date the form was signed by the appropriate signatory. The correct format for the date entry is "MM/DD/YYYY."

Signature of Appropriate Signatory. A signatory entry is required for all filings. Enter the full signature as it appears in typed or printed form.

Type or Print Name of Appropriate Signatory. The appropriate signatory's full legal name must be displayed under the signature. The name must be typed or printed as it appears in the signature form.

Person to Contact for Further Information. Enter the name of the person to contact for additional information regarding the matters reported on this form. Include the telephone number for the person listed here.

Form U-5B
Page 1 of 6

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)

Only Items 14–18 may be amended. To amend, complete only Items 1–4 and the item(s) being amended.

1. Applicant's Name (Last, First, Middle (specify if none), (Jr., Sr., etc.))		2. Applicant's CRD No.	Applicant's SSN
3. Sponsoring Bank			4. Sponsoring Bank CRD No.
5. Office of Employment Not Applicable	6. CRD Branch # Not Applicable	7. Billing Code (optional)	
8. Current Residential Address (Street, City, State/Country, ZIP Code)			

NOTICE TO THE INDIVIDUAL WHO IS THE SUBJECT OF THIS FILING

As a former Bank Securities Representative of the Sponsoring Bank filing this Form U-5B, you are under the continuing jurisdiction of regulators and may have to provide information about your activities while associated with this Sponsoring Bank. Forward any residential address changes for two years following your termination date or last Form U-5B amendment to:

CRD Address Changes, 9513 Key West Avenue, Rockville, MD 20850-3389.

9. Affiliated Firms

Not Applicable

10. Is this a **FULL TERMINATION**

☐ Yes ☐ No

11. Federal Banking Agency Termination
A. Registratoin to be terminated with the following:

☐ OCC ☐ FDIC ☐ FRS

12. Date Terminated (MM/DD/YYYY) (This date represent the actual date that the termination of registration is effective.

13. Reason for Termination (Check one)

☐ Voluntary ☐ Deceased ☐ Permitted to Resign ☐ Discharged ☐ Other

Provide an explanation:

PRIVACY ACT NOTICE

The Applicant's SSN is requested to differentiate among applicants with the same name. Providing the Applicant's SSN is voluntary. However, failure to provide the Applicant's SSN may result in confusion regarding who the Applicant is and may delay or prevent processing of this application for registration. The information you provide will be for the use of the appropriate Federal banking agency and for other State and Federal agencies and SROs. Maintenance of the information is authorized by sections 8, 9 and 31 of the Federal Deposit Insurance Act (12 U.S.C. 1818, 1819 and 1831).

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)—continued

Form U-5B
Page 2 of 6

Applicant's Name (Last, First, Middle)	Social Security No.	Applicant's CRD No.	Sponsoring Bank CRD No.

If the answer to any of the following questions in Items 14, 15, 16, 17 or 18 is "YES", and you cannot utilize the certification in item 19 below, attach complete details of all events or proceedings on appropriate DRP U-5(s).

If the information in Items 14–18 has already been reported on Form U-4B or Form u-5B, do no resubmit DRPs for these items.

Refer to the explanation of terms section of Form U-5B instructions for explanations of italicized terms.

	YES	NO	
14. Criminal Disclosure While employed by or associated with your sponsoring bank, was the individual:			
A. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, or foreign, or military court to any *felony*?			1
B. charged with any *felony*?			2
C. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?			3
D. charged with a *misdemeanor* specified in 14.C?			4
15. Regulatory Action Disclosure While employed by or associated with your sponsoring bank, was the individual *involved* in any *disciplinary* action by a Federal banking agency, domestic or foreign governmental body or *self regulatory organization* (other than those designated as a *"minor rule violation"* under a plan approved by the U.S. Securities and Exchange Commission) with jurisdiction over the *investment-related* businesses?			5
16. Investigation Disclosure Currently is, or at termination was, the individual the subject of an *investigation* or *proceeding* by a Federal banking agency, domestic or foreign governmental body or *self-regulatory organization* with jurisdiction over *investment-related* businesses?			6
17. Customer Complaint Disclosure While employed by or associated with you sponsoring bank was the individual the subject of an *investment-related*, consumer-initiated *complaint* or proceeding (even if such complaint was received after the individual was no longer employed with your firm) that:			
A. alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?			7
B. was settled or decided against the individual for $5,000 or more, or found fraud or the wrongful taking of property?			8
18. Internal Review Disclosure Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules or industry standards or conduct?			9

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in the individual's file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP U-5B(s). All appropriate questions in Items 14, 15, 16, 17 or 18 above must be answered, regardless of whether the certification is being utilized. Refer to the Form U-5B instructions for additional information on the utilization of the certification language.

This is to certify that details relating to the above answers to Items 14, 15, 16, 17 or 18 have been previously reported on amendments to Form U-4B or Form U-5B filed on behalf of this individual. Updated information will be provided, if needed, as it becomes available to the firm. This is to further certify the following:

A. There is no additional information to be reported at this time		10
B. There is additional information to disclose that is reported on the appropriate DRP U-5B(s)		11
C. There is updated information, reported on the appropriate DRP U-5B(s), relating to disclosures previously reported		12

I verify the accuracy and completeness of the information contained in and with this form.

Date (MM/DD/YYYY) Signature of *appropriate signatory*

Type or print name of *appropriate signatory*

Person to contact for further information Telephone No. of person to contact

A copy of this form must be provided to the terminated individual.

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)—continued

Form U-5B
Page 3 of 6

CRIMINAL DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-5B) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to ***Items 14.A, 14.B, 14.C and 14.D*** on Page 2 of the Form U-5B.

Check ☐ item(s) being responded to:

14. While employed by or associated with your sponsoring bank, was the individual:

- ☐ **A. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, or foreign, or military court to any *felony*?**
- ☐ **B. *charged* with any *felony*?**
- ☐ **C. convicted of or did the individual plead guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?**
- ☐ **D. *charged* with a *misdemeanor* specified in 14.C?**

Use the DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the above items.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

2. Formal charge(s) were brought in:

Court *(Name of Federal Military, State or Foreign Court)*	Location of Court *(City or County and State or Country)*	Docket/Case Number

3. Charge Detail Disclosure: (Continue on additional Criminal Disclosure Reporting Page U-5B if more than three charges arise out of the same event.)

Chg#	Formal Charge(s) Description	Charge Date (MM/DD/YYYY)	Number of Counts	Charge Type (check one only)		Plea (Guilty, Not Guilty, etc.)	Charge is Currently (check one only)	Appeal Date (MM/DD/YYYY)	Product Type (if charge is investment-related)
				Misdemeanor	Felony				
1.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		
2.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		
3.							☐ Pending ☐ Final ☐ On Appeal ☐ Pre-Trial Intervention		

IF FINAL, ON APPEAL, OR PRE-TRIAL INTERVENTION, COMPLETE ITEMS 3 AND 4. FOR EACH CHARGE THAT IS PENDING, COMPLETE ONLY ITEM 4.

Chg#	Disposition Type: (Convicted, Acquitted, Dismissed, Pre-Trail Intervention, etc.)	Disposition Date (MM/DD/YYYY)	Disposition Detail Sentence/Penalty (if applicable)	Duration (if sentence, suspension, probaton, etc.)	Start Date (MM/DD/YYYY)	Penalty/Fine Amount (if applicable)	DatePaid (MM/DD/YYYY)
1.							
2.							
3.							

4. Provide a brief summary of circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was subject of the charge(s) occurred. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of *appropriate signatory*

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)—continued

Form U-5B
Page 4 of 6

REGULATORY ACTION DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-5B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to ***Item15*** on Page 2 of the Form U-5B.

15. While employed by or associated with your sponsoring bank, was the individual *involved* in any *disciplinary action* by a Federal banking agency, domestic or foreign governmental body or *self regulatory organization* (other than those designated as a *"minor rule violation"* under a plan approved by the U.S. Securities and Exchange Commission) with jurisdiction over the *investment-related* businesses?

One event may result in more than one affirmative answer to these items. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details to each action on a separate DRP.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. Regulatory Action Initiated by (Name the regulator, foreign financial regulatory authority, SRO or commodities exchange, etc.)		2. Regulatory Action Type	3. Date Initiated (MM/DD/YYYY)
4. Docket/Case Number	5. Employing Firm when events occurred	6. Product Type(s)	
7. Describe the allegations related to this regulatory action (Use reverse side of this sheet for additional comments if necessary.)			
8. Is regulatory action currently (check one) ☐ Pending ☐ On Appeal ☐ Final	9. If on appeal, regulatory action appealed to (SEC, SRO, U.S. Court of Appeals, etc.)		10. If on appeal, date filed (MM/DD/YYYY)

IF FINAL OR ON APPEAL, COMPLETE ALL ITEMS BELOW. FOR PENDING ACTIONS, COMPLETE ITEM 19 ONLY.

11. How was the matter resolved? (Settled, Consent, etc.)	12. Resolution Date (MM/DD/YYYY)	13. Sanctions (Suspended, Censured, Barred, Requalification, etc.)

14. If Suspended, Enjoined or Barred:

Is suspension/injunction/bar of a fixed duration? ☐ Yes ☐ No (If No, provide details in Item 19)	Suspension/Injunction Bar Start Date (MM/DD/YYYY)	Suspension/Injunction Bar Duration	Suspension/Injunction/Bar capacity affected (General Securities Principal, Financial, & Operations Prinicpal, etc.)

15. If requalification by exam/retraining was a condition of the sanction:

Is requalification/retraining time-related? ☐ Yes ☐ No	If yes, length of time given to requalify/retrain: (If No, provide details in Item 19)	Type of exam required for requalification	Has condition been satisfied? ☐ Yes ☐ No

16. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation: (Fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

17. Were you required to pay any part of the monetary items disclosed in 16: ☐ Yes ☐ No (if yes, fill in amount and MM/DD/YYYY in appropriate box)

Penalty/Fine $	Date Paid	Restitution $	Date Paid	Disgorgement $	Date Paid	Other $	Date Paid

18. Was payment of all or any part of a monetary award, penalty or fine waived? ☐ Yes ☐ No If yes, provide details of Waiver in 19 below.

19. Provide summary of details related to the action status and(or) disposition and include relevant terms, conditions and dates. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of *appropriate signatory*

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)—continued

Form U-5B
Page 5 of 6

INVESTIGATION/INTERNAL REVIEW DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-5B) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to ***Items 16 and 18*** of the Form U-5B.

Check ☐ item(s) you are responding to:

☐ **16. Currently is, or at termination was, the individual the subject of an *investigation* or *proceeding* by a Federal banking agency, domestic or foreign governmental body or *self-regulatory organization* with jurisdiction over *investment-related* businesses?**

One event may result in more than one investigation. If more than one authority is investigating the individual, use a separate DRP to provide details.

☐ **18. Currently is, or at termination was, the individual under internal review for fraud or wrongful taking of property, or violating *investment-related* statutes, regulations, rules or industry standards or conduct?**

If the individual has been notified that the investigation/internal review has been concluded without formal action, complete Items 1, 2, 3, and 4 of this DRP to update.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))		
Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

PART I

1. Notice received from (Name of Regulator, Agency, SRO, etc. initiating the investigation)	2. Notice date (MM/DD/YYYY)
3. Describe briefly the nature of the investigation/internal review, if known, or details of the resolution (Use reverse side of this sheet for additional comments if necessary.)	
4. Date Resolved (MM/DD/YYYY)	

(MM/DD/YYYY)	Signature of *appropriate signatory*

PART II

The individual subject may use this space for details to affirmative answers of Item 18 only.

The individual who is the subject of the internal review may provide a brief summary of this event. The summary must fit within the space provided below. This summary may be sent to: Appropriate Federal Banking Agency, c/o Central Registration Depository, Membership Department, 9513 Key West Ave., Rockville, Maryland 20850-3389.

Date (MM/DD/YYYY)

Signature of Individual Subject

Uniform Termination Notice for Bank Securities Representative Registration (Form U-5B)—continued

Form U-5B
Page 6 of 6

CUSTOMER COMPLAINT DISCLOSURE REPORTING PAGE

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP U-5B) is an ☐ INITIAL *OR* ☐ AMENDED response used to report details for affirmative responses to ***Item 17.A and 17.B*** of the Form U-5B.

Check ☐ item(s) you are responding to:
17.While employed by or associated with your firm, was the individual the subject of an *investment-related*, consumer-initiated complain or *proceeding* that:
☐ **A. alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?**
☐ **B. was settled or decided against the individual for $5,000 or more, or found fraud or the wrongful taking of property**

One event may result in more than one affirmative answer to the above items; use only one DRP to report aal the details related to one customer complaint. Use a separate DRP for each customer complaint.

Applicant's Name (last, first, middle (specify if none), (Jr., Sr., etc.))

Applicant's CRD No.	Social Security No.	Sponsoring Bank CRD No.

1. Customer Name(s)	2. Customer's State(s) of Residence (2-Letter Abbreviation)
3. Employing Firm or Sponsoring Bank when events giving rise to the complaint occurred:	4. Date complaint was received (MM/DD/YYYY)

5. Allegation(s)

6. Provide a brief summary of events related to the allegation(s) including dates when activities leading to the allegation(s) occurred

7. Product Type(s)	8. Alleged Compensatory Damage Amount $

9. Is complaint currently pending ☐ Yes ☐ No	If No, how was complaint resolved (No Action, Withdrawn, Denied, Settled, Arbitrated, Litigated, CFTC Reparation, etc.)	If No Action, Denied, or Withdrawn, give date (MM/DD/YYYY)

IF STATUS IS SETTLED, ANSWER 10 AND 13; IF ARBITRATED OR CFTC REEPARATION, ANSWER 11 AND 13; IF LITIGATED, ANSWER 12 AND 13

10. If SETTLED by you, or on your behalf, without Arbitration, Litigation or Reparation:

Settlement Date (MM/DD/YYYY)	Settlement Amount $	Your Contribution $

11. If ARBITRATED or CFTC REPARATION:

Arbitration/Reparation Claim was filed with *(NASD, AAA, NYSE, CBOE, CFTC, etc.)*		Date You Received Service (MM/DD/YYYY)
Case/Docket Number	Is Arbitration/Reparation currently pending? ☐ Yes ☐ No	

If Status if FINAL:

Disposition (Settled, Dismissed, Award, Withdrawn, etc.)	Date of Disposition (MM/DD/YYYY)

If disposition resulted in monetary compensation:

Award Amount $	Award Amount $	Settlement Amount $	Individual's Contribution $	Date Paid (MM/DD/YYYY)

12. If CIVIL LITIGATION:

Court that case was filed in (Name of Federal, State or Foreign Court)	Location of Court (City or County and State or Country)	Docket/Case Number
Is Civil Litigation currently pending? ☐ Yes ☐ No		Date the Individual Received Service (MM/DD/YYYY)

If Status if FINAL:

Disposition (Settled, Dismissed, Judgment, Withdrawn, etc.)	Date of Disposition (MM/DD/YYYY)

If disposition resulted in monetary compensation:

Judgment Amount $	Judgment Amount $	Restitution Amount $	Individual's Contribution $	Date Paid (MM/DD/YYYY)

Is action currently on appeal? ☐ Yes ☐ No	If on appeal, date filed (MM/DD/YYYY)

13. Provide details as to any other limits or conditions to disposition. (Use reverse side of this sheet for additional comments if necessary.)

Date (MM/DD/YYYY)

Signature of *appropriate signatory*

[FR Doc. 96–32325 Filed 12–27–96; 8:45 am]

BILLING CODE 4810–33–C, 6210–01–C, 6714–01–C

federal register

Monday
December 30, 1996

Part III

Department of Housing and Urban Development

24 CFR Part 901

Public Housing Management Assessment Program; Interim Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 901

[Docket No. FR–3447–I–03]

RIN 2577–AA89

Public Housing Management Assessment Program

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule implements the proposed revision, published on May 6, 1996, of the Public Housing Management Assessment Program (PHMAP) at 24 CFR part 901. PHMAP applies to public housing agencies (PHAs) and resident management corporations (RMCs), and any other entities under contract to manage public housing, but does not apply to Indian housing authorities, nor to the Family Self-Sufficiency Program authorized under section 23. PHMAP provides policies and procedures to identify PHA management capabilities and deficiencies, and assists HUD State/Area Offices in accountability monitoring and risk management.

DATES: Effective Date: January 29, 1997. Assessments using the requirements of this rule will begin with PHAs whose fiscal years end on March 31, 1997, the final date of the quarter after this rule is published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: MaryAnn Russ, Deputy Assistant Secretary for Public and Assisted Housing Operations, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, S.W., Washington, D.C. 20410, telephone (202) 708–1380. A telecommunications device for hearing or speech impaired persons (TTY) is available at (202) 708–0850. (These are not toll-free telephone numbers.)

SUPPLEMENTARY INFORMATION: On May 6, 1996, HUD published a proposed rule (61 FR 20358) to revise the entire PHMAP at 24 CFR part 901. Eighty-seven comments were received on the proposed rule. The public comments on the proposed rule and the resulting changes in this rule are discussed below in section II of this preamble.

I. Highlights of Changes From the Proposed Rule

A number of changes, more fully discussed in section II of this preamble, below, have been made to the proposed rule by this interim rule, including the following:

- The definition for ''vacancy days: is modified to specify that it pertains to ''dwelling'' units.
- The definitions and methodologies for both the Performance Funding System (PFS) and PHMAP should be the same as long as feasible, and the language of the new rule reflects that.
- Definitions of the terms ''effective lease date,'' ''maintenance plan,'' and ''move-out date'' are added.
- The definition of ''average turnaround time'' is changed to read, ''. . . the annual average of the total number of turnaround days between the latter of the legal expiration date of the immediate past lease or the actual move-out date of the former tenant (whenever that occurred, including in some previous fiscal year) and the date a new lease takes effect.''
- The threshold for progress in reducing the vacancy rate that applies to a C grade has been changed from 30% to 15 percentage points.
- The term ''Reduced Actual Vacancy Rate in Previous 3 Years'' is clarified to include the fiscal year being assessed under PHMAP in the 3-year period.
- Dwelling units used for non-dwelling purposes with HUD approval, employee occupied units, and vacant units approved for demolition or disposition are not included as available units in the determination of occupancy/vacancy rates
- For purposes of indicator #2, Modernization, a minimum time is specified between the date HUD's monitoring report or audit is provided to the PHA and the end of the PHA's fiscal year in order to give the PHA sufficient time to correct all findings. The Department has revised components #3 and #4 to reflect a minimum time of 75 calendar days.
- The Department agrees that emergency CGP work does not require prior HUD approval and has revised component #5 of indicator #2, Modernization, to specifically exclude emergency work.
- The Department has added specific language to indicator #4, Work Orders, stating that all preventive maintenance work orders are to be tracked, as well as which type of work orders are exempted from the calculation of this indicator.
- The new resident services and community building indicator is now subdivided into four equally weighted components, and the indicator or the individual components are subject to exclusion based on the particular circumstances of each PHA. The name of this indicator has been renamed ''Resident Services and Community Building'' to place a more accurate emphasis upon the specific role of PHAs for these functions. PHA's with 100% elderly developments will not be assessed under this indicator. To avoid penalizing small PHAs with active programs, PHAs with fewer than 250 units or with 100% elderly developments may request to be assessed under the indicator at the time of PHMAP certification submission.
- The Resident Services and Community Building indicator has been revised in order to assess PHAs for the functions they perform in operating resident services programs and for resident management or TOP performance only when the PHA is the contract administrator for the program.
- The rule has been changed to state that indicator #8, Security, does not apply to PHAs with fewer than 250 units under management unless the PHA requests to be assessed under the indicator at the time of the PHMAP certification submission.
- Section 901.105(d)(3)(iv) has been clarified in the new rule to state that a PHA's score for indicators #1, #4 and/or #5, after any adjustment(s) for physical condition and/or neighborhood environment, may not exceed the maximum potential weighted points assigned to the respective indicator(s).
- Section 901.115(e) of the proposed rule read, ''PHAs with more than 100 units that achieve a total weighted score of less than 60% on indicator (2), modernization, shall be designated as mod-troubled.'' The Department agrees that these ''small'' PHAs should also be assessed on their modernization program, and has amended this section accordingly.
- The posting of PHA PHMAP scores is now required at all offices, rather than in all developments.
- The rule makes clear that PHAs are only required to post and report out final PHMAP scores and do not have to post and report any score that is appealed in a timely basis and is under consideration by HUD.
- The rule now specifically permits an appeal from a State/Area Office rejection of a claim for additional scoring adjustment that is based on the physical condition or neighborhood environment of housing developments.
- In sections 901.220(b) and 901.225, the Department has changed the percentage in the new rule to require that 20% of the residents at a PHA in substantial default indicate to HUD their interest in participating in the competitive proposal process.
- The period has been extended to a 60, rather than 45, day submission period for certifications to be submitted following the end of a PHA's fiscal year.

II. Discussion of Public Comments

General Comments

Comment: One comment stated that PHAs should be monitored, but the PHMAP grading system is not the answer.

Response: Congress passed the amendments to the 1937 Act that authorize PHMAP, and it is the clear intent and purpose of Congress to require HUD to assess PHA management performance. The authorizing statute provides specific statutory indicators, and permits, as HUD deems appropriate, up to five additional ones to be used for this purpose.

Comment: Twenty-four comments stated that a truer assessment can be accomplished now than before; overall, the proposed rule is positive; generally pleased with the proposed revisions that eliminate the snapshot indicators; and the proposed rule is a vast improvement over the current PHMAP certification. Many of the commenters commended HUD's effort to streamline the certification process by reducing the number of indicators from 12 to eight and by providing standard definitions for critical terms. The first six indicators are measures of essential property management and a marked improvement over the current system.

Response: The comments are noted by the Department.

Comment: Five comments felt that there should be a transition period to allow adequate time to change computer programs. There should be at least one year to sample the new indicators to see how changes are going to affect individual PHAs. Any revision of the PHMAP should be made effective beginning with the next fiscal year after the new rule has been published. Two comments felt that if Congress has moved the authorization process forward, PHA's should have an ''option year'' implementation where a PHA has a choice to use either the current PHMAP or the new PHMAP. If the authorization process is stalled, the Department should not implement the new rule.

Response: Most of the data elements required to determine the grade or score for the new indicators are already being maintained by PHAs for reporting requirements for the current PHMAP rule or for other programs. Because of that, a long transition period is not needed. Therefore, assessment under this rule will begin with PHAs whose fiscal year ends the quarter after the publication of this rule (PHAs whose fiscal year ends in the quarter immediately following publication of this revised rule will be assessed under the ''old'' PHMAP rule). This transition period will permit PHAs to organize their data in order to respond to the new requirements. During the first year of implementation of the new rule, the Department will consider modification and exclusion requests based on special circumstances arising from the initial implementation process. A choice of which set of criteria to use (have PHAs choose under which PHMAP rule, old or new, to be assessed) is not feasible because all PHA's must be assessed using the same indicators for the same period of time (i.e., the same calendar year) in order for the scoring to be comparable and fair. HUD is moving forward with this rule because the implementation of the new PHMAP is not dependant upon Congressional authorization. The new rule is published as an interim rule to indicate HUD's intention to continue to refine and improve PHMAP.

Comment: Three Comments requested the Department not to establish a system which requires PHAs to retroactively retrieve information. The Commenters stated that in areas where ''improvement over the last three years'' is considered to calculate the grade, the information needed is not readily available to the PHAs in the new format required by the proposed rule. A transition process should be addressed in the new rule to deal with this.

Response: The PHMAP new rule does not require a PHA to retroactively retrieve information unless the PHA chooses to certify to the percentage of improvement within the prior three year period as permitted by some of the indicators. Since whether to make such a certification is the decision of each PHA, a PHA should factor in the additional time to retrieve the necessary information. A transitional period for this reason is deemed to be unnecessary.

Comment: Three Comments felt that with fewer indicators, it will be more difficult for small PHAs to achieve high performer status; a low score on one indicator will have a much greater impact on the total score.

Response: The reinvention and streamlining of the PHMAP process seeks to focus on the most significant management aspects of PHA management and reduce the burden of the PHMAP process while still producing a valid and reliable assessment. However, the use of fewer indicators does not result in a disproportionate impact from any one indicator. The use of modification and exclusion requests allows PHAs the opportunity to justify why they should not be penalized by a performance that does not exactly meet the requirements of an indicator. Even if additional, though less significant, indicators were used in PHMAP, the weighting of indicators according to their significance would reduce their individual impact on the score despite the additional assessment burden that would result.

Comment: One Comment stated that HUD has attempted to add compliance with specific directives to a program that is supposed to rate performance, and that including them in PHMAP waters down the focus and the results of the program. HUD should remove all non-essential components (Section 3 program at 24 CFR part 135, energy/utility management, etc.).

Response: HUD has attempted to limit PHMAP to examining essential aspects of PHA management. Of these, some that deal with compliance issues, such as the energy indicator, are essential because they are statutory. In other indicators, such as Resident Initiatives, which examines, among other subjects, implementation of Section 3 programs, the degree of successful implementation is regarded as a valid measure of a PHA's efforts to encourage partnerships with residents and the local community that help improve management operations at the PHA. However, compliance-related measures have been kept at a minimum in this rule.

Comment: One Comment felt that the State/Area Offices should be given the flexibility to correct shortcomings in the system which could not have been foreseen in advance.

Response: This rule does provide a high degree of the requested flexibility to State/Area Offices. The State/Area Offices assess each PHA within their jurisdiction on an annual basis, and make determinations for high-performing, standard, and troubled PHAs, and troubled PHAs with respect to the program under section 14 (mod-troubled) in accordance with a PHA's PHMAP weighted score. On-site confirmatory reviews may be conducted by the State/Area Offices, which may result in corrections to a PHAs total weighted score, if appropriate. In addition, State/Area Offices make determinations for exclusion and modification requests, perhaps the greatest area of flexibility in the PHMAP rule. At the same time, HUD must ensure that PHMAP is a truly nationwide assessment methodology and that comparable performance by PHAs in different State/Area Offices is rated without regard to the location.

Comment: One Comment stated that the Commenter has worked very hard to achieve high performer status, but cannot achieve it, under the proposed

PHMAP ratings. Surely, a rating scheme can be formulated that would be equally fair to all PHAs, taking into consideration the huge differences between small and large PHAs, big city and rural PHAs, and the necessity for each to be operated differently.

Response: As indicated in the preamble of the proposed rule, the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992 (92 App. Act) (approved October 28, 1991, Pub. L. 102–139) provided that the evaluation of PHAs must be administered flexibly to ensure that they are not penalized for circumstances beyond their control; and that the weights assigned to indicators must reflect the differences in management difficulty that result from physical condition and neighborhood environment. HUD implements this mandate, which also reflects the concerns expressed in the comment, by permitting PHAs to submit modification and exclusion requests, by limiting the applicability of certain indicators by PHA size, and by assigning additional adjustments to a PHA's PHMAP score based upon physical condition and neighborhood environment.

Comment: Two comments stated that PHMAP scores for PHAs and RMCs should be assessed and scored separately. The purpose of the RMC is to manage and maintain public housing units independent of the PHA. The RMC is an independent body that neither answers to, nor is required to follow the advice of the PHA. Resident groups are being given an enormous amount of responsibility, without the corresponding accountability which puts the PHA in an unfair and untenable position. To relieve the RMC of the necessity of being accountable creates a situation of ''smoke and mirrors.'' Don't let resident management be an illusion; make it real. If the RMC has been deemed eligible and able to manage, it should also be deemed eligible to handle the corresponding success or failure. Do not combine RMC and PHA PHMAP scores.

Response: As discussed in the preamble to the proposed rule, because an RMC enters into a contract with a PHA to perform specific management functions on a development-by-development basis, and because the scope of the management that is undertaken varies, not every indicator that applies to a PHA would be applicable to each RMC. Even if an RMC were to assume all of the management functions for a particular development, 24 CFR 964.225(d), entitled, *Management contract,* and 24 CFR 964.225(h), entitled, *Prohibited activities*, provide that a PHA may enter into a management contract with a resident management corporation, but a PHA may not contract for assumption by the resident management corporation of the PHA's underlying responsibilities to the Department under the ACC. In addition, 24 CFR 964.225(k) requires a PHA to review, not less than annually, an RMC's performance to ensure that it complies with all applicable requirements and meets agreed-upon standards of performance. The ultimate responsibility for the management of all of its developments resides with the PHA, whether it contracts out management or other services to an RMC or any other contractor.

Comment: Two comments stated that the sample worksheet for indicator #6 and the PHMAP certification form are not exactly user friendly. One commenter suggested that HUD redesign these two forms so that they can be readily understood and computer formatted for those PHAs that have such capability. The other commenter stated that the new rule should include a standard questionnaire form for PHA use.

Response: The worksheet and certification form have been redesigned, as applicable, to make them more user friendly. HUD welcomes additional, specific recommendations to improve these documents further.

Comment: One comment felt that PHMAP should be aimed toward identifying a quality and reliable service delivery. Progress of development conditions, resident involvement in the solution of community affairs, as well as independent achievements by the residents should be evidence of growth and should be rewarded with high scores and additional benefits.

Response: Even with the reduction and streamlining of PHMAP to measure only the essential aspects of PHA management, as discussed in previous responses, the significance of resident involvement and achievement are recognized in this rule by maintaining resident involvement as a separate indicator. However, this is only one factor in a program that attempts to assess all of the significant areas of PHA management and a PHA must perform well in each area to receive a high score and additional benefits.

Comment: One comment maintained that the results in the quality of work and development conditions should be evaluated in connection with available resources versus market cost in the jurisdictions.

Response: The current PHMAP regulation contains substantial provisions to ensure that PHAs are not penalized for conditions beyond their control: (1) a PHA may request a modification of any indicator and/or component to compensate for conditions beyond its control; (2) a PHA may request the exclusion of an indicator and/or component for the same reason; (3) without requesting a modification, the current and new PHMAP regulations both allow PHAs to modify the scoring calculations for certain indicators by exempting certain units; and (4) there is a two-stage appeal process available if the PHA fails to find relief under items one, two and three, above. As discussed previously, exclusion and modification requests are processed by the local State/Area Office, which would have the greatest awareness of the resources and market conditions affecting a PHA. These procedures provide the appropriate mechanism to address special circumstances, such as area market costs, affecting a PHA's performance.

Comment: Two comments were concerned with revisions that would require the collection and management of new data when that data is needed solely for PHMAP and is not normally utilized in the management of housing. Such changes to the data collection and processing system are not easily accomplished.

Response: The Department's experience in implementing PHMAP so far has resulted in some refinement in the data necessary to assess management performance. The goal of this rule is to provide a more valid assessment process and HUD believes the data requested will produce this result. HUD will continue to evaluate the appropriateness and usefulness of the information it gathers in its implementation of this rule, and will make adjustments as warranted.

Comment: Three comments stated that the proposed rule should be delayed until Congress has completed action concerning the management assessment criteria of PHAs. Bills in the Senate and the House have provisions that would affect PHMAP. The Senate bill would add two indicators and the House bill would create an accreditation process for PHAs. It is not clear how these provisions may be reconciled. If the final bill contains significant changes, HUD should incorporate them into a new proposed rule re-issued for comment.

Response: HUD believes that this rule, incorporating nearly five years of experience and feedback on the rule first implemented in January 1992, represents an improvement over the existing process. The Department will fully implement any statutory amendments to PHMAP when they are made, but is also continuing to go forward with this rule to avoid delay in implementing an improved process.

Comment: One comment stated that a PHA's ability to maintain its units will decline due to the budget cuts to all PHAs, thus affecting the PHMAP scores. With no funds for repairs, more units will fail HQS. How are PHAs suppose to improve and maintain housing units when funds are reduced, and PHAs are denied modernization funds?

Response: HUD recognizes that PHAs have not been fully funded. In FY 1996, for example, PHAs received only 89% of their funding eligibility under the Performance Funding System (PFS). To the extent that a PHA can demonstrate its management performance has been adversely affected by funding shortfalls, it should do so in an exclusion/modification request. PHAs are expected and encouraged to do their best, but they cannot be expected to do the impossible. In addition, alternative measures have been implemented such as minimum rents and the new focus on mixed-income housing, which provide PHAs with possible alternative income sources.

Comment: One comment stated that a system designed to measure performance of PHAs nationally must be flexible and accommodate local differences. PHMAP should give consideration to the conditions and level of difficulty involved in owning and operating public housing in poverty impacted and distressed urban areas.

Response: PHMAP is required by statute to take into account the physical condition of a PHA's developments and their neighborhood environment in assessing management. In the previous rule, PHMAP scores could be adjusted, based upon physical condition and neighborhood, by up to 10 points to raise a designation to the next status level. In this rule, the overall PHMAP score of a PHA will be adjusted by adding weighted points that reflect the differences in the difficulty of managing developments that result from the physical condition and/or the neighborhood environment of a PHA's developments.

Comment: Two comments felt that two indicators, Resident Services and Security, are troubling and display a tendency toward meddling and micromanagement. HUD has been trying to retreat from that tendency. Plus, Congress has been cutting funding for PHAs. The commenters felt that these indicators are non-management in nature and are not within the control of the PHA. PHMAP should grade only those indicators which are within the control of the management.

Response: A PHA's management efforts are directed toward developments, which are not just properties or structures, but which are housing: buildings that are people's homes. Because of this, there is a strong relationship between a PHA's management efforts and quality of life for a development's residents. While the PHA cannot mandate or control the positive interaction or advancement of its tenants, it can foster the environment and opportunity for such interaction and advancement. The resident involvement indicator attempts to measure a PHA's success in accomplishing this. On the other hand, a PHA is obligated to manage and respond to the unlawful behavior of tenants whose actions impede the peaceful enjoyment of other tenants. The security indicator addresses the PHA's success in managing this significant housing issue.

Comment: One comment supports extending coverage to alternative management entities.

Response: The Department appreciates this concurrence in its effort to assess and improve the management performance of every PHA.

Comment: One comment urges HUD to adopt those changes that help streamline the process of assessment and to use the simplest methods necessary to achieve a particular goal or outcome.

Response: As discussed above, it is HUD's intention to streamline and improve the PHMAP process with this new rule. Further, HUD is by no means closing the door on additional refinement, but will continue to consider and examine additional ways of improving PHMAP. To this end, this rule is being published as an interim rule.

Comment: One comment felt that it is equally important for PHAs to develop strong relationships with their surroundings and their neighbors. There should be points added or deducted to a PHA's final score based on the role a PHA assumes and its relationship with its surroundings.

Response: The resident involvement indicator in this rule, as did the previous resident initiatives indicator that is being replaced, assesses, in part, a PHA's efforts to involve residents to improve the community in which they live. Beyond this specific aspect of community involvement, it is likely that a well managed PHA, the general goal of PHMAP, is a positive community asset and a good neighbor. The recognition of outstanding individual community contributions and achievements by PHAs is important and receives attention from HUD in special ceremonies rather than in PHMAP, which focuses on the overall, day-to-day management aspects of PHAs.

Comment: One comment felt that there should be a simplified list of indicators to be used for smaller PHAs: vacancy rate; rents uncollected; inspections; and financial management.

Response: The authorizing statute for PHMAP lists seven indicators that must be used in assessing PHAs. This limits HUD's ability to differentiate between large and small PHAs in the indicators used for assessment. However, for indicators #7 and #8, PHAs with fewer than 250 units will not be assessed under these indicators unless they request to be assessed at the time of submission of the PHMAP certification.

Comment: Three comments stated that the proposed rule is more process-oriented and requires the tracking and/or collection of much more data. This is more burdensome and requires additional administrative responsibilities at a time when the level of public housing operating subsidy is being reduced.

Response: Although the Paperwork burden estimate for this rule exceeds the Paperwork burden estimate for the previous rule published on January 17, 1992, a substantial part of that increase results from HUD's recognition that a change in necessary data for assessment purposes will initially require more effort to compile. As was the case for the previous rule, it is expected that as the collection and organization of the data becomes more routine following the first submission, the associated burden will also decrease.

Comment: One comment felt that HUD should look for ways to eliminate regulations, not just change regulations.

Response: In the past year, HUD has undertaken an extensive effort to reinvent and streamline all of its rules, and hundreds of pages of regulations have been eliminated. The statute authorizing PHMAP requires its implementation by regulations, and HUD must follow this Congressional mandate.

Comment: Two comments stated that a continuing concern is that making the annual grade in PHMAP may become the true mission of many PHAs.

Response: HUD does not consider the prospect of PHA's refining their management practices to become high performers under PHMAP year after year to be distressing. The purpose of PHMAP is to assess the quality of PHA management, and in implementing this program, HUD intends for the score achieved to be a valid measure of performance. To address situations in which the PHMAP score poorly corresponds to the actual conditions at a PHA, the rule permits the State/Area Office, in exceptional circumstances listed in the rule, to reinstate any review to address particular deficiencies, and to deny or rescind incentives or high performer status, even though a PHA has satisfied all of the indicators for high or standard performer designation. The purpose of this provision is to prevent PHMAP from being an empty, pro forma exercise.

Comment: One comment believes that PHMAP is but one way to evaluate a PHA's management and ultimately, the quality of its stock. PHMAP is not a comprehensive measure of PHA quality and it is too process oriented. Greater emphasis should be placed on key results which more accurately equate with the quality of the housing stock.

Response: The observation in this comment does not quite correspond to the parameters and purpose of PHMAP as established under the authorizing statute. PHMAP evaluates PHA management performance using seven indicators that are made mandatory under the statute, which permits the Department to use up to five additional indicators. These requirements establish limits on what must and what may be used to assess the quality of a PHA's management, and not the quality of its housing stock. The statute explicitly requires HUD to take into account the difficulty of managing developments that result from their physical condition, indicating the Congressional determination that, to some degree, the quality of the housing stock is independent of the PHA's management capability. HUD is obliged to implement PHMAP in a manner consistent with the statute, and attempts to do so in a manner that will produce a valid and reliable result. As the Department hopes this rule demonstrates, HUD is, and will continue to be, receptive to the refinement of PHMAP based upon its administrative experience and the input it receives from PHAs.

Comment: One comment encourages HUD to publish handbook guidance well in advance of the effective date of the new rule so that PHAs may make any planning, record keeping or operational changes required to ensure compliance and performance.

Response: The Department anticipates the issuance of a revised PHMAP Handbook 7460.5 and a new confirmatory review guidebook prior to the applicability date of the new rule.

Comment: One comment stated that the term ''approved, funded, on-schedule annual modernization program'' is defined in the rule and in the preamble under the discussion of indicator #1. But the term is not used in indicator #1. Is it intended that the term be applied to the exemption for ''vacant units undergoing modernization?'' If so, it should be made explicit. Is it intended that the term be used in connection with indicator #2? If so, then this term is contrary to the rule's discussion of indicator #2, which includes only CIAP and CGP.

Response: The comment is noted, and the definition for ''approved, funded, on-schedule annual modernization program'' is superseded by the definition for ''vacant units undergoing modernization.'' The definition in this rule, which includes the Hope VI Program, the Vacancy Reduction Program (VRP), lead based paint risk assessment funding (1992–1995) and any successor program to the CGP or the CIAP, applies to indicators #1, #4 and #5, as appropriate. In addition, the Department intended for all modernization programs to be assessed under indicator #2. For this reason, lead based paint risk assessment funding will be assessed under all five components of indicator #2. However, due to the design of the Hope VI and the VRP, these program areas cannot be assessed under components #1 and #2 under the modernization indicator. Therefore, in completing a PHA's assessment for indicator #2, the State/Area Office will only examine components #3, #4 and #5 for the Hope VI and the VRP. Appropriate language has been added to indicator #2 in the new rule. A similar comment was made with respect to indicators #4 and #5, and this response is also applicable to those two indicators.

Section 901.10 Indicator #1, Vacancy Rate and Unit Turnaround

Component #1, Vacancy Rate

Comment: Many comments agreed with the changes proposed for the indicator and commended the Department for making the indicator a more representative measure of vacancies. Six comments commended the Department for allowing an adjusted vacancy rate to be used for grades above a C. Seven comments stated that this is a much better way to compare vacancy indicator grades and scores since all PHAs will be compared on the same basis. Several comments indicated that this is a more accurate measure of good management and concurred with the proposed rule combining these two indicators whereas currently they are separate. One comment stated that the changes made to indicator #1 are much more equitable than the current indicator requirements and two other comments indicated agreement with adjusting the vacancies by the conditions listed in the rule and with the grading scale for the vacancy rates. Three comments expressed strong support for the change indicating that it will allow HUD to more accurately judge a PHA's vacancy rate.

Response: The Department agrees that, since the adjusted vacancy rate is derived from valid exemptions, PHAs should be able to achieve grades above a C level based on an adjusted vacancy rate. The Department feels that the new component #1 will provide a more representative picture of PHA vacancies than the current indicator. The Department also agrees with the assumption that if a PHA scores C or above in the vacancy component it should not have a problem with turning around vacant units, and that combining current indicators #1 and #5 into the new indicator #1 is a correct decision.

Comment: Four comments stated that the new vacancy indicator is really a measure of the number of vacancies weighted equally to the turnover rate. The comments indicated that the new weighting of turnover will penalize PHAs that have successful programs for families that move out of public housing. Two comments stated that the proposed rule rewards process over product and activity over results, and that the proposal is far more process-oriented and less results-oriented than the present system for counting vacancies. The proposed rule states that vacancy rates should have greater significance than unit turnaround but proposes a scoring system that requires greater reliance on unit turnaround and unit turnover than on the number of units vacant at the end of each month. Eight comments indicated that a 12 month average of the number of units that are vacant at the end of each month should be used. This is normally what is expected in any rental market and the proposed method is too complicated and requires too much staff time to calculate. Another comment stated that the proposed method places as much emphasis on turnaround time as on actual vacancies and suggested using a twelve month average of the number of vacant units on the 10th day of each month to avoid the problem.

Three comments indicated that the new vacancy indicator would not reward actual occupancy. Instead of measuring the number of units vacant at the end of each month, it measures the number of units leased each month and the amount of time required to lease the units to arrive at a vacancy rate which converts to an occupancy rate. The current method is an honest way to define occupancy levels. Computing the vacancy rate by calculating the ratio of unit vacancy days to unit days available places greater reliance on unit turnaround. It requires PHAs to calculate the vacancy days for all units leased in a given month plus the vacancy days for all units remaining vacant at the end of the month, divided by the total unit days available for occupancy that month.

Six comments stated that this method calculates vacancy days, which is a function of turnover, rather than the actual number of vacant units. For example, if two PHAs have the same number of units and turnaround time, but one has higher *turnover*, the latter will automatically have more vacant days than the former. The vacancy rate should be the average vacancy rate over the past twelve months. Three comments indicated that the current indicator allows PHAs to answer the question, ''What is your vacancy rate?'' The answer is, ''Our vacancy rate is the number of units vacant at the end of the month compared with the number of units available for occupancy.'' Two comments stated that if a PHA has a high turnover rate because it is moving residents out for private lease-up or home ownership, this too, should be an allowable adjustment to the vacancy rate because PHAs with high move-out rates are adversely affected even though they may have no control over the reasons for the high move-out. Two comments suggested that the snapshot picture be retained.

Three comments indicated that the proposed rule penalizes high turnover rates and provided the following examples: PHA with a high turnover rate but the same unit turnaround time would get a higher vacancy rate than a PHA with lower turnover rate (same unit turnaround time): PHA ''Y'' with 100 units, and 20 units vacated and filled during the year (10 days average turnaround) would have a .55% vacancy rate; and PHA ''Z'' with 100 units, and 40 units vacated and filled during the year (10 days average turnaround) would have a 1.10% vacancy rate. A PHA with a high turnover rate and a lower unit turnaround time could get a higher vacancy rate than a PHA with lower turnover rate and a higher unit turnaround time: PHA ''A'' with 100 units, and 60 units vacated and filled during the year (20 days average turnaround) would have a 3.2% vacancy rate and a B grade. PHA ''B'' with 100 units, and only 30 units vacated and filled during the year (35 days average turnaround) would have a 2.8% vacancy rate and an A grade, even though it averaged a higher (35 vs. 20) vacancy turnaround rate. There is no basis for rewarding or penalizing a housing authority based on a higher or lower percentage of residents moving out during a year. Turnover rates depend on a variety of factors, many beyond the PHA's control. Some factors are: availability of alternative affordable housing; self-sufficiency programs; resident demographics; eligibility screening and lease enforcement; and HUD required transfers.

Response: The Department agrees that by using a methodology that takes into account circumstances and actions that impact on the occupancy/vacancy status of a unit over the entire course of the PHA's fiscal year, PHAs with high turnover rates will have more vacancy days than comparable PHAs with low turnover rates, assuming that the turnaround time is the same. The Department disagrees, however, with the conclusion that this makes the proposed methodology less useful than one based on taking a snapshot, either on a one-time basis, as is currently the case, or on a monthly basis over a year's time as suggested in some comments. The ''snapshot'' approach may be easier to implement but it grades the PHA performance based on a single-day measurement that may or may not be representative of the PHA performance in this area over the entire period of time being assessed. If an average based on 12 snapshots is better than one snapshot, then an average based on 365 snapshots will present the most accurate picture.

It is incorrect to state that the measure of vacancies and the measure of turnaround time have been given equal weight in the development of this indicator. The new rule combines the vacancy indicator and the turnaround indicator of the current § 901 into one single indicator that has two components. The first component (with a weight of x2) measures the vacancy rate and, if applicable, the progress a PHA has made in reducing the vacancy rate. The second component (with a weight of x1) measures turnaround time. Because the vacancy rate is a clear manifestation of management effort and reflects the essence of a PHA's mission, it has been weighted more heavily than the unit turnaround component. In addition, the proposed rule would use the second component only when a PHA scores below a C on the first component.

The proposed methodology provides ample opportunities for a PHA to adjust its vacancy days for turnover of units due to reasons such as modernization or that are due to circumstances and actions beyond the control of the PHA, such as court-ordered or HUD-approved desegregation efforts. A PHA also has the option of requesting a modification to the calculation of this component that would take into account any other special factor, such as self-sufficiency activities or security measures implemented by the PHA, that may contribute to a higher than normal turnover of units. The indicator should not be a deterrent or penalty to PHAs that have successful programs that encourage residents to move out of public housing to private market housing opportunities. Success builds upon success and a PHA that is able to work with residents and prepare them for home ownership or private market rental units should not have difficulties in attracting applicants for units that have been vacated.

The Department believes the proposed method of calculating this component to be the most accurate measure of a PHA's performance in this area. Also, contrary to some comments, the proposed method of calculation is the method commonly in use in the real estate industry.

Comment: One comment stated that the proposed rule requires more calculations than the current method and also requires tracking each unit for potential adjustments. This will be difficult for many PHAs and for HUD field staff to verify. The current occupancy rate calculation method is preferred. Three comments indicated that the indicator will take hours more in record keeping. HUD reduces PFS and modernization monies, but expects more and more in reports and record keeping. The proposed method is cumbersome, inconsistent with other HUD definitions for determining vacancy, and increases the difficulty level for calculating vacancy rates.

Two comments stated that the new method of calculating the vacancy rate is far more process-intensive than the previous methods. PHAs should be given the opportunity to take a simple average based upon end-of-month vacancies rather than using the far more complex calculation offered in the proposed rule. Two comments stated that it is poor management practice to calculate vacancy/occupancy percentages one way for the PFS and another way for a management assessment system. Two comments agreed with the expansion and clarification of the units that can be exempted from the adjusted vacancy rate and indicated that the nine exemptions should remain consistent with reporting under the PFS.

One comment indicated concern with the need to maintain data on the cause of each vacancy, as in the examples presented in the preamble. For large PHAs the data collection and maintenance becomes very difficult. Maintenance of this data is doable, but HUD needs to recognize the impact on PHA data systems if the various categories for adjustment are revised from time to time.

Three other comments stated that this level of evaluating vacancies would be burdensome for large PHAs. To track the actual vacancy rate and have the ability to also accurately calculate an adjusted vacancy rate would require significant alterations to the mainframe computer system programs as well as to standard operating procedures, and large PHAs need ample time to implement these changes. One comment stated that the new component requires that PHAs analyze each vacant unit and in the absence of readily available industry software, this process could prove burdensome for large PHAs. Another comment stated that if HUD retains the methodology of the proposed rule it should provide PHAs with software that do the bulk of the calculation for them.

Response: The Department does not believe that the information collection requirements for this indicator represent an undue burden on PHAs. Most of the data elements required to determine the grade or score for the two components that comprise this indicator are already being maintained by PHAs and used in calculating operating subsidy eligibility under the PFS or used for reporting requirements of other programs. In fact, if PHAs have been maintaining turnaround time data accurately under the previous interim rule, no new data collection will be required, just a change in computation.

The Department understands that a well-run PHA should have a system in place for monitoring occupied units and vacant units and the duration of vacancies. Beyond simply being good business practice, PHAs must monitor turnaround time, both to evaluate the effectiveness of their maintenance and marketing and leasing efforts, and to develop information for the current PHMAP indicator on vacant unit turnaround time. This should pose no more onerous burden on large PHAs than on smaller institutions, and in fact, would probably be even more important to a large PHA, where remote monitoring of large-scale activities is the norm.

In response to the suggestion that HUD should provide software for this purpose, HUD has no plans to develop additional software at this time. In addition, as a matter of policy, HUD cannot be in a position of competing with private-sector software developers.

To a significant extent, the Department has also used definitions and methodologies in this section that are the same as those used in other programs. An example of this consistency is that the adjustment for units vacant for circumstances and actions beyond the PHA's control as defined in § 901.1(a)(9) is the same for both PHMAP and PFS. The Department will issue guidance to PHAs on how to use existing sources of data to calculate each component of this indicator.

Comment: Three comments stated that if HUD wants PHAs to calculate vacancy loss, then HUD should adjust the turnaround indicator to reflect that goal, rather than throwing out the existing common sense method of calculating vacancies. Three other comments indicated that HUD's justification for the new vacancy indicator is the need to calculate vacancy loss like the private sector does. The private sector can estimate dollar value of vacancy loss, but PHAs cannot because PHAs do not realize rental income until the unit is rented. The private sector can ''go down their waiting list'' or advertise in the paper to pick the tenant who can move in the day the unit is ready and PHAs can't do that. The information can be useful, but the private sector uses it to determine budgets, not to determine vacancy rate.

Response: The Department disagrees with these comments. Neither the current vacancy indicator nor the new vacancy indicator were developed to be a measure of rental revenue lost because of units becoming vacant. The vacancy indicator is not a measure of financial performance, but a measure of the ability of the PHA to maximize occupancy and minimize turnaround time within certain constraints recognized by the Department.

Comment: Several comments addressed the changes in the grading scale. One comment indicated that a vacancy rate of 3% for a grade C is too stringent. Another expressed support for the change from 1% to 3% vacancy rate in order to achieve an A grade, indicating that it makes sense with the national average vacancy rate of 7%. Two comments stated that the current 99% vacancy rate for an A is valid. Another comment expressed concern with the change indicating that a vacancy rate of 7% would yield a C grade and still exclude the unit turnaround component from consideration. One comment stated that it is not clear if the 3% vacancy threshold for not having to report unit turnaround was retained or not. Another comment stated its support for the provision that permits PHAs to choose between adjusted and actual vacancy rate calculation, but suggested that HUD retain the previous interim rule's alternative grade C for a reduction in vacancies of at least 30%.

One comment expressed support for the option that allows a PHA to achieve a C grade if it reduced its actual vacancy rate by at least 15 percentage points within the past three years and has an adjusted vacancy rate of between four and five percent. It also indicated support for somewhat lower grades for PHAs making slower progress. Another comment stated that a PHA can improve by at least 15% and still receive a lower grade by not matching the adjusted vacancy rate requirement.

Response: The Department agrees that a vacancy rate of 3% for a grade C is too stringent and changed that in the proposed rule. The Department believes that the new grading scale is reasonable and takes into account the national average vacancy rate and also takes into account the new method of calculating the vacancy rate, which is more representative of the true performance of PHAs in this area over the period of time being assessed.

The Department is also proposing a different threshold for not having to report unit turnaround. The second component, vacant unit turnaround time, will only apply to PHAs that score below a C grade on the first component. PHAs can achieve a C grade by meeting one of the following conditions: the PHA has an *actual* vacancy rate of greater than 5% and less than or equal to 7%; or an *adjusted* vacancy rate of greater than 3% and less than or equal to 4%; or the PHA reduced its actual vacancy rate by at least 15 percentage points within the past three years and has an adjusted vacancy rate of greater than 4% and less than or equal to 5%.

Regarding the threshold for progress in reducing the vacancy rate that applies to a C grade, the Department changed it from 30% to 15 percentage points. The Department agrees that it is important to recognize and reward significant progress. It also understands that the grade relief should not defeat the balance of the grading scale. The grading scale already provides for a somewhat lower grade (a D) for PHAs with adjusted vacancy rates between four and five percent that do not achieve the 15 percentage points decrease in the actual vacancy rate.

Comment: One comment requested that the term ''Reduced Actual Vacancy

Rate in Previous 3 Years'' be clarified in order to indicate if the fiscal year being assessed under PHMAP is the third year of that 3-year period or if the 3-year period is prior to the PHMAP year being assessed.

Response: The Department agrees with the comment and the new rule has been changed to state that the fiscal year being assessed is the third year of that three year period. An example will be provided in the revision to the PHMAP Handbook 7460.5.

Comment: One comment stated that the idea of measuring a PHA's performance over the previous three years seems to be unfair and generate inaccurate statistics because of diverse variables that would not remain constant over the years and suggested that each year be measured against its previous year. Another comment indicated that the PHA does not currently have a three-year history of the daily vacancy rate so it must have time to collect this data. It proposed to use the average rate on the last day of each month until it can get the actual daily and adjusted rates. One other comment indicated that it would be extremely difficult to track vacancy days and unit days available for the previous three years and requested that a more accurate and equitable method of calculation be sought so that comparison statistics can remain accurate and consistent.

Response: The Department agrees that due to the change in the method of computation, vacancy rates generated under the two systems cannot be compared unless an adjustment is made to the statistics for the previous two years. Only those PHAs interested in using this grading option (progress in reducing the vacancy rate during the previous three-year period) will have to recompute the vacancy rate for the two years prior to the year being assessed, using the new methodology. Most of the data needed for this will come from the records developed by the PHA to comply with the PHMAP reporting requirements for the current unit turnaround indicator.

Comment: One comment suggested that the five grades be condensed into a ''satisfactory'' rating (2% adjusted vacancy rate or below); ''adequate'' rating (2–4%); and ''unsatisfactory'' rating (over 4%); the five grades could be used as a mechanism for setting goals for troubled PHAs but need not be required for all PHAs.

Response: The Department has some sympathy for the suggestion that the number of evaluation levels be reduced and simplified, but we do not believe it appropriate to address that simplification issue at this time. The biggest reason for maintaining the larger number of evaluation categories is that beyond the pass/fail differentiation, the Department expects to be able to use PHMAP scores, and to some extent, individual indicators, to identify PHAs where performance is clearly superior and worthy of emulation, and at the other extreme, cases where performance indicates a need for the Department's intervention in PHA operations. Five or six ''grades'' may or may not be the perfect model for this kind of evaluation, but the existing structure appears to be working to date, and in the absence of demonstrable benefits of alternate approaches, HUD does not see a need to revisit this issue at this time.

Comment: One comment stated that it appears to be impossible for PHAs to obtain a grade of D or F if the adjusted vacancy rate is greater than 6%. This is not a true grading system and makes it impossible for PHAs with a high vacancy rate to realize any points for improvement. It would be unfair to compare a PHA with an older housing stock to a PHA which may have newer stock or modernized units.

Response: The comment is partially correct that under the proposed rule an adjusted vacancy rate greater than 6% will result in a PHA receiving a grade of F. If a PHA has an adjusted vacancy rate greater than 6% and less than or equal to 7%, and has reduced its actual vacancy rate by at least 5 percentage points during the past three years, then the PHA would get an E instead of an F. The grading system is not unfair to high vacancy PHAs because it does allow for adjustments in recognition that some types of vacancies are beyond the control of the PHA.

Comment: One comment stated that the actual vacancy rate does not exempt units occupied by employees, units used for resident services and units undergoing modernization. PHAs are penalized by an increase in the actual vacancy rate when these units are not exempted from the actual vacancy rate. This creates the potential for PHAs to eliminate needed resident services by eliminating space for these services in an effort to decrease the vacancy rate. Most PHAs will be prevented from ever using the actual vacancy rate if these units are not exempted.

Response: The Department disagrees with the comment. The rule has been clarified to indicate that units approved for non-dwelling use, employee occupied units and vacant units approved for deprogramming will be completely excluded from the computation of this indicator. Regarding the units undergoing modernization, PHAs are not penalized because these units can also be excluded under the adjusted vacancy rate computation. The grading scale for the vacancy indicator allows PHAs to get all possible grades, including an A, under the adjusted vacancy rate option. There is no real incentive for PHAs to cut back on resident services by eliminating space for these services in an effort to decrease the vacancy rate.

Comment: One comment stated that the increase in difficulty for calculating the vacancy rate will increase the cost of a PHA's annual audit.

Response: The Department believes that the increase in scope of work would not represent a substantial increase in the cost of the audit and that the additional expense, if any, will represent a good investment for the PHA. Since the Department reimburses a PHA for its audit costs, it will reimburse a PHA for any additional audit costs resulting from changes to any of the indicators.

Comment: One comment stated that the proposed calculation counts vacant units *both* during the month and at the end of the month, regardless of reoccupancy during the 30 days.

Response: The Department disagrees. The proposed calculation adds the number of vacant units each day of the year (adjusting for valid exemptions) and divides by the number of unit/days available.

Comment: Three comments proposed that PHAs should be able to choose either the current method or the new method for computing vacancy rates. One of the comments stated that there are currently two methods for calculating the vacancy rate and it seems a bit arbitrary to abolish this flexibility that PHAs utilize to reduce their paperwork requirements. Form HUD–51234 already is a requirement that must be submitted by PHAs and to require a duplication of effort for PHMAP purposes is contrary to good management practices. The comments recommend the use of form HUD–51234 or the new calculation methodology at the discretion of the PHA. This would enable PHAs to retain flexibility in the manner in which they choose to determine the vacancy rate without imposing any additional paperwork burden unless the PHAs elect to do so.

Response: While the Department favors maximum local flexibility, it is impractical to allow PHAs to be able to pick and choose among different methodologies for developing the data for this most important indicator. Allowing that would make it impossible to compare the vacancy rates for different PHAs (and even for the same

PHA over a period of time). The Department believes very strongly that all program participants need to be evaluated under the same basic procedures, especially the same definitions. To do otherwise is to invite complaints that the process compares apples with oranges; the process can't afford to permit the PHAs to elect whether to present ''apples or oranges'' for evaluation.

Comment: One comment stated that the Department should give consideration to reducing the vacancy standards for a period of time due to the One Strike policy. Improved screening standards will increase the amount of time to process an application. If the Department is seriously concerned about quality of life in PHAs, give the occupancy people time to do their jobs efficiently.

Response: The Department agrees that the implementation of the ''One Strike and You're Out'' policy and stricter security measures may temporarily increase vacancy and turnover rates at some PHAs. Adequate planning in the implementation of the security measures should help PHAs reduce these temporary problems. After the initial stages, these programs will have a positive impact on the vacancy and turnover rates of PHAs due to the increased security and stability of their public housing communities. Because these situations will greatly vary from PHA to PHA, it would not be proper to make any changes, even temporary ones, to the grading standards of the vacancy indicator. Instead, PHAs that believe that the implementation of stricter security measures related to the ''One Strike and You're Out'' policy negatively impacted their vacancy rate may submit a modification request along with their PHMAP certification.

Comment: One comment stated that because of the low weight (x1) of the turnaround component relative to the vacancy rate component, the turnaround component is almost unnecessary since it can't change the grade of the indicator in a significant way.

Response: The Department disagrees with the comment. Although the component would not have a big impact in determining the final grade of the indicator, this is in accordance with the position of the Department regarding the interrelation and relative weight of the two components. Because the vacancy rate is a clear manifestation of management effort and reflects the essence of a PHA's mission, it has been weighted more heavily than the vacant unit turnaround component. In addition, the new rule uses the second component only when a PHA scores below a C on the first component. The Department believes that if vacancies are at a C level or above, the PHA does not have a problem with turning around vacant units. It should be noted that the component would have at least a minor impact in the final grade of the indicator (may increase or decrease one grade level) and may add up to 6.66 points to the total PHMAP score.

Comment: One comment stated that the proposed rule requirement for vacant units undergoing modernization is inconsistent with scheduling adjustments that HUD permitted in the past in recognition of the realities that some PHAs face in soliciting bids from contractors for modernization funded work. The proposed time requirement would punish a PHA with few vacancies that may need to ''stockpile'' vacancies to accumulate sufficient volume of work to obtain competitive bids from contractors. It is recommended that all vacancies covered by a funded, on-schedule modernization program be excluded from the vacancy rate calculation.

Response: The Department disagrees because the small purchase procedure is a viable option for PHAs with few vacancies to accomplish modernization costing less than $100,000 (or a lesser amount as specified by State law). Under this method, PHAs solicit quotes from an adequate number (normally, no less than three) of sources and can award the contract to the offeror with the lowest quote. This method is significantly less time consuming than the normal sealed bid procedure where formal advertising is involved. It is also noted that contractors can be procured for utilization on an as-needed basis, allowing them to begin work immediately.

Comment: One comment stated that the proposed definition of and calculations concerning a vacant unit undergoing modernization seems to be counterproductive; a more equitable way of calculating vacant days would be to count only those vacant days between the completion of the modernization work and the day of tenant move-in or reoccupancy.

Response: The Department disagrees with the comment regarding the adjustment for vacant units undergoing modernization. The adjustments provided in the proposed rule are either activities that the Department wishes to support, such as modernization, or represent circumstances or actions that the Department considers to be beyond the PHA's control. In such cases where these definitions apply to vacant units before the units are included in a HUD-approved modernization budget, the units may be exempted for those other reasons. If the units were vacant prior to being included in the HUD-approved modernization budget for other than the exempted reasons in the rule, the vacancy days accumulated prior to the unit being included in the HUD-approved modernization budget must be included in the vacancy rate calculation as non-exempted vacancy days.

Comment: One comment stated that not excluding the vacancy days that accumulated prior to a unit being included in the HUD-approved modernization budget from the calculation of this indicator could result in substantial dollars wasted to make vacant units temporarily habitable until such time that a modernization plan has been approved by HUD. Dollars invested in temporary major rehabilitation of units located in buildings subsequently placed under modernization are lost because major replacements cannot be salvaged during/after modernization. In order to not provide PHAs with an unintentional PHMAP performance measure incentive to waste limited HUD dollars, vacancy days for units in a building included in a modernization budget which was approved by HUD during the PHMAP assessment year should be exempt regardless of whether or not some units in the building were vacant prior to HUD's approval of the plan.

Another comment recommended excluding from the vacancy calculation units that a PHA has scheduled to modernize but not yet included in the modernization budget, as well as vacant units that have been modernized and are scheduled to be reoccupied. These vacant units should be excluded because the vacancies are part of the normal modernization process and are not the result of poor performance. For example, this PHA has completed modernization of hundreds of apartments for people with mobility impairments, but HUD has not permitted us to rent accessible apartments to non-disabled families. These vacancy days should not be included in the vacancy rate calculation.

Response: The Department disagrees with the comments. The issue of whether to expand the preferential treatment for units undergoing modernization to include units scheduled for modernization but not yet under a modernization budget (for example, units scheduled for modernization in the second year of the CGP Five Year Plan) was discussed as part of the Vacancy Rule negotiated rulemaking proceedings but not adopted. The Department was part of the consensus that developed the definition of vacant unit undergoing modernization and believes it to be appropriate. For the same reason, the Department does not believe that an adjustment should be given for the time between completion of modernization work and reoccupancy. Once a unit has been modernized, there is no reason to allow an adjustment for the time needed to lease the unit. Marketing and leasing of units is a normal function of a PHA.

The Department also disagrees with the second part of the comment. HUD does not control whether or not a PHA can admit non-disabled applicants to a unit designed for the disabled. If a PHA cannot lease units with accessible facilities to the persons with disabilities, they are free to lease those units to non-disabled applicants (see Handbook 7465.1 REV–2, paragraph 5–2c). The cited handbook urges that a PHA facing such a circumstance ''* * * include a provision in the lease requiring the family to move if someone needing that size specially designed unit applies and there is an appropriate unit available for the family originally admitted.''

Comment: One comment indicated that the PHA has a large number of competing subsidized units, and certain bedroom sizes and certain handicapped units are very difficult to rent to residents that are actually eligible for them. Another comment stated that the indicator does not accurately reflect the capabilities of a PHA to manage its units; such factors as market conditions greatly impact a PHA's score in this area. One other comment indicated that the rule does not provide enough information on what may be acceptable under changing market conditions and it does not define what constitutes ''aggressive marketing and outreach measures'' or provide standards by which such goals should be reached or judged.

Response: The Department feels that the new rule adequately addresses the issue of marketing difficulties at § 901.5 and § 901.10(b)(2)(iii). An adjustment may be made to a PHA's vacancy days because of market conditions. In order to justify the adjustment, the PHA will need to document the specific market conditions that exist and document marketing and outreach efforts. The PHA will need to describe when the downturn in market conditions occurred, the location(s) of the unit(s) effected, the likelihood that these circumstances will be mitigated or eliminated in the near term and why the market conditions are such that they are preventing the PHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating, or modernizing the vacant units. The Department has provided examples of what constitutes changing market conditions in 24 CFR § 990.102 and will issue further guidance to PHAs on this circumstance in the revision of the PHMAP Handbook 7460.5.

Comment: One comment stated that the grading system for this indicator penalizes PHAs that are actively modernizing their housing stock. To require lower vacancy rates for PHAs actively improving their housing stock through modernization than for PHAs not undertaking the improvements is egregious at best. The scoring of actual and adjusted vacancies appears to be unnecessary since the adjusted vacancy rate only occurs for authorized reasons as defined by HUD. To allow for adjustments to be made and then apply a different scoring criteria is illogical and inconsistent.

Response: The Department disagrees with the comment. The proposed methodology provides ample opportunities for a PHA to adjust its vacancy days for turnover of units due to reasons that are accepted and supported by the Department such as modernization or are due to circumstances and actions beyond the control of the PHA, such as court-ordered or HUD-approved desegregation efforts. A PHA also has the option of requesting a modification to the calculation of this component that would take into account some other factor that is causing frequent turnover of units at the PHA. The Department believes the proposed method of calculating this component to be the most accurate measure of a PHA's performance in this area.

Exemptions

Comment: One comment stated that adjusted vacancies help a poorly performing PHA score better under the proposed rule, but generally will do nothing to assist high-performing PHAs because it is doing the things necessary to prevent these types of vacancies. A high-performing PHA with just normal vacancies is hurt by the proposed rule. Another comment stated that the proposed scoring range is looser and, therefore, objectionable and there are more exemptions. Vacancies have decreased since the advent of PHMAP, just because HUD is grading PHAs and they are concentrating on keeping vacancies low. HUD should not reduce its standards simply to satisfy PHAs who aren't getting the job done. There should be no changes to the current grading standards. HUD is going in the wrong direction by making PHMAP high-performance status so easy to attain as it compromises the credibility of the evaluation process.

Another comment stated that if a PHA chooses an adjusted vacancy rate, it has the potential to exempt vacancy days in nine different categories, some of which are very broad. Under this scenario, it is conceivable that some PHAs will assume responsibility for few vacancy days. One other comment stated that most exemptions are easy to determine or validate except for units uninhabitable ''for reasons beyond the PHA's control.'' Two other comments indicated that ''reasons beyond the PHA's control'' is vague and may indirectly be within the control of the PHA. Because such an adjustment should be the exception rather than the rule, it should be eliminated. Such units fall into a murky area that some poorly run agencies may be tempted to exploit. It may be difficult to demonstrate that the conditions leading to condemnation by the health department were either within or outside of a PHA's control.

Response: The Department believes that the adjustments are not a function of whether a PHA is a high or poor performer, but a recognition that there are some circumstances and actions that impact on vacancies that are beyond the control of the PHA, such as a natural disaster, or that should be supported, such as modernization. The Department understands that there are often good reasons for unit vacancies, and that a blanket appraisal of unit vacancies as a bad condition glosses over some very real and explicable conditions that affect management of low-income properties in the real world.

The Department believes that it has defined the categories of vacancies completely enough that most of a PHA's vacancies can be clearly identified, and that a PHA has a fair opportunity to explain its situation. Where some number of unit vacancies cannot be adequately explained in terms of the acceptable or allowable categories, the PHA will be held strictly accountable, but where the unit vacancies are within the parameters established by HUD, under the negotiated rulemaking for the PFS vacancy rule, for example, the Department does not believe it fair or reasonable that the PHA should be penalized. The Department agrees that the exemption categories, as presented in the proposed rule, need some clarification and the new rule reflects that. The category mentioned by some of the comments is duplicated in the proposed rule and that duplication will be eliminated in the new rule. The exemptions will remain consistent with the nine exemption categories used under PFS.

Comment: Two comments stated that the language for exemption of units vacant for circumstances and actions beyond the PHA's control (§ 901.10(9)(v)) provides that insufficient funding for otherwise approvable applications made for CIAP funds (only PHAs with less than 250 units are eligible to apply and compete for CIAP funds) are exempted from the calculation of this component. It further provides that this definition will cease to be used if CIAP is replaced by a formula grant. The comments stated that this subsection should apply to CGP, particularly now with the budget reductions. Also, one of the comments stated that vacant units covered in proposed unit demolition and disposition applications should be excluded, even if the applications have yet to be acted upon by HUD.

Response: The Department disagrees and has retained this language in the new rule. The provisions referred to in the comments were taken directly from the new Vacancy Rule published in the Federal Register on February 28, 1996 (61 FR 7586). The rule incorporated recommendations of a regulatory negotiation advisory committee. The committee did discuss the issue of providing relief to PHAs (and RMCs) because of insufficient funding for the CIAP and CGP programs. The relief was limited, however, to insufficient funding for an otherwise approvable CIAP application (or failure of a PHA to fund an otherwise approvable RMC request for CGP funds from its PHA). The CIAP is a competitive program with insufficient funding to cover the needs of all approvable funding applications. When the funding program is competitive, a PHA either gets the funding applied for, or it doesn't. However, since the CGP is a formula grant program, with guaranteed yearly funding, a CGP PHA is better able to plan modernization activities in advance and make crucial repairs as necessary.

The Department does not agree with the suggestion that a PHA be able to assume HUD approval of a pending application for demolition or disposition, if the application has not been acted upon at the end of the fiscal year being assessed. There are significant differences between initiating the application process and receiving approval to dispose or demolish.

Comment: Six comments indicated that vacancy days for units that suffer casualty damage, especially by fire, should not be counted until the unit is turned back over to the PHA after the contractor completes the repairs, if applicable, instead of at the time of insurance claim settlement. It is more logical to include casualty-damaged units in the same exemption status as units undergoing modernization or units documented to be uninhabitable for reasons beyond the PHA's control. The exempted vacancy days for units that suffer casualty damage should change to read, ''vacant units that have sustained casualty damage until the unit is ready to be leased or 90 days, whichever is earlier.''

Response: The Department disagrees with the comment. The indicator retained the current provision that already allows a PHA to make an adjustment for the period of time during which the claim is being adjusted. Since the fire damage to the unit may be minimal or severe, it would not be appropriate for the Department to allow an automatic additional period of time of up to 90 days to repair the unit. PHAs may request a modification to the calculation if they believe they have a situation (severe damage) that warrants a special adjustment.

Comment: One comment recommended substituting the word ''permits'' for ''requires'' in § 901.10(a)(4) which exempts vacant units in which resident property has been abandoned, but only if State law requires the property to be left in the unit. The comment added that when a resident abandons a unit, leaving their personal property therein, many small PHAs have no other appropriate space to store such property during the period of time specified by State law before they can legally dispose of the abandoned property.

Response: The Department does not concur in the recommendation. The point of this provision is to limit the period of time when a vacant unit would be exempted from the vacancy count to the period of time that is beyond the PHA's control. The proposed change would expand the provision to cases in which State law ''permits'' a unit to remain encumbered by abandoned possessions. HUD believes that the existing language—''requires''—is more specific and more limiting, and is more consistent with the intent of this regulation and similar recent regulatory efforts to reduce unit vacancies.

The Department recognizes that some small PHAs might be inconvenienced by having to store abandoned effects for some period of time before disposition, but we are not convinced that such inconvenience is sufficient to justify holding a residential unit off-line. In most cases, laws on abandonment require that the landlord secure abandoned property, not necessarily that they leave such property in place in anticipation of the abandoning family's possible return. If storage space is at a premium, PHAs have the option of renting a storage locker and either deducting the cost of the rental from the proceeds of the sale of the goods, if any, or collecting that cost from the resident, should he/she re-appear.

Comment: One comment stated that the total available units should not include units that are being modernized as a result of Federally mandated work projects (such as a lead-based paint abatement project) that require that the residents be relocated while the work is being performed. All vacant units as a result of Federally mandated work that requires resident relocation should be considered not available for the period of time that the unit is vacant as a result of the required work, including the use of the unit to relocate residents during the course of the work. Another comment stated that the exemptions should include a category for units held to house residents relocated due to comprehensive modernization. When a large development undergoes comprehensive modernization, it is difficult to quickly find units to transfer all residents; a reasonable time limit should be included in the exemption.

Response: The Department partially agrees with the comment. The proposed methodology for calculating the vacancy rate component already permits a PHA to make an adjustment to its vacancy days for units undergoing modernization. A PHA also has the option of requesting a modification to the calculation of this component that would take into account any other special factors or special circumstances that are out of the control of the PHA. The Department does not agree with the suggestion that PHAs be allowed to adjust their vacancy days for units that are not undergoing modernization but are being held vacant for relocation purposes.

Comment: One comment stated that the exemption of units that are uninhabitable is valuable because it allows troubled PHAs to work on renovating units and getting them back into the occupied inventory without being penalized in the vacancy rate calculations.

Response: The Department agrees that this exemption category is valuable, but it should be noted that the category restricts the exempted units to those uninhabitable *for reasons beyond the PHA's control.* The rule further defines these reasons.

Comment: One comment suggested that the rule should be expanded to specifically exempt vacant days due to transfer of residents resulting from overhoused/underhoused conditions and when for security reasons, a resident must be relocated under a witness protection program.

Response: The Department does not agree with the comment that the new rule include adjustments for vacancy days associated with relocation of residents because of over/underhoused circumstances. This is a situation that should be dealt with by the PHA as part of its normal operations. Adequate planning on the part of the PHA can greatly reduce the amount of time that the units involved in the transfer remain vacant. Vacancies arising as a result of relocation of residents for security reasons may be dealt with under the modification procedures.

Comment: One comment indicated that the rule should clarify whether the PHA can exclude units used for non-dwelling purposes, for resident services, or that are occupied by PHA employees even if HUD has not specifically approved their conversion for non-dwelling purposes.

Response: The Department believes that the relevant rules are sufficiently clear. PHAs may not use dwelling units for non-dwelling purposes without explicit authorization for the conversion, and there should be no expectation that HUD would permit exemption of vacant units used for unauthorized purposes.

Comment: One comment indicated that it appears that § 901.10(a)(3) requires that to be exempted under this item, units have to comply with the two conditions at the same time. The comment added that the exemption should apply if either one of the conditions: high/unsafe levels of toxic materials or structurally unsound, is present.

Response: The Department agrees with the comment that the exemption should apply when either one of the conditions is satisfied. The new rule has been modified to conform with the Vacancy Rule and the subject items are now covered under §§ 901.10(b)(2)(ii) and (b)(2)(iv).

Comment: Two comments observed that there are several categories of units exempted ''off-the-top'' when calculating adjusted vacancy rate and turnaround time. The comments indicated that HUD should clarify if the exemption of units vacant for circumstances beyond the PHA's control due to changing market conditions is determined by the PHA (self-certified) or reviewed and decided by HUD as a modification. The comments also requested HUD to clarify the exemption of units vacant for circumstances beyond the PHA control due to natural disasters as to who determines or declares the natural disaster condition.

The comments suggested that, because these are excluded ''off-the-top'' and using a PHA-certified figure, it is left entirely to the PHA to decide if these circumstances apply, when they apply, and then to subtract them out of the calculation. As currently structured, a PHA could unilaterally adjust the figures they report under ''adjusted vacancy rate'' and ''turnaround time'' because they believe that ''changing market conditions'' have caused their units to remain vacant, or because ''insufficient CIAP funding'' prevented the PHA from occupying the units. *All* market conditions are ''changing'' to some extent, and no CIAP-funded PHA ever receives ''sufficient funding for otherwise approvable applications'' to meet *all* of their needs. The real question is, when are these circumstances sufficiently unique and extensive to impact a PHA's ability to occupy its units?

The comments indicated that these two conditions are so subjective and judgmental that they should be addressed through the regular PHMAP modification process. The comments added that it is inappropriate for an allegedly objective assessment process such as PHMAP to allow the entity being assessed (i.e., the PHA) to exercise this degree of unilateral control over their own assessment. This may help to improve PHA grades, but it does nothing for the integrity of the PHMAP assessment process. One comment requested that exemptions be clearly defined, leaving as little subjective determination as possible to HUD field staff. Another comment requested HUD to clarify if the PHA may exempt the units listed when preparing the PHMAP certification or if it should request a modification.

Response: The Department disagrees with the proposition that the PHAs have free rein to define away unit vacancies as a function of natural calamities and/or market circumstances beyond control. These issues were a major source of discussion during the negotiation of the PFS Vacancy Rule, and the language upon which the negotiated rulemaking committee reached agreement is faithfully reproduced in this regulation. For example, the committee deemed the term ''natural disaster'' sufficiently precise for purposes of establishing a formula for determining PFS eligibility.

In the case of a claim for exemption under any of these ''beyond-the-control'' criteria, the PHAs can exclude the units when preparing the PHMAP certification, but HUD intends that the burden of proof should fall on the PHA to demonstrate that it has done what it can to remedy the reason(s) for the vacancy. In the case of a ''natural disaster'' claim, the PHA would be expected to point to a proclamation by the President or the Governor that the county or other local area in question has, in fact, been declared a disaster area. Where a PHA claims extraordinary market conditions, the PHA will be expected to document the market conditions to which it refers (the examples of changing population base and competing projects are the simplest) and the explicit efforts that the PHA has made to address those conditions.

The Department does not believe that it can draft a regulation that concretely defines and delimits all the circumstances that could affect a PHA's capacity to maintain high occupancy levels, nor does HUD deem it advisable to attempt to do so. The PHAs and their parent State and local governments are in the best position to recognize and appreciate specific local circumstances. In this regulation, and in the supporting handbook guidance, we will expect that PHAs will be able to provide data with which to support their self-certifications, and upon which HUD reviewers can verify such self-certifications, but HUD believes that it would be counter-productive to attempt to define further or to limit the scope of PHAs' capacity to describe their real-world situations.

Comment: One comment proposes that an adjustment factor be added for turnovers delayed because the applicant must give 30 to 60 days notice (by lease) to their current landlord before moving.

Response: The Department does not agree with the proposed addition. PHAs should know local conventions on requirements for notice, and plan their own management activities accordingly, projecting expected turnovers and providing notice to applicants that a unit is expected to become available, for example, far enough in advance to avoid delays in leasing. In those cases where special local circumstances make this unfeasible, the PHA may submit a modification request to the indicator.

Comment: One comment requested guidance on HUD's interpretation of units that are vacant ''for reasons beyond the PHA's control'' asking whether this category includes items such as termite damage, vandalism, or casualty loss that may not be covered by insurance if there is a high deductible. Two other comments asked if the exemption would include units delayed for reoccupancy as a result of heavy vandalism since such vandalism is often beyond the PHA's control.

Response: The Department does not consider that the examples cited in the comment fall under the definition of units vacant for reasons beyond the PHA's control. Termite control is similar to other examples of pest control and is considered part of the normal maintenance operations of any standard performance PHA. A well managed PHA should also have insurance coverage for casualty loss (including vandalism) providing enough coverage to enable the PHA to repair the units in case of casualty damage. In cases where special local circumstances may make this unfeasible, the PHA should submit a modification request to the indicator.

Definitions

Comment: One comment stated that the definition of ''under construction'' as related to force account work should be changed to indicate that force account work has started in the block (as opposed to the specific unit).

Response: The new rule has been changed to indicate that force account work has started either in the unit(s) or in the building(s).

Comment: One comment stated that the term ''units available for occupancy'' needs to be clearly defined. Some troubled PHAs could argue that a certain number of their units are not available for occupancy because of the extremely poor condition of the units.

Another comment indicated that the term ''dwelling unit'' is not defined in the proposed rule. It should be defined as a unit that is either leased or available for lease to eligible low-income residents. Another comment stated that the term ''available unit'' is defined in the preamble and the rule but never used again. Instead, the term ''unit'' is used in connection to the terms ''vacant unit'' and ''vacancy day''. The term ''unit days available'' is used but no clear connection is ever drawn between it and ''available units''. HUD should clarify and substitute where necessary.

One comment stated that the term ''vacant unit'' in the rule is different from the term as used in the preamble. The preamble indicates that ''units under lease for non-dwelling uses should not be included...'' In other words, these units should be excluded. The rule definition states that units under lease for police substations, social service providers, etc., are treated the same as units under lease to eligible families. If an occupant vacates the unit, it is made available to another social service provider. These units are not available for lease to eligible low-income residents, and as such, should not be treated the same as units which are available in this definition. It should be clarified whether these units will be excluded from the computation of vacant units or if they will be counted as occupied units. Another comment stated that units used for non-dwelling purposes and dwelling units occupied by PHA employees and units used for resident services need to have additional parameters defined. This adjustment may encourage some poorly run PHAs to use these loopholes to get a better adjusted vacancy rate.

Response: The Department agrees that dwelling units used for non-dwelling purposes with HUD approval, employee occupied units, and vacant units approved for demolition or disposition should not be included as available units in the determination of occupancy/vacancy rates and the new rule reflects that change. We also agree with the definition of a ''dwelling unit'' as a unit that is either leased or available for lease to eligible low-income residents.

Comment: Two comments indicated that while the use of the total unit days available as the denominator in both the actual and adjusted vacancy rates provides a simple procedure, it tends to understate the adjusted vacancy rate. A more accurate calculation would exclude the adjusted vacant units from both the numerator and denominator.

Response: The calculation of the vacancy rate and the use of that rate to determine a given grade for PHMAP purposes has been and continues to be closely linked to the methodology and definitions used in the PFS. Under the PFS, a PHA, when calculating occupancy or vacancy rates, first determines the total number of dwelling units in its inventory (the denominator portion of the rate being calculated). Regulations then permit the PHA to exclude units that have been approved for deprogramming (e.g., demolition or disposition) as they become vacant and units approved for non-dwelling use. These exclusions reflect the permanent nature of the action. Units that are undergoing modernization or are vacant because of circumstances beyond the PHA's control are not excluded from the denominator because these actions are not permanent. By remaining in the denominator, they will continue to be eligible for operating subsidy.

The inclusion of units undergoing modernization or units vacant because of circumstances beyond the PHA's control in the denominator does not make the calculation of the PHMAP adjusted vacancy rate either ''more'' accurate or ''less'' accurate. What is necessary is that the two quantities that comprise the rate have a logical relationship to each other. In this case, the relationship is between a PHA's dwelling unit inventory and that portion of the inventory that is vacant during the PHA's fiscal year. Under both PHMAP and PFS, there are incentives to minimize the portion of the inventory that is vacant and both approaches start by looking at the proportion of total vacancies to the dwelling unit inventory. If that rate is low enough, the PHA will maximize its PHMAP grade and its operating subsidy eligibility.

Both PHMAP and PFS also recognize that not all vacancies are ''equal.'' A PHA with a high number of vacant units may still maximize its PHMAP grade and PFS eligibility if it can show that most of the vacant units are undergoing modernization. When one makes an adjustment to the total number of vacancies to exclude those that are undergoing modernization, the PHA is not changing the fact that the unit is still part of the PHA's dwelling unit inventory. This is why the adjustment is only to the numerator portion of the rate and not to the denominator.

Comment: One comment indicated that the term ''vacancy day'' definition uses the qualifying statement ''...unless the vacancy day is exempted for an eligible reason.'' A ''vacancy day'' does not lose its status as a ''vacancy day'' because it is exempted. It simply becomes a ''vacancy day that is exempted''. This should be clarified because other terms (like ''actual vacancy rate'' and ''adjusted vacancy rate'') make reference to it in their definitions. Another comment proposed that the definition for vacancy day should be modified to specify that it pertains to ''dwelling'' units.

Response: The Department agrees with the comments and the new rule reflects the changes.

Comment: One comment indicated that the term ''units available for occupancy'' is defined as the number of units identified on a PHA's ACC times the number of days available and asked then what number should be used for units acquired or built during the assessment year? Two comments asked whether occupied units that have not reached Date of Full Availability (DOFA) are counted or excluded until they reach DOFA date.

Response: The definition of number of ''units available for occupancy'' has been clarified to exclude three categories of units from the number of units identified in the PHA's ACC. The units acquired or built during an assessment year will be added on a prorated basis based on the sum of the number of days available of each individual unit added to the ACC. The date to be used for determining days available is the date of ''End of Initial Operating Period'' (EIOP) for the corresponding project. *COMMENT:* One comment stated that the formula used for the calculation of the actual vacancy rate is inconsistent with that used for the completion of PHA financial information and creates the potential for errors when preparing both the PHMAP certification and the annual budget documents. The actual vacancy rate should be consistent throughout all HUD requirements (i.e., form HUD–51234 and budget forms).

Response: The Department agrees that the definitions and methodologies for both PFS and PHMAP should be the same as long as feasible, and the language of the new rule reflects that.

Comment: One comment recommended adding to the list of definitions the terms ''move-out date,'' which is when the PHA regains possession of the unit by the legal expiration of the lease; and ''effective lease date,'' which is the date from which rent is due and payable and all other provisions of the lease are enforceable.

Response: The Department partially agrees with the comment and the new rule includes the definitions. The ''effective lease date'' is the date when the executed lease contract becomes effective and rent is due and payable and all other provisions of the lease are enforceable. On the other hand, the ''move-out date'' is the actual date when the resident vacates the unit, which may or may not coincide with the legal expiration of the lease agreement.

Component #2, Unit Turnaround

Comment: Two comments stated that if the turnaround calculation is retained, it should be kept as a separate indicator. Two comments suggested the elimination of this component, because unit turnaround measures efficiency of scheduling maintenance activities, which should be covered by indicators #4 and #5.

Response: The Department disagrees with both of these suggestions. The requirement to measure a PHA's ability to turn around its vacant units is statutory, whether the statutory requirement is carried out by establishing a separate indicator for unit turnaround or by including unit turnaround as a component of a different indicator. The Department agrees with the assumption that if vacancies are at a grade C or above, a PHA does not have a problem with turning around vacant units. The Department also disagrees that unit turnaround solely measures a PHA's efficiency of scheduling maintenance activities. The calculation of unit turnaround also includes down time, which is the time between when the unit is vacated and a work order is issued for the repair of the unit; and lease-up time, which is the time from when maintenance completes the repair of the unit and a new lease takes effect.

Comment: Three comments stated that this component does not accurately measure a PHA's performance in maintaining and leasing their units because nothing in the component shows how many units the PHA had to turn around during the year. These commenters believed the percentage of units that are turned around during the year should be included in the formula. For example, if a PHA has a turnaround time of 20 days, and turned over 45% of their units, and you multiply the turnaround time (20 days) times the percentage of turnover (45%), it equals 20 times 45%, or nine days. You then subtract nine days from the 20 days to equal a turnaround of 11 days. The commenters felt that this is a more accurate measure of a PHA's ability to manage and turnaround per unit. A PHA with a high yearly turnaround is unduly taxed under the current formula.

Response: The Department disagrees with this suggestion because this component is measuring the annual average of time it takes a PHA to turn around its vacant units, rather than measuring the turnover rate, which takes into account how many units the PHA had to turn around during the year.

Comment: Three comments stated that the calculation of unit turnaround includes vacancy days from prior fiscal years, offering little incentive (scoring) under the proposed rule for re-occupying older units. It is recommended that unit turnaround time be capped at one year or 360 days.

Response: The Department disagrees because to do so would result in an inaccurate assessment of a PHA's ability to turnaround all vacant units and would provide no incentive for PHAs to ensure that long-tern vacant units are turned around and reoccupied. In addition, if these units are not included in the calculation of this component, it would result in a skewed perception of a PHA's ability to manage its total maintenance/re-leasing activities. Furthermore, ''turnaround time'' is a term of art and means all the days that elapse between one tenancy and the next. In the event that unusual or special circumstances exists, a PHA may request a modification to the calculation of this component.

Comment: Two comments feel that this component should be given the same exemptions as in component #1.

Response: The Department agrees and stated so in both the preamble and the regulation of the proposed rule, as well as in the new rule.

Comment: Two comments stated that unit turnaround time should exempt seven days for each PHA-required transfer because one resident has two units tied-up for a week and sometimes longer.

Response: The Department disagrees with this suggestion. Although the total time it took the two units mentioned in the comment to be turned around may have been a week or longer, each unit was turned around on different days, with different individual total turnaround time. The intent of this component is to measure the annual average number of days it takes a PHA to turn around its vacant units, which includes for each vacant unit a total of down time, make ready time, and lease up time.

Comment: Two Comments questioned the definition which states that units are exempted from the vacancy calculation if special conditions exist that are beyond control of the PHA. They inquired whether this definition includes units delayed for reoccupancy as a result of heavy vandalism. They contend that it should because such vandalism is often beyond the PHA's control.

Response: The Department has determined not to specifically include heavy vandalism as part of conditions beyond a PHA's control in this definition since circumstances for individual PHAs will differ. In such a case, a PHA may submit a modification request to exclude such units in the calculation of this component, accompanied by justifying documentation.

Comment: One Comment stated that unit turnaround is assessed based on calendar days rather than working days (25% of the time in 20 calendar days is non-working time). The Commenter contended that it should be based on regular working days since most PHAs cannot afford to pay overtime salary rates.

Response: The Department disagrees and will continue to use calendar days as the standard for all of the PHMAP indicators. Vacancies, rent collection, etc., are not based on working days, and it would be unrealistic to do so. In addition, it is easier to calculate calendar days, especially when using an automated system, due to the necessity of factoring in holidays and weekends when using working days.

Comment: One Comment stated that unit turnaround operates against thorough tenant screening and compliance with city code requirements and, therefore, against the reputation of public housing. These other factors that affect unit turnaround should be considered, including strict lease compliance, terminating residencies or relocating over or underhoused families. The Commenter said that conscientious implementation of HUD policy can create large turnovers, stress maintenance resources and result in poor ratings, while a PHA with no turnovers or even lack of attention to over and under-housing can maintain an excellent rating.

Response: The Department disagrees with this statement because the enforcement of and/or compliance with these factors is part of the ongoing management responsibility of all PHAs. Using good management practices, a PHA should not have a higher turnaround time due to enforcement and/or compliance with the other factors mentioned in the Comment. For example, a PHA that strictly enforces rent collection procedures will typically have fewer evictions since more residents will pay rent in a timely manner. This normally will eliminate the need for evictions or situations where huge balances are built up and the resident vacates as a result of not being able to pay off the indebtedness once court action is taken. If a PHA enforces the lease clauses regarding the upkeep of the unit by occupants through informing the resident of the family's responsibility, providing instruction as necessary, and through inspections, repair, and properly instituted resident charges, units will tend to be in better condition when vacated, thereby reducing needed repairs and subsequently reducing vacant unit turnaround time. Additionally, a lack of attention to over and underhoused residents will affect a PHA's turnover rate, rather than its turnaround time.

Comment: One Comment requested that the Department consider the implementation of an exception to the component whereby, if all but one unit turns over in a timely manner, a PHA can request an exception for a circumstance that was beyond its control. Even one exception can have a big impact in a small PHA.

Response: The Department agrees, and in the event a truly unusual or special circumstance exists, a PHA may submit a modification request that addresses the circumstance(s) beyond its control.

Comment: One Comment stated that assessing this component based on how the PHA fared in the first component is appropriate and the grading is equitable.

Response: The Department agrees, and will continue to examine unit turnaround as the second component under this indicator.

Comment: One Comment stated that if the current turnaround method stays, it should be a measure of when the unit is ready physically for rental and the new tenant has committed to the unit, not necessarily when physical occupancy occurs.

Response: The Department disagrees with the Comment for several reasons. First, there is no guarantee that maintenance staff will start renovations as soon as possible after the unit is vacated. Secondly, there is no guarantee that the first applicant that is offered the unit will accept, thereby leaving the unit vacant for a longer period of time. Thirdly, the Department believes that the definition of turnaround time takes into account the concerns expressed in the Department's first two reasons for disagreeing. A well managed PHA coordinates maintenance and resident selection activities to ensure that as many units as possible are available for occupancy as soon as possible by planning move-ins in advance and notifying applicants as soon as possible. Since the PHMAP assesses management performance, it is appropriate to include the management of the total maintenance/re-leasing activities in this component.

Comment: One Comment (1) disagrees that unit turnaround is an unnecessary component for high performers; (2) feels that this component should be weighted as proposed; (3) believes that an adjusted turnaround time exceeding 30 days is unacceptable performance for any management agency regardless of the vacancy rate; and (4) believes that the need for a turnaround time of 50 days or less to score on this component is a poor standard and would not show the results of what may be clear and significant performance improvements.

Response: The Department disagrees with the first statement because normally, a PHA (whether a standard or high performer) that achieves at least a grade of C for component #1 does not have a problem with turning around vacant units, i.e., unit turnaround is not a factor in a high vacancy rate. The Department agrees with the second statement because the vacancy rate is a clear manifestation of management effort and embodies the essence of a PHA's mission; therefore, it is weighted more heavily than the process-oriented unit turnaround component. It is not clear what the Comment meant in the third statement by ''adjusted turnaround time.'' This term was not referred to in the proposed rule, was not included as a definition, nor was it used in the text of the component. The Department also disagrees with the fourth statement and believes that the range between the grades in this component is equitable for the new rule.

Comment: One Comment stated that the proposed rule provides that the calculation of turnaround time for newly modernized units starts when the unit is turned over to the PHA from the contractor and ends when the lease is effective for the new or returning resident. This provision eliminates a level playing field for measuring the normal turnaround time required by a PHA to restore vacant units to occupancy. The Commenter alleges that this gives unfair advantage to PHAs that did not need to vacate units for modernization and it doubly penalizes PHAs that modernize units for completing modernization on large numbers of units concurrently. The Commenter felt that this component should measure the time it takes PHAs to restore units to occupancy when they vacate for normal move-out reasons.

Response: The Department disagrees with this Comment and believes that this method of calculating unit turnaround does provides a level playing field for PHAs because it provides a standard method that will be used by all PHAs. The Department does not believe that this method of calculating unit turnaround gives an unfair advantage to any PHA, regardless of the scope or type of modernization. A unit that is modernized with the resident in place is not included in the calculation of this indicator because it has not been vacated and subsequently turned around; therefore, there is no advantage to be considered. If a PHA vacates a unit to modernize, the time it took to modernize the unit is not included in unit turnaround time regardless of the number of units completing modernization concurrently. A PHA should be able to plan for move-ins in advance and notify applicants in sufficient time to coincide with the availability of units. This component will continue to measure unit turnaround for whatever reason the unit is vacated and turned around.

Comment: One Comment recommended that average turnaround time be defined as, ''the annual average of the total number of turnaround days between the legal expiration date of the immediate past lease (whenever that occurred, including in some previous fiscal year) and the date a new lease takes effect, that being the date from which rent is due and payable and all other provisions of the lease are enforceable.'' This allows PHAs to take into consideration the wide variety of local ordinances and State statues that effect the termination of a lease and date the PHA thereby regains possession of the unit.

Response: The Department agrees, in part, with this recommendation, and will change the definition of average turnaround time to read, ''...the annual average of the total number of turnaround days between the latter of the legal expiration date of the immediate past lease or the actual move-out date of the former tenant (whenever that occurred, including in some previous fiscal year) and the date a new lease takes effect.'' This change will take into consideration the wide variety of State and local laws that effect the termination of a lease. By retaining the actual move-out date of the former tenant in the definition, a PHA is not penalized for doing evictions, since in such cases, the resident usually vacates after the legal expiration date of the lease. It should be noted that in the rare case where an applicant executes a lease and moves into the unit prior to the completion of minor repairs, the calculation of turnaround time continues until the repairs to the unit have been completed by the PHA.

Indicator #2, Modernization—§ 901.15

The weight for this indicator has been increased to x1.5 in the new rule to reflect the importance of planning for and allocating scarce modernization funding.

Comment: Ten Comments supported the greater emphasis being given to obligation of funds in relation to expenditure of funds for components #1 and #2.

Response: The Department concurs that by assigning more weight to fund obligation, and less to fund expenditure, the rule largely removes the disincentive for PHAs to accept inferior work products from contractors.

Comment: Two comments recommended that there should be intermediate grades for components #1 and #2 that allow for varying times beyond the required deadlines (e.g., within one year after deadline = C, two years = D, etc.). Interim grades should be adopted to recognize that capacities vary between PHAs and the size of their modernization programs. One method would be: A for 100%, B for 90–99.9%, C for 80–89.9%, D for 70–79.9%, and F for below 70%. If the Department remains adamant that these are too many grades, then at least a grade of C should be available for > 80% but < 100%. Another comment suggested that components #1 and #2 should have more grades (A–F) to allow small amounts of funds to be expended/obligated without scoring an F. For example, 99% of funds obligated/expended would receive a score of B, and 95% of funds obligated/expended would receive a score of C. Another comment recommended that all components should have grades A–F; larger PHAs may have multiple modernization projects being run simultaneously. A problem with just one such project should not be the cause of a failing grade. In addition, another comment recommended that an intermediate grade of C should be created for components #1 and #2 for PHAs that, for example, are one year behind the expenditure or obligation time. Some PHAs may need to accumulate funds over several years in order to fully carry out their strategic plans. Another comment recommended that large PHAs that administer complex, multi-year programs that exceed $100 million in a single year, be given more flexible standards than are proposed for components #1 and #2. The proposed rule refers to the HUD-approved original implementation schedule, and the previous interim rule refers to the HUD-approved revised schedule. HUD should allow a grade of A for these two components where the HUD-approved original or revised implementation schedule allows longer than three years to expend all funds, and the PHA is either in compliance with that schedule or has timely self-executed an extension of the HUD-approved deadline for valid reasons beyond its control.

Response: The Department does not agree with these comments since components #1 and #2 adequately take into account situations where longer times are appropriate in the original implementation schedule or are necessary in the revised implementation schedule due to reasons outside of the PHA's control. The Department believes that it is appropriate to distinguish between time extensions due to reasons outside of the PHA's control (which have no adverse impact on the PHA's score on components #1 and #2) and time extensions due to reasons within the PHA's control (which avoid fund recapture, but have an adverse impact on the PHA's score on components #1 and #2). The Department notes that the need to use leftover funds is a reason for a time extension outside of the PHA's control. In addition, the Department notes that while larger PHAs have more funds to obligate and expend, such PHAs also have greater resources and capacity to implement their programs; therefore, size of program is not appropriate in measuring fund obligation and expenditure performance.

Comment: Six comments expressed concern about how HUD will define ''significant findings'' for components #3 and #4 in the new rule. This is a very critical issue since HUD staff judgments vary widely from city to city. Significant findings should be really significant. PHAs should have the opportunity to see and comment on the definition.

Response: The Department has revised components #3 and #4 to include a definition of ''findings.'' The Department has eliminated the term ''significant'' since, by definition, all findings made in connection with HUD monitoring or an audit are significant. Items that are not significant are considered to be observations and are not designated as findings.

Comment: Two comments disagreed that obligation of funds should be weighted higher than expenditure of funds. Often it is easier to enter into a contract than it is to complete one. Emphasis should be on a PHA's planning efforts and its record of delivering promised work.

Response: The Department does not agree with this comment. The Department believes that the more time-consuming part of implementation involves the design work, the bid process, and the award of contract. In the overwhelming majority of cases, fund expenditure occurs routinely after fund obligation, in accordance with the schedule for periodic payments.

Comment: Two comments were unclear about the reporting requirements for a self-executed time extension for obligation of funds and suggested that the Department provide a short list of examples of the types of circumstances ''out of the control of the PHA'' which would warrant a self-executing extension.

Response: The Department has revised components #1 and #2 to provide additional examples which are: unforeseen delays in contracting or contract administration; and need to use left-over funds from a completed modernization program for additional work. Additional examples will be provided in the revised PHMAP Handbook 7460.5.

Comment: One comment stated that it was not clear what data were being used to score components #1, #2 and #5, and suggested that HUD needs to develop a procedure reflecting PHA performance in the same fiscal year as other PHMAP grades.

Response: The Department scores components #1 and #2 on the basis of Federal Fiscal Year (FFY), not PHA fiscal year, in order to provide a uniform measurement for all PHAs, without regard to the relationship between the construction season and PHA fiscal year. The Department scores components #3, #4, and #5 based on the status of the PHA's modernization program(s) as of the PHA's fiscal year end. The Department intends to continue these bases for scoring.

Comment: One comment noted that the components are well described and the grading is equitable.

Response: The comment is noted by the Department.

Comment: One comment recommended that only fund obligation should be measured since in fact this is the only activity really under a PHA's control, with expenditures affected by contractor progress, litigation, and other outside factors.

Response: Fund expenditure is a performance measure mandated by the 1992 Appropriations Act and, therefore, must be included.

Comment: One comment recommended that the modernization indicator be changed for the assessment of the CGP. Requirements for measurements should be in large percentages rather than items of work (i.e., 33% of all funds three years old or less should be obligated). Further detail should not be required. HUD should model these reporting requirements on those of the CDBG program. There should be flexibility for expenditure rate requirements based on circumstances beyond PHA control, such as contractor default, the discovery of hidden conditions, etc.

Response: The Department believes that the component on fund obligation appropriately assesses performance under the CGP. The CGP provides annual formula funding for modernization. Accordingly, such stable and predictable funding should enable CGP PHAs to plan and implement their modernization programs in an expeditious manner. The Department strongly believes that two years is adequate time for most PHAs to obligate all funds, but provides for a longer time period where appropriate.

Comment: One comment recommended that fund obligation be extended to three years rather than the two proposed.

Response: The Department believes that two years is a more appropriate measure of performance. However, the Department notes that the PHA may propose, and HUD may approve, implementation schedules with fund obligation deadlines of longer than two years due to local differences in work scope and complexity, construction seasons, material or equipment supply, or State/local contracting requirements.

Comment: One comment questioned how HUD will know whether the PHA extended the target date within 30 calendar days after the deadline and whether such extensions were for reasons outside of the PHA's control. These components are not certified by the PHA, but are graded by HUD based on HUD in-house information. HUD will only know what it can gather from LOCCS and from on-site reviews. Assessments will be very inconsistent and of questionable accuracy.

Response: A PHA is currently required to inform HUD if it has extended the target date for fund obligation so that HUD may enter the revised date into the Line of Credit Control System (LOCCS). A PHA also is currently required to report on all time extensions that it issued and the reasons for those extensions in its annual CGP performance and evaluation report for the program year ending June 30. If a PHA issues a time extension between June 30 and September 30, it will be required to inform HUD so that components #1 and #2 may be scored correctly. If the State/Area Office fails to take into account a time extension made by the PHA, the PHA may appeal its score to the State/Area Office so that the corrected information may be used in rescoring.

Comment: One comment stated that component #1 is an example of excessive flexibility, in that a PHA can miss the performance target but still receive a grade A by executing a self-imposed time extension within 30 calendar days after the expenditure deadline so long as the extension is for conditions which the PHA determines is beyond its control. A PHA also can manage this requirement by simply including in its original implementation schedule, a time period longer than three years to expend its modernization funds. The same options are available in connection with component #2.

Response: The Department believes that PHA flexibility to issue time extensions for reasons outside of the PHA's control is critical to streamlining program requirements and is an important tool in expediting program implementation. HUD still approves the original implementation schedule and may require a shorter time period if a PHA proposes a time period that is too long. Also, HUD reviews the basis on which the PHA issues a time extension and, if inappropriate, may withdraw the PHA's authority to do so, thereby requiring that all future time extensions be submitted for prior HUD approval.

Comment: One comment questioned the term ''modernization'' as used in components #1 and #2. Does it mean CIAP/CGP only, or the larger definition of ''modernization'' found in the term ''approved funded, on-schedule annual modernization program?'' The comment contended that the rule uses two different definitions of the term ''modernization'': one that is CIAP/CGP only; and one that includes more than just CIAP/CGP.

Response: All components apply to both the CGP, the CIAP and lead based paint risk assessment (1992–1995). Only components #3, #4 and #5 apply to funding under the HOPE VI Program and the Vacancy Reduction Program for the assessment of this indicator. The new rule has been revised to include this language.

Comment: One comment recommended that HUD decouple the fund obligation deadline from specific modernization projects. This is in keeping with HUD's approach in the community development program arena where HUD tracks a specified amount of funds obligated each year regardless of the year in which HUD allocated the funds to a locality.

Response: The Department does not agree with this comment since each annual grant must be individually tracked and closed out.

Comment: One comment stated that components #1 and #2 do not measure the adequacy of modernization efforts or address the adequacy of the overall maintenance program of the PHA.

Response: The Department points out that both components are mandated by statute. The Department believes that component #2, fund obligation, is a critical indicator of modernization performance. Neither component is intended to address the adequacy of the PHA's overall maintenance program.

Comment: One comment stated that a PHA's potential score for components #3 and #4 seems to be subject to the timing of a HUD monitoring visit. A PHA should not be graded on these components unless at least three months have elapsed between the date of HUD's monitoring report to the PHA and the end of the PHA's fiscal year; also, the time frame for HUD reviews should be clarified.

Response: The Department agrees that a minimum time should be specified between the date of HUD's monitoring report or audit is provided to the PHA and the end of the PHA's fiscal year in order to give the PHA sufficient time to correct all findings. Accordingly, the Department has revised components #3 and #4 to reflect a minimum time of 75 calendar days.

Comment: One comment stated that a clearer distinction should be established between an ''A'' and a ''C'' grade for components #3 and #4; i.e., that a PHA must ''have corrected'' all findings versus ''be in the process of correcting'' all findings.

Response: The phrase the ''PHA has corrected'' all findings means that HUD concurs in the PHA's determination that the violation no longer exists and that HUD is ready to close the finding or has already closed it. The phrase the ''PHA is in the process of correcting'' all findings means that the violation still exists and the finding is not yet ready to be closed.

Comment: One comment supports an appeal process in the event a PHA and HUD differ on what constitutes ''significant findings.''

Response: As stated, above, this language has been changed and the term ''significant'' has been eliminated. In addition, the PHMAP rule at § 901.125 sets forth the PHA's right of appeal.

Comment: One comment recommended that HUD use qualified building inspection firms or inspectors, in combination with qualified HUD engineers as they are available to inspect the physical work that is completed rather than the Corps of Engineers.

Response: The Department intends to use all resources available to it, including the U.S. Army Corps of Engineers, for inspection of approved modernization programs.

Comment: One comment recommended that component #5 be covered under indicator #6, financial management, since financial management of the modernization program is part of the overall financial management of the PHA's programs.

Response: The Department rejects this comment since the modernization budget controls are so integral to implementation performance by a PHA.

Comment: One comment supported the change to component #5 that reflects the flexibility recently provided to CGP PHAs to move work items between approved annual statements and the five-year action plan and to address emergency items not reflected in either document. Another comment noted that emergency CGP work does not require prior HUD approval.

Response: The Department agrees that emergency CGP work does not require prior HUD approval and has revised component #5 to specifically exclude emergency work.

Comment: One comment proposed a new component related to the incorporation of work orders, which are identified by yearly inspections of systems and units and deferred for modernization, in the modernization plan.

Response: The Department does not agree with this comment because all work orders are tracked under indicator #4 in the new rule. A work order deferred for modernization is any work order that is combined with similar work items as defined in § 901.5.

Indicator #3 Rents Uncollected—§ 901.20

Comment: Ten comments supported the simplification of the indicator and the grading method, without further comment.

Response: The comments are noted by the Department.

Comment: Ten comments sought a variety of additional exclusions from ''dwelling rent'' such as charges for amounts that cannot be collected by the PHA without stopping the eviction process, amounts owed by tenants no longer in possession, disputed amounts, amounts written off, or amounts abated. One PHA thought that the indicator was inconsistent with the one strike policy in indicator #8 because a resident evicted for selling drugs would be charged dwelling rent that could not be collected during the eviction process.

Response: The Department does not agree. The reasons for nonpayment of rent are varied and the specific conditions mentioned are not unique. The purpose of the indicator is to assess a PHA's ability to deal with conditions for nonpayment effectively to collect the rent due; excluding the charges related to all possible reasons for noncollection would defeat the purpose of the indicator. A PHA may request a modification or exclusion to this indicator due to highly unusual or unique circumstances.

Comment: Five comments pointed out inconsistencies in terminology in the indicator that they believed made the indicator unclear. One comment stated that the terminology in § 901.20 doesn't have the same specificity as the summary. The language in § 901.20 needs to be revised to conform with the summary and the definitions. There were four comments regarding the definition of the terms ''current dwelling rent billed,'' ''current dwelling rent uncollected,'' ''percent of current dwelling rent,'' and ''rents uncollected.''

Response: The terminology referred to in the comments has been changed in the new rule to be consistent.

Comment: Four comments stated that uncollected rent of 2% or less for a grade of A was unduly restrictive and not in line with the private market standard. The comments requested that the 2% be changed to 5% to conform to industry standards.

Response: The Department believes that the percentage for grade A is fair since this grade represents the truly outstanding PHA, rather than the industry standard. The industry standard of 5% is reflected in grade C of this indicator, and denotes standard performance.

Comment: Two comments noted that the indicator is not as simple as it seems since data required by the indicator is not readily available in the accounting system. One comment stated that the method should not be changed from the interim method.

Response: The Department recognizes that accounting systems do not usually collect or compile the specific tenant accounts receivable information required for indicator #3 as proposed; therefore, the proposed indicator has been changed to incorporate information that is collected by PHAs to compile other tenant accounts receivable and financial reports. The major change between the new indicator and the current method is that the new indicator includes only information for tenants in residence during the assessed fiscal year.

Comment: One PHA commented that rent collections are so important that the indicator should have a weight of x3.

Response: The Department agrees that rent collections are important to the financial health of the PHA, and it has the second highest weight of all the indicators. The weighting has been simplified to a ten point scale, with only indicator #1, vacancy rate and unit turnaround, having a weight of x2.

Indicator #4, Work Orders § 901.25

General Comments

Comment: Many comments received were generally supportive of the revised requirements of this indicator. Most indicated that the changes made to this indicator will create a management tool that is more equitable and provide a more accurate measurement of work order completion.

Response: The comments are noted by the Department.

Comment: Four comments stated that recording the time for completing emergency and non-emergency work orders is unnecessary and unproductive. The extra administrative expense to record the time of processing work orders is not justified. One comment stated that this change will put an excessive burden on small PHAs in tracking the time involved on routine (non-emergency) work orders due to the many factors which can effect how long it takes to do a work order.

Response: The Department does not agree with this statement. This indicator is a statutory requirement under the PHMAP. The preamble to the PHMAP rule and the new rule state that ''implicit in this indicator is the adequacy of the PHA's work order system in terms of how a PHA accounts for and controls its work orders, and its timeliness in preparing/issuing work orders.'' Therefore, there should not be substantial additional administrative expense since an adequate work order system must be able to track and control work orders from the dates/times of when the work orders were initiated to the dates/times when they were completed.

Comment: Two comments stated that emergency work orders should be at least equal in weight to non-emergency work orders.

Response: The Department believes that since emergency conditions must be abated immediately or no longer than 24 hours from when first reported, the tracking and controlling of non-emergency work orders would provide more accurate information of PHA work order performance. Hence, more weight is given to the PHAs' non-emergency work order activities. However, the weight of the total indicator in the new rule is x1.

Comment: Two comments stated that the definitions for cyclical work orders and preventive maintenance are very similar, which is especially distressing because the proposed rule is very clear in its requirement that the two not be confused.

Response: The Department agrees that there are many instances in which PHAs might not use the work order process to do general cleaning activities, pick up trash or change light bulbs. When they do, these work orders are classified as cyclical work orders and are excluded from component #2, non-emergency work order, calculation. Other examples of cyclical work orders might be work orders that are routinely written each year to replace furnace filters, clean out site and roof storm drains or raking leaves in the fall. Preventive maintenance work orders are usually generated from preventive maintenance inspections. They are primarily related to the modification or repair of physical systems of units, buildings and grounds. The Department will include examples of cyclical and preventive work orders in the revision of the PHMAP Handbook 7460.5.

Comment: Two comments stated that for work orders done by outside contractors, which may take longer to complete or that require special parts, if a vendor has difficulty in securing a part, the PHA would be penalized even though the living conditions in the unit aren't compromised.

Response: The Department does not agree with this comment. The Department has provided up to 25 days for the average time to complete non-emergency work orders in order for a PHA to achieve a grade A for this component. This is quite liberal as compared to the private sector. The few cases that might exceed the 25 day period, due to a wait on a special part, should not significantly impact a final PHMAP score. In regards to emergency work orders, if the emergency condition in a particular unit cannot be corrected or abated within the 24 hour time frame, the resident(s) could be moved out of the unit, which would abate the emergency situation.

Comment: Two comments wants to know if the reduction of days needed to complete work orders affect grades A and B, or is it only taken into consideration when the grade is C or less. Under what conditions may a PHA make such an election? To this, the rule appears to be silent.

Response: The reduction of days needed to complete non-emergency work orders is only taken into consideration when the grade is C or less. The Department has revised the reduction of days needed to complete non-emergency work orders during the preceding three years to conform with other changes in the new rule.

Comment: One comment stated that this indicator is poorly written and needs additional clarification.

Response: The comment is not specific as to where the clarifications are needed. The Department wants a new PHMAP rule that is clear, concise and easy to understand, and welcomes any and all suggestions on how it can achieve that goal. If some areas of the rule are unclear to a reader, or needs further interpretation, he/she can contact the local State/Area Office for assistance.

Comment: One comment stated that PHAs may need technical assistance to construct an effective tracking system without spending scarce funds on additional software or special tracking systems.

Response: The Department agrees with this comment and maintains that PHAs must have in place an adequate work order system that tracks and controls work orders from the dates that they were initially entered into the system to the dates when they were completed. The necessary information to grade emergency and non-emergency work orders should be readily accessible from the data in the PHA's work order system. However, if the PHA's existing system cannot perform the necessary tracking function, it should be a priority of the PHA to up-date the existing system or replace it with one that can. To that end, HUD is always available to provide appropriate technical assistance.

Comment: One comment stated that there should be a one year delay in implementation.

Response: The Department has determined that the revisions in the new PHMAP rule will apply to PHAs with fiscal years ending the quarter after the new PHMAP rule is published in the Federal Register.

Comment: One comment stated that this indicator does not provide any means for measuring the effectiveness of a PHA's response to deficiencies identified in inspections.

Response: The Department agrees. Measuring the effectiveness of PHA response to deficiencies is too subjective and would not necessarily be the same from PHA to PHA; PHMAP measures performance.

Comment: One comment stated that a confirmatory review should be required each year by qualified HUD staff or building inspection firms.

Response: The Department disagrees due to the lack of resources. Risk management is used to determine where confirmatory reviews are most needed.

Component #1, Emergency Work Orders

Comment: One comment stated that the evaluation for grading emergency work orders under component #1, is too tight, i.e., 99% of the emergency work orders completed or abated within 24 hours for a grade A and down to 95% completed or abated for a grade F.

Response: The Department does not agree. The Department defines emergency as physical work items that pose an immediate threat to the life, health and safety of residents or that are related to fire safety. If emergency work items cannot be completed or abated within 24 hours, the PHA could move the resident out of the unit until the emergency work is completed or abated. The removal of the resident(s) from the emergency condition is considered abatement. Therefore, correcting or abating an emergency situation should never exceed 24 hours.

Comment: One comment stated that a more specific definition of emergency work orders should be given, possibly including examples.

Response: Emergency means physical work items that pose an IMMEDIATE threat to life, health, safety, or property, or that are related to fire safety. Some of the more easily definable emergency situations would be: (1) an unhealthy or undrinkable water supply; (2) a gas leak; (3) a broken sanitary sewer line where sewage is ponding on the surface of the ground; (4) failed heating systems in colder winter climates; (5) hazardous electrical systems; non-working smoke detector or fire alarm system; and (7) toxic material situations such as exposure to asbestos or defective lead-based paint. Situations such as leaky roofs, broken windows or stairways might be classified as an emergency depending on specific circumstances and the degree to which the situation is an immediate threat to tenant health, safety or to property. Temporarily covering a hole in the roof or broken window, or closing off a stairwell until the condition can be corrected would be considered emergency abatement and would change these types of work orders from emergency to regular (non-emergency) work orders. The Department will include examples of emergency and non-emergency work orders in the revision of the PHMAP Handbook 7460.5.

Component #2, Non-Emergency Work Orders

Comment: Two comments stated that excluding cyclical work orders from the calculation of this indicator serves to create what must be an unintentional disincentive to devote staff resource time to routine daily maintenance work. The PHA that devotes all of its maintenance resources to competing PHMAP measured work orders while ignoring trash on the grounds and in the hallways will score higher than a PHA that devotes its resources to daily maintenance as well as inspection and resident initiated work orders. Unless the PHMAP rule intends to cause PHAs to place a very low priority on the completion of daily maintenance work orders, work orders generated to accomplish this work should not be excluded from the calculation of this indicator.

Response: The Department disagrees with this suggestion since this component was designed to only measure PHA performance in completing work orders and was never intended to place daily maintenance work at a low priority or ignore trash on the grounds and in the hallways. Normally, tasks such as picking up trash, etc., are performed by laborers and would not be covered by a work order. Work orders exempted for modernization, issued to prepare a vacant unit for re-rental, or issued for the performance of cyclical maintenance are not necessarily the same from PHA to PHA and consequently, would tend to skew the performance grade results from PHA to PHA if they were not exempted.

Comment: One comment stated that preventive maintenance work orders are not exempted from the calculation of this component and should be. This PHA issues over 3,000 work orders for preventive maintenance to be performed on the heating systems over the period of the three to four month non-heating season. If these are included in the count, there is no possible way for this PHA to obtain a high score for this component since the work could never be completed in 25 days or less.

Response: It appears that the work orders described above should be classified as cyclical work orders, which are excluded from the non-emergency calculation. If this is not the case, the PHA does have the option to request HUD's approval of either a modification or exclusion of this indicator.

Comment: One comment stated that to divide work orders among routine and emergency, then determine average number of days it took to complete them assumes that only closed work orders will be counted under this indicator, and any work order that is not closed will be counted against the following fiscal year as we currently do with vacant units. Please clarify.

Response: The calculation of this indicator includes: the number of days in the assessed fiscal year it takes to close active non-emergency work orders carried over from the previous fiscal year; the number of days it takes to complete non-emergency work orders issued and closed during the assessed fiscal year; and the number of days all active non-emergency work orders are open in the assessed fiscal year, but not completed. The new rule includes a definition of the average number of days for non-emergency work orders to be completed.

Comment: One comment stated that this indicator should specifically state that HUD wants all preventive maintenance work orders tracked rather than focusing on exclusions and thus, place proper emphasis on preventive maintenance.

Response: The Department agrees and has added specific language to the new rule stating that all preventive maintenance work orders are to be tracked, as well as which type of work orders are exempted from the calculation of this indicator.

Section 901.30 Indicator #5, Annual Inspection of Units and Systems

General Comments

Comment: Three comments support the improvements in this indicator, particularly reducing the components from four to two and eliminating redundancies.

Response: HUD agrees that it is more appropriate to track all work orders, including inspection generated work orders, under indicator #4. Indicator #5 now focuses more on a PHA's ability to determine short-term maintenance needs and long-term modernization needs.

Comment: Three comments expressed concern about the possible subjective interpretation of the adequacy of a PHA's inspection system by HUD field staff. A clear and reasonable description of an adequate inspection system should be included in the rule.

Response: The preamble to the proposed rule stated that the adequacy of a PHA's inspection program will be part of the confirmatory review in terms of the quality of a PHA's inspections, and how a PHA tracks both inspections and needed repair, and the adequacy of a PHA's inspection system is also included in the new rule. The Department recognizes that what is adequate for one PHA may not be adequate for another PHA, thereby making this term general in concept. Examples of inspection systems will be included in a guidebook on the conduct of confirmatory reviews and in the revised PHMAP Handbook 7560.5.

Comment: Two comments stated that the two components are well described and are graded equitably. However, it should be clarified if damages caused by residents that are not reported to maintenance for prompt repair could be exempted and considered as repairs for code compliance.

Response: If a unique or unusual circumstance were to occur, a PHA could request a modification to this indicator to avoid being penalized for circumstances beyond its control. However, one of the purposes of an annual unit inspection is for a PHA to be able to identify, at least annually, the condition of its housing stock. Since this indicator no longer measures the amount of time it takes to correct unit/system deficiencies, the annual inspection would simply initiate corrective action.

Comment: One comment stated that this indicator is poorly written and needs additional clarification.

Response: The comment is not specific as to where the clarifications are needed. The Department wants a new PHMAP rule that is clear, concise and easy to understand, and welcomes any and all suggestions on how it can achieve that goal. If some areas of the rule are unclear to a reader, or needs further interpretation, he/she may contact the local State/Area Office for assistance.

Comment: One comment stated that PHAs must have adequate time to change the manner in which they track annual inspections and needed repairs.

Response: The Department agrees, and the new rule will apply to PHAs whose fiscal year ends the quarter after the publication of this rule in the Federal Register.

Comment: One comment recommended that a confirmatory review of this indicator be required each year by HUD or qualified building inspection firms that would track whether each item was completed or whether it was referred to a work order and when the work order was completed.

Response: The Department disagrees because these issues are more properly examined under indicator #4, work orders. Also, due to the lack of resources, risk management is used to determine where confirmatory reviews are most needed. However, when HUD conducts a confirmatory review of indicator #4, the items mentioned in the comment are verified and confirmed.

Comment: One comment stated that component #2 should have a higher weight. The commenter suggested that there should be a new component that requires a monthly walk through of the common areas, with the results of these inspection being available for HUD monitoring.

Response: The Department disagrees with both parts of the comment. HUD believes that the inspection of units and the inspection of systems are equally important to the quality of a PHA's housing stock and, therefore, each component is weighted equally. The Department believes that adding a new component that requires a monthly walk through of the common areas would result in the micromanagement of PHAs.

Comment: One comment asked why the proposed certification form asks the question, ''Percent of units meeting HQS.''

Response: This question has always been on the certification form. The Department requests this information for trending and statistical purposes.

Comment: One comment felt that this indicator has been severely weakened. Poor property management may be rewarded simply because inspections have been conducted. The necessary follow-up to correct identified deficiencies is not addressed in the proposed rule.

Response: The Department disagrees with this comment because inspection generated repair items are tracked under indicator #4, work orders.

Comment: One comment suggested that units under proposed demolition and disposition applications that are vacant should be excluded from this indicator.

Response: The Department does not agree with this comment. There have been and will continue to be significant differences between initiating the application process and receiving approval to dispose or demolish.

Comment: One comment does not agree with the exemption of occupied units that the PHA has made two documented attempts to inspect because this could become an excuse for PHAs with poor inspection programs.

Response: The Department disagrees that such a situation is likely to happen because the language of the exemption goes on to state that PHAs may claim this exemption only if it can document that appropriate legal action (up to and including eviction of the legal or illegal occupant(s)), has been taken under the provisions of the lease to ensure that the unit can be subsequently inspected.

Comment: One comment observed that the expanded definition of what units are excluded from the calculations are an improvement. It seems logical to exclude units in the same category as in the vacancy indicator. However, there is concern about the exclusion of ''units vacant for circumstances and actions beyond the PHA's control.'' The concept is too vague. There will be situations cited that may arguably be within an agency's control. HUD should, minimally, identify a short list of examples as a guide to PHAs and HUD State/Area Offices.

Response: The Department agrees and this rule has been revised to specifically state the allowable exemptions for indicator #5.

Comment: One comment agrees with excluding units documented as uninhabitable, but feels the term should be defined (e.g., condemned by local health department). In addition, PHAs with uninhabitable units should indicate what plans they have to demolish and dispose of such units.

Response: The language for this indicator already states that units that are documented to be uninhabitable by order of the local health department may be exempted. To further enumerate all of the possible Federal, State or local agencies that could be involved in such a process is unnecessary since situations differ from PHA to PHA. However, if units have been determined to be in such a state as to be designated uninhabitable, HUD strongly recommends that PHAs at least inspect these units annually to verify the structural integrity of the building. This is particularly important for scattered site units and long-term vacant buildings. In addition, a CGP PHA has to address the physical needs of all of its developments in its Comprehensive Plan.

Component #1, Annual Inspection of Units

Comment: Three comments stated that HQS should remain as the standard, with the PHA expanding on the HQS requirements to include local code items. Otherwise, HUD would need knowledge of many different local codes to properly assess PHA actions. The commenters added that it would be necessary to adapt HQS at the highest local standard or a PHA would have to modify inspection standards based on where the unit was located.

Response: The Department requires that HQS be used as the inspection criteria for PHAs *only* if there are no local occupancy and/or housing codes that cover a PHA's jurisdiction. The PHMAP Handbook 7460.5 requires that a PHA comply with local occupancy and/or housing codes. Rather than expand on the HQS requirements to include local code items, a PHA should expand upon local code requirements to include omitted HQS items. If a PHA is dealing with more than one local occupancy/housing code within its jurisdiction, the PHA should incorporate HQS items into the local occupancy/housing inspection forms for each locality.

Comment: Two comments stated that incorporating maintenance long-term planning into annual inspections would greatly compromise the ability of a PHA to abate common problems. In addition, it is difficult to determine if completion of long-term preventive maintenance functions (exterior painting, etc.) would be included.

Response: The Department disagrees with this comment and believes that just the opposite is likely to occur. A PHA's ability to abate common problems should be greater when a PHA is able to plan for short-term maintenance needs and long-term modernization needs. Such planning will allow a PHA to budget appropriate expenditures from its operating budget and modernization program, thereby avoiding possible budget short falls. With such planning done on an on-going basis, a PHA can focus more resources on day-to-day operations and the abatement of common problems. In addition, the completion of long-term preventive maintenance items are included at the discretion of each PHA. A PHA may decide to fund all exterior painting out of its operating budget, painting ''X'' amount of units/buildings each year on a rotating basis. Or, a PHA may decide to include 50% of its exterior painting under its modernization program, and fund the exterior painting of the remaining units out of its operating budget.

Comment: One comment felt that the proposed indicator does not exempt occupied units scheduled for modernization this year or the next. Inspection of occupied units scheduled for imminent modernization should be limited to an inspection of emergency conditions only. It seems wasteful to take the time to write up deficiencies on a unit when specifications have been developed and possibly even bid for the modernization of the unit. One comment stated that the term ''referred the deficiency to the current year's or next year's modernization program'' is an incredible loophole simply permitting the existence of non-compliant conditions.

Response: This indicator does exempt a vacant unit undergoing modernization as stated in the preamble language and the proposed rule. The Department has added new language to the new rule in order to clarify the circumstances under which work orders can be deferred to modernization. As stated in the definition for this term, only similar items can be deferred by a PHA to be completed in the current year's modernization program, or to be completed in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the work order was generated.

However, before an item is deferred to modernization, it should be (1) similar to a work item that is in the current year's modernization program, (2) similar to a work item that is in next year's modernization program, or (3) similar to deficiencies noted in other units/buildings and the correction of such deficiencies has not been included in the current or next year's modernization program, but the current or next year's Annual Statement is revised to include the new work item. If the similar deficiency that was deferred for modernization is not corrected in the current or next year's modernization program, the work item may no longer be exempted from the calculation of this indicator and the deficiency reverts back to being tracked through the work order system.

Occupied units shall be inspected, particularly for detection and repair of emergency conditions, as long as they remain occupied. Non-emergency work orders generated during inspection of occupied units scheduled for imminent modernization (this year or the next) should be classified as deferred for modernization and not included in the computation of this indicator as long as the identified deficiencies are part of the work items included in the modernization project.

Comment: One comment stated that it is not clear whether preventive maintenance items, such as repairs to stoves and plumbing, etc., would be recorded or tracked. How are they recorded if completed during the inspection?

Response: All preventive maintenance items should be recorded and tracked through the work order tracking system. This information will enable a PHA to plan for short- and long-term maintenance needs. If a minor deficiency is corrected during an inspection, the PHA should not retroactively issue a work order for that work item. A minor deficiency that is corrected during the inspection is no longer a deficiency, and there is no need to issue a work order. However, any parts used to complete minor repairs made during the course of an annual inspection should be tracked through inventory control.

Comment: One comment was concerned that many PHAs may misinterpret the indicator as suggesting that a PHA must use only local housing/occupancy code or HQS, and nothing else.

Response: A PHA should use local housing and/or occupancy codes, and should expand upon local code requirements to include omitted HQS items, when applicable. In cases where there is no local occupancy and/or housing code or the local code is less stringent than HQS, the PHA should use HQS.

Component #2, Annual Inspection of Systems

Comment: One comment stated that there is no definition provided for the term ''maintenance plan'' and yet it is used as a factor of measure for indicator #5, component #2. The use of this term appears to be with an appropriate intent to allow for the fact that a major system that has been inspected and documented to be in good repair does not require another inspection in the following year. An effective PHA systems maintenance plan could appropriately reschedule the system for inspection three years later. If the system is new, after the first year of operation, testing it might not need to be rescheduled until five years later. A maintenance plan would document the performance of appropriately scheduled preventive maintenance on systems. Only safety systems and those required to be inspected and certified annually by State law for safety reasons should require annual inspection. If the intent of this provision is the use of the term ''maintenance plan'' is to allow for this fact, it should be clearly stated as such. Otherwise, different Field Offices will be left to subjectively interpret the meaning of this term and its applicability in the determination of PHA performance under indicator #5.

Response: The Department agrees that the term ''maintenance plan'' should be defined. It is defined in the rule as a comprehensive annual plan of a PHA's maintenance operation by providing the total year's estimated work schedule supported by a staffing plan, contract schedule, materials and procurement plan, training, and approved budget. The plan should establish a strategy for meeting the goals and time frames of the facilities management planning and execution, capital improvements, utilities, and energy conservation activities. The Department disagrees with the rest of the comment because this component examines whether a PHA inspects all of its systems *at least annually* to ensure the viability of the units/buildings and the provision of safe, sanitary and decent housing.

Section 901.35 Indicator #6, Financial Management

Component #1, Cash Available

Comment: Eight comments specifically approved of combining the cash and energy/utility consumption components; three more comments specifically approved of the cash available component.

Response: The comments are noted by the Department.

Comment: Three comments objected to the combination of cash available with energy/utility consumption and/or to the use of one or the other as a measure of financial management. Commenters stated that energy is not a measure of financial management and that available cash is not a measure of energy management.

Response: The Department disagrees. Although the amount of cash on hand is not by itself a measure of energy management, efficiencies in operation and in energy/utility consumption will reduce expenditures and thereby affect cash available.

Comment: Nine comments stated that the indicator should include other factors such as ratio of reserves to expenses over a period of time, an assessment of audit findings, average monthly cash reserves instead of a ''snapshot'' of cash available at fiscal year end, ability to maintain expenses within budget, ability to maintain an adequate reserve level for contingencies, or that the existing interim indicators should be retained.

Response: The Department does not disagree that there are a number of additional factors that could be measured as an indication of good financial management. However, the review of existing PHMAP procedures was done with the intent of streamlining and of limiting the number and content of the indicators to the basic information that could be used for performance measurement. This review process intentionally resulted in fewer, not more, indicator measurements. Maintaining a minimum level of liquidity was determined to be a basic requirement for financial management that should be an essential part of performance measurement.

Comment: Nine comments expressed concern that the terms ''cash available,'' ''cash reserves,'' and ''routine operating expenses'' were not adequately defined and would lead to inconsistent reporting on the part of PHAs. One comment stated that the sample worksheet should be revised to be computer friendly. One comment stated that the ''Analysis of General Fund Cash Balance'' should be used in lieu of the sample worksheet. One comment stated that the sample worksheet should match the information on form HUD–52595, Balance Sheet, because it would be difficult for small PHAs to identify accounts receivable/payable that would be active within 30 days.

Response: The Department notes that the sample worksheet is intended as guidance to the PHA in determining the cash available to meet routine operating expenditures, but its use is optional. ''Routine operating expenses'' are identified on the worksheet as being those reported on form HUD–52599, Statement of Operating Receipts and Expenditures, Line 520, Total Routine Expense. If a PHA experiences one-time expenditures in a given year that would distort the use of Line 520 information for the indicator, the PHA may request a modification. If PHAs follow the practice of aging their accounts receivable/payable, determining those that would be active within 30 days should not be a problem, and if the accrual information is immaterial to the computation, it need not be included. The use of information directly from form HUD–52595, Balance Sheet, would be possible only in the case of a PHA with no programs other than the management of PHA-owned rental. For the same reason, the Department does not think that the ''Analysis of General Fund Cash Balance,'' which is based on form HUD–52595, is a substitution for the sample worksheet since the Analysis does not, without further calculation, provide the user with the amount of cash specifically available for PHA-owned rental operations. In any case, the sample worksheet is optional and a PHA may choose to develop its own format and procedures, as long as its results are the same as would be derived by utilizing the optional worksheet.

Comment: Five comments stated that the indicator penalizes PHAs for using reserve dollars to operate, and two comments expressed concern that small PHAs will never be able to accumulate sufficient cash to score well on the indicator.

Response: The Department recognizes that PHAs must make choices in the use of funds and that there are circumstances that may make it difficult to achieve or to sustain a given level of cash, or that may reduce available cash on a short term basis. However, HUD also recognizes that in order to function in a financially responsible manner a PHA must have a minimum amount of cash on hand to cover day-to-day routine expenditures. Available cash to cover one month's routine expenditures would be 8.33% of total routine expenditures; a PHA does not fail this indicator unless the percentage is less than 5%. In order to meet its monitoring responsibilities, it is important that the Department take note of such PHAs and of the circumstances that are affecting their cash flow situation.

Comment: Three comments asked if the cash available calculation was to be adjusted for subsidy proration or year end adjustments for subsidy.

Response: The sample worksheet for indicator #6 has provision for including year end adjustments for subsidy in determining cash availability. The difference between subsidy eligibility and the prorated subsidy amount is not included because the amount of the difference will not be realized in cash payments.

Comment: One comment stated that percentages should be applied to PHAs of all sizes since $3 million in cash for a large PHA might not be enough to cover unexpected financial difficulties. One comment stated that dollars, not percentages, should be applied to all PHAs.

Response: The indicator measures cash available to cover routine expenditures, not unexpected cash needs for emergencies. The new indicator is measured in percentages because a percent gives a more flexible basis for evaluation than a flat dollar amount.

Comment: One comment expressed concern that the indicator would encourage PHAs to exercise poor financial judgment by deferring needed maintenance expenditures in order to maintain a large cash balance and score well on indicator #6.

Response: The Department disagrees. Indicator #6 is but one indicator in a group of indicators intended to measure PHA performance; two other indicators (#4 and #5) measure the PHA's performance in the area of maintenance.

Comment: One comment stated that the available cash should take into consideration funds that might be available from local government to help the PHA.

Response: The Department disagrees that the PHA potential to tap the local government for funds should be automatically included in determining the amount of cash available. Unless the local government is legally required to subsidize the operation of the PHA, there is no assurance that the local government's willingness or ability to provide funds to the PHA will continue in the future.

Component #2, Energy Consumption

In the proposed rule, the Department indicated particular interest in receiving comments from PHAs as to whether they preferred Option A, Option B or the choice of being able to use either option for their PHMAP certification and assessment. Option A compares energy/utility consumption expenses to the average of those computed on a three year rolling base and Option B measures whether or not a PHA has conducted an energy audit and implemented the improvements recommended as a result of the energy audit.

Comment: Nine comments preferred a choice of either Option A or Option B. Four comments stated a preference for Option B.

Response: The Department adopts the preferred approach of the majority of comments, which offers PHAs required to be assessed on this component a choice of either Option A or Option B.

Comment: Five comments stated that the energy/utilities component, Option A, should be based on consumption instead of dollars expended since PHAs don't have any control over the utility rate charged by local utility companies.

Response: The Department agrees and the proposed PHMAP energy/utilities component, Option A, does measure energy/utilities consumption rather than dollars. The sample worksheet for computing Option A compares a PHA's current consumption to its rolling base period consumption. In comparing Line 17 to Line 13 of form HUD–52722B, Adjustment for Utilities Consumption and Rates, the rolling base period consumption is adjusted prior to the comparison with the current year to reflect the current year's rates. Since the same rates are used, the only difference in the amounts compared is due to consumption. The wording of the proposed rule regarding Option A in the preamble may have been confusing in this regard and this option has been revised to refer to energy/utility consumption expenses.

Comment: Three comments stated that the upgrading of equipment, e.g., the addition of security lighting, affects consumption and that PHAs should not be penalized. One comment stated that PHAs should not be penalized for positive initiatives, such as increased utilization by resident initiatives and family self-sufficiency participants, that result in increased consumption for office buildings.

Response: The Department agrees that a PHA should not be penalized for increased energy/utility consumption due to upgrades of equipment such as adding security lighting for safety, etc., and resident initiatives programs. Therefore, with sufficient supporting documentation, a PHA may request a modification to exempt the excess energy/utility consumption from the calculation of the energy/utility component, Option A. The Department anticipates the issuance of a revised PHMAP Handbook 7460.5 subsequent to the effective date of the new rule. Examples of eligible modification requests and required supporting documentation will be included in the Handbook.

Comment: One comment stated that the component should be named ''utility consumption'' rather than ''energy consumption'' since water and sewer charges are a utility expense for PHAs, not an energy source.

Response: The name of the component was, in fact, changed from ''energy'' to ''energy/utility'' in the proposed rule to reflect the fact that water and sewer charges, which are now included in the consumption measurement, are, as the comment states, a utility expense for PHAs, not an energy source. This component is referred to as ''energy consumption'' in the new rule, with Option A referred to as ''energy/utility consumption expenses.''

Comment: One comment stated that the cost of utilities, in comparison with other operating expenses, is not sufficient to justify a PHMAP indicator when other expenses are not measured at all under the PHMAP.

Response: The Department disagrees. Currently, PHA utility expenses exceed $1 billion annually and represent over one-quarter of PHA operating expenses. It is clear that the cost of utilities is a major operating expense that must be addressed on an on-going basis by management. Congress recognized the importance of this issue by including it in the statute as one of the mandatory indicators. Therefore, the cost of utilities must be included in the PHMAP assessment.

Comment: One Comment supported the elimination of measuring energy/utility consumption for those PHAs scoring C or higher for component #1, but stated that the energy audit rule at § 905.302 should be revised to require an audit every five years only for PHAs that score lower than C. Otherwise, the Comment states, comparing energy and utility cost to the average of a three year rolling base should be eliminated as unnecessary.

Response: The Department disagrees. The Department addressed this concern regarding audits for standard and high performers at the time it issued the final rule at 24 CFR part 965 earlier this year. At that time, it was noted that PHA utility expenses exceed $1 billion annually, and the appropriation for operating subsidy for fiscal years 1994 and 1995 was sufficient to fund PHAs at 95% and 96%, respectively. In fiscal year 1996, the appropriation for operating subsidy was only sufficient to fund PHAs at 89%. It is not guaranteed that future appropriations will result in a higher percentage of funding. Hence, the Department must ensure that PHAs conduct audits as one means of holding down operating costs, including the cost of utilities, and ensuring that the limited funds available for operations are used as efficiently as possible.

HUD's Office of Inspector General (OIG) recently completed an Audit Report entitled ''Review of Opportunities to Reduce Utility Costs At Public Housing Authorities.'' The OIG report was based on visits to approximately 63 PHAs that manage 41% of the 1.3 million public housing units nationally. The OIG indicated that, despite past efforts, opportunities for reducing utility costs continue to exist and are cost effective in many instances due to ongoing improvements in technology. PHA managers need to be aware of, evaluate, and give maximum consideration to these ongoing and new opportunities when managing their utility costs. The OIG further states, that, because of improvements in technology, managing utilities is a continuous process that requires an ongoing energy management program.

Comment: One Comment stated that the rule needs a definition of ''energy audit'' and ''cost effective'' so that PHAs know how to determine what is ''cost effective'' and what is not. In addition, the Comment stated that the rule should also cross-reference the location of any applicable HUD guidance on the matter.

Response: The terms referenced by the Commenter have previously been defined at 24 CFR 965.303, PHA-Owned or Leased Projects-Maintenance and Operation. However, as a result of President Clinton's regulatory reinvention efforts and Executive Order 12866, Regulatory Planning and Review, issued by President Clinton on September 30, 1993, HUD commenced a comprehensive review of all of its regulations to determine which regulations could be eliminated and streamlined. One such review was with respect to 24 CFR part 965. The Department favored providing PHAs with more flexibility to meet local custom and eliminated those definitions. The Department still believes that those definitions still represent a reasonable description for those terms and may be used by PHAs. The revised PHMAP Handbook 7460.5 will include cross-references to applicable HUD issuances as appropriate.

Comment: One Comment stated that the energy/utility component could be greatly improved by lowering the standards and recommended adopting a standard of a 10% increase for a grade C level performance and a 4%-5% increase for a grade A.

Response: The Department believes that the current percentage ranges are equitable and that a choice of using Option A or Option B, which the Department has decided to adopt, offers PHAs much greater latitude with regard to the energy/utilities component.

Comment: One Comment stated a preference to let Option A stand as a separate indicator as it does now since Option B (energy audits) is not funded by the Department.

Response: The Department disagrees with this rationale on the basis of its belief that a sound energy management program is fundamental to good property management and that energy audits are a cost of doing business that should be included as a part of an agency's budget.

Comment: One Comment stated that, for purposes of PHMAP, Option A should be modified to reinstate the HDD factor. One Comment stated that if HDDs are not considered for PHMAP, the rolling base period should be extended so as not to distort energy expenditure trend data due to abnormal weather. One Comment stated that the elimination of the HDD factor no longer offers adjustments for unusually harsh winters.

Response: The Department agrees that HDDs should be considered for purposes of PHMAP if an HDD adjustment would significantly affect a PHA's assessment. For purposes of PHMAP, therefore, a PHA may request a modification to adjust consumption using an HDD adjustment for space heating utilities provided that the same data source is used for the current year as well as the three year rolling base period. The HDD factors used by a PHA are subject to HUD State/Area Office approval.

Comment: One Comment recommended the elimination of Option A due to conditions beyond the control of the PHA (e.g., rate increases) or positive initiatives (e.g., increased resident programs that have resulted in increased consumption to provide facilities for these activities).

Response: As previously discussed, Option A measures only consumption, not rate, increases and increased consumption due to special circumstances, e.g., resident initiatives programs, will be addressed in a revised PHMAP Handbook 7460.5.

Comment: One Comment proposed that Option B be modified to permit a passing grade for PHAs that have conducted an energy audit and have an implementation plan for all items in the audit in that it may not be feasible to implement all recommendations given insufficient funding and other priorities relating to health and safety.

Response: The Department agrees. A PHA may achieve a grade C under Option B if it has completed the energy audit, developed an implementation plan and is on schedule with its implementation schedule, based on available funds. The implementation plan should identify at least the items from the audit, the estimated cost, the planned funding source (e.g., funds from 1998 operating budget, 1998 CGP, etc.) and the anticipated date of completion for each item. The Department has changed the language in the new rule to reflect this comment.

Comment: One Comment expresses concern that at the time of a PHMAP self-certification, an audit report may have just been issued or may be five years old. The Comment states that this would give some PHAs an advantage and force others into an F grade. The Comment also questions whether a PHA should implement all cost effective recommendations, e.g., it may be cost-effective to use gas appliances rather than electric, but could create a carbon monoxide danger in units of a certain design. Other recommendations may be cost-effective over a very long payback period but there may be higher priority needs. The Comment recommends that Option B refer to an energy audit completed at least two years earlier and implementation of all recommendations with a payback period of five years or less unless the PHA has established good cause for not implementing them.

Response: The Comment lacks specificity as to exactly how the Commenter believes that the existence of an audit just issued or which may be five years old will give any PHA an advantage. Not all PHAs are going to do audits at the same time, nor would the Department expect them to. As such, some PHAs will be completing work from a previous audit while other PHAs are planning new work from a recently completed audit. The Department does not have a problem with this sequence as it expects energy management to be a constant, ongoing and evolutionary process. Therefore, HUD has determined not to revise Option B to refer to an energy audit completed at least two years earlier, and not to adopt the suggestion that PHAs implement all recommendations with a payback period of five years or less unless the PHA has established good cause for not implementing them.

The Department has no problem with eliminating an otherwise cost effective energy conservation measure (ECM) if the existing design would render the measure hazardous. Issues such as this should be a consideration during the development of the audit itself. At that point, consideration would have to be given to the cost of work necessary to make the ECM safe. If all costs are considered, including the additional hazard, the ECM would likely not be cost effective.

The Department believes that a two year audit period is excessively short and unnecessarily burdensome on PHAs, and has included in this component the existing five year frequency contained in 24 CFR part 965. As noted above, during HUD's streamlining process of 24 CFR part 965, the definition of cost effective (a pay back period of 15 years or less) was eliminated. HUD favors giving PHAs the flexibility to determine what is cost effective. Therefore, HUD will not adopt the recommendation of requiring incorporation of EMCs with a five year payback. The revised PHMAP Handbook 7460.5 will include cross-references to applicable HUD issuances, as appropriate.

Indicator #7, Resident Services and Community Building—Section 901.40

General Comments

Comment: One comment stated that this indicator combines several distinct elements with the grading system, requiring a PHA to score an A on each element in order to score an A on the indicator. The comment added that these elements should be reorganized as separate components within the indicator and the indicator grade should be a composite of the component scores, as is the pattern in the other PHMAP indicators.

Response: The Department agrees with the comment and the new rule reflects the changes. The new resident services and community building indicator is now subdivided into four equally weighted components, and the indicator or the individual components are subject to exclusion based on the particular circumstances of each PHA. The name of this indicator has been renamed ''Resident Services and Community Building'' to place a more accurate emphasis upon the specific role of PHAs for these functions.

Comment: One comment suggested that the criteria for this indicator should recognize innovations in program design or implementation beyond the traditional grant programs that often require considerable effort and resourcefulness.

Response: The Department agrees that PHAs should promote innovation in the implementation of resident programs, especially if this results in linkages to additional resources and measurable results. The subdivision of the indicator into four components will provide more flexibility to recognize this type of innovation when assessing the indicator. The Department will provide further guidance, in the form of examples of activities that PHAs could get credit under each one of the components, in the revision of the PHMAP Handbook 7460.5.

Comment: One comment indicated agreement with the reduction of weight factor from triple weight but suggested that a reduction to a weight of x1.5 would be more appropriate.

Response: The Department disagrees with the comment. A weight of x1 in the new 100 point system represents 10% of the score. A weight of x3 in the current 220 point system represents 13.6% of the score. It should also be considered that some elements of the current resident initiatives indicator are now covered in the new security indicator. The Department feels that the weight assigned to the new resident services and community building indicator is adequate.

Comment: One comment stated support for a PHMAP indicator measuring resident involvement, but expressed disappointment with the language of the proposed rule and indicated that the current rule gives more flexibility and offers a broader base for resident participation. Another comment stated that the proposed scoring aspects of the indicator appear unrealistic. Both comments suggested HUD retain the current indicator.

Response: The Department disagrees that the current resident initiatives indicator should be retained, without changes, in the new rule. The Department agrees that the indicator required some clarification in order to make it easier to assess and score and the new rule reflects those changes.

Comment: Two comments requested that the term ''on-going management issues'' be defined. The comments argued that this is a very broad term and could create problems if PHAs are required to pass all on-going management issues by the residents because business delays would be very costly. The comments stated that this is not a practical requirement and that the term ''ample opportunity'' is too vague. Another comment requested that the terms: ''Section 3 program,'' ''monitors progress,'' ''issues reports,'' ''encouraged the formation of a resident council,'' ''mechanisms to ensure residents have ample opportunity for input,'' and ''percent of goals met under implementation plan'' be defined in the rule.

Response: Many of these terms have either been revised, or the term is defined elsewhere in the Code of Federal Regulations. The Department will add any applicable guidance regarding such terms in the revised PHMAP Handbook 7460.5.

Comment: The Department received several comments regarding applicability of this indicator to small PHAs. One comment stated that it is impossible for small PHAs to organize a workable resident initiatives program with part-time staff and that the indicator imposes too much extra work and is an administrative burden for small PHAs. Another comment indicated that small PHAs don't have the resources to handle this workload and residents don't have the interest. Five comments proposed that PHAs with 100 units or less be exempted from this indicator and that only large PHAs be assessed under it.

Three comments suggested that the indicator be removed for all housing authorities, or revised to consider only PHAs of 250 or more units. The comments proposed that as a minimum, PHAs with 249 or less units should be exempted. The comments argued that HUD has used 249 or less units as criterion for ''small housing authorities'' for nearly all aspects of funding such as CIAP vs. CGP, Youth Build Grants, Vacancy Reduction Grants, or Tenant Opportunity Program grants. Another comment indicated that maybe this indicator exclusion should be for all PHAs with less than 500 units.

One comment stated that small PHAs should be assessed under the indicator because residents of these PHAs also have a right to involvement in PHA management. One comment indicated that under the proposed changes, HUD has the appearance that it no longer cares what these smaller PHAs are doing. Another comment added that all PHAs should be assessed under the indicator in order to ensure that they are informed of the programs available and are conforming, to the best of their ability, to the Section 3 program. One other comment stated that since many PHAs over the past three years have gotten extensively involved in aspects of resident initiatives, it seems unfair to automatically exclude the efforts of those who have performed and earned merit. Another comment suggested that PHAs with 100% elderly units be excluded from this indicator.

Response: The Department agrees that since it has used fewer than 250 units as a threshold for ''small housing authorities'' for nearly all aspects of funding, the same criterion should and is being used for applicability of this indicator. This policy is consistent with the Tenant Participation and Tenant Opportunities regulation (24 CFR part 964) which has a participating threshold of 250 units, and it is also utilized in the CGP. In addition, PHA's with 100% elderly developments will not be assessed under this indicator. To avoid penalizing small PHAs with active programs, PHAs with fewer than 250 units or with 100% elderly developments may request to be assessed under the indicator at the time of PHMAP certification submission.

Comment: Two comments indicated that what this indicator measures is not a property management issue, but a social issue related to PHAs. The provision of social service support is not a function of PHA management any more than it is a function of privately owned or Section 8 residential property management.

Response: The Department understands that active resident participation and involvement have a direct affect on property management and are a key element to a successful, well managed public housing community. The Department provided a separate resident initiatives indicator and component on resident involvement in PHMAP because there is considerable evidence that resident services programs can help to promote and sustain housing authority management successes. Various tenant participation initiatives (patrols, neighborhood clean-ups, etc.) can reduce vandalism and project maintenance. Resident employment initiatives get residents involved in positive pursuits and employed residents can act as role models for others. Overall, involving residents in the various facets of property management—as trainees in a landscaping project or as participants in screening prospective residents—can showcase self-improvement and individual responsibility and contribute substantially to building positive and strong public housing communities.

Comment: Two comments requested HUD to clarify if the indicator intends to ''examine efforts'' or to ''require efforts'' and argued that it seems that it has been prescribed to require PHAs to develop and administer programs that at times are not funded by HUD, are not long-term commitments by HUD, and in most cases, the results of performance are predicated on the residents' willingness to participate. It is not equitable to score a PHA on items that are beyond the PHA's control. It is equitable to request PHAs to adopt resolutions encouraging participation. Another comment indicated that this is an unfunded mandate.

One comment stated that the performance message has now been confused with compliance items. Another comment indicated that PHMAP is intended to be a performance-based assessment system in which indicators must be written so that standards and criteria are clear, measurable, and capable of being duplicated from one PHA to another. The comment added that too much of this indicator is process-oriented, not performance-based and that adopting programs and ''mechanisms'' is administrative process and offers no guarantee or measure of results. One other comment stated that the indicator, as currently structured, will be very difficult to grade and will produce very inconsistent results. Three comments recommended that this indicator be deleted entirely because it measures process and not outcomes.

Response: This indicator has been revised to hold PHAs accountable only for the functions they perform in operating resident services programs. The indicator has been subdivided into four separate components to make it easier to assess and grade: economic uplift and self-improvement; resident organization, resident involvement; and resident programs management. Each has been reshaped to address the public comments, especially to focus solely on the PHA's responsibilities for resident services. The indicator has been renamed ''Resident Services and Community Building'' to place a more accurate emphasis upon the specific roles of PHAs for these functions.

In response to concerns about short-term resident initiatives funding, it should be emphasized that PHAs would only be assessed for programs for which it has been funded. PHAs could also get credit for programs implemented through a partnership, for which the funding was made available through another of the partners.

Component #1, Economic Uplift and Self-Improvement

Comment: One comment stated that under the proposed changes, HUD adds a Section 3 requirement that has mixed adherence throughout the country. Another comment indicated that in small communities there are very few Section 3 programs and if there is one and the contractor's contract calls for them to hire Section 3 people, all a PHA can do is inform the residents that they may apply. One other comment argued that the implementation of Section 3 programs and the number of residents hired by the PHA is not a measure of its management. The comment concluded that resident self-sufficiency and related programs don't have any place in a management assessment program.

One comment indicated that to implement Section 3 training, you must have residents willing to participate. It stated that most of their residents are elderly, handicapped or have very small children and many are not able to work. Another comment stated that the Section 3 program may be disadvantageous to large municipalities facing a hiring freeze. Another comment stated that Section 3 is a mandate for any department using federal funds, and should not be a centralized program, as indicator #7 seems to require. It added that there seems to be no final rule for Section 3 in Public Housing (24 CFR part 135) and its status seems in doubt.

One comment mentioned that it does not have a concern with the Section 3 program emphasis because it has a great program now, but it is concerned with future funding and the impact if no new funding is available to continue the program. One comment agreed with the Department's efforts to emphasize the Section 3 program and another comment recommended that PHAs be required to show results in employment efforts in subsequent years to add to the results oriented focus. One other comment stated that it is difficult to be consistently abreast of a PHA performance under Section 3 and resident employment and suggested that it must be a PHA requirement to report resident employment to the HUD office in order to assess this criteria. Another comment stated that Section 3 is already a requirement and argued that PHAs should not get credit for something they are already required to implement. It further suggested that credit be given only for those things that PHAs do that are over and above HUD requirements such as internship programs or on the job training plans and also for using CGP funds to assist resident groups and develop security measures.

Response: The inclusion of an employment-related subcomponent in the resident initiatives indicator reflects the Department's emphasis on economic uplift as a proactive means to reducing dependency, and as mandated by the recent welfare reform legislation. The Department understands that there is considerable evidence that the increase in working families is very beneficial to property management. Because of the importance of this area, the Department wishes to give PHAs credit for the leadership role they can perform in employment-related initiatives. The Department has expanded the definition to include all employment-related initiatives, not just Section 3 or those in the public sector. Section 3 is effective as an interim rule and should be viewed as one tool in employment related initiatives.

In response to comments that the indicator be strengthened, language has been added to the indicator to require the PHA to provide evidence that they have one or more economic uplift and self-improvement programs and partnerships for economic uplift, including but not limited to, Section 3 initiatives. Such opportunities can be provided either directly or through non-PHA partners. The Department believes it is important for PHAs to get credit for their initiatives in promoting employment opportunities for residents. It is expected that PHAs will provide data on the number of residents by development in employment-related programs as well as evidence of the number of residents obtaining employment. PHAs can use Multifamily Tenant Characteristics System information to measure employment.

While the Department is supportive of PHAs efforts to measure employment, the indicator only requires that PHAs implement programs (HUD funded or non-HUD funded through partnerships) in its family occupied developments and set up and implement a system for measuring progress. The Department is not trying to dictate specific numeric employment goals but rather emphasizing activities that help measure PHA effort in implementing these programs.

Component #2, Resident Organization

Comment: One comment stated that HUD's encouragement of a resident council at each family development site assumes that resident councils are an absolute for every family development, regardless of the size of the development. Resident councils for some small developments are not only not necessary, but impractical. Another comment indicated that family developments are often built on scattered sites throughout a wide geographical area. The comment added that it is next to impossible to establish a resident council under these conditions and that this goal should be voluntary in these situations.

Response: Current HUD requirements give PHAs and resident communities the flexibility to determine how resident councils are organized. There is no specific requirement for a resident council at each development. The local public housing community should determine what kind of representation system suits its needs and makes the most sense. In larger developments, a separate resident council is merited. In smaller PHAs, a city-wide council may be more appropriate.

Comment: One comment stated that the current rule is supportive of resident councils and other resident groups while the proposed rule is too restrictive because it only makes reference to resident councils. The comment added that, while highly desirable, it is not always possible to organize and conduct development-wide elections and it urged the Department to reinstate the ''or other resident groups'' language of the current rule. Three comments suggested that the indicator reference to resident councils at each PHA family development should be changed to specify ''HUD recognized resident councils.''

Response: HUD is supportive of all resident organizations that work to benefit the residents, but the indicator does not pretend to cover all possible forms of resident organization. The Department considers that resident councils, as official vehicles of resident representation, should be encouraged and the indicator measures PHA efforts to promote this goal. In regards to the issue of ''HUD-recognized resident councils,'' the Department understand that it is not HUD's role to certify resident councils and that it is the PHA's responsibility to certify if such organizations have been formed in compliance with approved regulations, policies and procedures.

Component #3, Resident Involvement

Comment: Four comments stated that PHAs should not be penalized for lack of participation by the residents provided the PHA promotes self-sufficiency programs and community involvement. The comments indicated that PHAs may offer a variety of programs and training for residents, but they cannot make residents attend and participate. Another two comments recommended that an exclusion of the indicator be permitted in such cases where a PHA can show that the residents are not interested in forming a resident council and do not want to be involved in any of the programs covered by this indicator. One other comment also recommended to make each component potentially able to be excluded, based upon PHA's situation. Two comments stated that this indicator cannot accurately establish levels of participation, interest, etc., of the residents, it only measures the level of opportunities the PHA makes available to its residents. Therefore, it cannot measure performance.

Response: The Department agrees that PHAs cannot be made responsible for lack of interest by residents in organizing resident councils, but PHAs can be assessed on their efforts to promote and facilitate the organization of resident councils by activities such as: facilitating space for meetings, providing training, access to bulletin boards, helping to schedule and promote meetings, approving Board policies and developing PHA procedures for certifying resident councils.

In response to some of the concerns expressed in the comments, the Department changed the indicator to subdivide it into four components. This component measures PHA efforts regarding resident councils, and PHA collaboration and support to existing resident councils or to those that are in the process of being organized. A PHA is not responsible for the formation or continuation of resident councils as these functions are the responsibility of the resident councils. The Department is making the indicator and each of its components subject to exclusion. This would certainly apply to cases where the PHA can show evidence that it has predominately scattered site units and that residents are not interested in these programs. The Department will provide additional guidance to PHAs on this issue in the revision of the PHMAP Handbook 7460.5.

Comment: Three comments indicated that resident involvement is simply not an appropriate measure of a PHA's management capability.

Response: The Department disagrees and as mentioned earlier, believes that active resident participation and involvement have a direct affect on property management and are key elements to a successful, well managed PHA. In addition, there is considerable evidence that resident involvement and resident services programs can help to promote and sustain housing authority management successes.

Resident Surveys

Comment: One comment stated that resident surveys would be time consuming, but may be helpful. Another comment suggested that PHAs should be required to complete a resident survey on the fear of crime and the measure of disorder in each community once a year.

Two comments stated that resident surveys are most important in order to establish programs in which the residents are interested and suggested that PHAs be required to report on whether they conduct resident surveys for modernization or whether the PHA attempts to conduct resident surveys or communicates with newsletters. Five other comments expressed support for resident surveys, with one proposing an annual standardized survey used as a learning tool by PHAs and another three arguing that standardized surveys should only be used as models for PHAs to develop locally oriented surveys.

One comment suggested that resident surveys be optional for well managed PHAs and required under the MOA for troubled PHAs. Another comment stated that conducting resident surveys is a good idea, but HUD should allow PHAs to complete regular surveys in lieu of HUD's mandated ideas of what resident involvement means.

Two comments indicated that PHAs should be encouraged, but not required, to conduct such surveys, with HUD assisting in the development of survey formats and data analysis models that PHAs may use for this purpose. The comments argued that if HUD wishes to use customer satisfaction as the basis for the PHMAP score, then HUD should conduct the survey itself using some type of sampling technique that employs consistent and statistically reliable methods. Another comment expressed concern with the feasibility of implementing this measure in small PHAs with a majority of elderly and residents with disabilities.

Another comment stated that consumer satisfaction is critical in public housing and a survey of residents may be a way to gauge satisfaction. Surveys should not be conducted by PHAs; that would add too much paperwork and residents would feel inhibited to express their true feelings. Surveys should be conducted by private contractors, using a standardized form on a statistically significant sample of residents (using MTCS data to assure a diverse and representative group) from each PHA. The results would be shared with HUD and the PHA.

Ten comments stated that resident surveys as suggested would only amount to more paperwork with few, if any, tangible results. A survey completed by the resident council or advisory board would be more accurate and more useful. Another three comments stated that the present contact with residents is sufficient to adequately assess their level of satisfaction. One comment indicated that no new unfunded tasks should be imposed on PHAs through PHMAP.

Four comments indicated that surveys, by their nature, are subjective in orientation and often reflect the goals of the entity doing the survey. There are too many variables which would affect the responses. To direct PHAs to design and implement their own surveys would be a self-serving exercise of little real value. For HUD to develop a standard survey to be used by every PHA, each with its own set of problems and capabilities, would result in a document devoid of any real meaning. Another two comments stated that surveys are complex to develop and can be resented or distrusted by residents. Four comments expressed concern with the cost to PHAs of implementing resident surveys and indicated that a national format is not a good idea because of the special local conditions. Another comment stated that PHAs shouldn't be penalized for lack of resident response to these surveys.

Two other comments argued that total consumer satisfaction is impossible to achieve and even more difficult to measure. Requiring PHAs to conduct periodic surveys for this purpose is an undue burden, especially on large PHAs where housing projects are distant from one another and from the PHA.

One comment recommended that this be a voluntary activity and that it not be included in performance measurements. Another comment requested HUD to provide technical assistance in the area of assessing consumer satisfaction, but discouraged the creation of a new reporting requirement. HUD could distribute information to PHAs on how to design, develop and implement resident satisfaction surveys. It is unrealistic to expect that a single resident survey instrument will necessarily be meaningful to every PHA and every resident population. In times of diminishing operating subsidies, HUD should not force PHAs to conduct such surveys only for the sake of PHMAP.

Response: In response to the comments, the Department decided not to require the implementation of resident surveys as part of the PHMAP process. Although it is not required, PHAs may consider the voluntary use of this optional tool to obtain resident input and to measure resident involvement and satisfaction.

The Tenant Participation and Tenant Opportunities regulation (24 CFR § 964) stipulates that PHAs shall encourage full resident participation and partnership with the PHA. The Department does not want to provide overly specific instructions to PHAs, but instead wants to offer options for alternative approaches for promoting constructive resident participation and customer satisfaction. Therefore, the component on resident participation has been changed to require a PHA to provide evidence that the PHA is providing meaningful ways to communicate and partner with residents concerning the quality of life and housing management services (such as screening, relocation, capital improvements), but is not prescribing the specific method(s).

Possible methods used by PHAs would include, but not be limited to: resident membership on the PHA Board of Commissioners or on specific policy committees that contribute substantially in planning and implementing PHA programs; regular resident consultation through ongoing, scheduled meetings with the PHA-certified duly-elected resident councils; regular communication mechanisms with residents, such as a newsletter, as well as other means such as customer surveys and focus groups.

Component #4, Resident Programs Management

Comment: Several comments stated that PHA performance should not be assessed based on grants and activities that are not under the control of the PHA. Sixteen comments indicated that TOP and TAG are controlled by the resident organization and not by the PHAs and that it would be unfair of HUD to hold PHAs accountable for tenant organization grants that are not under the PHA's control. One of the comments suggested that HUD eliminate this component. Another comment asked if a PHA would get credit if its resident organization implements a TOP grant training.

Response: The Department agrees that PHAs should not be held responsible for resident activities or grants that are not under their control and the new rule reflects these changes. The indicator has been revised in order to assess PHAs for the functions they perform in operating resident services programs and for resident management or TOP performance only when the PHA is the contract administrator for the program.

Comment: One comment stated that in order to meet 90% of the goals as defined in the grants, a PHA would need to adjust those goals under various circumstances, i.e., numbers versus percentages; either the grant plan should allow for a percentage versus an exact number to be included, or the goal must be flexible enough to change when circumstances dictate.

Another two comments indicated that this indicator requires the documentation of achievement of a certain percentage of goals under resident initiative programs, but goals tend to be few and somewhat unquantifiable; such program goals should not be measured by PHMAP unless the goals had been articulated with the understanding that they were to be quantifiable and achievable within the grant term; progress is often in the hands of the tenants and tenant leaders.

Two comments stated that there is general concern that measuring performance in meeting grant goals may be difficult to evaluate and may not be representative of performance. There is a clear incentive for PHAs to establish easily attainable goals to protect a good PHMAP score. We believe the goals for such programs should be set as high as possible and used as targets for achievement. Some other system of measurement should be found. This should be measured in the criteria used to determine management capability in the competition to receive grants.

One comment argued that HUD shouldn't ask PHAs to document goals met under resident initiatives programs. Those programs already have exhaustive reporting requirements.

One comment stated that the standard defined as 90% and 60% of goal attainment under the implementation plan for any and all of the grant programs are too stringent and perhaps inappropriate to the goals being measured. The measure of goal attainment based on implementation strategies is at best subjective and at times affected by conditions beyond the control of the PHA.

One comment indicated concern with the indicator measuring resident involvement via any resident related grants received by the agency. The comment argued that HUD would do better to leave grant measurements with the specific grant processes and perhaps rate PHAs on whether they have a system to become informed about resident related grant opportunities or if they have applied, assuming they have resources to do so.

Another comment indicated that § 901.40(a)(4) attempts to measure compliance in many categorical funding programs in which PHAs are voluntary participants and that have their own contractual requirements and enforcement mechanisms. If HUD were to grade compliance with these contracts under PHMAP, HUD would be unilaterally imposing new contractual provisions that substantially alter the consequences of performance or non-performance. Provisions of this nature should not take effect unless and until they are subject to negotiation between the contracting parties.

One comment stated that applying for social service grants is a PHA option, not a requirement. PHAs that do not elect to apply are appropriately not penalized. How can evaluation of a PHA's performance of optional activities be used as a basis to rate the PHA's management performance?

Response: The Department included resident grant progress as a component of the resident initiatives indicator because it is critical that any available categorical grant funding be utilized effectively to meet the defined work plan objectives of the specific programs. This component would only apply if the PHA has responsibility for administering one or more grant programs.

By applying to these programs, a participating PHA accepts implementation requirements attached to them. Goals for these programs are developed by the PHA and should reflect realistic expectations of what the

PHA proposes to accomplish. The rule reflects some margin of flexibility in grading the percentage of goals achieved. Assessing PHAs on performance in managing grant programs is not new to PHMAP. PHAs are assessed under other areas of their management, including performance in managing grant programs (competitive or formula) such as modernization. In addition, the Department has revised the regulation to eliminate assessment of the resident management or TOP unless the PHA acts as the contract administrator for the resident grantee.

Section 901.45 Indicator #8, Security

General Comments

Comment: There were fifteen comments recommending that indicator #8 not apply to smaller PHAs, described variously as those PHAs with fewer than 500 units, fewer than 250 units, and fewer than 100 units. One comment felt that all PHAs, regardless of size, should be assessed under this indicator because crime and drugs exists everywhere.

Response: In response to the comments received, the Department has determined that indicator #8 will apply to PHAs with 250 or more units under management. To avoid penalizing small PHAs with active programs, PHAs with fewer than 250 units can request to be assessed under the indicator at the time of the PHMAP certification submission. However, PHAs with fewer than 250 units should be keeping records of crime, reporting it to local law enforcement, administering rigorous screening criteria, evicting residents who engage in criminal activity, and meeting the goals specified by categorical grants as good management practices, even though they are not required to be measured on this activity.

Comment: There were two comments specifically supporting ''One Strike and You're Out'' and screening and eviction policies through indicator #8. Two commenters mentioned that constraints in existing State law or the local court system have made it difficult to comply with the intent of the one strike policy. Two other commenters indicated that PHAs should be required to submit evidence that they have implemented eviction policies that could be monitored through tracking systems.

Response: The Department is pleased that there is a positive response to its one strike policies which are established pursuant to the ''Housing Opportunity Program Extension Act of 1996'' and PIH implementing guidance (Notice PIH 96–27), which provided additional guidance to PHAs in the areas of screening, lease enforcement and eviction in order to help PHAs fight crime. The one strike policy must be implemented within the context of the applicable State laws and court systems. PHAs will not be required to submit documentation at the time of certification; rather, PHAs are required to maintain supporting documentation for all of the indicators it certifies to for HUD post review. To assist PHAs in setting up and operating successful programs, the Department will provide examples of best practices in the forthcoming revised PHMAP Handbook 7460.5.

Comment: There were four comments that felt that this indicator would place unnecessary administrative burdens on a small PHA that does not have a crime problem and is already cooperating with the local police department. In addition, small PHAs do not have the resources (funds and personnel) to perform the security measures required by this indicator.

Response: Current practices by PHAs show that the cooperation of PHAs and local law enforcement for the collection and reporting of PHA crime information is not always a cost issue. Please note that the Extension Act permits PHAs to request criminal conviction records of adult applicants from the National Crime Information Center (NCIC), police departments and other law enforcement agencies. The Public Housing Drug Elimination Technical Assistance Program can be used to assist PHAs in developing appropriate collection systems and data bases. The Department anticipates that the use of NCIC and other data sources in addition to the technical assistance from HUD will enable PHAs to obtain necessary information in a timely manner.

Comment: Three comments felt that there should be a policy designed for small PHAs and one for large PHAs. It will be very difficult for a small PHA with no security problem and no resident involvement to make a passing grade in this indicator.

Response: Rather than have a separate security indicator for small and large PHAs, the Department has determined that PHAs with fewer than 250 units shall be exempted from this indicator unless the PHA requests to be assessed under the indicator at the time of the PHMAP certification submission.

Comment: Three comments stated that the criteria listed for this indicator are measures of process and not necessarily results. A more appropriate measure would include actual crime data. Also, indicators of vacancy percentage and financial management are directly related to the degree of security in the developments.

Response: This indicator has been revised to reflect the comments received and its components now more accurately measure results. The Department agrees that vacancies and financial management are directly related to security in the developments, but performance in these areas are measured under indicators #1 and #6.

Comment: One comment suggested that this indicator shouldn't apply until adequate time is provided for PHAs to establish the proper documentation, reporting, and tracking criteria to successfully score in this indicator. Another comment strongly requested that HUD require data be provided beginning with the next fiscal year after the effective date of the provisions of this indicator because it would be very difficult to secure data from January 1, 1996, to the present.

Response: The Department has determined that the new rule will apply to PHAs with fiscal years ending the quarter after the new rule is published in the Federal Register.

Comment: One comment stated that this indicator combines several distinct elements with the grading system, requiring a PHA to score an A on each element to score an A on the indicator. These elements should be reorganized as separate components within the indicator and the indicator grade should be a composite of the component scores, as is the pattern in the other PHMAP indicators.

Response: The Department will grade this indicator as a composite of the sub-component scores, as is the pattern in other PHMAP indicators.

Comment: One comment felt that security is not a property management issue, but a social issue related to PHAs, and was outside of the PHA's control. Another comment stated that reducing crime and drugs was an appropriate property management issue.

Response: In both public and private property management, crime and drug problems have a direct affect on property management. Because of this, the Department has determined it is critical that this indicator apply to all PHAs with 250 units or more under management.

Comment: One comment stated that this indicator will be very difficult to grade objectively and consistently. The terms ''mechanism to track crime-related problems'' and ''system for taking action'' are vague and undefined and need clarification. Two comments questioned the meaning of ''document results in screening out'' various applicants. One comment felt the proposed measure of PHA actions to appropriately screen out applicants and evict residents who engage in criminal activity is the only appropriate measure of PHA management performance under this indicator.

Response: The Department has rephrased this component and the first two phrases mentioned are no longer included in the new rule. The third phrase commented on has been revised to say, ''can document that it successfully screens out and denies admission to a public housing applicant who * * *'' and ''can document that it successfully evicts a public housing resident who * * *'' This new language more clearly embodies the intent of the one strike policy. The Department agrees with the last comment.

Comment: One comment felt that the term ''crime'' should be defined to avoid wasting time on crimes that do not affect the safety/security of residents.

Response: The Department has not established one uniform national definition of crime, since different types of crime represent different threats, and vary among communities. HUD believes each PHA should decide what constitutes criminal violations that are unacceptable to the local community. In general, the crimes against which PHAs should screen applicants are those that would pose a threat to the health or safety of other residents or PHA staff, or a financial risk to the PHA. These crimes would be lease violations. These are the crimes against which applicants should be screened and for which violators be evicted.

Comment: One comment stated that § 901.110(e) should state that indicator #8 should be excluded automatically for PHAs with 100 or fewer units.

Response: The Department agrees with this comment and the rule has been changed to state that this indicator does not apply to PHAs with fewer than 250 units under management unless the PHA requests to be assessed under the indicator at the time of the PHMAP certification submission.

Comment: One comment reflected that criteria #2 and #3 deal with screening and evictions. If HUD is to allow a PHA to self-certify on this indicator, the PHA should be required to submit evidence of policies and leases to support the certification.

Response: The Department disagrees and is requiring that a PHA maintain supporting documentation for all of the indicators it certifies to for post review by HUD or the independent auditor rather than submit additional documentation at the time of certification.

Comment: One comment felt that too many communities already have police departments that avoid their responsibilities in public housing ''projects'' for reasons that include the perception that public housing is a Federal rather than local responsibility. This indicator plays into that mind set, and therefore, hurts the crime fighting goals PHAs and HUD share.

Response: The Department believes that the establishment of one strike leasing, eviction and related processes have already proven to be effective in crime/drug reduction. This indicator has been designed to measure the implementation of mechanisms that many PHAs have already used successfully in developing safe and secure environments for public housing residents.

Comment: One comment believes that this is the most important indicator for large PHAs where crime is a critical problem, and should have a greater weight than x1.

Response: The Department agrees that this is a very important indictor. This indicator and indicator #7, resident involvement, have a combined total of 20 points in a 100 point scale. The Department feels that this is an equitable distribution when the importance of all of the indicators are considered as a whole.

Comment: One comment thought that PHAs should request help from the HUD State Coordinator in getting assistance from law enforcement agencies.

Response: The Department recommends that a PHA first contact its State/Area Office for technical assistance in obtaining assistance from law enforcement agencies, and to explore alternative solutions. HUD agrees that the State Coordinator and the Area Representative should be advised of unresolved difficulties in implementing the one strike policy. The Department will provide assistance, as appropriate, to further the implementation of the one strike policy.

Comment: One comment suggested that additional criteria should be considered that would give recognition to PHAs that have made tremendous progress in arresting crime and/or have established resident patrols to assist in crime reduction.

Response: The Department appreciates the suggestion, but feels that the appropriate vehicle for such recognition is its Performance Awards Ceremony.

Comment: One comment suggested there be a criterion that measures a PHA's efforts to get resident involvement in citizen patrols.

Response: The Department agrees that citizen patrols are very effective in helping to reduce incidence of crime in a community, and this criterion is indirectly measured under components #1 and/or #4 of this indicator.

Component #1, Tracking and Reporting Crime Related Problems

Comment: Thirty comments felt that PHAs should not be held accountable under indicator #8 for cooperation with local police departments and other community agencies, as this partnership was beyond their control. At least one commenter expressed concern about being able to access criminal data. Another commenter indicated that PHAs do not have the authority to address crime problems.

Response: As a result of these concerns, the Department has determined that PHAs will not be assessed for partnerships with the local police departments and other local agencies, with the exception of grade A. Grade A of this component has been revised to assess a PHA's cooperative system for tracking and reporting incidents of crime to local police authorities. Grades below an A assess only the reporting of incidents of crime to local police authorities. Although PHAs will not be measured under this criterion for grades below an A, it is essential for PHAs to work closely with local and State agencies in order to operate effective crime and drug prevention programs. Also, while PHAs do not specifically have the authority for arrests, they can utilize one strike to deny admission or evict known criminal violators.

Comment: Five comments thought that documentation from local law enforcement agencies might be a method of reporting crime in small housing authorities.

Response: The Department couldn't agree more. All PHAs are encouraged to develop partnership relationships with local law enforcement entities, and all PHAs should be keeping records of crime, reporting it to local law enforcement, administering rigorous screening criteria, and evicting residents who engage in criminal activity.

Comment: One comment stated that HUD shouldn't ask PHAs to try to require their municipal police departments to act beyond the scope of the Cooperation Agreement.

Response: It is not intended that tracking and reporting crime-related problems would in any way mandate PHAs to require their municipal police departments to act beyond the scope of the Cooperation Agreement. A PHA should always act within the scope of the Cooperation Agreement and should never require another agency to act beyond the scope of the Agreement.

Comment: One comment stated that PHAs that complain that they cannot negotiate obtaining monthly calls for service confirm that they have poor relations with their local police departments.

Response: Although this may be true, it is not necessarily through lack of trying. A PHA should continue to negotiate working relationships with local law enforcement entities.

Component #4, Grant Program Goals

Comment: Five comments reflected that this indicator requires the documentation of achievement of a certain percentage of goals under resident initiative programs, but goals tend to be few and somewhat unquantifiable. Such program goals should not be measured by PHMAP unless the goals had been articulated with the understanding that they were to be quantifiable and achievable within the grant term. There is general concern that measuring performance in meeting grant goals may be difficult to evaluate and may not be representative of performance. There is a clear incentive for PHAs to establish easily attainable goals to protect a good PHMAP score. Four of these commenters felt that some other system of measurement should be found, or the indicator eliminated. One commenter proposed that the goals be set as high as possible and used as a target for achievement. Seven commenters indicated that PHAs should not be rated on this indicator unless there was specific funding for all PHAs, and therefore, this program area was an unfunded mandate. One commenter stated that PHAs should only be rated on resident initiatives, not security. One commenter questioned why the goal did not track progress in goal achievement under the Drug Elimination program.

Response: The Department believes that the establishment of one strike leasing, eviction and related processes have already proven to be effective in crime/drug reduction. This indicator has been designed to measure the implementation of mechanisms that many PHAs have already used successfully in developing safe and secure environments for public housing residents. Grant goals are part of the overall evaluation of an application for funding. If a PHA has unrealistic goals, they are either renegotiated, or the PHA does not receive funding.

The Department has determined that security will continue to be a separate indicator because it is integral to good management and can be accomplished without additional funding, or with operating subsidy and comprehensive grant funds. PHAs should make use of these or other allowable funding sources to address crime and security problems. The Department cannot restrict factors to those in the Drug Elimination Program since crime problems affect all PHAs, not only those that have successfully competed for drug elimination grants.

Comment: One comment stated that goal achievement should be measured in terms of program implementation (which it is within the power of the PHA), not impact on crime (which is beyond the control of the PHA). A range from 85% to 100% should be establish for achieving an A grade.

Response: The Department has determined that a PHA will achieve a grade A for this indicator if it is meeting at least 90% of its goals under the implementation plan for any and all of these programs.

Data Collection—§ 901.100

Comment: Thirty comments stated that 45 days to submit the certification is a concern because PHAs are busy completing their year end work. It would cause a problem for small PHAs that have limited human resources to complete all other fiscal year end reports required. The time to submit should remain 90 days. Two comments stated that 45 days to submit its certification would be sufficient time as long as there was a quorum for the Board meeting, and as long as the process works smoothly. Seven comments recommended that certifications should be submitted 60 days following the end of a PHA's fiscal year.

Response: HUD is attempting to balance the need to make the PHMAP scoring as quick and timely as possible, so that it more accurately reflects a PHA's current status, with the additional year end burden it represents to both PHAs and HUD itself. In light of the above comments, the Department has determined that a better balance is achieved with a 60, rather than 45, day submission period, and the rule is amended accordingly.

Comment: Two comments pointed out that PHAs that request and receive an extension to submit their fiscal year end financial reports should also be granted an extension to file their PHMAP certification. Large PHA's must routinely ask for extensions to submit their year end financial statements.

Response: The Department agrees with the comment. To satisfy administrative requirements, PHAs must submit extension requests or waiver requests for both their fiscal year end financial reports and their PHMAP certification. However, a State/Area Office may grant an extension for the submission of year end financial statements for a period of no more than 90 calendar days. Requests for extensions for more than 90 calendar days, or requests for extensions in addition to the initial 90 calendar days, shall be approved by the Assistant Secretary, as well as waivers for the submission of a PHA's PHMAP certification.

Comment: Two comments felt that PHMAP should be more flexible so as not to discourage otherwise outstanding performance due to late submission of required reports or a PHA's inability to review and approve submissions more quickly. Lateness should not have the effect of decimating the performance ratings in all areas rated by PHMAP.

Response: The Department disagrees with this comment, and will retain the option which permits State/Area Offices to award a presumptive rating of failure in all of the PHMAP indicators if required reports have not been submitted to HUD in a timely manner. HUD believes that outstanding performance includes a PHA's ability to submit in a timely manner required reports that are used to calculate the PHA's PHMAP score.

Comment: Two comments felt that the revisions to the rule may require major changes in the systems used to maintain records related to PHMAP. Changes in a PHA's information systems will be both costly and burdensome. It will require PHAs to focus important resources on administrative areas that will not improve the manner in which quality housing is provided to low-income families.

Response: HUD recognizes that, at least initially, the changes made by this rule to improve PHMAP will impose a burden on PHAs who will have to make necessary adjustments in their information systems. As was the case for the previous rule, it is expected that as the collection and organization of the data will become more routine following the first submission, the associated burden will also decrease.

Comment: One comment felt that the time frame for submission should relate to the size of the PHA.

Response: HUD disagrees with this comment. The Department has received comments from small PHAs citing small staffs and from large PHAs citing large administrative burdens to justify changes in the time frame for submission. The Department has concluded that, until experience demonstrates otherwise, the same time frame for submissions should apply to all PHAs.

Comment: One comment felt that the certification form is cumbersome and includes requests for information currently available to HUD, specifically financial data required to be provided to HUD by all PHAs, or more information than currently required. It appears to require inclusion of data necessary for HUD to perform or confirm the calculations made by the PHA, and this is repetitive since PHA audits ensure accuracy in reporting. This is contrary to HUD's intent to require PHAs to certify to information otherwise not available.

Response: The worksheet and certification form have been redesigned to make them more user friendly, as applicable. HUD welcomes additional, specific recommendations to improve these documents further. The Department disagrees that the certification form requests information currently available to HUD. For example, the new certification form financial management question for indicator #6 requests the dollar amount of a PHA's cash reserve available for operations. The requested financial information is not reported on any other required reporting submission. The Department cannot rely totally on audit report confirmation because audit reports are not normally available until after the PHMAP process has been completed for the assessed fiscal year. The certification form requires a PHA to state the raw data that are used to calculate the score of specific indicators to ensure accurate calculation.

Comment: One comment stated that if the purpose is to shorten the time it takes for a PHA to learn its status/score, it may be more appropriate to reduce the amount of time that HUD has to respond. It should not take any more than two weeks to review the PHA submission (one page) and to perform any analysis or calculations for indicators that HUD scores.

Response: HUD is attempting to balance the need to make the PHMAP scoring as quick and timely as possible, so that it more accurately reflects a PHA's current status, with the additional year end burden it represents to both PHAs and HUD itself. In light of the above comments, the Department has determined that a better balance is achieved with a 60, rather than 45, day submission period. State/Area Offices monitor other program areas in addition to the PHMAP, which is just one facet of the Department's overall affordable rental housing efforts. In addition to the section 8 program, State/Area Offices must administer such efforts as modernization programs, resident initiative programs, and drug elimination programs. The Department feels that 60 days for State/Area Offices to complete a PHMAP assessment is equitable in view of other workload requirements.

Comment: One comment reflected that in the preamble to the proposed rule, HUD states that it will require State/Area Offices to give PHAs their PHMAP scores within 45 days from certification, but the proposed rule's text does not contain that requirement. The commenter suggests that HUD include that requirement in the text.

Response: State/Area Offices will be required to meet the 60 day notification period by an internal directive that will be as binding upon them as a regulatory requirement.

Comment: One comment observed that § 901.100(b)(5) stipulates that a PHA's certification will be post-reviewed by HUD during the next on-site review, but is subject to verification at any time. What does this mean? It suggests that verification could be accomplished by some means other than on-site review. It is critical to clearly stipulate in the rule a standard and consistent approach that must be followed by all HUD State/Area Offices in order to validate, document and justify a conclusion that a PHMAP score certified by a PHA should be changed.

Response: On-site reviews are usually conducted pursuant to risk management, and § 901.100(b)(9) simply provides that certification verification can take place at any time notwithstanding the regularly scheduled on-site reviews. In addition, the rule does clearly stipulate a standard and consistent approach to validate, document and justify a conclusion that a PHMAP score certified by a PHA should be changed. The verification language in § 901.100(b)(9) is related to the provision at § 901.115(k), that permits, in exceptional circumstances that constitute a standard and consistent approach, a State/Area Office to reinstate any review as necessary to address particular deficiencies, or deny or rescind incentives or high performer status, even though a PHA has satisfied all of the indicators for high or standard performer designation.

Comment: One comment asked exactly what information does HUD expect to derive from ''existing reporting and data forms?'' As written, only indicator #2 can be scored by HUD without complete and total reliance on PHA self-certified data. This is an enormous flaw in any allegedly objective assessment process, including PHMAP.

Response: The assessment process is the result of balancing the two objectives of maximizing reliability and minimizing the administrative burden. The Department realizes that the extensive demands upon both its own and PHAs' resources limit what may be appropriately imposed upon PHAs and adequately monitored by the Department. HUD's reliance upon PHA-certified data is backed up by the admittedly small number of on-site reviews HUD is able to conduct, but these reviews do indicate substantial, good faith compliance. HUD attempts to target its monitoring resources as efficiently as possible by focusing on troubled or near troubled PHAs or PHAs in which the factors identified in § 901.115(k) of the rule are present. The required supplement to the independent audit requires a PHA's independent audit to ascertain whether the PHA maintains the data necessary to support its PHMAP certification and whether the PHMAP data are consistent with the PHA's other records. HUD will continue to consider ways in which the reliability of PHMAP may be improved. In addition, the new rule has been revised to state that a PHA may not appeal its PHMAP score to the State/Area Office if the reason the PHA received a failing in any indicator or component was due to the fact that the PHA did not provide justifying documentation to the independent auditor for the indicator(s) the PHA certified to.

Comment: One comment stated that the clause that allows PHAs to include in their PHMAP certifications ''any information bearing on the accuracy or completeness of the data being used by HUD in grading an indicator'' is confusing. A PHA should certify to the correct data in exactly the manner prescribed by the PHMAP process. If a PHA believes that the data does not fairly represent its performance, it should submit a ''modification'' request, but the data in the certification shouldn't be changed.

Response: The rule, at § 901.100(b)(3), provides that a PHA may include such information in its certification, rather than through an exclusion or modification request, and that HUD will consider the information in grading the affected indicator. The intent is not to encourage a result that the certified information would be changed, but to encourage a PHA to submit corrected data, late reports, or previously omitted required data at the time it submits its PHMAP certification. This provision allows more flexibility in the PHMAP process, and helps ensure that the most recent data is available to use in completing the PHMAP assessment.

Comment: One comment felt that the provision that suggests a PHA could get a presumptive F in all PHMAP indicators if the certification is not submitted on time should be clarified. Does this mean all indicators or only those which rely on the certification?

Response: The language states all indicators. This provision at § 901.100 (b)(4) gives HUD a direct and timely way of enforcing the certification requirement. Although compliance with PHMAP is the norm among PHAs, if failure to provide the certification would only result in failing grades for the indicators subject to certification, a PHA may decide to forgo submitting the certification when a passing grade could be achieved without it. This would defeat the purpose of PHMAP to assess the performance of a PHA on all of the indicators.

Computing Assessment Score—§ 901.105

Comment: Two comments agree that the establishment of clear-cut adjustment guidelines is a good addition to PHMAP.

Response: The comment is noted by the Department.

Comment: One comment stated that the physical condition of a project reflects not only the care and maintenance provided by the PHA, it also reflects the attitudes and behavior of residents in some communities. Those cases where the physical condition of the project does not improve regardless of a PHA's efforts to improve and maintain the project in safe and sanitary condition should be considered as a condition beyond the PHA's control, and a modification or exclusion should be allowed for this reason.

Response: The Department disagrees with this comment. If a resident's attitudes and behavior cause maintenance or other physical problems, it then becomes a lease enforcement issue rather than automatic grounds for a modification or exclusion request due to conditions beyond a PHA's control. However, HUD considers modification and exclusion requests individually, and on a case by case basis, and grants or denies them as appropriate.

Comment: One comment stated that the definition of neighborhood is based on census tract and proposed that HUD permits also the option of census block groups. Census blocks allows for more specific definition of demographic characteristics.

Response: The Department agrees that PHAs may use census blocks as well as census track data, as appropriate.

Comment: One comment stated that the proposed rule excludes developments that received comprehensive modernization within the past ten years from receiving additional weight for the physical condition factor. Some PHAs receive comprehensive modernization for a portion of a larger community. When that happens, some proportional additional weight should be allowed for the physical condition factor.

Response: The Department has determined that if only certain units or developments received substantial rehabilitation, the additional weight would be prorated to exclude the units or developments with substantial rehabilitation. The revision to the PHMAP Handbook 7460.5 will include examples of proration.

Comment: One comment suggested that an alternative for weighting could be to provide extra credit for PHAs that, because of aggressive efforts to develop joint programs, are able to mitigate the adverse conditions in the general vicinity of the developments as well as within them.

Response: The Department may not provide an alternative to the physical condition and neighborhood environment factors because they are statutory. A PHA's efforts to mitigate the adverse conditions in the general vicinity of the developments will be recognized by the resident involvement indicator to the extent the PHA involves residents in such efforts. In general, it is expected that a well-managed PHA would have a positive influence on the adverse conditions in its general vicinity, but the PHA's primary responsibility is to conditions within its developments, and this remains the focus of PHMAP.

Comment: One comment felt that adjustments for physical condition and neighborhood environment are too liberal and can result in artificially inflated scores.

Response: The Department disagrees with this comment, since the adjustments for physical condition and/or their neighborhood environment apply to the following three indicators only: indicator #1, vacancy percentage and unit turnaround; indicator #4, work orders; and indicator #5, annual inspection and condition of units and systems.

Comment: One comment reflected that § 901.105(d)(3)(ii) states that developments that have received comprehensive modernization within the past ten years are not eligible for a weighted score for the physical condition factor. Are these developments eligible for the neighborhood factor?

Response: Yes, these developments are eligible for the neighborhood environment factor.

Comment: One comment reflected that § 901.105(d)(3)(iii) states that a PHA that receives a grade of A under indicators #4 and #5 may not claim the additional weight for indicator #1 since the physical condition of its developments is not applicable. Is a PHA eligible for the additional weight for indicator #1 using the neighborhood environment factor?

Response: Yes, such a PHA is eligible for the neighborhood environment factor.

Comment: One comment disagreed that a PHA that receives a grade of A under indicators #4 and #5 may not claim the additional weight for indicator #1 since the physical condition of its developments is not applicable. The ability of management to lease a vacant unit bears a direct relationship to its age and neighborhood environment. A PHA's ability to market a unit and a housing applicant's decision to rent a unit is influenced by the neighborhood conditions and environment in which the development is located. Accordingly, the additional weight for indicator #1 should be permitted. Another comment stated that a PHA could be doing a good job of inspecting units and responding to work orders and still have a high vacancy rate at one or more of its developments due to neighborhood environment (if not also physical condition). A PHA has the right to qualify under either one or both.

Response: The Department disagrees with this comment, and maintains that if a unit is in good physical condition, the age of the unit has little bearing on the ability to rent the unit. HUD believes that well maintained units, as evidenced by an outstanding rating in the areas of work orders and the condition of units and systems, are not eligible for the additional weight for physical condition, since indicators #4 and #5 account for the physical condition of a PHA's units. The additional weight based upon neighborhood environment for indicator #1 is permitted in such a case.

Comment: One comment stated that since PHAs already have the right to seek modifications or exclusions, rewarding PHAs with bonus points seems ludicrous.

Response: The additional weight given the factors of physical condition and neighborhood environment represents the Department's implementation of the statutory mandate to have the weights assigned to various indicators reflect these factors. The use of exclusion and modification requests implements the statutory mandate that PHAs not be penalized as a result of circumstances beyond their control.

Comment: One comment stated that the additional points made available to PHAs that demonstrate a significant number of units subject to adverse physical conditions or neighborhood environment, seem significant. If over 50% of a PHA's units are subject to such conditions, a PHA may get no more than one additional point for each of the three indicators that can be adjusted under the rule.

Response: This comment is correct, and the Department believes that this represents a fair and equitable adjustment for the physical condition and neighborhood environment of a PHA's developments.

Comment: One comment stated that the proposed rule also excludes ''developments that have received comprehensive modernization funds within the past ten year'' from eligibility for the adjustment based on physical condition. This should be revised to make it clear that ''comprehensive modernization'' does not simply mean the use of any CGP money, but contemplates, for example, ''significant capital investments that addresses more than 80% of a development's assessed capital need.''

Response: The Department has defined modernization to include not only the CIAP and CGP, but also the Vacancy Reduction Program, Hope VI Program, and any successor program(s) to the CGP or the CIAP. For indicator #2, modernization, all components apply to both the CGP and the CIAP. Only components #3, #4 and #5 apply to funding under the Hope VI Program and the Vacancy Reduction Program for the assessment of indicator #2.

Comment: One comment thought this section should be more explicit in order to allow anyone to actually compute a PHA's score following the instructions, and examples should be provided.

Response: The Department agrees, and examples of how to compute a PHA's score will be included in the revision to the PHMAP Handbook 7460.5.

Comment: One comment stated that the provision for ''adjustment for physical condition and neighborhood environment'' makes reference to units located in developments over 10 years old that require major capital investment. HUD needs to clarify how that applies to scattered-site projects where the age of the units and buildings will vary greatly.

Response: For scattered site projects, where the age of the units and buildings vary, the Date of Full Availability (DOFA) should be applied. Normally, when a PHA purchases scattered site units, they are rehabilitated prior to occupancy. DOFA also applies in cases where scattered site units are built under new construction.

Comment: One comment pointed out that HUD needs to define how to compute the 5% (of the units) to which the limiting conditions apply for the ''adjustment for physical condition and neighborhood environment.'' Is it individually computed or cumulative (i.e., 5% of physical condition vs. 3% of physical condition plus 2% of neighborhood environment condition).

Response: The percent of units to which the limiting conditions apply is computed as the total number for physical condition (PC) and neighborhood environment (NE) with each unit counted only once if both apply to it (so that a PHA with 10 units both PC and NE + 5 units PC only + 5 units NE only would have 20 eligible units that would be used for purposes of computing the percent applicable to indicators #1, #4 and #5; unless the PHA received a grade of A in indicators #4 and #5, then indicators #4 and #5 would have zero eligible units, and indicator # 1 would have 15 eligible units for purposes of computing the percent). This procedure of adding the number of units to which both conditions apply to the number of units to which only one condition applies is followed because the rule reads, ''Any PHA with 5% or more of its units *subject to either or both of the above conditions* shall, if they so choose, be issued a weighted PHMAP score in addition to the regular score based solely upon the certification of the PHA.''

Comment: One comment stated that the provision for ''adjustment for physical condition and neighborhood environment'' states that PHAs will certify to ''which of the indicators the extra scoring will be added.'' How is the PHA to make this determination? What would preclude the PHA to add the points to all three indicators? The sample certification form offers no clarification of this issue, nor does the rule. The PHA should be required to certify the data used to claim the ''adjustment.''

Response: A PHA does certify to the adjustment for physical condition (PC) and neighborhood environment (NE). It could and should add the points to each of the three indicators to which the weights apply. Example: a 100 unit (scattered site) PHA has 10 units both PC and NE + 10 units PC only + 10 units NE only. In this case .8 is added to indicators #1, #4 and #5 (because both or either conditions apply to at least 30% but less than 40% of the units, and .8 is the weight added for this percentage range), except if indicators #4 and #5 get grades of A, zero is added to indicators #4 and #5, and .7 is added to indicator #1 (because PC does not apply for purposes of indicator #1 when indicators #4 and #5 get grades of A, and so the 10 units would not be counted for indicator #1, leaving 20 eligible units, 20% of the total, for which .7 is the added weight).

Comment: One comment suggested that § 901.105(d)(3)(ii) should read: Units in developments that have received comprehensive modernization within the past ten years are not eligible to be included in the calculation of total PHA units subject to ''management difficulties'' due to physical condition only.

Response: The Department agrees and has rephrased that section to read: Units in developments that have received substantial rehabilitation within the past ten years are not eligible to be included in the calculation of total PHA units due to physical condition only.

Comment: One comment felt that § 901.105(d)(3)(iv) should be clarified since it is confusing.

Response: The Department agrees, and this has been clarified in the new rule to state that a PHA's score for indicators #1, #4 and/or #5, after any adjustment(s) for physical condition and/or neighborhood environment, may not exceed the maximum potential weighted points assigned to the respective indicator(s).

PHA Request for Exclusion or Modification—§ 901.110

Comment: Two comments stated that the previous interim rule permits a PHA to submit a request if the PHA were to discover and demonstrate ''highly unusual circumstances.'' The commenters urge HUD to retain this mechanism to permit consideration of first-time exclusion/modification requests at the appellate level. It is recognized and expected that HUD would subject such requests to strict scrutiny, but there is no reason why such matters cannot be solved by State/ Area Office Directors of Public Housing as part of the appellate process rather than at the Assistant Secretary level.

Response: This stipulation was eliminated because it restricted the grounds for appeal.

Comment: One comment reflected that this section requires that a request for an exclusion or modification be submitted at the time of certification. There has been no understanding from HUD on how it grades certain items or what time periods are considered for the indicators that HUD grades. PHAs should have the right to request an exclusion or modification on the HUD-graded indicators after HUD has announced the preliminary grades on them.

Response: The indicators scored by HUD are based on information that a PHA submits to HUD on other reports. Therefore, a PHA should know what its HUD graded scores are based on. The interim and proposed rules clearly state ''annual'' and ''immediate past fiscal year,'' except for components #2–1 and #2–2, where they clearly state Federal fiscal year.

PHA Score and Status—§ 901.115

Comment: Seventeen comments felt that denying high performer status to a PHA if it scores below a C on any indicator is not a good change. It does not make sense to punish a PHA for only one low score; the total numerical rating should be the only determination in high/standard/troubled performer. The commenters noted that under the proposed rule, PHAs with the same overall score could receive different ratings; this does not seem equitable. The overall performance of the PHA operation is being graded, not an indicator. Denying high performer status to a PHA that gets less than a C in any indicator should be dropped from the rule. Two other comments felt that a system that really identifies and rewards outstanding performance is much more desirable.

Response: The Department believes that high performer designation should identify outstanding management performance, and thus stipulates that a PHA shall not be designated as a high performer if it receives less than a C for any indicator. The intent in not to punish a PHA, but rather to recognize PHAs for outstanding management performance. It has always been possible for PHAs to have the same score, but a different designation, when high performer designation was awarded or when troubled designation was withheld.

Comment: One comment notes that § 901.115(g)(1) stipulates that PHMAP incentives or high performer status could be rescinded in the case of a PHA that is operating under a special agreement with HUD. The commenter asks what a special agreement is and how does it bear on a PHA's actual performance rating under PHMAP? Three additional comments strongly opposes sections 901.115(g)(2) and (3), which would allow the State/Area HUD Office to deny or rescind incentives or high performer status for PHAs either involved in litigation that bears directly upon the management of PHAs or are operating under a court order. HUD should require that the ''specific explanation'' referred to in § 901.115(g) include, at least, a summary of proven fraud, misconduct, or substantial noncompliance. PHAs that can achieve high performer status while operating under these conditions should not be penalized by HUD for continuing to manage operations efficiently and demonstrate positive effort to eliminate obstacles while improving housing conditions for families.

Response: Section 901.115(k) only delineates the exceptional circumstances under which State/Area Offices may deny or rescind initiatives or high performer status. Such actions are not automatic when these exceptional circumstances are present, but are determined on a case by case basis with consideration of the specific circumstances involved. In addition, these determinations may be appealed to the Assistant Secretary, providing an additional safeguard that they will not be made without due deliberation.

Comment: One comment suggested that HUD should submit a written explanation of any PHMAP score of C or below on any indicator not directly certified by the PHA because PHAs are required to submit an Improvement Plan for indicators with grades under C.

Response: The indicators scored by HUD are based on information that a PHA submits to HUD on other reports. Therefore, a PHA should know on what its HUD graded scores are based. Improvement plans are only required for a grade of F and a State/Area Office may require it for every indicator with a grade of D or E.

Comment: One comment observed that in the preamble to the previous interim rule, HUD stated that it would address how the State/Area Offices will determine at which PHAs it would conduct confirmatory reviews in handbook guidance. HUD should at least provide handbook guidance on the factors that the State/Area Office will consider to select a PHA for a confirmatory review.

Response: The Department has provided such guidance in the Field Office Monitoring of Public Housing Agencies (PHAs) Handbook 7460.7 REV–2.

Comment: One comment stated that § 901.115(e) suggests that a ''small'' PHA (100 units or less) will not be designated as mod-troubled, no matter how bad their program is. This is not reasonable.

Response: Section 901.115(e) of the proposed rule reads, ''PHAs with more than 100 units that achieve a total weighted score of less than 60% on indicator (2), modernization, shall be designated as mod-troubled.'' The Department agrees that these ''small'' PHAs should also be assessed on their modernization program, and will amend this section accordingly.

Comment: One comment stated that in § 901.115(h), the reference to ''paragraph (e)'' should be a reference to ''paragraph (g).''

Response: HUD agrees and has amended § 901.115(l) to reference § 901.115(k).

Posting of PHA PHMAP Scores

Comment: Four comments felt that the posting of PHA PHMAP scores should be required at all offices, rather than in all developments, since many developments are too small to have an office or any other building where such notice could be posted, and it is virtually impossible to do with scattered site projects. Notice can be mailed to residents where it is impractical or inappropriate to post the notice.

Response: The Department agrees and has amended this section accordingly.

Comment: Three comments felt that it was not clear why the posting of PHMAP scores is necessary, or why are PHAs being singled out when reviews of other public entities are not held up for public scrutiny. To post a score with no explanation is silly and there would be no way to post an explanation. By the same token, to publish in the Federal Register is not really fair without offering a PHA an opportunity to explain why they may have scored poorly in a particular area.

Response: This provision was recommended by the Office of Management and Budget in the course of its review of the proposed rule in accordance with Executive Order 12866. These requirements are intended to make the community, and tenants in particular, aware of their PHA's management score and to encourage dialogue among the PHA, residents and the community.

Comment: One comment felt that the rule should make clear that PHAs are only required to post and report out final PHMAP scores and do not have to post and report any score that is appealed in a timely basis and is under consideration by HUD.

Response: The Department agrees and has amended this section accordingly.

Comment: One comment observed that § 901.120(b) references a ''handicapped'' score. This term is not used elsewhere in the rule. It should be changed to ''adjustment for physical condition and neighborhood environment''.

Response: The Department agrees and will amend this section accordingly.

Comment: One comment stated that § 901.120(c) should explicitly state that a normal ''confirmatory review'' is to be conducted prior to the issuance of the initial notification letter. This way, the statement in paragraph (c)(1) about ''exceptional circumstance'' will make sense.

Response: The Department agrees and has added appropriate language to the rule.

Comment: One comment reflects that § 901.120(c)(1) states that the results of a confirmatory review should be explained in writing if the review is conducted after the issuance of the initial notification letter. The results of confirmatory reviews should always be explained in writing to the PHA, regardless of when conducted.

Response: The Department agrees and has added appropriate language to the rule.

Making the Right Decision

The Department specifically expressed its interest in receiving comments concerning ways in which PHAs can receive positive recognition within the context of this regulation for making the right decision.

Comment: One comment stated that it is unreasonable to put forth an assessment system which rewards highly graded performance and not expect actions to be guided by that system.

Response: The Department recognizes that PHMAP scores should not be interpreted as the sole determinant of a PHA's performance, nor should actions be solely guided by the PHMAP. Good management recognizes and balances all variables in the day-to-day operations of a PHA.

Comment: One comment agrees with a PHA doing the right thing. If doing the right thing is important for the PHA, then HUD should also do the right thing. HUD should ensure that PHMAP scores can be adjusted appropriately for any situation that results in lower grading of any indicator that occurs while doing the right thing. Recognition is nice, but PHMAP should be designed in such a way as to actually reward PHAs for right decisions, not simply recognize them outside the program structure.

Response: The Department believes that the ability to request a modification or exclusion of any indicator will usually result in the appropriate adjustments for making the right decision. The Department will continue to explore ways to provide incentives to PHAs for making the right decisions that result in the long-term improvement of overall PHA operations and of a PHA's housing stock. In addition, the Department will recognize such PHAs at the Performance Awards Ceremony.

State/Area Office Functions—§ 901.120

Comment: One comment reflected that § 901.120(2)(c) states the purpose of on-site confirmatory reviews but does not provide a standard applied circumstance under which or manner in which they will be carried out. The new rule should stipulate that an on-site confirmatory review is required before a State/Area Office can decide to change the PHMAP score certified by a PHA, and should include specifically what documentation State/Area Offices must review as a basis for determining the validity of PHA performance certifications. The confirmatory review documentation requirements should be adequate to meet HUD's verification needs while at the same time comply with the Paperwork Reduction Act.

Response: State/Area Offices conduct confirmatory reviews on a risk management basis, as discussed in the Field Office Monitoring of Public Housing Agencies (PHAs) Handbook 7460.7 REV–2. The confirmatory review guidebook and the revised PHMAP Handbook, which will be issued subsequent to the publication of the new rule, will include appropriate guidance regarding the conduct of confirmatory reviews. The rule requires confirmatory reviews of PHAs with 100 or more units before removing a designation of troubled or mod-troubled. In addition, the rule requires a confirmatory review of any PHA that scores less than 60% for its total weighted score, or less than 60% on indicator #2, modernization, before the designation of a PHA as troubled or mod-troubled. Although troubled or mod-troubled pre-designation confirmatory reviews were not previously mandatory, the Department has determined that such reviews can be significant elements of its risk management approach to PHMAP and can maximize the efficient use of its limited resources.

Appeals—§ 901.125

Comment: One comment urged HUD to extend the deadline for appeals to the State/Area to the 30th calendar day after the PHMAP initial notification letter is received. The deadline in the proposed rule of 15 days after mailing is not sufficient time to file a carefully crafted appeal, nor should the time to appeal be measured from the date of mailing. The losing party in a Federal lawsuit has 30 days to appeal. HUD should provide no less time to a PHA that contends it has not been fairly or accurately assessed.

Response: The Department has determined not to change the time frame for a PHA to submit an appeal. The experience of HUD has been that appeals received in Headquarters are well thought out and presented. A PHA that submits an appeal should not have to go through a lengthy process in order to appeal; the documentation and information should be readily available since the PHA would have researched the information in order to submit its certification.

Comment: One comment stated that the proposed rule does not specifically permit an appeal from a State/Area Office rejection of a claim for additional scoring adjustment that is based on the physical condition or neighborhood environment of housing developments. Although the proposed rule appears to cover disputes over the analysis or accuracy of data submitted in support of the claim, it would not cover disputes over whether a PHA maintained adequate documentation to support its claim. The proposed rule covers this type of dispute as it relates to denials of exclusion or modification requests but does not extend to a dispute over weighted scoring. This appears to be an unintended oversight and should be corrected.

Response: HUD agrees and has amended this section accordingly.

Comment: One comment urges HUD to reconsider the amorphous term ''data errors'' that the proposed rule would carry over from the previous interim rule or in the PHMAP Handbook 7460.5. HUD's failure to explain the meaning of this term could result in ad hoc, overly narrow interpretations by State/Area Offices in individual ratings. HUD should revise this ground for appeal to encompass any dispute over the accuracy, calculation, or interpretation of data employed in the grading process that, if resolved in the PHA's favor, would affect its regular or weighted score.

Response: The Department has changed the language to read, ''any dispute over the accuracy, calculation, or interpretation of data employed in the grading process that would affect a PHA's PHMAP score.''

Comment: One comment stated that according to § 901.125(a), a PHA could appeal the denial of an exclusion/modification request if that denial has any effect on their total score. This is different from the 5% threshold in the current rule. If this is the intent, it should be explicitly stated.

Response: The Department believes that it is stated explicitly: ''A PHA may appeal...the denial of exclusion or modification requests when their denial affects a PHA's total weighted score, * * *'' As stated previously, a PHA should have the right to appeal its PHMAP score with as few restrictions as possible.

Comment: One comment thought § 901.125(a)(3) should specify how long the State/Field Offices have to rule on an appeal.

Response: State/Area Offices will be required to meet the 30 day period for responding to appeals by an internal directive that will be as binding upon them as a regulatory requirement.

Comment: One comment stated that § 901.125(a)(5) is duplicative of paragraph (a)(1)(ii).

Response: The Department agrees and has deleted § 901.125(a)(5) from the new rule.

Incentives—§ 901.130

Comment: Five comments stated that HUD should specify the actual HUD requirements that it intends to waive for high and standard performers and supports the extension of any such incentives to standard performers, as the proposed rule accomplishes. The proposed rule falls short of offering any true incentives that would encourage more PHAs to improve their performance. Besides a certificate, the only other incentives mentioned are being relieved from unspecified procedural requirements. But the rule also states that the State/Area Office has the discretion to continue to hold PHAs accountable for those same requirements. HUD must grant additional flexibility, on the record, to standard and high performing agencies. In the past, there seems to have been recognition, but little or no actual relief from administrative burdens.

Response: The Department will cite specific incentives for high and standard performers in the revision of the PHMAP Handbook 7460.5. Incentives are presented in the handbook rather than the regulation to enable the Department to revise the incentives more quickly as conditions and circumstances warrant.

Comment: One comment felt that the administrative burden on PHAs is growing and requested HUD to consider measurable relief such as the elimination of Davis-Bacon or project-based accounting for well-managed PHAs.

Response: The Department cannot eliminate administrative burdens that are separate statutory requirements, such as Davis-Bacon and project-based accounting (applicable to PHAs with 500 or more units). However, the Department's Labor Relations Office is intending to implement a provision that will allow PHAs to obtain only one HUD-determined wage rate determination for a PHA's entire fiscal year.

Comment: One comment suggested that HUD exempt PHAs with three consecutive years of standard or high performing determinations from having to calculate and certify their PHMAP indicators. Rather, the indicators could be subject to the independent public audit (IPA). If, and when, the IPA indicates that a PHA is experiencing significant management problems, it could again be subject to yearly certifications.

Response: The Department disagrees with this suggestion because the independent audit only checks the existence and consistency of a PHA's PHMAP documentation; it does not award a score. In addition, a well managed PHA should have little or no troubled certifying on an annual basis.

Comment: One comment proposes that PHAs designated as high performers for a minimum of three consecutive years be required to certify to PHMAP only every other year unless and until they are designated as something less than high performers. In the event that their PHMAP score slips to standard performer or below, PHAs would revert to annual certifications until they, once again, have established themselves as high performers for three consecutive years. This would not only be a good incentive for PHAs, but also would reduce workload of the HUD offices.

Response: As stated, above, a well managed PHA should have little or no troubled certifying on an annual basis.

Comment: One comment feels that HUD's proposal that representatives of high-performing PHAs may be requested to serve on a Departmental group working with troubled PHAs is not of sufficient benefit to most PHAs. HUD must be willing to provide real cash incentive to the PHAs that perform well, not just pat them on the back. For instance, if high-performing PHAs are able to enter into ventures that provide monies in excess of 100% PFS subsidy, they should be able to keep most, if not all, of it. The ability of high-performing PHAs to generate revenue should not be used to reward low-performing PHAs.

Response: The Department already permits the retention of ''other income,'' as stipulated in Notice PIH 96–24, Performance Funding System Policy Revision to Encourage Public and Indian Housing Authorities to Facilitate Resident Employment and Undertake Entrepreneurial Initiatives, issued April 3, 1996.

Comment: One comment stated that the proposed rule limits incentives to mod high performers that are also overall high performers. This appears to be a change from the previous interim rule, and is unfair. Mod high performers that are overall standard performers should be able to benefit from mod incentives.

Response: The Department disagrees with this comment and believes that only outstanding performance overall and in modernization warrants the high performer designation.

Comment: One comment encourages HUD to permit the State/Area Offices to add incentives to the extent practical and as deemed appropriate.

Response: The Department agrees and has amended the new rule to permit State/Area Offices to add incentives to the extent practical and as deemed appropriate, with prior concurrence of such action by the Assistant Secretary.

Comment: One comment stated that § 901.130(g) of the proposed rule states that the State/Area Office will have discretion to subject a PHA to any requirement that would otherwise be omitted under the specified relief in accordance with § 901.115. What does this mean? It reads like an attempt to catch anything that the rule makers forgot without specifying what. Anything significant that might be recognized at some later date as omitted should be addressed as an amendment to the rule for consistent application nationwide.

Response: This section refers to cases where the specified unusual circumstances listed in § 901.115 exist at a PHA and the State/Area Office determines the necessity of reinstating any review or requirement.

Comment: One comment stated that according to § 901.130(a), both high performers and standard performers will receive incentives. If so, will these incentives be different for each group? If not, what is the advantage of achieving high performer status?

Response: The Department agrees, and will provide separate incentives for both standard and high performers.

Memorandum of Agreement—§ 901.135

Comment: One comment stated that an independent assessment team is not discussed or defined anywhere else in the rule. What is it? What are its functions? How is it assembled? The requirement for an ''independent assessment'' prior to ''troubled'' designation should be thoroughly discussed somewhere in the rule.

Response: The Department went through the procurement process to contract with the two consultants that conduct the independent assessments. The function of the two consultants is to conduct an assessment of problem areas independent of HUD, issue a report of findings, and perhaps participate in MOA negotiations. Since the independent assessment is separate from the PHMAP scoring process, the independent assessment is addressed only in § 901.135, Memorandum of Agreement, in the new rule.

Improvement Plan—§ 901.145

Comment: One comment stated that the phrase, ''* * * as well as other performance and/or compliance deficiencies as may be identified as a result of an on-site review of the PHA's operations * * *, is too broad and loose. The Improvement Plan shouldn't try to cover everything; this muddies the Improvement Plan and the PHMAP process. This section should specify that additional issues may be added to the Improvement Plan only if HUD and the PHA agree that they are directly related to PHA non-performance in the PHMAP deficiencies.

Response: The Department disagrees with this suggestion and believes that the rule should provide the flexibility to permit identified deficiencies to be addressed as soon as possible, whether they are related to PHMAP or not. This provision allows all identified deficiencies to be addressed in one document.

PHMAP Public Record—§ 901.155

Comment: One comment raised several questions, such as: how do FOIA requirements apply to PHMAP records, if at all; how do these requirements complement each other; are all internal HUD records on the PHMAP assessment included in the ''open public record,'' including those that would be excluded from the normal FOIA request? This should be clarified.

Response: The FOIA does apply to PHMAP. The items listed in § 901.155 (''certifications, the records of exclusion and modification requests, appeals, and designations of status based on physical condition and neighborhood environment'') are all public records, and do not make an exclusive or exhaustive list. Also included would be such items as the notification to the PHA, and the State/Area Office scoring sheet. Exemptions authorized under FOIA by 5 U.S.C. 552(b) would still apply. This section is clarified to read, ''...as open records, available for public inspection for three years consistent with the Freedom of Information Act (5 U.S.C. 552) and in accordance with any procedures established by the State/Area Office to minimize disruption of normal office operations.''

Substantial Default—§ 901.200

Comment: One comment observed that § 901.200 requires HUD to determine a PHA in ''substantial default'' if that PHA has been designated as troubled and does not show significant improvement (i.e., 10 point increase) in its PHMAP score within one year. The preamble notes that the rationale for this is that ''troubled PHAs have already had more than adequate time to implement corrective action, or will have at least one year from the time of its initial troubled designation.'' This is not correct. Because of the PHMAP score notification process, a PHA would have less than a year to correct deficiencies once it is notified and before the next assessment. The time frame established for improvement is arbitrary and too short for real improvement to take place. It may be reasonable for some PHAs but not for others. Improvement in performance is the function of many factors. This time frame should be changed.

Response: The rule is modified to stipulate one year after final notification.

Notice and Response—§ 901.205

Comment: One comment stated that section (a) stipulates that if information from any other credible source indicates that there may exist events or conditions constituting a substantial breach or default, HUD shall advise a PHA of such information. Before taking further action, except in cases of apparent fraud or criminality, and/or if emergency conditions exist posing an imminent threat to the life, health or safety of residents, HUD shall afford the PHA a timely opportunity to initiate corrective action. This provision lends itself to unintentional abuse. The use of unidentified credible sources as the basis for action on unverified conditions could leave PHAs vulnerable to becoming the victims of political witch hunts. Even emergency conditions allow 24 hours for corrective action. At minimum, a PHA should be afforded 24 hours for emergencies and longer as appropriate for non-emergency conditions to respond with verification that the condition does or does not exist. This provision should be modified accordingly.

Response: ''Timely opportunity'' varies due to possible individual situations and the Department will provide for a reasonable amount of time for a PHA to initiate corrective action. The Department will consider each situation individually, and on a case by case basis, as appropriate.

Resident Participation in Competitive Proposals—§ 901.220 and Resident Petitions for Remedial Action—§ 901.225

Comment: One comment stated that § 901.220(b) and § 901.225 require at least 5% of the residents at a PHA in substantial default to indicate to HUD their interest in participating in the competitive proposal process. This percentage is unreasonably low. There isn't a PHA in the country that doesn't have at least five people out of 100 eager to get rid of the current PHA management. This doesn't necessarily mean that they know what they are talking about or are right. The Department needs to seriously consider a threshold of interest that is high enough to ensure true interest by the resident population, not just a handful of disgruntled residents.

Response: The Department agrees, and has changed the percentage in the new rule to require that 20% of the residents at a PHA in substantial default indicate to HUD their interest in participating in the competitive proposal process.

Technical Assistance—§ 901.235

Comment: One comment felt that this section is confusing and gives the impression that it is designed to limit HUD's ability to offer technical assistance and should be clarified.

Response: The Department disagrees and thinks this section very specifically states and authorizes under what circumstances HUD may provide technical assistance to troubled or near troubled PHAs.

III. Findings and Certifications

Justification for Interim Rulemaking

Although this rule could have been published as a final rule because it was first published as a proposed rule for prior notice and comment on May 6, 1996 (61 FR 20358), it is being published as an interim rule to communicate HUD's intention to continue to revise and improve the rule. Following a period of implementation and experience with this rule, HUD will again solicit public comment to further refine the PHMAP process.

Paperwork Reduction Act

The information collection requirements for the Public Housing Management Assessment Program have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB control number 2577–0156. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, local and tribal governments and the private sector. This rule does not impose any Federal mandates on any State, local or tribal governments or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Environmental Review

A Finding of No Significant Impact with respect to the environment, in accordance with HUD regulations at 24 CFR part 50, which implements § 102(2)(C) of the National Environmental Policy Act of 1969, was prepared for the proposed rule and remains applicable. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) has reviewed and approved this rule, and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities, since the rule only establishes management assessment criteria which will be utilized by State/Area Offices for monitoring purposes and the provision of technical assistance to PHAs.

Federalism

The General Counsel, as the Designated Official under Executive Order 12612, Federalism, has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule is intended to promote good management practices by including, in HUD's relationship with PHAs, continuing review of PHAs' compliance with already existing requirements. In addition, the rule carries out, as unobtrusively as possible, a Federal statutory mandate. The rule does not create any new significant requirements of its own. As a result, the rule is not subject to review under the Order.

Family Impact. The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. The rule involves requirements for management assessment of PHAs. Any effect on the family would be indirect. To the extent families in public housing will be affected, the impact of the rule's requirements is expected to be a positive one.

List of Subjects in 24 CFR Part 901

Public housing, reporting and recordkeeping requirements.

Accordingly, part 901 of title 24 of the Code of Federal Regulations is revised to read as follows:

PART 901—PUBLIC HOUSING MANAGEMENT ASSESSMENT PROGRAM

Sec.

Authority: 42 U.S.C. 1437d(j); 42 U.S.C. 3535(d).

§ 901.1 Purpose, program scope and applicability.

(a) *Purpose.* This part establishes the Public Housing Management Assessment Program (PHMAP) to implement and augment section 6(j) of the 1937 Act. PHMAP provides policies and procedures to identify public housing agency (PHA), resident management corporation (RMC), and alternative management entity (AME) management capabilities and deficiencies, recognize high-performing PHAs, designate criteria for defining troubled PHAs and PHAs that are troubled with respect to the program under section 14 (Public Housing Modernization Program), and improve the management practices of troubled PHAs and mod-troubled PHAs.

(b) *Program scope.* The PHMAP reflects only one aspect of PHA operations, i.e., the results of its management performance in specific program areas. The PHMAP should not be viewed by PHAs, the Department or other interested parties as an all-inclusive and encompassing view of overall PHA operations. When viewing overall PHA operations, other criteria, including but not limited to, the quality of a PHA's housing stock, compliance issues, Fair Housing and Equal Opportunity issues, Board knowledge and oversight of PHA operation, etc., even though not covered under the PHMAP, are necessary in order to determine the adequacy of overall PHA operations. The PHMAP can never be designed to be the sole method of viewing a PHA's overall operations. A PHA should not manipulate the PHMAP system in the short-term in order to achieve a higher PHMAP score, thereby delaying or negating long-term improvement. Making a correct and viable long-term decision (doing the right thing) may hurt a PHA in the short-term (i.e., lower PHMAP score), but will result in improved housing stock and better overall management of a PHA over the long-term and a higher sustainable PHMAP score.

(c) *Applicability.* (1) The provisions of this part apply to PHAs and RMC/AMEs as noted in the sections of this part. The management assessment of an RMC/AME differs from that of a PHA. Because an RMC/AME enters into a contract with a PHA to perform specific management functions on a development-by-development or program basis, and because the scope of the management that is undertaken varies, not every indicator that applies to a PHA would be applicable to each RMC/AME.

(2) Due to the fact that the PHA and not the RMC/AME is ultimately responsible to the Department under the ACC, a PHA's score will be based on all of the developments covered by the ACC, including those with management functions assumed by an RMC or AME (pursuant to a court ordered receivership agreement, if applicable). This is necessary because of the limited nature of an RMC/AME's management functions and the regulatory and contractual relationships among the Department, PHAs and RMC/AMEs.

(3) A significant feature of RMC management is that 24 CFR §§ 964.225 (d) and (h) provide that a PHA may enter into a management contract with an RMC, but a PHA may not contract for assumption by the RMC of the PHA's underlying responsibilities to the Department under the Annual Contributions Contract (ACC).

(4) When a PHA's management functions have been assumed by an AME:

(i) If the AME assumes only a portion of the PHA's management functions, the provisions of this part that apply to RMCs apply to the AME (pursuant to a court ordered receivership agreement, if applicable); or

(ii) If the AME assumes all, or substantially all, of the PHA's management functions, the provisions of this part that apply to PHAs apply to the AME (pursuant to a court ordered receivership agreement, if applicable).

(5) To ensure quality management results from a contract between an AME and a PHA, or between an AME and HUD, minimum performance criteria that relate to the PHMAP indicators, as applicable, should be included in such contract. Failure to meet the performance criteria would be a basis for termination of the contract. However, even in the absence of explicit contractual provisions, this part applies to AMEs in accordance with paragraph (b)(4) of this section, above.

§ 901.5 Definitions.

Actual vacancy rate is the vacancy rate calculated by dividing the total number of vacancy days in the fiscal year by the total number of unit days available in the fiscal year.

Adjusted vacancy rate is the vacancy rate calculated after excluding the vacancy days that are exempted for any of the eligible reasons. It is calculated by dividing the total number of adjusted vacancy days in the fiscal year by the total number of unit days available in the fiscal year.

Alternative management entity (AME) is a receiver, private contractor, private manager, or any other entity that is under contract with a PHA, or that is otherwise duly appointed or contracted (for example, by court order, pursuant to a court ordered receivership agreement, if applicable, or agency action), to manage all or part of a PHA's operations. Depending upon the scope of PHA management functions assumed by the AME, in accordance with § 901.1(b)(2), the AME is treated as a PHA or an RMC for purposes of this part and, as appropriate, the terms PHA and RMC include AME.

Assessed fiscal year is the PHA fiscal year that has been reviewed for management performance using the PHMAP indicators. Unless otherwise indicated, the assessed fiscal year is the immediate past fiscal year of a PHA.

Assistant Secretary means the Assistant Secretary for Public and Indian Housing of the Department.

Available units are dwelling units, (occupied or vacant) under a PHA's Annual Contributions Contract, that are available for occupancy, after excluding or adjusting for units approved for non-dwelling use, employee-occupied units, and vacant units approved for deprogramming (units approved for demolition, disposition or units that have been combined).

Average number of days for non-emergency work orders to be completed is calculated by dividing the total of the:

(1) Number of days in the assessed fiscal year it takes to close active non-emergency work orders carried over from the previous fiscal year;

(2) The number of days it takes to complete non-emergency work orders issued and closed during the assessed fiscal year; and

(3) The number of days all active non-emergency work orders are open in the assessed fiscal year, but not completed, by the total number of non-emergency work orders used in the calculation of paragraphs (1), (2) and (3), of this definition.

Average turnaround time is the annual average of the total number of turnaround days between the latter of the legal expiration date of the immediate past lease or the actual move-out date of the former tenant (whenever that occurred, including in some previous fiscal year) and the date a new lease takes effect. Each time an individual unit is re-occupied (turned around) during the fiscal year, the turnaround days for that unit shall be counted in the turnaround time. Average turnaround time is calculated by dividing the total turnaround days for all units re-occupied during the assessed fiscal year by the total number of units re-occupied during the assessed fiscal year.

Cash reserve is the amount of cash available for operations at the end of an annual reporting period after all necessary expenses of a PHA or development have been paid or funds have been set-aside for such payment. The cash reserve computation takes into consideration both short-term accounts receivable and accounts payable.

Confirmatory review is an on-site review for the purposes of State/Area Office verification of the performance level of a PHA, the accuracy of the data certified to by a PHA, and the accuracy of the data derived from State/Area Office files.

Correct means to improve performance in an indicator to a level of grade C or better.

Cyclical work orders are work orders issued for the performance of routine maintenance work that is done in the same way at regular intervals. Examples of cyclical work include, but are not limited to, mopping hallways; picking up litter; cleaning a trash compactor; changing light bulbs in an entryway; etc. (Cyclical work orders should not be confused with preventive maintenance work orders.)

Deficiency means any grade below C in an indicator or component.

Down time is the number of calendar days a unit is vacant between the later of the legal expiration date of the immediate past lease or the actual move-out date of the former resident, and the date the work order is issued to maintenance.

Dwelling rent refers to the resident dwelling rent charges reflected in the monthly rent roll(s) and excludes utility reimbursements, retroactive rent charges, and any other charges not specifically identified as dwelling rent, such as maintenance charges, excess utility charges and late charges.

Dwelling rent to be collected means dwelling rent owed by residents in possession at the beginning of the assessed fiscal year, plus dwelling rent charged to residents during the assessed fiscal year.

Dwelling rent uncollected means unpaid resident dwelling rent owed by any resident in possession during the assessed fiscal year, but not collected by the last day of the assessed fiscal year.

Dwelling unit is a unit that is either leased or available for lease to eligible low-income residents.

Effective lease date is the date when the executed lease contract becomes effective and rent is due and payable and all other provisions of the lease are enforceable.

Emergency means physical work items that pose an immediate threat to life, health, safety, or property, or that are related to fire safety.

Emergency status abated means that an emergency work order is either fully completed, or the emergency condition is temporarily eliminated and no longer poses an immediate threat. If the work cannot be completed, emergency status can be abated by transferring the resident away from the emergency situation.

Emergency work order is a work order, from any source, that involves a circumstance that poses an immediate threat to life, health, safety or property, or that is related to fire safety.

Employee occupied units refers to units that are occupied by employees who are required to live in public housing as a condition of their job, rather than the occupancy being subject to the normal resident selection process.

HQS means Housing Quality Standards as set forth at 24 CFR § 882.109 and amended by the Lead-Based Paint regulation at 24 CFR § 35.

Improvement Plan is a document developed by a PHA, specifying the actions to be taken, including timetables, that may be required to correct deficiencies where the grade for an indicator is a grade D or E, and shall be required to correct deficiencies of failed indicators, identified as a result of the PHMAP assessment when an MOA is not required.

Indicators means the major categories of PHA management functions that are examined under this program for assessment purposes. The list of individual indicators and the way they are graded is provided in § 901.10 through § 901.45.

Lease up time is the number of calendar days between the time the repair of a unit is completed and a new lease takes effect.

Local occupancy/housing codes are the minimum standards for human occupancy, if any, as defined by the local ordinance(s) of the jurisdiction in which the housing is located.

Maintenance plan is a comprehensive annual plan of a PHA's maintenance operation that contains the fiscal year's estimated work schedule and which is supported by a staffing plan, contract schedule, materials and procurement plan, training, and approved budget. The plan should establish a strategy for meeting the goals and time frames of the facilities management planning and execution, capital improvements, utilities, and energy conservation activities.

Major systems include, but are not limited to, structural/building envelopes which include roofing, walls, windows, hardware, flashing and caulking; mechanical systems which include heating, ventilation, air conditioning, plumbing, drainage, underground utilities (gas, electrical and water), and fuel storage tanks; electrical systems which include underground systems, above ground systems, elevators, emergency generators, door bells, electronic security devices, fire alarms, smoke alarms, outdoor lighting, and indoor lighting (halls, stairwells, public areas and exit signs); and transformers.

Make ready time is the number of calendar days between the date the unit is referred to maintenance for repair by a work order and occupancy is notified that the unit is ready for re-occupancy.

Memorandum of Agreement (MOA) is a binding contractual agreement between a PHA and HUD that is required for each PHA designated as troubled and/or mod-troubled. The MOA sets forth target dates, strategies and incentives for improving management performance; and provides sanctions if performance does not result.

Move-out date is the actual date when the resident vacates the unit, which may or may not coincide with the legal expiration of the lease agreement.

Non-emergency work order is any work order that covers a situation that is not an immediate threat to life, health, safety, or property, or that is unrelated to fire safety.

Percent of dwelling rent uncollected is calculated by dividing the amount of dwelling rent uncollected by the total dwelling rent to be collected.

PHA means a public housing agency. As appropriate in accordance with § 901.1(b)(2), PHA also includes AME.

Percentage of emergency work orders completed within 24 hours is the ratio of emergency work orders completed in 24 hours to the total number of emergency work orders. The formula for calculating this ratio is: total emergency work orders completed (or emergency status abated) in 24 hours or less, divided by the total number of emergency work orders.

PHA-generated work order is any work order that is issued in response to a request from within the PHA administration.

Preventive maintenance program is a program under which certain maintenance procedures are systematically performed at regular intervals to prevent premature deterioration of buildings and systems. The program is developed and regularly updated by the PHA, and fully documents what work is to be performed and at what intervals. The program includes a system for tracking the performance of preventive maintenance work.

Preventive maintenance work order is any work done on a regularly scheduled basis in order to prevent deterioration or breakdowns in individual units or major systems.

Reduced actual vacancy rate within the previous three years is a comparison of the vacancy rate in the PHMAP assessment year (the immediate past fiscal year) with the vacancy rate of that fiscal year which is two years previous to the assessment year. It is calculated by subtracting the vacancy rate in the assessment year from the vacancy rate in the earlier year. If a PHA elects to certify to the reduction of the vacancy rate within the previous three years, the PHA shall retain justifying documentation to support its certification for HUD post review.

Reduced the average time it took to complete non-emergency work orders during the previous three years is a comparison of the average time it took to complete non-emergency work orders in the PHMAP assessment year (the immediate past fiscal year) with the average time it took to complete non-emergency work orders of that fiscal year which is two years previous to the assessment year. It is calculated by subtracting the average time it took to complete non-emergency work orders in the PHMAP assessment year from the average time it took to complete non-emergency work orders in the earlier year. If a PHA elects to certify to the reduction of the average time it took to complete non-emergency work orders during the previous three years, the PHA shall retain justifying documentation to support its certification for HUD post review.

Resident-generated work order is a work order issued by a PHA in response to a request from a lease holder or family member of a lease holder.

Resident management corporation (RMC) means the entity that proposes to enter into, or that enters into, a management contract with a PHA in accordance with 24 CFR 964.120. As appropriate in accordance with § 901.1(b)(2), RMC also includes AME.

Routine operating expenses are all expenses which are normal, recurring fiscal year expenditures. Routine expenses exclude those expenditures that are not normal fiscal year expenditures and those that clearly represent work of such a substantial nature that the expense is clearly not a routine occurrence.

Standards equivalent to HQS are housing/occupancy inspection standards that are equal to HUD's Section 8 HQS.

Substantial default means a PHA is determined by the Department to be in violation of statutory, regulatory or contractual provisions or requirements, whether or not these violations would constitute a substantial default or a substantial breach under explicit provisions of the relevant Annual Contributions Contract (ACC) or a Memorandum of Agreement.

Unit days available are the number of days that the available units were available for occupancy in a PHA fiscal year. Unit days available are calculated by adding the number of days that each unit was available for occupancy in the year.

Units approved for non-dwelling use refers to units approved for non-dwelling status for use in the provision of social services, charitable purposes, public safety activities and resident services, or used in the support of economic self-sufficiency and anti-drug activities.

Units vacant due to circumstances and actions beyond the PHA's control are dwelling units that are vacant due to circumstances and actions that prohibit the PHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing the units. For purposes of this definition, circumstances and actions beyond the PHA's control are limited to:

(1) *Litigation.* The effect of court litigation such as a court order or settlement agreement that is legally enforceable. An example would be units that are required to remain vacant because of fire/police investigations, coroner's seal, or as part of a court-ordered or HUD-approved desegregation effort.

(2) *Laws.* Federal or State laws of general applicability, or their implementing regulations. This category does not include units vacant only because they do not meet minimum housing and building code standards pertaining to construction or habitability under Federal, State, or local laws or regulations, except when these code violations are caused for reasons beyond the control of the PHA, rather than as a result of management and/or maintenance failures by the PHA. Examples of exempted units under this category are: vacant units that are documented to be uninhabitable for reasons beyond the PHA's control due to high/unsafe levels of hazardous/toxic materials (e.g., lead-based paint or asbestos), by order of the local health department or directive of the Environmental Protection Agency, where the conditions causing the order are beyond the control of the PHA, and units kept vacant because they became structurally unsound (e.g., buildings damaged by shrinking/swelling subsoil or similar situations). Other examples are vacant units in which resident property has been abandoned, but only if State law requires the property to be left in the unit for some period of time, and only for the period stated in the law and vacant units required to remain vacant because of fire/police investigations, coroner's seal, or court order.

(3) *Changing market conditions.* Example of units in this category are small PHAs that are located in areas experiencing population loss or economic dislocations that face a lack of demand in the foreseeable future, even after the PHA has taken aggressive marketing and outreach measures. Where a PHA claims extraordinary market conditions, the PHA will be expected to document the market conditions to which it refers (the examples of changing population base and competing projects are the simplest), the explicit efforts that the PHA has made to address those conditions, the likelihood that those conditions will be mitigated or eliminated in the near term, and why the market conditions are such that the PHA is prevented from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating or modernizing the vacant units. In order to justify the adjustment, the PHA will need to document the specific market conditions that exist and document marketing and outreach efforts. The PHA will need to describe when the downturn in market conditions occurred, the location(s) of the unit(s) effected, the likelihood that these circumstances will be mitigated or eliminated in the near term and why the market conditions are such that they are preventing the PHA from occupying, selling, demolishing, rehabilitating, reconstructing, consolidating, or modernizing the vacant units.

(4) *Natural disasters.* These are vacant units that are documented to be uninhabitable because of damaged suffered as a result of natural disasters such as floods, earthquakes, hurricanes, tornadoes, etc. In the case of a ''natural disaster'' claim, the PHA would be expected to point to a proclamation by the President or the Governor that the county or other local area in question has, in fact, been declared a disaster area.

(5) *Insufficient funding.* Lack of funding for otherwise approvable applications made for Comprehensive Improvement Assistance Program (CIAP) funds (only PHAs with less than 250 units are eligible to apply and compete for CIAP funds). This definition will cease to be used if CIAP is replaced by a formula grant.

(6) *Casualty Losses.* Vacant units that have sustained casualty damage and are pending resolution of insurance claims or settlements, but only until the insurance claim is adjusted, i.e., funds to repair the unit are received. The vacancy days exempted are those included in the period of time between the casualty loss and the receipt of funds from the insurer to cover the loss in whole or in part.

Vacancy day is a day when an available unit is not under lease by an eligible low-income resident. The maximum number of vacancy days for any unit is the number of days in the year, regardless of the total amount of time the unit has been vacant. Vacancy days are calculated by adding the total number of days vacant from all available units that were vacant for any reason during the PHA's fiscal year.

Vacant unit is an available unit that is not under lease to an eligible low-income family.

Vacant unit turnaround work order is a work order issued that directs a vacant unit to be made ready to lease to a new resident and reflects all work items to prepare the unit for occupancy.

Vacant unit undergoing modernization as defined in 24 CFR § 990.102. In addition, the following apply when computing time periods for a vacant unit undergoing modernization:

(1) If a unit is vacant prior to being included in a HUD-approved modernization budget, those vacancy days that had accumulated prior to the unit being included in the modernization budget must be included as non-exempted vacancy days in the calculation.

(2) The calculation of turnaround time for newly modernized units starts when the unit in turned over to the PHA from the contractor and ends when the lease is effective for the new or returning resident. Thus, the total turnaround time would be the sum of the pre-modernization vacancy time, and the post-modernization vacancy time.

(3) Unit-by-unit documentation, showing when a vacant unit was included in a HUD-approved modernization budget, when it was released to the PHA by the contractor, and when a new lease is effective for the new or returning resident, must be maintained by the PHA.

(4) Units remaining vacant more than two FFYs after the FFY in which the modernization funds are approved, may no longer be exempted from the

calculation of the adjusted vacancy rate if the construction contract has not been let. These units may be exempted again, but only after a contract is let.

Vacant units approved for deprogramming exist when a PHA's application for the demolition and/or disposition of public housing units has received written approval from HUD; or when a PHA's application to combine/convert has received written approval from HUD.

Work order is a directive, containing one or more tasks issued to a PHA employee or contractor to perform one or more tasks on PHA property. This directive describes the location and the type of work to be performed; the date and time of receipt; date and time issued to the person or entity performing the work; the date and time the work is satisfactorily completed; the parts used to complete the repairs and the cost of the parts; whether the damage was caused by the resident; and the charges to the resident for resident-caused damage. The work order is entered into a log which indicates at all times the status of all work orders as to type (emergency, non-emergency), when issued, and when completed.

Work order completed during the immediate past fiscal year is any work order that is completed during the PHA's fiscal year regardless of when it may have been received.

Work order deferred for modernization is any work order that is combined with similar work items and completed within the current PHMAP assessment year, or will be completed in the following year if there are less than three months remaining before the end of the PHA fiscal year when the work order was generated, under the PHA's modernization program or other PHA capital improvements program.

§ 901.10 Indicator #1, vacancy rate and unit turnaround time.

This indicator examines the vacancy rate, a PHA's progress in reducing vacancies, and unit turnaround time. Implicit in this indicator is the adequacy of the PHA's system to track the duration of vacancies and unit turnaround, including down time, make ready time, and lease up time. This indicator has a weight of x2.

(a) For the calculation of the actual and adjusted vacancy rate (and, if applicable, unit turnaround time), the following three categories of units (as defined in the rule at § 901.5), that are not considered available for occupancy, will be completely excluded from the computation:

(1) Units approved for non-dwelling use.

(2) Employee occupied units.

(3) Vacant units approved for deprogramming (i.e., demolition, disposition or units that have been combined).

(b) For the calculation of the adjusted vacancy rate and turnaround time, the vacancy days for units in the following categories (fully defined in the rule at § 901.5) shall be exempted:

(1) Vacant units undergoing modernization as defined in § 901.5.

(i) Only vacancy days associated with a vacant unit that meets the conditions of being a unit undergoing modernization will be exempted when calculating the adjusted vacancy rate or, if necessary, the unit turnaround time. Neither vacancy days associated with a vacant unit prior to that unit meeting the conditions of being a unit undergoing modernization nor vacancy days associated with a vacant unit after construction work has been completed or after the time period for placing the vacant unit under construction has expired shall be exempted.

(ii) A PHA must maintain the following documentation to support its determination of vacancy days associated with a vacant unit that meets the conditions of being a unit undergoing modernization:

(A) The date on which the unit met the conditions of being a vacant unit undergoing modernization: and

(B) The date on which construction work was completed or the time period for placing the vacant unit under construction expired.

(2) Units vacant due to circumstances and actions beyond the PHA's control as defined in § 901.5. Such circumstances and actions may include:

(i) Litigation, such as a court order or settlement agreement that is legally enforceable.

(ii) Federal or, when not preempted by Federal requirements, State law of general applicability or their implementing regulations.

(iii) Changing market conditions.

(iv) Natural disasters.

(v) Insufficient funding for otherwise approvable applications made for CIAP funds. This definition will cease to be used if CIAP is replaced by a formula grant.

(vi) Vacant units that have sustained casualty damage and are pending resolution of insurance claims or settlements, but only until the insurance claim is adjusted. A PHA must maintain at least the following documentation to support its determination of vacancy days associated with units vacant due to circumstances and actions beyond the PHA's control:

(A) The date on which the unit met the conditions of being a unit vacant due to circumstances and actions beyond the PHA's control;

(B) Documentation identifying the specific conditions that distinguish the unit as a unit vacant due to circumstances and actions beyond the PHA's control as defined in § 901.5;

(C) The actions taken by the PHA to eliminate or mitigate these conditions; and

(D) The date on which the unit ceased to meet such conditions and became an available unit.

(E) This supporting documentation is subject to review and may be requested for verification purposes at any time by HUD.

(c) *Component #1, vacancy percentage and progress in reducing vacancies.* A PHA may choose whether to use the actual vacancy rate, the adjusted vacancy rate or a reduction in the actual vacancy rate within the past three years. This component has a weight of x2.

(1) *Grade A:* The PHA is in one of the following categories:

(i) An actual vacancy rate of 3% or less; or

(ii) An adjusted vacancy rate of 2% or less.

(2) *Grade B:* The PHA is in one of the following categories:

(i) An actual vacancy rate of greater than 3% and less than or equal to 5%; or

(ii) An adjusted vacancy rate of greater than 2% and less than or equal to 3%.

(3) *Grade C:* The PHA is in one of the following categories:

(i) An actual vacancy rate of greater than 5% and less than or equal to 7%; or

(ii) An adjusted vacancy rate of greater than 3% and less than or equal to 4%; or

(iii) The PHA has reduced its actual vacancy rate by at least 15 percentage points within the past three years and has an adjusted vacancy rate of greater than 4% and less than or equal to 5%.

(4) *Grade D:* The PHA is in one of the following categories:

(i) An actual vacancy rate of greater than 7% and less than or equal to 9%; or

(ii) An adjusted vacancy rate of greater than 4% and less than or equal to 5%; or

(iii) The PHA has reduced its actual vacancy rate by at least 10 percentage points within the past three years and has an adjusted vacancy rate of greater than 5% and less than or equal to 6%.

(5) *Grade E:* The PHA is in one of the following categories:

(i) An actual vacancy rate of greater than 9% and less than or equal to 10%; or

(ii) An adjusted vacancy rate of greater than 5% and less than or equal to 6%; or

(iii) The PHA has reduced its actual vacancy rate by at least five percentage points within the past three years and has an adjusted vacancy rate of greater than 6% and less than or equal to 7%.

(6) *Grade F:* The PHA is in one of the following categories:

(i) An actual vacancy rate greater than 10%; or

(ii) An adjusted vacancy rate greater than 7%; or

(iii) An adjusted vacancy rate of greater than 6% and less than or equal to 7% and the PHA has not reduced its actual vacancy rate by at least five percentage points within the past three years.

(d) *Component #2, unit turnaround time.* This component is to be completed only by PHAs scoring below a grade C on component #1. This component has a weight of x1.

(1) *Grade A:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is less than or equal to 20 calendar days.

(2) *Grade B:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is greater than 20 calendar days and less than or equal to 25 calendar days.

(3) *Grade C:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is greater than 25 calendar days and less than or equal to 30 calendar days.

(4) *Grade D:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is greater than 30 calendar days and less than or equal to 40 calendar days.

(5) *Grade E:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is greater than 40 calendar days and less than or equal to 50 calendar days.

(6) *Grade F:* The average number of calendar days between the time when a unit is vacated and a new lease takes effect for units re-occupied during the PHA's assessed fiscal year, is greater than 50 calendar days.

§ 901.15 Indicator #2, modernization.

This indicator is automatically excluded if a PHA does not have a modernization program. This indicator examines the amount of unexpended funds over three Federal fiscal years (FFY) old, the timeliness of fund obligation, the adequacy of contract administration, the quality of the physical work, and the adequacy of budget controls. All components apply to both the Comprehensive Grant Program (CGP), the Comprehensive Improvement Assistance Program (CIAP) and lead based paint risk assessment funding (1992–1995), and any successor program(s) to the CGP or the CIAP. Only components #3, #4 and #5 apply to funding under the Hope VI Program and the Vacancy Reduction Program for the assessment of this indicator. This indicator has a weight of x1.5.

(a) *Component #1, unexpended funds over three Federal fiscal years (FFYs) old.* This component has a weight of x1.

(1) *Grade A:* The PHA has no unexpended funds over three FFYs old or is able to demonstrate one of the following:

(i) The unexpended funds are leftover funds and will be recaptured after audit;

(ii) There are no unexpended funds past the original HUD-approved implementation schedule deadline that allowed longer than three FFYs; or

(iii) The PHA has extended the time within 30 calendar days after the expenditure deadline and the time extension is based on reasons outside of the PHA's control, such as need to use leftover funds, unforeseen delays in contracting or contract administration, litigation, material shortages, or other non-PHA institutional delay.

(2) *Grade F:* The PHA has unexpended funds over three FFYs old and is unable to demonstrate any of the above three conditions; or the PHA requests HUD approval of a time extension based on reasons within the PHA's control.

(b) *Component #2, timeliness of fund obligation.* This component has a weight of x2.

(1) *Grade A:* The PHA has no unobligated funds over two FFYs old or is able to demonstrate one of the following:

(i) There are no unobligated funds past the original HUD-approved implementation schedule deadline that allowed longer than two FFYs; or

(ii) The PHA has extended the time within 30 calendar days after the obligation deadline and the time extension is based on reasons outside of the PHA's control, such as need to use leftover funds, unforeseen delays in contracting or contract administration, litigation, material shortages, or other non-PHA institutional delay.

(2) *Grade F:* The PHA has unobligated funds over two FFYs old and is unable to demonstrate any of the above two conditions; or the PHA requests HUD approval of a time extension based on reasons within the PHA's control.

(c) *Component #3, adequacy of contract administration.* For the purposes of this component, the term ''findings'' means a violation of a statute, regulation, Annual Contributions Contract or other HUD requirement in the area of contract administration. This component has a weight of x1.5.

(1) *Grade A:* Based on HUD's latest on-site inspection and/or audit, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were no findings related to contract administration or the PHA has corrected all such findings.

(2) *Grade C:* Based on HUD's latest on-site inspection and/or audit, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were findings related to contract administration and the PHA is in the process of correcting all such findings.

(3) Grade F: Based on HUD's latest on-site inspection and/or audit, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were findings related to contract administration and the PHA has failed to initiate corrective actions for all such findings or those actions which have been initiated have not resulted in progress toward remedying all of the findings.

(d) *Component #4, quality of the physical work.* For the purposes of this component, the term ''findings'' means a violation of a statute, regulation, Annual Contributions Contract or other HUD requirement in the area of physical work quality. This component has a weight of x3.

(1) *Grade A:* Based on HUD's latest on-site inspection, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were no findings related to the quality of the physical work or the PHA has corrected all such findings.

(2) *Grade C:* Based on HUD's latest on-site inspection, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were findings related to the quality of the physical

work and the PHA is in the process of correcting all such findings.

(3) *Grade F:* Based on HUD's latest on-site inspection, where a written report was provided to the PHA at least 75 calendar days before the end of the PHA's fiscal year, there were findings related to the quality of the physical work and the PHA has failed to initiate corrective actions for all such findings or those actions which have been initiated have not resulted in progress toward remedying all of the findings.

(e) *Component #5, adequacy of budget controls.* This component has a weight of x1.

(1) *Grade A:* The CGP PHA has expended modernization funds only on work in HUD-approved CGP Annual Statements, CGP Five-Year Action Plan, excluding emergencies, or CIAP Budgets, or has obtained prior HUD approval for required budget revisions. The CIAP PHA has expended modernization funds only on work in HUD-approved CIAP Budgets or related to originally approved work or has obtained prior HUD approval for required budget revisions.

(2) *Grade F:* The *CGP PHA* has expended modernization funds on work that was not in HUD-approved CGP Annual Statements, CGP Five-Year Action Plan, excluding emergencies, or CIAP Budgets, and did not obtain prior HUD approval for required budget revisions. The *CIAP PHA* has expended modernization funds on work that was not in HUD-approved CIAP Budgets or was unrelated to originally approved work and did not obtain prior HUD approval for required budget revisions.

§ 901.20 Indicator #3, rents uncollected.

This indicator examines the PHA's ability to collect dwelling rent owed by residents in possession during the immediate past fiscal year by measuring the balance of dwelling rents uncollected as a percentage of total dwelling rents to be collected. This indicator has a weight of x1.5.

(a) *Grade A:* The percent of dwelling rent uncollected in the immediate past fiscal year is less than or equal to 2% of total dwelling rent to be collected.

(b) *Grade B:* The percent of dwelling rent uncollected in the immediate past fiscal year is greater than 2% and less than or equal to 4% of total dwelling rent to be collected.

(c) *Grade C:* The percent of dwelling rent uncollected in the immediate past fiscal year is greater than 4% and less than or equal to 6% of total dwelling rent to be collected.

(d) *Grade D:* The percent of dwelling rent uncollected in the immediate past fiscal year is greater than 6% and less than or equal to 8% of total dwelling rent to be collected.

(e) *Grade E:* The percent of dwelling rent uncollected in the immediate past fiscal year is greater than 8% and less than or equal to 10% of total dwelling rent to be collected.

(f) *Grade F:* The percent of dwelling rent uncollected in the immediate past fiscal year is greater than 10% of total dwelling rent to be collected.

§ 901.25 Indicator #4, work orders.

This indicator examines the average number of days it takes for a work order to be completed, and any progress a PHA has made during the preceding three years to reduce the period of time required to complete maintenance work orders. Implicit in this indicator is the adequacy of the PHA's work order system in terms of how a PHA accounts for and controls its work orders, and its timeliness in preparing/issuing work orders. This indicator has a weight of x1.

(a) *Component #1, emergency work orders completed within 24 hours or less.* All emergency work orders should be tracked. This component has a weight of x1.

(1) *Grade A:* At least 99% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(2) *Grade B:* At least 98% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(3) *Grade C:* At least 97% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(4) *Grade D:* At least 96% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(5) *Grade E:* At least 95% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(6) *Grade F:* Less than 95% of emergency work orders were completed or the emergency was abated within 24 hours or less during the PHA's immediate past fiscal year.

(b) *Component #2, average number of days for non-emergency work orders to be completed.* All non-emergency work orders that were active during the assessed fiscal year should be tracked (including preventive maintenance work orders), except non-emergency work orders from the date they are deferred for modernization, issued to prepare a vacant unit for re-rental, or issued for the performance of cyclical maintenance. This component has a weight of x2.

(1) *Grade A:* All non-emergency work orders are completed within an average of 25 calendar days.

(2) *Grade B:* All non-emergency work orders are completed within an average of greater than 25 calendar days and less than or equal to 30 calendar days.

(3) *Grade C:* The PHA is in one of the following categories:

(i) All non-emergency work orders are completed within an average of greater than 30 calendar days and less than or equal to 40 calendar days; or

(ii) The PHA has reduced the average time it takes to complete non-emergency work orders by at least 15 days during the past three years.

(4) *Grade D:* The PHA is in one of the following categories:

(i) All non-emergency work orders are completed within an average of greater than 40 calendar days and less than or equal to 50 calendar days; or

(ii) The PHA has reduced the average time it takes to complete non emergency work orders by at least 10 days during the past three years.

(5) *Grade E:* The PHA is in one of the following categories:

(i) All non-emergency work orders are completed within an average of greater than 50 calendar days and less than or equal to 60 calendar days; or

(ii) The PHA has reduced the average time it takes to complete non-emergency work orders by at least 5 days during the past three years.

(6) *Grade F:* The PHA is in one of the following categories:

(i) All non-emergency work orders are completed within an average of greater than 60 calendar days; or

(ii) The PHA has not reduced the average time it takes to complete non-emergency work orders by at least 5 days during the past three years.

§ 901.30 Indicator #5, annual inspection of units and systems.

This indicator examines the percentage of units that a PHA inspects on an annual basis in order to determine short-term maintenance needs and long-term modernization needs. Implicit in this indicator is the adequacy of the PHA's inspection program in terms of the quality of a PHA's inspections, and how a PHA tracks both inspections and needed repairs. All occupied units are required to be inspected. This indicator has a weight of x1.

(a) Units in the following categories are exempted and not included in the calculation of the total number of units, and the number and percentage of units inspected. Systems that are a part of individual dwelling units that are exempted, or a part of a building where all of the dwelling units in the building are exempted, are also exempted from the calculation of this indicator:

(1) Occupied units where the PHA has made two documented attempts to inspect, but only if the PHA can document that appropriate legal action (up to and including eviction of the legal or illegal occupant(s)), has been taken under provisions of the lease to ensure that the unit can be subsequently inspected.

(2) Units vacant for the full immediate past fiscal year for the following reasons, as defined at § 901.5:

(i) Vacant units undergoing modernization; and

(ii) Vacant units that are documented to be uninhabitable for reasons beyond a PHA's control due to:

(A) High/unsafe levels of hazardous/toxic materials;

(B) By order of the local health department or a directive of the Environmental Protection Agency;

(C) Natural disasters; and

(D) Units kept vacant because they became structurally unsound.

(b) *Component #1, annual inspection of units.* This component refers to an inspection using either the local housing and/or occupancy code, or HUD HQS if there is no local code or the local code is less stringent that HQS. This component has a weight of x1.

(1) *Grade A:* The PHA inspected 100% of its units and, if repairs were necessary for local code or HQS compliance, either completed the repairs during the inspection; issued work orders for the repairs; or referred similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(2) *Grade B:* The PHA inspected less than 100% but at least 97% of its units and, if repairs were necessary for local code or HQS compliance, either completed the repairs during the inspection; issued work orders for the repairs; or referred similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(3) *Grade C:* The PHA inspected less than 97% but at least 95% of its units and, if repairs were necessary for local code or HQS compliance, either completed the repairs during the inspection; issued work orders for the repairs; or referred similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(4) *Grade D:* The PHA inspected less than 95% but at least 93% of its units and, if repairs were necessary for local code or HQS compliance, either completed the repairs during the inspection; issued work orders for the repairs; or referred similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(5) *Grade E:* The PHA inspected less than 93% but at least 90% of its units and, if repairs were necessary for local code or HQS compliance, either completed the repairs during the inspection; issued work orders for the repairs; or referred similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(6) *Grade F:* The PHA has failed to inspect at least 90% of its units; or failed to correct deficiencies during the inspection or issue work orders for the repairs; or failed to refer similar work items to the current year's modernization program, or to next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was completed.

(c) *Component #2, annual inspection of systems.* This component examines the inspection of buildings and sites according to the PHA's maintenance plan, including performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or issuing work orders for maintenance/repairs, or including identified deficiencies in this year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed. This component has a weight of x1.

(1) *Grade A:* The PHA inspected all major systems at 100% of its buildings and sites, according to its maintenance plan. The inspection included performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or issuing work orders for maintenance/repairs, or including identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

(2) *Grade B:* The PHA inspected all major systems of at least a minimum of 90% but less than 100% of its buildings and sites, according to its maintenance plan. The inspection included performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or issuing work orders for maintenance/repairs, or including identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

(3) *Grade C:* The PHA inspected all major systems of at least a minimum of 80% but less than 90% of its buildings and sites, according to its maintenance plan. The inspection included performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or issuing work orders for maintenance/repairs, or including identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

(4) *Grade D:* The PHA inspected all major systems of at least a minimum of 70% but less than 80% of its buildings and sites, according to its maintenance plan. The inspection included performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or issuing work orders for maintenance/repairs, or including identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

(5) *Grade E:* The PHA inspected all major systems of at least a minimum of 60% but less than 70% of its buildings and sites, according to its maintenance plan. The inspection included performing the required maintenance on structures and systems in accordance with manufacturer's specifications and established local/PHA standards, or

issuing work orders for maintenance/repairs, or including identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

(6) *Grade F:* The PHA failed to inspect all major systems of at least 60% of its buildings and sites and perform the required maintenance on these systems in accordance with manufacturers specifications and established local/PHA standards, or did not issue work orders for maintenance/repairs, or did not include identified deficiencies in the current year's modernization program, or in next year's modernization program if there are less than three months remaining before the end of the PHA fiscal year when the inspection was performed.

§ 901.35 Indicator #6, financial management.

This indicator examines the amount of cash reserves available for operations and, for PHAs scoring below a grade C on cash reserves, energy/ utility consumption expenses. This indicator has a weight of x1.

(a) *Component #1, cash reserves.* This component has a weight of x2.

(a) *Grade A:* Cash reserves available for operations are greater than or equal to 15% of total actual routine expenditures, or the PHA has cash reserves of $3 million or more.

(2) *Grade B:* Cash reserves available for operations are greater than or equal to 12.5%, but less than 15% of total actual routine expenditures.

(3) *Grade C:* Cash reserves available for operations are greater than or equal to 10%, but less than 12.5% of total actual routine expenditures.

(4) *Grade D:* Cash reserves available for operations are greater than or equal to 7.5%, but less than 10% of total actual routine expenditures.

(5) *Grade E:* Cash reserves are greater than or equal to 5%, but less than 7.5% of total actual routine expenditures.

(6) *Grade F:* Cash reserves available for operations are less than 5% of total actual routine expenditures.

(b) *Component* #2, *energy consumption.* Either option A or option B of this component is to be completed only by PHAs that score below a grade C on component #1. Regardless of a PHA's score on component #1, it will not be scored on component #2 if all its units have tenant paid utilities. Annual energy/utility consumption expenses includes water and sewage usage. This component has a weight of x1.

(1) *Option A, annual energy/utility consumption expenses.*

(i) *Grade A:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have not increased.

(ii) *Grade B:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have not increased by more than 3%.

(iii) *Grade C:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have increased by more than 3% and less than or equal to 5%.

(iv) *Grade D:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have increased by more than 5% and less than or equal to 7%.

(v) *Grade E:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have increased by more than 7% and less than or equal to 9%.

(vi) *Grade F:* Annual energy/utility consumption expenses, as compared to the average of the three years' rolling base consumption expenses, have increased by more than 9%.

(2) *Option B, energy audit.*

(i) *Grade A:* The PHA has completed or updated its energy audit within the past five years and has implemented all of the recommendations that were cost effective.

(ii) *Grade C:* The PHA has completed or updated its energy audit within the past five years, has developed an implementation plan and is on schedule with the implementation plan, based on available funds. The implementation plan identifies at a minimum, the items from the audit, the estimated cost, the planned funding source, and the anticipated date of completion for each item.

(iii) *Grade F:* The PHA has not completed or updated its energy audit within the past five years, or has not developed an implementation plan or is not on schedule with its implementation plan, or has not implemented all of the recommendations that were cost effective, based on available funds.

§ 901.40 Indicator #7, Resident Services and Community Building.

This indicator examines the PHA's efforts to deliver quality customer services and to encourage partnerships with residents, resident organizations, and the local community, including non-PHA service providers, that help improve management operations at the PHA; and to encourage programs that promote individual responsibility, self improvement and community involvement among residents and assist them to achieve economic uplift and develop self-sufficiency. Also, if applicable, this indicator examines PHA performance under any special HUD grant(s) administered by the PHA. PHAs can get credit for performance under non-HUD funded programs if they choose to be assessed for these programs. PHAs with fewer than 250 units or with 100% elderly developments will not be assessed under this indicator unless they request to be assessed at the time of PHMAP certification submission. This indicator has a weight of x1.

(a) *Component* #1, *economic uplift and self-improvement.* PHAs will be assessed for all the programs that the PHA has HUD funding to implement. Also, PHAs can get credit for implementation of programs through partnerships with non-PHA providers, even if the programs are not funded by HUD or the PHA, if they choose to be assessed for them. PHAs must select either to be assessed for all or none of the non-HUD funded programs. This component has a weight of x1.

(1) *Grade A:* The PHA Board of Commissioners, by resolution, has adopted one or more economic uplift and self-improvement programs, examples include but are not limited to, the Section 3 program, homeownership, PHA support for resident education, training, child-care, job-placement programs, Head Start, etc., and the PHA can document that it has implemented these programs in developments covering at least 90% of its family occupied units, either directly or through partnerships with non-PHA providers, and the PHA monitors performance under the programs and issues reports concerning progress, including residents receiving services and residents employed, under these programs.

(2) *Grade C:* The PHA Board of Commissioners, by resolution, has adopted one or more economic uplift and self-improvement programs, including but not limited to, the programs described in grade A, above, and the PHA can document that it has implemented these programs in developments covering at least 60% of its family occupied units, either directly or through partnerships with non-PHA providers, and the PHA staff monitors performance under the programs and issues reports to the Board concerning progress, including residents receiving

services and residents employed, under these programs.

(3) Grade F: The PHA Board of Commissioners, by resolution, has not adopted one or more economic uplift and self-improvement programs, including but not limited to, the programs described in grade A, above, or the PHA has not implemented these programs in developments covering at least 60% of its family occupied units, either directly or through partnerships with non-PHA providers.

(b) *Component* #2, resident organization. This component has a weight of x1.

(1) *Grade A:* The PHA can document formal recognition of, a system of communication and collaboration with, and support for resident councils where these exist, and where no resident council exists, the PHA can document its encouragement for the formation of such councils.

(2) *Grade F:* The PHA cannot document formal recognition of, or a system of communication and collaboration with, or document its support for resident councils where these exist, or where no resident council exists, the PHA cannot document its encouragement for the formation of such councils.

(c) *Component* #3, resident involvement. Implicit in this component is the need to ensure a PHA's delivery of quality customer services to residents. This component has a weight of x1.

(1) *Grade A:* The PHA Board of Commissioners, by resolution, provides for resident representation on the Board and committees, and the PHA has implemented measures that ensure the opportunity for regular resident input into plans and the evaluation for ongoing quality of life and housing management conditions, including but not limited to, modernization and development programs, screening and other occupancy matters, relocation, the operating budget, resident programs, security and maintenance programs.

(2) *Grade C:* The PHA Board of Commissioners, by resolution, provides for resident representation on the Board and committees, and the PHA has implemented measures that ensure the opportunity for regular resident input into plans and the evaluation for ongoing quality of life and housing management conditions in the modernization and development programs and at least three of the remaining six areas described in grade A, above.

(3) *Grade F:* The PHA Board of Commissioners, by resolution, did not provide for resident representation on the Board and committees, or the PHA has not implemented measures that ensure the opportunity for regular resident input into plans and the evaluation for ongoing quality of life and housing management conditions in the modernization and development programs and at least three of the remaining six areas described in grade A, above.

(d) *Component* #4, *resident programs management.* This component examines a PHA's management of HUD funded resident programs. However, PHAs can also get credit for performance under non-HUD funded programs if they choose to be assessed for them. PHAs must select either to be assessed for all or none of the non-HUD funded programs. This component has a weight of x1.

(1) *Grade A:* If the PHA has any HUD funded special programs that benefit the residents, including but not limited to, the Family Investment Center (FIC), Youth Sports (YS), Food Banks, Health Clinics, Youth Apprenticeship Program (YAP), Family Self-Sufficiency (FSS), or a Resident Management (RM) or Tenant Opportunity Programs (TOP) where the PHA is the contract administrator, the PHA can document that it is meeting at least 90% of its goals under the implementation plan for any and all of these programs.

(2) *Grade C:* If the PHA has any HUD-funded special programs that benefit the residents, including but not limited to, the programs described in grade A, above, the PHA can document that it is meeting at least 60% of its goals under the implementation plan for any and all of these programs.

(3) *Grade F:* If the PHA has any HUD-funded special programs that benefit the residents, including but not limited to, the programs described in grade A, above, the PHA cannot document that it is meeting at least 60% of its goals under the implementation plan for all of these programs.

§ 901.45 Indicator #8, security.

This indicator evaluates the PHAs performance in tracking crime related problems in their developments, reporting incidence of crime to local law enforcement agencies, the adoption and implementation of tough applicant screening and resident eviction policies and procedures, and, as applicable, PHA performance under any HUD drug prevention or crime reduction grant(s). PHAs can get credit for performance under non-HUD funded programs if they choose to be assessed for these programs. PHAs with fewer than 250 units will not be assessed under this indicator unless they request to be assessed at the time of PHMAP certification submission. This indicator has a weight of x1.

(a) Component #1, Tracking and Reporting Crime Related Problems. This component has a weight of x1.

(1) *Grade A:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures and can document that it (1) tracks crime and crime-related problems in at least 90% of its developments, and (2) has a cooperative system for tracking and reporting incidents of crime to local police authorities to improve law enforcement and crime prevention.

(2) *Grade C:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures and can document that it (1) tracks crime and crime-related problems in at least 60% of its developments, and (2) reports incidents of crime to local police authorities to improve law enforcement and crime prevention.

(3) *Grade F:* The PHA Board, by resolution, has not adopted policies and the PHA has not implemented procedures or cannot document that it (1) tracks crime and crime-related problems in at least 60% of its developments, or (2) reports incidents of crime to local police authorities to improve law enforcement and crime prevention.

(b) *Component* #2, *Screening of Applicants.* This component has a weight of x1.

(1) *Grade A:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures and can document that it successfully screens out and denies admission to a public housing applicant who:

(i) Has a recent history of criminal activity involving crimes to persons or property and/or other criminal acts that would adversely affect the health, safety or welfare of other residents or PHA personnel;

(ii) Was evicted, because of drug-related criminal activity, from housing assisted under the U.S. Housing Act of 1937, for a minimum of a three year period beginning on the date of such eviction, unless the applicant has successfully completed, since the eviction, a rehabilitation program approved by the public housing agency;

(iii) The PHA has reasonable cause to believe is illegally using a controlled substance; or

(iv) The PHA has reasonable cause to believe abuses alcohol in a way that causes behavior that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel.

(2) *Grade C:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures, but cannot document results in successfully screening out and denying admission to a public housing applicant who meets the criteria as described in grade A, above.

(3) *Grade F:* The PHA has not adopted policies or has not implemented procedures that result in screening out and denying admission to a public housing applicant who meets the criteria as described in grade A, above, or the screening procedures do not result in the denial of admission to a public housing applicant who meets the criteria as described in grade A, above.

(c) *Component* #3, *Lease Enforcement.* This component has a weight of x1.

(1) *Grade A:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures and can document that it appropriately evicts any public housing resident who:

(i) The PHA has reasonable cause to believe engages in any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel;

(ii) The PHA has reasonable cause to believe engages in any drug-related criminal activity (as defined at section 6(l) of the 1937 Act (42 U.S.C. 1437d(l)) on or off the PHA's property; or

(iii) The PHA has reasonable cause to believe abuses alcohol in such a way that causes behavior that may interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents or PHA personnel.

(2) *Grade C:* The PHA Board, by resolution, has adopted policies and the PHA has implemented procedures, but cannot document results in appropriately evicting any public housing resident who meets the criteria as described in grade A, above.

(3) *Grade F:* The PHA has not adopted policies or has not implemented procedures that document results in the eviction of any public housing resident who meets the criteria as described in grade A, above, or the eviction procedures do not result in the eviction of public housing residents who meet the criteria as described in grade A, above.

(d) *Component* #4, *Grant Program Goals.* This component examines a PHA's management of HUD-funded drug prevention or crime reduction programs. However, PHAs can also get credit for performance under non-HUD funded programs if they choose to be assessed for them. PHAs must select either to be assessed for all or none of the non-HUD funded programs. This component has a weight of x1.

(1) *Grade A:* If the PHA has any special drug prevention program or crime reduction program funded by any HUD funds, the PHA can document that the goals are related to drug and crime rates, and it is meeting at least 90% of its goals under the implementation plan for any and all of these programs.

(2) *Grade C:* If the PHA has any special drug prevention program or crime reduction program funded by any HUD funds, the PHA can document that the goals are related to drug and crime rates, and it is meeting at least 60% of its goals under the implementation plan for any and all of these programs.

(3) *Grade F:* If the PHA has any special drug prevention program or crime reduction program funded by any HUD funds, the PHA does not have a system for documenting or cannot document that the goals are related to drug and crime rates, or cannot document that it is meeting 60% or more of its goals under the implementation plan for any and all of these programs.

§ 901.100 Data collection.

(a) Information on some of the indicators will be derived by the State/Area Office from existing reporting and data forms.

(b) A PHA shall provide certification as to data on indicators not collected according to paragraph (a) of this section, by submitting a certified questionnaire within 60 calendar days after the end of the fiscal year covered by the certification:

(1) The certification shall be approved by PHA Board resolution, and signed and attested to by the Executive Director.

(2) PHAs shall maintain documentation for three years verifying all certified indicators for HUD on-site review.

(3) A PHA may include along with its certification submission, rather than through an exclusion or modification request, any information bearing on the accuracy or completeness of the data used by HUD (corrected data, late reports, previously omitted required reports, etc.) in grading an indicator. HUD will consider this assertion in grading the affected indicator.

(4) If a PHA does not submit its certification, or submits its certification late, appropriate sanctions may be imposed, including a presumptive rating of failure in all of the PHMAP indicators, which may result in troubled and mod-troubled designations.

(5) A PHA that cannot provide justifying documentation to HUD during the conduct of a confirmatory review, or other verification review(s), for any indicator(s) or component(s) certified to, shall receive a failing grade in that indicator(s) or component(s), and its overall PHMAP score shall be lowered.

(6) If the data for any indicator(s) or component(s) that a PHA certified to cannot be verified by HUD during the conduct of a confirmatory review, or any other verification review(s), the State/Area Office shall change a PHA's grade for any indicator(s) or component(s), and its overall PHMAP score, as appropriate, to reflect the verified data obtained during the conduct of such review.

(7) A PHA that cannot provide justifying documentation to the independent auditor for the indicator(s) or component(s) that the PHA certified to, as reflected in the audit report, shall receive a grade of F for that indicator(s) or component(s), and its overall PHMAP score shall be lowered.

(8) A PHA's PHMAP score for individual indicators or components, or its overall PHMAP score, may be changed by the State/Area Office pursuant to the data included in the independent audit report, as applicable.

(9) A PHA's certification and supporting documentation will be post-reviewed by HUD during the next on-site review as determined by risk management, but is subject to verification at any time. Appropriate sanctions for intentional false certification will be imposed, including suspension or debarment of the signatories, the loss of high performer designation, a lower grade for individual indicators and a lower PHMAP total weighted score.

(c) For those developments of a PHA where management functions have been assumed by an RMC, the PHA's certification shall identify the development and the management functions assumed by the RMC. The PHA shall obtain a certified questionnaire from the RMC as to the management functions undertaken by the RMC. The PHA shall submit the RMC's certified questionnaire along with its own. The RMC's certification shall be approved by its Executive Director or Chief Executive Officer of whatever title.

§ 901.105 Computing assessment score.

(a) Grades within indicators and components have the following point values:

(1) Grade A = 10.0 points;
(2) Grade B = 8.5 points;
(3) Grade C = 7.0 points;
(4) Grade D = 5.0 points;
(5) Grade E = 3.0 point; and
(6) Grade F = 0.0 points.

(b) If indicators or components are designated as having additional weight (e.g., x1.5 or x2), the points in each grade will be multiplied times the additional weight.

(c) Indicators will be graded individually. Components within an indicator will be graded individually, and then will be used to determine a single grade for the indicator, by dividing the total number of component points by the total number of component weights and rounding off to two decimal places. The total number of component weights for this purpose includes a one for components that are unweighted (i.e., they are weighted x1, rather than x1.5 or x2).

(d) *Adjustment for physical condition and neighborhood environment.* The overall PHMAP score will be adjusted by adding additional points that reflect the adjustment to be given to the differences in the difficulty of managing developments that result from physical condition and neighborhood environment:

(1) Adjustments shall apply to the following three indicators only:

(i) Indicator #1, vacancy rate and unit turnaround;

(ii) Indicator #4, work orders; and

(iii) Indicator #5, annual inspection and condition of units and systems.

(2) Definitions of physical condition and neighborhood environment are:

(i) *Physical condition:* refers to units located in developments over ten years old that require major capital investment in order to meet local codes or minimum HQS standards, whichever is applicable. This excludes developments that have been comprehensively modernized.

(ii) *Neighborhood environment:* refers to units located within developments where the immediate surrounding neighborhood (that is a majority of the census tracts or census block groups on all sides of the development) has at least 51% of families with incomes below the poverty rate as documented by the latest census data.

(3) Any PHA with 5% or more of its units subject to either or both of the above conditions shall, if they so choose, be issued an adjusted PHMAP score in addition to the regular score based solely upon the certification of the PHA. The adjusted score shall be calculated as follows:

Percent of units subject to physical condition and/or neighborhood environment	Extra points
At least 5% but less than 10%	.5
At least 10% but less than 20%	.6
At least 20% but less than 30%	.7
At least 30% but less than 40%	.8
At least 40% but less than 50%	.9
At least 50%	1.0

(i) These extra points will be added to the score (grade) of the indicator(s) to which these conditions may apply. A PHA is required to certify on form HUD–50072, PHMAP Certification, the extent to which the conditions apply, and to which of the indicators the extra scoring points should be added.

(ii) Units in developments that have received substantial rehabilitation within the past ten years are not eligible to be included in the calculation of total PHA units due to physical condition only.

(iii) A PHA that receives a grade of A under indicators #4 and/or #5 may not claim the additional adjustment for indicator #1 based on physical condition of its developments, but may claim additional adjustment based on neighborhood environment.

(iv) A PHA that receives the maximum potential weighted points on indicators #1, #4 and/or #5 may not claim any additional adjustment for physical condition and/or neighborhood environment for the respective indicator(s).

(v) A PHA's score for indicators #1, #4 and/or #5, after any adjustment(s) for physical condition and/or neighborhood environment, may not exceed the maximum potential weighted points assigned to the respective indicator(s).

(4) If only certain units or developments received substantial rehabilitation, the additional adjustment shall be prorated to exclude the units or developments with substantial rehabilitation.

(5) The Date of Full Availability (DOFA) shall apply to scattered site units, where the age of units and buildings vary, to determine whether the units have received substantial rehabilitation within the past ten years and are eligible for a adjusted score for the physical condition factor.

(6) PHAs shall maintain supporting documentation to show how they arrived at the number and percentage of units out of their total inventory that are subject to adjustment.

(i) If the basis was neighborhood environment, the PHA shall have on file the appropriate maps showing the census tracts or census block groups surrounding the development(s) in question with supporting census data showing the level of poverty. Units that fall into this category but which have already been removed from consideration for other reasons (permitted exemptions and modifications and/or exclusions) shall not be counted in this calculation.

(ii) For the physical condition factor, a PHA would have to maintain documentation showing the age and condition of the units and the record of capital improvements, indicating that these particular units have not received modernization funds.

(iii) PHAs shall also document that in all cases, units that were exempted for other reasons were not included in the calculation.

§ 901.110 PHA request for exclusion or modification of an indicator or component.

(a) A PHA shall have the right to request the exclusion or modification of any indicator or component in its management assessment, thereby excluding or modifying the impact of those indicator's or component's grades in its PHMAP total weighted score.

(b) Exclusion and modification requests shall be submitted by a PHA at the time of its PHMAP certification submission to the State/Area Office along with supporting documentary justification, rather than during the appeal process.

(c) Requests for exclusions and modifications that do not include supporting documentary justification will not be considered.

(d) Indicator #2, modernization, shall be automatically excluded by the State/Area Office if a PHA does not have an open modernization program.

(e) Indicator #7, resident services and community building, shall be automatically excluded by the State/Area Office for PHAs with fewer than 250 units, or with 100% elderly developments, unless they request to be assessed at the time of the PHMAP certification submission.

(f) Indicator #8, security, shall be automatically excluded by the State/Area Office for PHAs with fewer than 250 units unless they request to be assessed at the time of the PHMAP certification submission.

§ 901.115 PHA score and status.

(a) PHAs that achieve a total weighted score of 90% or greater shall be designated high performers. A PHA shall not be designated as a high performer if it scores below a grade of C for any indicator. High performers will be afforded incentives that include relief from reporting and other requirements, as described in § 901.130.

(b) PHAs that achieve a total weighted score of 90% or greater on its overall PHMAP score and on indicator #2, modernization, shall be designated mod-high performers.

(c) PHAs that achieve a total weighted score of less than 90% but not less than 60% shall be designated standard. Standard performers will be afforded incentives that include relief from reporting and other requirements, as described in § 901.130.

(d) PHAs that achieve a total weighted score of less than 60% shall be designated as troubled.

(e) PHAs that achieve 60% of the maximum calculation for indicator #2, modernization, shall be designated as mod-troubled.

(f) Each PHA shall post a notice of its final PHMAP score and status in appropriate conspicuous and accessible locations in its offices within two weeks of receipt of its final score and status. In addition, HUD will publish every PHA's score and status in the Federal Register.

(g) A PHA that cannot provide justifying documentation to HUD during the conduct of a confirmatory review, or other verification review(s), for any indicator(s) or component(s) certified to, shall receive a failing grade in that indicator(s) or component(s), and its overall PHMAP score shall be lowered.

(h) If the data for any indicator(s) or component(s) that a PHA certified to cannot be verified by HUD during the conduct of a confirmatory review, or any other verification review(s), the State/Area Office shall change a PHA's grade for any indicator(s) or component(s), and its overall PHMAP score, as appropriate, to reflect the verified data obtained during the conduct of such review.

(i) A PHA that cannot provide justifying documentation to the independent auditor for the indicator(s) or component(s) that the PHA certified to, as reflected in the audit report, will receive a grade of F for that indicator(s), and its overall PHMAP score will be lowered.

(j) A PHA's PHMAP score for individual an indicator(s), component(s) or its overall PHMAP score may be changed by the State/Area Office pursuant to the data included in the independent audit report, as applicable.

(k) In *exceptional circumstances,* even though a PHA has satisfied all of the indicators for high or standard performer designation, the State/Area Office may conduct any review as necessary, including a confirmatory review, and deny or rescind incentives or high performer status, as described in paragraphs (a) and (b) of this section in the case of a PHA that:

(1) Is operating under a special agreement with HUD;

(2) Is involved in litigation that bears directly upon the management of a PHA;

(3) Is operating under a court order;

(4) Demonstrates substantial evidence of fraud or misconduct, including evidence that the PHA's certification of indicators is not supported by the facts, resulting from such sources as a confirmatory review, routine reports and reviews, an Office of Inspector General investigation/audit, an independent auditor's audit or an investigation by any appropriate legal authority; or

(5) Demonstrates substantial noncompliance in one or more areas (including areas not assessed by the PHMAP). Areas of substantial noncompliance include, but are not limited to, noncompliance with statutes (e.g., Fair Housing and Equal Opportunity statutes); regulations (e.g., 24 CFR § 85); or the Annual Contributions Contract (ACC) (e.g., the ACC, form HUD–53012A, Section 4, Mission of the PHA). Substantial noncompliance would cast doubt on the PHA's capacity to preserve and protect its public housing developments and operate them consistent with Federal law and regulations.

(l) When a State/Area Office Public Housing Director acts for any of the reasons stated in paragraph (k) of this section, the State/Area Office will send written notification to the PHA with a specific explanation of the reasons. An information copy will be forwarded to the Assistant Secretary for Public and Indian Housing.

(m) A PHA may appeal denial of high performer status in accordance with § 901.125.

§ 901.120 State/Area Office functions.

(a) The State/Area Office will assess each PHA within its jurisdiction on an annual basis:

(1) The State/Area Office will make determinations for high-performing, standard, troubled PHAs and mod-troubled PHAs in accordance with a PHA's PHMAP weighted score.

(2) The State/Area Office will also make determinations for exclusion and modification requests.

(b) Each State/Area Office will notify each PHA of the PHA's grade and the grade of the RMC (if any) assuming management functions at any of the PHA's developments, in each indicator; the PHA's management assessment total weighted score and status, and if applicable; its adjustment for physical condition and neighborhood environment; any determinations concerning exclusion and modification requests; and any deadline date by which appeals must be received. PHA notification should include offers of pertinent technical assistance in problem areas, suggestions for means of improving problem areas, and areas of relief and incentives as a result of high performer status. The PHA must notify the RMC (if any) in writing, immediately upon receipt of the State/Area Office notification, of the RMC's grades.

(c) An on-site confirmatory review may be conducted of a PHA by HUD. The purpose of the on-site confirmatory review is to verify those indicators for which a PHA provides certification, as well as the accuracy of the information received in the State/Area Office pertaining to the remaining indicators.

(1) Whenever practicable, a confirmatory review should be conducted by HUD prior to the issuance of a PHA's initial notification letter. The results of the confirmatory review shall be included in the PHA's initial notification letter.

(2) If, in an exceptional circumstance, a confirmatory review is conducted after the State/Area Office issues the initial notification letter, the State/Area Office shall explain the results of the confirmatory review in writing, correct the PHA's total weighted score, as appropriate, and reissue the initial notification letter to the PHA.

(3) The State/Area Office shall conduct a confirmatory review of a PHA with 100 or more units under management that scores less than 60% for its total weighted score, or less than 60% on indicator #2, modernization, before initially designating the PHA as troubled or mod-troubled. The results of the confirmatory review shall be included in the PHA's initial notification letter.

(4) The State/Area Office shall conduct a confirmatory review on a yearly basis of all troubled and mod-troubled PHAs.

(5) The State/Area Office shall conduct a confirmatory review of a PHA with 100 or more units under management prior to the removal of troubled or mod-troubled designation.

(6) Independent confirmatory reviews (team members from other State/ Area Offices) shall be conducted of troubled PHAs with 1250 or more units under management prior to the removal of troubled designation.

(d) A PHA that cannot provide justifying documentation to HUD during the conduct of a confirmatory review, or other verification review(s), for any indicator(s) or component(s) certified to, shall receive a failing grade in that indicator(s) or component(s), and its overall PHMAP score shall be lowered by the State/Area Office. The State/Area Office shall explain to the PHA the reason(s) for the change(s) in writing, correct the PHA's grade for an individual component(s) and/or indicator(s) and total weighted score, as appropriate, and reissue the initial notification letter to the PHA.

(e) If the data for any indicator(s) or component(s) that a PHA certified to cannot be verified by HUD during the conduct of a confirmatory review, or any other verification review(s), the State/Area Office shall change a PHA's grade for any indicator(s) or component(s), and its overall PHMAP score, as appropriate, to reflect the verified data obtained during the conduct of such review. The State/Area Office shall explain to the PHA the reason(s) for the change(s) in writing, correct the PHA's grade for an individual component(s) and/or indicator(s) and total weighted score, as appropriate, and reissue the initial notification letter to the PHA.

(f) A PHA that cannot provide justifying documentation to the independent auditor for the indicator(s) or component(s) that the PHA certified to, as reflected in the audit report, will receive a grade of F for that indicator(s), and its overall PHMAP score will be lowered by the State/Area Office. The State/Area Office shall explain to the PHA the reason(s) for the change(s) in writing, correct the PHA's grade for an individual component(s) and/or indicator(s) and total weighted score, as appropriate, and reissue the initial notification letter to the PHA.

(g) A PHA's PHMAP score for an individual indicator(s), component(s) or its overall PHMAP score may be changed by the Area/State Office pursuant to the data included in the independent audit report, as applicable. The State/Area Office shall explain to the PHA the reason(s) for the change(s) in writing, correct the PHA's grade for an individual component(s) and/or indicator(s) and total weighted score, as appropriate, and reissue the initial notification letter to the PHA.

(h) Determinations on appeals and on petitions to remove troubled or mod-troubled status will be made by the State/Area Office.

(i) Determinations of intentional false certifications will be made by the State/Area Office. State/Area Offices shall consult with the local Office of Inspector General for guidance in cases of determinations of intentional false certification.

(j) In exceptional circumstances, the State/Area Office may deny or rescind a PHA's status as a standard or high performer, in accordance with § 901.115(i), so that it will not be entitled to any of the areas of relief and incentives.

(k) The State/Area Office will maintain PHMAP files for public inspection in accordance with § 901.155.

§ 901.125 PHA right of appeal.

(a) A PHA has the right to appeal its PHMAP score to the State/Area Office, including a troubled designation or a mod-troubled designation. A PHA may appeal its management assessment rating on the basis of data errors (any dispute over the accuracy, calculation, or interpretation of data employed in the grading process that would affect a PHA's PHMAP score), the denial of exclusion or modification requests when their denial affects a PHA's total weighted score, the denial of an adjustment based on the physical condition and neighborhood environment of a PHA's developments, or a determination of intentional false certification:

(1) A PHA may appeal its management assessment rating to the State/Area Office only for the reasons stated in paragraph (a) of this section:

(i) A PHA may not appeal its PHMAP score to the State/Area Office unless it has submitted its certification to the State/Area Office.

(ii) A PHA may not appeal its PHMAP score to the State/Area Office if the reason the PHA received a deficient grade in any indicator or component was due to the fact the PHA did not submit a required report in a timely manner or without an approved time extension.

(iii) A PHA may not appeal its PHMAP score to the State/Area Office if the reason the PHA received a failing grade in any indicator or component was due to the fact that the PHA did not provide justifying documentation to the independent auditor for any indicator(s) or component(s) the PHA certified to.

(2) The appeal shall be submitted to the State/Area Office and shall include supporting documentary justification of the reasons for the appeal.

(3) The State/Area Office will make determinations on initial appeals and will transmit the determination of the appeal to the PHA in a notification letter that will also include the date and place for submitting any further appeal.

(4) Appeals submitted to the State/Area Office without appropriate documentation will not be considered and will be returned to the PHA.

(b) Appeals of rescission of high performer designation shall be made directly to the Assistant Secretary for Public and Indian Housing.

(c) A PHA may appeal the denial of an initial appeal by the State/Area Office to the Assistant Secretary for Public and Indian Housing for the following reasons:

(1) Initial appeals denying high performer designation;

(2) Initial appeals denying the removal of troubled designation;

(3) Initial appeals denying the removal of mod-troubled designation;

(4) The denial of an appeal of a determination of intentional false certification;

(5) Data errors;

(6) The denial of exclusion or modification requests when their denial affects a PHA's total weighted score;

(7) The denial of an adjustment based on the physical condition and neighborhood environment of a PHA's developments;

(8) The refusal of a petition in accordance with § 901.140 to remove troubled or mod-troubled designations.

(d) A PHA may appeal its management assessment rating to the Assistant Secretary for Public and Indian Housing only for the reasons stated in paragraph (c) of this section.

(e) A PHA may not appeal its PHMAP score to the Assistant Secretary unless it has submitted its certification to the State/Area Office.

(f) Appeals submitted to the Assistant Secretary for Public and Indian Housing without appropriate documentation will not be considered and will be returned to the PHA.

(g) The date and place by which any appeal must be submitted will be specified in the letter from the State/Area Office notifying the PHA of any determination or action. For example, the State/Area Office initial notification letter or denial of initial appeal letter will specify the date and place by which appeals must be received. The date specified will be the 15th calendar day after the letter is mailed, not counting the day the letter is mailed. If the 15th day falls on a weekend or holiday, the date specified will be the next day that is not on a weekend or a holiday. Any appeal not received by the specified time and place will not be considered.

§ 901.130 Incentives.

(a) A PHA that is designated high performer or standard performer will be relieved of specific HUD requirements, effective upon notification of high or standard performer designation.

(b) A PHA shall not be designated a mod-high performer and be entitled to the applicable incentives unless it has been designated an overall high performer.

(c) High-performing PHAs, and RMCs that receive a grade of A on each of the indicators for which they are assessed, will receive a Certificate of

Commendation from the Department as well as special public recognition.

(d) Representatives of high-performing PHAs may be requested to serve on Departmental working groups that will advise the Department in such areas as troubled PHAs and performance standards for all PHAs.

(e) State/Area Offices may award incentives to PHAs on an individual basis for a specific reason(s), such as a PHA making the right decision that impacts long-term overall management or the quality of a PHA's housing stock, with prior concurrence from the Assistant Secretary.

(f) Relief from any standard procedural requirements does not mean that a PHA is relieved from compliance with the provisions of Federal law and regulations or other handbook requirements. For example, although a high or standard performer may be relieved of requirements for prior HUD approval for certain types of contracts for services, it must still comply with all other Federal and State requirements that remain in effect, such as those for competitive bidding or competitive negotiation (see 24 CFR 85.36):

(1) PHAs will still be subject to regular independent auditor (IA) audits.

(2) Office of Inspector General (OIG) audits or investigations will continue to be conducted as circumstances may warrant.

(g) In exceptional circumstances, the State/Area Office will have discretion to subject a PHA to any requirement that would otherwise be omitted under the specified relief, in accordance with § 901.115(i).

§ 901.135 Memorandum of Agreement.

(a) After consulting the independent assessment team and reviewing the report identified in section 6(j)(2)(b) of the 1937 Act, a Memorandum of Agreement (MOA), a binding contractual agreement between HUD and a PHA, shall be required for each PHA designated as troubled and/or mod-troubled. The scope of the MOA may vary depending upon the extent of the problems present in the PHA, but shall include:

(1) Baseline data, which should be raw data but may be the PHA's score in each of the indicators identified as a problem, or other relevant areas identified as problematic;

(2) Annual and quarterly performance targets, which may be the attainment of a higher grade within an indicator that is a problem, or the description of a goal to be achieved, for example, the reduction of rents uncollected to 6% or less by the end of the MOA annual period;

(3) Strategies to be used by the PHA in achieving the performance targets within the time period of the MOA;

(4) Technical assistance to the PHA provided or facilitated by the Department, for example, the training of PHA employees in specific management areas or assistance in the resolution of outstanding HUD monitoring findings;

(5) The PHA's commitment to take all actions within its control to achieve the targets;

(6) Incentives for meeting such targets, such as the removal of troubled or mod-troubled designation and Departmental recognition for the most improved PHAs;

(7) The consequences of failing to meet the targets, including such sanctions as the imposition of budgetary limitations, declaration of substantial default and subsequent actions, limited denial of participation, suspension, debarment, or the imposition of operating funding and modernization thresholds; and

(8) A description of the involvement of local public and private entities, including PHA resident leaders, in carrying out the agreement and rectifying the PHA's problems. A PHA shall have primary responsibility for obtaining active local public and private entity participation, including the involvement of public housing resident leaders, in assisting PHA improvement efforts. Local public and private entity participation should be premised upon the participant's knowledge of the PHA, ability to contribute technical expertise with regard to the PHA's specific problem areas and authority to make preliminary/tentative commitments of support, financial or otherwise.

(b) A MOA shall be executed by:

(1) The PHA Board Chairperson and accompanied by a Board resolution, or a receiver (pursuant to a court ordered receivership agreement, if applicable) or other AME acting in lieu of the PHA Board;

(2) The PHA Executive Director, or a designated receiver (pursuant to a court ordered receivership agreement, if applicable) or other AME-designated Chief Executive Officer;

(3) The Director, State/Area Office of Public Housing, except as stated in (d) of this section; and

(4) The appointing authorities of the Board of Commissioners, unless exempted by the State/Area Office.

(c) The Department encourages the inclusion of the resident leadership in MOA negotiations and the execution of the MOA.

(d) Upon designation of a large PHA (1250 or more units under management) as troubled, the State/Area Office shall make a referral to HUD Headquarters for appropriate recovery intervention and the execution of an MOA by the Assistant Secretary for Public and Indian Housing.

(e) A PHA will monitor MOA implementation to ensure that performance targets are met in terms of quantity, timeliness and quality.

§ 901.140 Removal from troubled status and mod-troubled status.

(a) A PHA has the right to petition the State/Area Office for the removal of a designation as troubled or mod-troubled.

(b) A PHA may appeal any refusal to remove troubled and mod-troubled designation to the Assistant Secretary for Public and Indian Housing in accordance with § 901.125.

(c) A PHA with fewer that 1250 units under management will be removed from troubled status by the State/Area Office upon a determination by the State/Area Office that the PHA's assessment reflects an improvement to a level sufficient to remove the PHA from troubled status, or mod-troubled, i.e., a total weighted management assessment score of 60% or more, and upon the conduct of a confirmatory review for PHAs with 100 or more units under management.

(d) A PHA with 1250 units or more under management will be removed from troubled status by the Assistant Secretary for Public and Indian Housing upon a recommendation by the State/Area Office when a PHA's assessment reflects an improvement to a level sufficient to remove the PHA from troubled or mod-troubled status, i.e., a total weighted management assessment score of 60% or more, and upon the conduct of an independent confirmatory review (team members from other State/Area Offices).

§ 901.145 Improvement Plan.

(a) After receipt of the State/Area Office notification letter in accordance with § 901.120(b) or receipt of a final resolution of an appeal in accordance with § 901.125 or, in the case of an RMC, notification of its indicator grades from a PHA, a PHA or RMC shall correct any deficiency indicated in its management assessment within 90 calendar days.

(b) A PHA shall notify the State/Area Office of its action to correct a deficiency. A PHA shall also forward to the State/Area Office an RMC's report of its action to correct a deficiency.

(c) If the State/Area Office determines that a PHA or RMC has not corrected a deficiency as required within 90 calendar days after receipt of its final notification letter, the State/Area Office may require a PHA, or a RMC through the PHA, to prepare and submit to the State/Area Office an Improvement Plan within an additional 30 calendar days:

(1) The State/Area Office shall require a PHA or RMC to submit an Improvement Plan, which includes the information stated in (d) of this section, for each indicator that a PHA or RMC scored a grade of F.

(2) The State/Area Office may require, on a risk management basis, a PHA or RMC to submit an Improvement Plan, which includes the information stated in paragraph (d) of this section, for each indicator that a PHA scored a grade D or E, as well as other performance and/or compliance deficiencies as may be identified as a result of an on-site review of the PHA's operations.

(d) An Improvement Plan shall:

(1) Identify baseline data, which should be raw data but may be the PHA's score in each of the indicators identified as a problem in a PHA's or RMC's management assessment, or other relevant areas identified as problematic;

(2) Describe the procedures that will be followed to correct each deficiency; and

(3) Provide a timetable for the correction of each deficiency.

(e) The State/Area Office will approve or deny a PHA's or RMC's Improvement Plan, and notify the PHA of its decision. A PHA must notify the RMC in writing, immediately upon receipt of the State/Area Office notification, of the State/Area Office approval or denial of the RMC's Improvement Plan.

(f) An Improvement Plan that is not approved will be returned to the PHA with recommendations from the State/Area Office for revising the Improvement Plan to obtain approval. A revised Improvement Plan shall be resubmitted by the PHA or RMC within 30 calendar days of its receipt of the State/Area Office recommendations.

(g) If a PHA or RMC fails to submit an acceptable Improvement Plan, or to correct deficiencies within the time specified in an Improvement Plan or such extensions as may be granted by HUD, the State/Area Office will notify the PHA of its or the RMC's noncompliance. The PHA, or the RMC through the PHA, will provide HUD its reasons for lack of progress in submitting or carrying out the Improvement Plan within 30 calendar days of its receipt of the noncompliance notification. HUD will advise the PHA as to the acceptability of its reasons for lack of progress and, if unacceptable, will notify the PHA that it will be subject to sanctions provided for in the ACC and HUD regulations.

§ 901.150 PHAs troubled with respect to the program under section 14 (mod-troubled PHAs).

(a) PHAs that achieve a total weighted score of less than 60% on indicator #2, modernization, may be designated as mod-troubled.

(b) PHAs designated as mod-troubled may be subject, under the Comprehensive Grant Program, to a reduction of formula allocation or other sanctions (24 CFR § 968, Subpart C) or under the Comprehensive Improvement Assistance Program to disapproval of new funding or other sanctions (24 CFR § 968, Subpart B).

§ 901.155 PHMAP public record.

The State/Area Office will maintain PHMAP files, including certifications, the records of exclusion and modification requests, appeals, and designations of status based on physical condition and neighborhood environment, as open records, available for public inspection for three years consistent with the Freedom of Information Act (5 U.S.C. 552) and in accordance with any procedures established by the State/Area Office to minimize disruption of normal office operations.

§ 901.200 Events or conditions that constitute substantial default.

(a) The Department may determine that events have occurred or that conditions exist that constitute a substantial default if a PHA is determined to be in violation of Federal statutes, including but not limited to, the 1937 Act, or in violation of regulations implementing such statutory requirements, whether or not such violations would constitute a substantial breach or default under provisions of the relevant ACC.

(b) The Department may determine that a PHA's failure to satisfy the terms of a Memorandum of Agreement entered into in accordance with § 901.135 of this part, or to make reasonable progress to meet time frames included in a Memorandum of Agreement, are events or conditions that constitute a substantial default.

(c) The Department shall determine that a PHA that has been designated as troubled and does not show significant improvement (10 percentage point increase) in its PHMAP score within one year after final notification of its PHMAP score are events or conditions that constitute a substantial default:

(1) A PHA shall be notified of such a determination in accordance with § 901.205(c).

(2) A PHA may waive, in writing, receipt of explicit notice from the Department as to a finding of substantial default, and voluntarily consent to a determination of substantial default. The PHA must concur on the existence of substantial default conditions which can be remedied by technical assistance, and the PHA shall provide the Department with written assurances that all deficiencies will be addressed by the PHA. The Department will then immediately proceed with interventions as provided in § 901.210.

(d) The Department may declare a substantial breach or default under the ACC, in accordance with its terms and conditions.

(e) The Department may determine that the events or conditions constituting a substantial default are limited to a portion of a PHA's public housing operations, designated either by program, by operational area, or by development(s).

§ 901.205 Notice and response.

(a) If information from an annual assessment, as described in § 901.100, a management review or audit, or any other credible source indicates that there may exist events or conditions constituting a substantial breach or default, the Department shall advise a PHA of such information. The Department is authorized to protect the confidentiality of the source(s) of such information in appropriate cases. Before taking further action, except in cases of apparent fraud or criminality, and/or in cases where emergency conditions exist posing an imminent threat to the life, health, or safety of residents, the Department shall afford the PHA a timely opportunity to initiate corrective action, including the remedies and procedures available to PHAs designated as ''troubled PHAs,'' or to demonstrate that the information is incorrect.

(b) In any situation determined to be an emergency, or in any case where the events or conditions precipitating the intervention are determined to be the result of criminal or fraudulent activity, the Assistant Secretary is authorized to intercede to protect the residents' and the Department's interests by causing the proposed interventions to be implemented without further appeals or delays.

(c) Upon a determination or finding that events have occurred or that conditions exist that constitute a substantial default, the Assistant Secretary shall provide written notification of such determination or finding to the affected PHA. Written notification shall be transmitted to the Executive Director, the Chairperson of the Board, and the appointing authority(s) of the Board, and shall include, but need not necessarily be limited to:

(1) Identification of the specific covenants, conditions, and/or agreements under which the PHA is determined to be in noncompliance;

(2) Identification of the specific events, occurrences, or conditions that constitute the determined noncompliance;

(3) Citation of the communications and opportunities to effect remedies afforded pursuant to paragraph (a) of this section;

(4) Notification to the PHA of a specific time period, to be not less than 10 calendar days, except in cases of apparent fraud or other criminal behavior, and/or under emergency conditions as described in paragraph (a) of this section, nor more than 30 calendar days, during which the PHA shall be required to demonstrate that the determination or finding is not substantively accurate; and

(5) Notification to the PHA that, absent a satisfactory response in accordance with paragraph (d) of this section, the Department will take control of the PHA, using any or all of the interventions specified in § 901.210, and determined to be appropriate to remedy the noncompliance, citing § 901.210, and any additional authority for such action.

(d) Upon receipt of the notification described in paragraph (c) of this section, the PHA must demonstrate, within the time period permitted in the notification, factual error in the Department's description of events, occurrences, or conditions, or show that the events, occurrences, or conditions do not constitute noncompliance with the statute, regulation, or covenants or conditions to which the PHA is cited in the notification.

§ 901.210 Interventions.

(a) Interventions under this part (including an assumption of operating responsibilities) may be limited to one or more of a PHA's specific operational areas (e.g., maintenance, modernization, occupancy, or financial management) or to a single development or a group of developments. Under this limited intervention procedure, the Department could select, or participate in the selection of, an AME to assume management responsibility for a specific development, a group of developments in a geographical area, or a specific operational area, while permitting the PHA to retain responsibility for all programs, operational areas, and developments not so designated.

(b) Upon determining that a substantial default exists under this part, the Department may initiate any interventions deemed necessary to maintain decent, safe, and sanitary dwellings for residents. Such intervention may include:

(1) Providing technical assistance for existing PHA management staff;

(2) Selecting or participating in the selection of an AME to provide technical assistance or other services up to and including contract management of all or any part of the public housing developments administered by a PHA;

(3) Assuming possession and operational responsibility for all or any part of the public housing administered by a PHA; and

(4) The provision of intervention and assistance necessary to remedy emergency conditions.

(c) HUD may take the actions described in this part sequentially or simultaneously in any combination.

§ 901.215 Contracting and funding.

(a) Upon a declaration of substantial default or breach, and subsequent assumption of possession and operational responsibility, the Department may enter into agreements, arrangements, and/or contracts for or on behalf of a PHA, or to act as the PHA, and to expend or authorize expenditure of PHA funds, irrespective of the source of such funds, to remedy the events or conditions constituting the substantial default.

(b) In entering into contracts or other agreements for or on behalf of a PHA, the Department shall comply with requirements for competitive procurement consistent with 24 CFR 85.36, except that, upon determination of public exigency or emergency that will not permit a delay, the Department can enter into contracts or agreements on a noncompetitive basis, consistent with the standards of 24 CFR 85.36(d)(4).

§ 901.220 Resident participation in competitive proposals to manage the housing of a PHA.

(a) When a competitive proposal to manage the housing of a PHA in substantial default is solicited in a Request for Proposals (RFP) pursuant to section 6(j)(3)(A)(i) of the 37 Act, the RFP, in addition to publishing the selection criteria, will:

(1) Include a requirement for residents to notify the Department if they want to be involved in the selection process; and

(2) Include a requirement for the PHA that is the subject of the RFP to post a notice and a copy of the RFP in a prominent location on the premises of each housing development that would be subject to the management chosen under the RFP, for the purposes of notifying affected residents that:

(i) Invites residents to participate in the selection process; and

(ii) Provides information, to be specified in the RFP, on how to notify the Department of their interest.

(b) Residents must notify the Department by the RFP's application due date of their interest in participating in the selection process. In order to participate, the total number of residents that notify the Department must equal at least 20 percent of the residents, or the notification of interest must be from an organization or organizations of residents whose membership must equal at least 20 percent of the PHA's residents.

(c) If the required percentage of residents notify the Department, a minimum of one resident may be invited to serve as an advisory member on the evaluation panel that will review the applications in accordance with applicable procurement procedures. Resident advisory members are subject to all applicable confidentiality and disclosure restrictions.

§ 901.225 Resident petitions for remedial action.

The total number of residents that petition the Department to take remedial action pursuant to sections 6(j)(3)(A)(i) through (iv) of the 1937 Act must equal at least 20 percent of the residents, or the petition must be from an organization or organizations of residents whose membership must equal at least 20 percent of the PHA's residents.

§ 901.230 Receivership.

(a) Upon a determination that a substantial default has occurred and without regard to the availability of alternate remedies, the Department may petition the court for the appointment of a receiver to conduct the affairs of the PHA in a manner consistent with statutory, regulatory, and contractual obligations of the PHA and in accordance with such additional terms and conditions that the court may provide. The court shall have authority to grant appropriate temporary or preliminary relief pending final disposition of any petition by HUD.

(b) The appointment of a receiver pursuant to this section may be terminated upon the petition to the court by the PHA, the receiver, or the Department, and upon a finding by the court that the circumstances or conditions that constituted substantial default by the PHA no longer exist and that the operations of the PHA will be conducted in accordance with applicable statutes and regulations, and contractual covenants and conditions to which the PHA and its public housing programs are subject.

§ 901.235 Technical assistance.

(a) The Department may provide technical assistance to a PHA that is in substantial default.

(b) The Department may provide technical assistance to a troubled or non-troubled PHA if the assistance will enable the PHA to achieve satisfactory performance on any PHMAP indicator. The Department may provide such assistance if a PHA demonstrates a commitment to undertake improvements appropriate with the given circumstances, and executes an Improvement Plan in accordance with § 901.145.

(c) The Department may provide technical assistance to a PHA if without abatement of prevailing or chronic conditions, the PHA can be projected to be designated as troubled by its next PHMAP assessment.

(d) The Department may provide technical assistance to a PHA that is in substantial default of the ACC.

(e) The Department may provide technical assistance to a PHA whose troubled designation has been removed and where such assistance is necessary to prevent the PHA from being designated as troubled within the next two years.

Dated: December 10, 1996.

Kevin Emanuel Marchman,

Acting Assistant Secretary for Public and Indian Housing.

[FR Doc. 96–32469 Filed 12–27–96; 8:45 am]

BILLING CODE 4210–33–P

federal register

Monday
December 30, 1996

Part IV

Department of Transportation

Research and Special Programs Administration

49 CFR Part 171 et al.

Prohibition of Oxygen Generators as Cargo in Passenger-Aircraft; Final Rule and Prohibition of Oxidizers Aboard Aircraft; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171 and 173

[Docket No. HM–224; Amdt. Nos. 171–146; and 173–254]

RIN 2137–AC89

Prohibition of Oxygen Generators as Cargo in Passenger- Aircraft

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: RSPA is prohibiting the transportation of oxygen generators as cargo on board passenger-carrying aircraft. This rule applies to both foreign and domestic passenger-carrying aircraft entering, leaving or operating in the United States, and to any person offering an oxygen generator for transportation on any passenger-carrying aircraft.

EFFECTIVE DATE: This final rule is effective December 31, 1996.

FOR FURTHER INFORMATION CONTACT: William E. Vincent, Director, Office of Policy and Program Support, (202) 366–4831, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW., Washington DC 20590–0001.

SUPPLEMENTARY INFORMATION:

I. Background

On May 24, 1996, RSPA published in the Federal Register an interim final rule temporarily prohibiting, until January 1, 1997, the transportation of chemical oxygen generators as cargo on passenger-carrying aircraft. 61 FR 26418. This prohibition applies to domestic and foreign air carriers operating passenger-carrying aircraft entering, leaving or operating in the United States, and to any person offering a chemical oxygen generator for transportation as cargo on any of these aircraft.

This interim final rule was issued under the authority delegated to RSPA by the Secretary of Transportation, in 49 CFR 1.53(b), to issue regulations implementing the Federal hazardous material transportation law, 49 U.S.C. 5101–5127. Enforcement of the Federal hazardous material transportation law and the Hazardous Materials Regulations (HMR, 49 CFR Parts 171–180) issued under that law is shared by RSPA and four modal administrations within the Department of Transportation: Federal Aviation Administration (FAA), Federal Highway Administration, Federal Railroad Administration, and United States Coast Guard. FAA has primary enforcement authority concerning transportation of hazardous materials by air. 49 CFR 1.47(k).

RSPA does not regulate, and the HMR do not apply to, components of the aircraft itself. Accordingly, the May 24, 1996 interim final rule does not apply to chemical oxygen generators that are installed in the cabins of many aircraft to provide oxygen in emergencies to passengers and crew members. The prohibition in the May 24, 1996 interim final rule also does not apply to compressed oxygen in cylinders.

The May 24, 1996 interim final rule included the following definition of an oxygen generator to which the prohibition applies: ''Oxygen generator (chemical) means a device containing chemicals that upon activation release oxygen as a product of chemical reaction.'' 49 CFR 171.8 (61 FR 26419). Exceptions to the prohibition are provided for a chemical oxygen generator that meets the specific safety requirements of 49 CFR 175.10(a)(7), for medical use of passengers in the passenger cabin, and for small oxygen generators for personal use that are transported as checked baggage in accordance with 49 CFR 175.10(a)(24). 49 CFR 173.21(k) (61 FR 26419). As discussed below, in a separate rulemaking proceeding in Docket No. HM–224A, RSPA is proposing elimination of the exception in 49 CFR 175.10(a)(24) for small personal oxygen generators.

II. NTSB Recommendations

The May 24, 1996 interim final rule responds in part to the following two recommendations of the National Transportation Safety Board (NTSB) that RSPA:

> In cooperation with the Federal Aviation Administration, permanently prohibit the transportation of chemical oxygen generators as cargo on board any passenger or cargo aircraft when the generators have passed expiration dates, and the chemical core has not been depleted. (A–96–29) (Class I, Urgent Action)
>
> In cooperation with the Federal Aviation Administration, prohibit the transportation of oxidizers and oxidizing materials (e.g., nitric acid) in cargo compartments that do not have fire or smoke detection systems. (A–96–30) (Class I, Urgent Action)

These recommendations were issued as part of NTSB's ongoing investigation of the May 11, 1996 accident involving the loss of ValuJet Airlines Flight 592. Preliminary evidence indicates that chemical oxygen generators were being carried in a cargo compartment on board Flight 592 and may have caused, or contributed to the severity of, the accident. NTSB and FAA are continuing to investigate this accident and issues concerning whether the chemical oxygen generators in the cargo compartment on board Flight 592 were offered for transportation, and were being transported, in accordance with the applicable requirements of the HMR. Nonetheless, RSPA issued the May 24, 1996 interim final rule to prevent any similar incidents involving chemical oxygen generators as cargo on passenger-carrying aircraft while RSPA could consider whether to make this prohibition permanent. In the separate rulemaking in Docket No. HM–224A, RSPA addresses the remaining parts of the NTSB recommendations by proposing to prohibit oxidizers from being transported aboard all passenger-carrying aircraft and in those inaccessible cargo compartments on cargo aircraft that lack fire or smoke detection and suppression systems (i.e., Class D compartments, *see* 14 CFR 25.857).

III. Comments and Other Matters Considered

RSPA received five comments on the interim final rule. As discussed below, RSPA is permanently prohibiting the transportation of oxygen generators (chemical) as cargo on passenger-carrying aircraft. This prohibition is consistent with the July 1996 amendment to the 1995–96 Edition of the International Civil Aviation Organization's Technical Instructions for the Safe Transport of Dangerous Goods by Air. (The HMR authorize the transportation of hazardous materials within the United States by aircraft in accordance with the ICAO Technical Instructions. 49 CFR 171.11.)

Two commenters recommended that the prohibition in the interim final rule be made permanent and extended to cargo aircraft. According to the Air Line Pilots Association (ALPA), similar crash scenarios ''can produce the same amount of destruction'' for both cargo and passenger-carrying aircraft. ALPA stated that oxygen generators pose a significant potential hazard to all aircraft and that the ''line of demarcation'' is not the number of persons on board an aircraft that might be lost, but whether the aircraft could withstand the potential hazard and be landed safety without loss of life or the aircraft.

A consultant who previously worked for FAA as a hazardous material inspector and coordinator expressed his concern that chemical oxygen generators should be forbidden for transport by any type of aircraft. He stated that it is difficult, if not impossible, for an air carrier to insure that these items are in safe condition for transportation. He believes that airlines could normally transport replacement generators by ground and keep a supply at strategic locations, to avoid the need to carry them as cargo on their own airplanes, but he indicated that a limited exemption might be appropriate to allow replacements to be transported to overseas or remote areas. A private citizen also expressed her concern about hazardous materials contained in passengers' baggage. She recommended a prohibition against transportation of any material having the remotest possibility of endangering those on board an aircraft.

The Air Transport Association (ATA) supported the interim final rule but recommended that RSPA not rule out the possibility of reauthorizing the air transportation of chemical oxygen generators at a future date. ATA expressed its understanding that the oxygen generators carried aboard ValuJet Flight 592 ''were unnecessarily and perhaps improperly offered for transportation by aircraft.'' It stated that, ''since chemical oxygen generators were first installed in aircraft in lieu of oxygen bottles, tens of thousands have been safely transported by airlines in compliance with regulations'' and also ''as part of the aircraft's installation.'' ATA urged RSPA and FAA to address the ''two possible failure modes'' for these devices, inadequate safety devices and high ambient temperatures, through regulations that would require protective devices (such as a locking pin and a protective cap) and research into packaging methodologies that would provide thermal protection. ATA recommended that these issues receive further analysis ''before RSPA totally forecloses the possibility of the resupply of chemical oxygen generators for installation in air carrier fleets via the combination air carriers' cargo system.'' ATA also indicated that air carriers had sought for many years, and would welcome, an increase in enforcement directed at offerors who fail to properly disclose shipments of hazardous materials.

A European supplier of aircraft oxygen equipment stated that it was necessary to allow chemical oxygen generators to be transported on passenger-carrying aircraft in order to repair planes on which the oxygen equipment had malfunctioned. This company indicated it is often requested to supply replacement equipment within four hours, because an aircraft is not permitted to take off before the defective equipment is replaced. This commenter stated that this happens ''monthly several times all over the world,'' and asked if there was an exemption for an ''aircraft on ground'' situation. Otherwise, it stated, a forwarding agency would have to wait for a cargo-only aircraft, which operate less frequently.

RSPA recognizes that the oxygen generators involved in the ValuJet accident appear to have been shipped in violation of the HMR, and RSPA continues to believe that these generators may be safely transported in compliance with the HMR, including the conditions of the approvals under which the generators are offered for transportation by their original manufacturers. However, these devices appear to be unique in that, if handled improperly, they can both generate sufficient heat to set adjacent materials on fire and also provide oxygen to intensify a fire. The potential for loss of life and damage to property justify this prohibition and the consequence that any generators needed as replacement parts must be transported by ground or by cargo-only aircraft.

At the present time, RSPA is continuing this prohibition as limited to passenger-carrying aircraft. RSPA believes that any decision to prohibit chemical oxygen generators from cargo aircraft should only follow public notice and an opportunity for further comment. A prohibition against transporting any oxidizers in Class D compartments of cargo aircraft, as proposed under docket HM–224A, would apply to chemical oxygen generators. In that proceeding, among others, RSPA will continue to evaluate the hazards posed by chemical oxygen generators to determine what additional requirements, if any, are needed to insure their safe transportation.

ALPA also recommended removing the exceptions provided in 49 CFR 175.10(a) (7) and (24). The first subparagraph allows the transportation of an oxygen generator provided by the air carrier for medical use of a passenger in the passenger cabin. The exception solely applies to the transportation of those oxygen generators that are for use by on-board passengers and does not provide for the transportation of medical oxygen generators for the purposes of staging or positioning. ALPA believes that the availability of gaseous oxygen makes this part of the exception unnecessary. RSPA is not eliminating this part of subparagraph 175.10(a)(7) at this time because there is insufficient information on the potential effect on airline passengers with breathing difficulties, and the public interest would require public notice and comment before making this type of change to the HMR. RSPA may consider removing oxygen generators from subparagraph (a)(7) in a future rulemaking.

The exception in 49 CFR 175.10(a)(24) allows a small oxygen generator intended for personal use to be transported as a passenger's checked baggage under certain circumstances, including the approval of the air carrier. ALPA believes that passengers are unaware of this requirement, and therefore fail to notify the carrier, because of a lack of public awareness programs and procedures for informing passengers that they must contact the carrier before checking baggage containing an oxygen generator. ALPA also stated that there is no practical means of assuring that the person owning this type of oxygen generator has been educated in how to inspect and maintain the generator as specified in the HMR, and there is no way for the air carrier to examine the generator to verify compliance with the conditions in subsection 175.10(a)(24). ALPA pointed out that the United Kingdom's Civil Aviation Authority has prohibited the transportation of these personal oxygen generators on passenger-carrying aircraft.

ALPA's arguments in favor of eliminating the exception in subsection 175.10(a)(24) warrant further consideration. At the same time, RSPA believes that any such change should follow public notice and comment. Accordingly, RSPA is proposing to eliminate 49 CFR 175.10(a)(24) in the proposed rule in docket No. HM–224A. ALPA's recommendation and supporting comments will be considered in that proceeding.

IV. Effective Date

Because of the potential safety risk posed by continued transportation of oxygen generators as cargo in passenger-carrying aircraft, RSPA has determined that good cause exists for making this rule effective less than 30 days following its issuance.

V. Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and therefore is subject to review by the Office of Management and Budget. The rule is significant according to the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034).

The changes adopted in this rule should not result in any significant additional costs to persons subject to the HMR. About 150,000 of these oxygen generators are installed on about 1,000 U.S. passenger-carrying aircraft. Because of their typical effective life of about twelve years, it is not necessary to frequently transport these generators as uninstalled or not-in-use materials. In addition, alternative transportation is available for these generators because this rule does not prohibit or inhibit their transportation by highway, rail, water or cargo aircraft. Because of the minimal economic impact of this rule, a full regulatory evaluation is not warranted.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 12612 (''Federalism'') and does not have sufficient Federalism impacts to warrant the preparation of a federalism assessment.

Regulatory Flexibility Act

I certify that this final rule will not have a significant economic impact on a substantial number of small entities. There are limited adverse economic impacts on small businesses or other organizations because this rule imposes a limited prohibition on certain persons subject to the HMR.

Paperwork Reduction Act

There are no information collection requirements in this final rule.

Regulation Identifier Number

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

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

In consideration of the foregoing, the interim rule amending 49 CFR parts 171 and 173 which was published at 61 FR 26418 on May 24, 1996, is adopted as a final rule with the following change:

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

1. The authority citation for Part 173 is revised to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

2. In § 173.21, paragraph (k) is revised to read as follows:

§ 173.21 Forbidden materials and packages.

* * * * *

(k) Notwithstanding any other provision of this subchapter, including §§ 171.11 and 175.10(a)(2) of this subchapter, an oxygen generator (chemical) as cargo on a passenger-carrying aircraft. This prohibition does not apply to an oxygen generator for medical or personal use of a passenger that meets the requirements of § 175.10(a)(7) or § 175.10(a)(24) of this subchapter.

Issued in Washington, DC on December 23, 1996, under authority delegated in 49 CFR part 1.

Kelley S. Coyner,

Acting Administrator, Research and Special Programs Administration.

[FR Doc. 96–33036 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171, 172, 173 and 175

[Docket No. HM–224A; Notice No. 96–26]

RIN 2137–AC92

Prohibition of Oxidizers Aboard Aircraft

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: RSPA proposes to amend the Hazardous Material Regulations to prohibit the carriage of oxidizers, including compressed oxygen, in passenger carrying aircraft and in Class D compartments on cargo aircraft. This proposal specifically analyzes the prohibition of oxidizers in Class D cargo compartments. RSPA plans to issue a supplemental notice of proposed rulemaking further analyzing the prohibition on the carriage of oxidizers aboard passenger carrying aircraft in Class B and C cargo compartments. RSPA is also proposing to add a shipping description to the Hazardous Materials Table for chemical oxygen generators and to require approval of a chemical oxygen generator that is transported with its means of initiation attached. These requirements would apply to foreign and domestic aircraft entering, leaving, or operating within the United States. The purpose of these proposals is to enhance air transportation safety.

DATES: Comments must be received by February 28, 1997.

ADDRESSES: Address comments to the Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, room 8421, 400 Seventh Street, SW, Washington, DC 20590–0001. Comments should identify the docket number and be submitted in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed, stamped postcard. The Dockets Unit is located in the Department of Transportation headquarters building (Nassif Building) at the above address on the eighth floor. Public dockets may be reviewed there between the hours of 8:30 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John A. Gale, Office of Hazardous Materials Standards, (202) 366–8553, Research and Special Programs Administration, U.S. Department of Transportation, 400 Seventh Street SW, Washington DC 20590–0001; or Gary Davis, Office of Flight Standards, (202) 267–8166, Federal Aviation Administration, U.S. Department of Transportation, 800 Independence Avenue, SW, Washington DC 20591.

SUPPLEMENTARY INFORMATION:

I. Background

The National Transportation Safety Board (NTSB) is investigating the May 11, 1996, crash of a passenger-carrying aircraft which resulted in 110 fatalities. Preliminary evidence indicates that chemical oxygen generators were carried as cargo on board the aircraft and may have caused or contributed to the severity of the accident. On May 24, 1996, RSPA published an interim final rule (IFR) in the Federal Register (61 FR 26418) under Docket HM–224 which temporarily prohibits the offering for transportation and transportation of chemical oxygen generators as cargo aboard in passenger carrying aircraft. The period for submitting comments on the interim final rule in Docket HM–224 closed July 23, 1996. After completing evaluation of the comments received, and the risks posed by oxygen generators, RSPA will issue a final rule under Docket HM–224 to make the prohibition permanent, terminate or modify the prohibition, or otherwise amend provisions of the Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through 180) that apply to oxygen generators. The proposal in this NPRM for amendments to 49 CFR 171.11 and 172.101 are based on the existing (temporary) prohibition against transporting chemical oxygen generators as cargo aboard passenger carrying aircraft. These proposals may be modified in a final rule, as appropriate, to consider the further final rule to be issued under Docket HM–224.

On May 31, 1996, NTSB issued two recommendations to RSPA, as follows:

In cooperation with the Federal Aviation Administration, permanently prohibit the transportation of chemical oxygen generators as cargo on board any passenger or cargo aircraft when the generators have passed their expiration dates, and the chemical core has not been depleted. (Class I, Urgent Action) (A–96–29)

In cooperation with the Federal Aviation Administration, prohibit the transportation of oxidizers and oxidizing materials (e.g., nitric acid) in cargo compartments that do not have fire or smoke detection systems. (Class I, Urgent Action) (A–96–30)

The actions proposed in this notice are responsive, in part, to the NTSB recommendations and are based on RSPA's preliminary assessment of the hazards posed by oxidizers. In its recommendations to RSPA, the NTSB cited three previous incidents in which oxidizers caused fires aboard aircraft. In each of these incidents, there were apparent or known serious violations of the HMR. RSPA and FAA are not aware of any fire aboard an aircraft having been caused directly by transport of oxidizers in conformance with the HMR. However, RSPA and FAA agree with the NTSB that, in certain circumstances, oxidizers can contribute to the severity of a fire and may pose an unreasonable risk when transported in inaccessible cargo compartments which are not required to be equipped with fire or smoke detection systems or fire suppression (i.e., fire-extinguishing) systems.

II. Cargo Compartments Aboard Aircraft

Various design features incorporated into a cargo compartment's design are intended to control or extinguish any fire which might occur in that compartment. Under the Federal Aviation Regulations (FAR), cargo compartments are classified into five categories, Classes A, B, C, D, and E (see 14 CFR 25.857). In brief, a Class A compartment is one which is easily accessible in flight and in which the presence of a fire would be easily discovered by a crewmember. A Class B compartment is one in which any part of the compartment is accessible in flight to a crewmember with a hand held fire extinguisher and has an approved smoke detector or fire detector system. A Class C compartment is not accessible but has an approved smoke detector or fire detector system, an approved built-in fire-extinguishing system, means to control ventilation so that the extinguishing agent can control any fire that may start within the compartment, and means to exclude hazardous quantities of smoke, flames or extinguishing agent from any compartment occupied by crew or passengers.

A Class D compartment is not accessible but is one in which a fire occurring in it will be completely confined without endangering the safety of the airplane or the occupants, ventilation is controlled so that any fire likely to occur will not progress beyond safe limits, compartment volume does not exceed 1,000 cubic feet, and there are means to exclude hazardous quantities of smoke, flames or noxious gases from any compartment occupied by crew or passengers. A Class D compartment is not required to have a fire or smoke detection system or a fire suppression system. Its design is intended to confine and control the severity of a fire. It generally is not sealed sufficiently to extinguish a fire, but is designed to limit air flow enough to prevent a significant fire. For a compartment of 500 cubic feet (cu. ft.) or less, an air flow of 1500 cu. ft. per hour (three air exchanges per hour) is acceptable.

A Class E compartment is one used on cargo-only aircraft which has an approved smoke or fire detection system, means to shut off the ventilating airflow and means to exclude hazardous quantities of smoke, flames or noxious gases from the flight crew compartment.

III. Oxidizers Under the HMR

Under the HMR, an oxidizer (Division 5.1) is a material that may, generally by yielding oxygen, cause or enhance the combustion of other materials (see 49 CFR 173.127). Materials in Division 5.1 are subdivided into Packing Groups I, II, or III, a relative ranking corresponding to high, moderate or low risks posed by the material. Packing groups are assigned to specifically named materials in the § 172.101 Hazardous Materials Table (Table). For generic entries, such as ''Oxidizing solid, n.o.s.'' (''n.o.s.'' means ''not otherwise specified''), packing groups are assigned by analogy with existing entries in the Table for liquids, and by test results for solids. Certain gases (Class 2), most notably oxygen, are also oxidizers under the HMR and, even though they are not classed as such, they are required to be identified with the OXIDIZER or OXYGEN label.

IV. Oxidizers Aboard Aircraft

Liquid oxidizers in Packing Group I are very reactive and have the ability to initiate and substantially intensify fires. These materials are forbidden for transportation by passenger-carrying aircraft and are permitted only in restricted quantities aboard cargo-only aircraft. Most oxidizers will not initiate fires when spilled or released, but will intensify fires from other sources. Many of these materials are permitted for transport aboard passenger-carrying and cargo-only aircraft. When transported by aircraft, these materials are subject to per package quantity limits specified in the Table, and to aircraft quantity limits specified in § 175.75.

Oxidizers currently authorized for transportation by aircraft in Class D cargo compartments generally will not initiate a fire. The potential hazard posed by them is that, if a fire were to occur elsewhere in the compartment, in the absence of a fire suppression system, the fire may burn long enough to involve the oxidizer. The oxidizer would then provide an oxygen-enriched environment which could intensify the fire and override the limited safety features of the compartment.

In the absence of a fire caused by another source, oxidizers currently authorized for air transportation and offered in conformance with the HMR present very little risk to aircraft, crew or passengers. The threat of a serious risk arises from the mixing of oxidizers with baggage and other cargo which are potential sources of fire. Over the past twenty years, virtually all fires aboard aircraft in passenger baggage or cargo involved forbidden materials or serious violations of the HMR.

V. Prohibition of Oxidizers Aboard Aircraft in Class D Cargo Compartments

Knowledge of the May 11, 1996, crash has increased awareness of the hazards posed by hazardous materials in transportation, and increased the vigilance on the part of the public, airlines, commercial shippers and the Federal Government. While this should result in fewer instances involving transportation of forbidden materials aboard aircraft, fires initiated by forbidden materials in passenger baggage and cargo likely will not be totally eliminated. Further, because Class D cargo compartments are not required to be equipped with smoke or fire detection systems or fire-extinguishing systems, oxidizers could become involved in and substantially intensify a cargo compartment fire thereby contributing to the severity of an incident and, possibly, the loss of life and property. For these reasons, RSPA and FAA agree with the NTSB recommendation to prohibit the transportation of oxidizers in cargo compartments that do not have fire or smoke detection systems. Therefore, RSPA proposes to amend § 175.85 to prohibit the loading or transportation in a Class D cargo compartment of a package for which an OXIDIZER or OXYGEN label (see §§ 172.426 and 172.405) is required under Subpart E of Part 172. These restrictions would apply to both foreign and domestic aircraft entering, leaving or operating in the United States.

The proposed prohibition against transportation of oxidizers as cargo in Class D compartments (and the possible expansion of this proposed prohibition to Class B and C compartments, as discussed in Part VI, below) would not affect the exception in 49 CFR 175.10(a)(7) for operator-supplied oxygen for a passenger's use during flight. However, in this NPRM, RSPA is proposing an editorial change to this section to clarify that this exception applies only to oxygen provided for use by an onboard passenger and does not allow the air carrier to transport medical oxygen devices as cargo in order to move them to the locations where they will be needed, at a later time, for use by passengers.

At the present time, a passenger's own medical oxygen cylinder may be transported as cargo on passenger-carrying aircraft in compliance with the HMR, but the passenger's own cylinder may not be transported in the passenger cabin. 49 CFR 175.85(a). If RSPA ultimately prohibits the carriage of all oxidizers, including gaseous oxygen, in Class B, C, and D compartments on passenger-carrying aircraft, a passenger would not be able to ship its own medical oxygen on the same airplane. The passenger would have to arrange for another supply of oxygen at destination, rather than using a cylinder that the passenger owns.

FAA supports a complete removal of oxidizers from passenger-carrying aircraft, as proposed, but also believes that, if it is necessary to allow a passenger to transport its own oxygen cylinder for use at destination, it is far safer to stow the cylinder in the passenger cabin, under the control of and accessible to the airline crew, than in an inaccessible cargo compartment. FAA does not believe that it is prudent to allow for the carriage of compressed oxygen in an inaccessible Class D compartment. It believes that, if an oxygen cylinder is involved in a fire, the release of oxygen will intensify the fire. Because the Class D cargo compartment does not contain detection or suppression devices and because it is inaccessible to crew, a fire that might otherwise be survivable has an increased risk of becoming fatal. Thus, FAA believes that it would be safer to carry personal medical oxygen cylinders in the cabin because the crew could quickly remove the cylinders from any fire area in the cabin. This is in contrast to the complete inability of the crew to remove compressed oxygen from an inaccessible Class D cargo compartment.

RSPA expressly invites comments on this and any other alternatives (to completely prohibiting passenger-owned oxygen cylinders) that would accommodate passengers with breathing difficulties that need their own supply of oxygen at destination. These comments should indicate whether, and how many, passengers actually ship their own medical oxygen cylinders on the same airplane in order to have a supply of oxygen at their destination.

RSPA also invites air carriers to submit comments on the effect of the prohibition on current practices of using passenger-carrying aircraft to ''stage'' or position the oxygen cylinders that airlines provide to passengers with breathing difficulties for use during flight under 49 CFR 175.10(a)(7). The proposed prohibition would have the effect of requiring air carriers to ship their own cylinders by ground transportation or by cargo-only aircraft, rather than using their own passenger-carrying aircraft to move these devices to locations for passenger use.

FAA is working on a related action to require that Class D compartments be clearly marked so that cargo-handling personnel will be able to recognize them.

RSPA and FAA have tentatively determined that the costs of the requirements of this proposal would be $25 million over ten years ($17 million, present value). RSPA and FAA have also tentatively determined that the benefits of this proposal will outweigh the costs if it saves nine or more lives over the next ten years.

VI. Prohibition of Oxidizers As Cargo on All Passenger Carrying Aircraft

RSPA is proposing to extend the prohibition on oxidizers to Class B and C aircraft cargo compartments, effectively prohibiting the carriage of oxidizers on passenger carrying aircraft. RSPA plans on issuing an SNPRM further developing and analyzing this part of our proposed rule in the very near future. Although the proposal has not been fully developed, it is being proposed in this document for two reasons: (1) we would like to take advantage of the intervening time to seek public comment that can be used in development of the SNPRM; to the extent that commenters can very quickly provide us with their comments and supporting data, we will consider them in developing the SNPRM; and (2) we believe that, in preparing comments on the prohibition in ''D'' compartments, commenters should consider the possibility that any final rule could include a prohibition on all passenger carrying aircraft.

VII. Oxygen Generators: Shipping Description and Small Personal Oxygen Generators

A. Shipping Description

Currently, under the HMR, the most appropriate shipping description for an oxygen generator (chemical) containing sodium chlorate as the primary constituent is ''Oxidizing solid, n.o.s., 5.1, UN1479, II.'' RSPA does not believe that this name adequately describes an oxygen generator. In particular, the name does not communicate to an air carrier the fact that the material is not authorized on passenger carrying aircraft. Therefore, consistent with changes recently adopted into the International Civil Aviation Organizations Technical Instructions for the Transport of Dangerous Goods By Air, RSPA proposes to add the following description to the Hazardous Materials Table (Table) ''Oxygen generator, chemical, 5.1 UN3353, II.'' RSPA also is proposing to revise §§ 171.11, 171.12, and 171.12a to require the use of the new name in international transportation.

The second sentence of proposed § 171.11(d)(14) and the word ''Forbidden'' in Column 9A of the proposed Table entry for ''Oxygen generator, chemical'' are based on the existing (temporary) prohibition against transporting chemical oxygen generators aboard passenger-carrying aircraft. These proposals may be modified in a final rule, as appropriate, to consider the further final rule to be published under Docket HM–224. The UN identification number assigned to the proposed shipping name ''Oxygen generator, chemical'' in the Table may be revised if the UN Committee of Experts on the Transport Of Dangerous Goods adopts a different identification number in its Recommendations on the Transport of Dangerous Goods.

In addition, RSPA believes that the hazards posed by an oxygen generator, chemical that is shipped with its means of initiation attached require special approval. Therefore, consistent with the prohibitions and conditions specified in § 173.21, RSPA is proposing a separate requirement that oxygen generator, chemical that is shipped with its means of initiation attached must: (1) be classed and approved by the Associate Administrator for Hazardous Materials Safety; (2) incorporate at least two safety features that will prevent unintentional activation of the generator; and (3) when transported by air, be contained in a packaging prepared and originally offered for transportation by the approval holder. RSPA is also proposing to require that each shipper of an approved oxygen generator have a copy of the approval and that the approval number be marked on the outside of the package.

B. Small Personal Oxygen Genenerators

In the interim final rule RSPA published under Docket HM–224, RSPA prohibited the transportation of oxygen generators by passenger carrying aircraft. An exception was provided for personal oxygen generators that meet the conditions of § 175.10(a)(24). Section 175.10(a)(24) requires that the person carrying the oxygen generator receive the approval of the operator of the aircraft and that the personal oxygen generators conform to the following: (1) a six foot drop test without loss of contents or activation; (2) be equipped with at least two positive means of preventing unintentional activation; (3) be well insulated, and when actuated the temperature on any external surface does not exceed 212 degrees Fahrenheit; (4) be in the manufacturer's original packaging which must include a sealed outer wrapping or clear evidence that the generator has not been tampered with; and (5) be marked to indicate conformance with § 175.10(a)(24).

In its comments to the interim final rule, the Air Line Pilots Association (ALPA) requested that the exception for small personal oxygen generators in § 175.10(a)(24) be removed. Though § 175.10(a)(24) requires passengers to notify operators when there are oxygen generators in their baggage, ALPA stated that an aircraft operator has no way of knowing that these small chemical oxygen generators are being carried in a passenger's checked baggage because there are no public awareness programs or procedures for notifying passengers that passengers are to contact operators before they offer bags containing generators as checked baggage. ALPA also stated that there is no realistic way to know when or that the person who purchased or who intends to carry oxygen generators has been educated in the proper way to inspect and maintain them as specified in the HMR. ALPA went on to say that there is no way for an operator to examine the units to verify that a passenger is in compliance with these requirements. ALPA also pointed out that the Civil Aviation Authority of the United Kingdom has banned personal oxygen generators on passenger-carrying aircraft.

RSPA believes that adequate public notice and comment should be provided before the exception in § 175.10(a)(24) is removed. Therefore, RSPA is proposing, in this NPRM, to remove the exception provided in § 175.10(a)(24) for small personal oxygen generators.

VIII. Request for Additional Comments

RSPA requests any available information concerning the costs and benefits of this proposed action. RSPA is requesting information concerning the hazards posed by oxidizers in aircraft cargo compartments that have fire detection or suppression systems. Please provide detailed cost information to RSPA as to the manner by which you would incur costs as the result of the proposed ban of oxidizers including all germane monetary and qualitative cost information. RSPA also solicits comments from those foreign operators who would incur costs as the result of this proposal. Although our evaluation has not been able to determine any apparent cost impact on cargo aircraft carriers, RSPA recognizes there could, nonetheless, be a potential cost impact. As the result of this concern, RSPA solicits information from cargo aircraft operators who find they would incur costs from implementation of the proposed rule. Potentially impacted shippers are asked to provide detailed information on the manner by which they would incur costs.

There may also be adverse impacts on airlines if they routinely use passenger-carrying aircraft to transport, as cargo, oxygen cylinders which are normally installed on aircraft and must be periodically retested or refilled. RSPA has not assessed the costs associated with prohibiting the shipment of oxygen cylinders on passenger carrying aircraft. Therefore, RSPA requests any available information concerning the costs and benefits of banning oxygen cylinders, as cargo, aboard passenger carrying aircraft. Please provide detailed information as to the manner by which you would incur costs. In particular, RSPA is requesting information on the number of cylinders of oxygen which are transported each day on passenger carrying aircraft. What is the typical size of these containers? What other means of transportation are available? What are the cost differences to the airlines for using these other means of transportation?

By limiting the prohibition on oxidizers to packages required to be labeled OXIDIZER and OXYGEN, the prohibition would not apply to oxidizers classed as consumer commodities, ORM–D, under the provisions of § 173.152, or as consumer commodities, Class 9, as permitted under § 171.11. RSPA requests comments regarding whether it would be appropriate to extend this prohibition to consumer commodities which are oxidizers or whether quantity limits should be imposed on these materials in § 175.75.

IX. Future Rulemaking

RSPA, in coordination with FAA, has initiated a study to assess the risks associated with the transportation of hazardous materials in aircraft cargo compartments. As an initial step, RSPA held a meeting in Cambridge, Massachusetts on October 22, 1996, for purposes of identifying accident scenarios, probabilities of occurrence, and expected consequences. In attendance were representatives from the NTSB, FAA, Air Transport Association, Chemical Manufacturers Association, Air Line Pilots Association, International Air Line Passenger Association and several aircraft manufacturers. Based on the outcome of this study, RSPA may initiate a rulemaking to ban additional hazardous materials. RSPA requests comments regarding whether it would be appropriate to extend this prohibition to other materials which may pose hazards similar to oxidizers, such as organic peroxides. Comments are requested as to the costs and benefits of these possible actions.

X. Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is considered a significant regulatory action under section 3(f) of Executive Order 12866 and was reviewed by the Office of Management and Budget. The rule is considered significant under the regulatory policies and procedures of the Department of Transportation (44 FR 11034). A preliminary regulatory evaluation is available for review in the public docket.

Executive Order 12612

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''). The Federal hazardous materials transportation law (49 U.S.C. 5101–5127) contains an express preemption provision that preempts State, local, and Indian tribe requirements on certain covered subjects. Covered subjects are:

(i) the designation, description, and classification of hazardous material;

(ii) the packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(iii) the preparation, execution, and use of shipping documents pertaining to hazardous material and requirements respecting the number, content, and placement of such documents;

(iv) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material; or

(v) the design, manufacturing, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold as qualified for use in the transportation of hazardous material.

Because RSPA lacks discretion in this area, preparation of a federalism assessment is not warranted. Title 49 U.S.C. 5125(b)(2) provides that DOT must determine and publish in the Federal Register the effective date of Federal preemption. That effective date may not be earlier than the 90th day following the date of issuance of the final rule and not later than two years after the date of issuance. This proposed rule would require oxidizers to be transported in certain types of cargo compartments aboard aircraft. RSPA solicits comments on whether the proposed rule would have any effect on State, local or Indian tribe requirements and, if so, the most appropriate effective date of Federal preemption.

Regulatory Flexibility Act

I certify that this proposed rule will not have a significant economic impact on a substantial number of small entities. This proposed rule applies to air carriers, most of whom are not small entities.

Paperwork Reduction Act

This proposed rule does not propose any new information collection requirements.

Regulation Identifier Number (RIN)

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

List of Subjects

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 172

Hazardous materials transportation, Hazardous waste, Labeling, Marking, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Radioactive materials, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR Parts 171, 172, 173 and 175 would be amended as follows:

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

1. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

2. In § 171.11, paragraph (d)(14) is added to read as follows:

§ 171.11 Use of ICAO Technical Instructions.

* * * * *

(d) * * *

(14) An oxygen generator (chemical) must be classed, approved, and described in accordance with the requirements of this subchapter. Except as provided in § 175.10(a)(7) of this subchapter, oxygen generators (chemical) may not be transported on passenger carrying aircraft (see § 173.21 of this subchapter).

3. In § 171.12, paragraph (b)(17) is added to read as follows:

§ 171.12 Import and export shipments.

* * * * *

(b) * * *

(17) An oxygen generator (chemical) must be classed, approved, and described in accordance with the requirements of this subchapter.

* * * * *

4. In § 171.12a, paragraph (b)(16) is added to read as follows:

§ 171.12a Canadian shipments and packagings.

* * * * *

(b) * * *

(16) An oxygen generator (chemical) must be classed, approved, and described in accordance with the requirements of this subchapter.

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS

5. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

6. In the § 172.101 Hazardous Materials Table, the following entry is added in appropriate alphabetical order:

§ 172.101 Purpose and use of hazardous materials table.

* * * * *

SECTION 172.101.—HAZARDOUS MATERIALS TABLE

Symbols (1)	Hazardous materials descriptions and proper shipping names (2)	Hazard class or division (3)	Identification numbers (4)	PG (5)	Label Codes (6)	Special provisions (7)	(8) Packaging authorizations (§ 173.***)			(9) Quantity limitations		(10) Vessel stowage requirements	
							Exceptions (8A)	Nonbulk (8B)	Bulk (8C)	Passenger aircraft/rail (9A)	Cargo aircraft only (9B)	Location (10A)	Other (10B)
	*		*	*		*	*		*	*			
....	Oxygen generator, chemical	I5.1	UN3353	I	5.1	57	None	211	None	Forbidden	15 kg	D	56, 58, 69, 106
....	....	....	....	II	5.1	57	None	212	None	Forbidden	25 kg	D	56, 58, 69, 106
	*		*	*		*	*		*	*			

7. In 172.102, in paragraph (c)(1), Special Provision 57 is added to read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

57 An oxygen generator, chemical that is shipped with its means of initiation attached must: (1) be classed and approved by the Associate Administrator for Hazardous Materials Safety; (2) incorporate at least two safety features that will prevent unintentional activation of the generator; and (3) when transported by cargo-only aircraft, be contained in a packaging prepared and originally offered for transportation by the approval holder. Each offerer of an approved oxygen generator must have a copy of the approval, and the approval number must be marked on the outside of the package.

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

8. The authority citation for Part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5127, 44701; 49 CFR 1.45, 1.53.

§ 173.21 [Amended]

9. In § 173.21, in paragraph (k), the words ‘‘or § 175.10(a)(24)’’ are removed.

PART 175—CARRIAGE BY AIRCRAFT

10. The authority citation for Part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

§ 175.10 [Amended]

11. In § 175.10, in paragraph (a)(7), the wording ‘‘a passenger’’ is revised to read ‘‘an onboard passenger’’ and paragraph (a)(24) is removed and reserved.

12. In § 175.85, paragraph (d) is added to read as follows:

§ 175.85 Cargo location.

* * * * *

(d) No person may load or transport in a Class D cargo compartment, as defined in 14 CFR 25.857(c), a package containing a hazardous material for which an OXIDIZER or OXYGEN label is required under Subpart E of Part 172 of this subchapter (see § 172.426 or § 172.405 of this subchapter, respectively).

* * * * *

Issued in Washington, DC on December 20, 1996, under the authority delegated in 49 CFR part 106.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 96–33035 Filed 12–27–96; 8:45 am]

BILLING CODE 4910–60–P

federal register

Monday
December 30, 1996

Part V

Environmental Protection Agency

40 CFR Part 228

Ocean Dumping; Amendment of Site Designation; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

Ocean Dumping; Amendment of Site Designation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) amends the site designation for the San Francisco Deep Ocean Disposal Site (SF-DODS), an existing deep ocean dredged material disposal site located off San Francisco, California, by establishing a new temporary disposal volume limit of 4.8 million cubic yards per year, and by extending the time period during which the disposal site would be managed under the temporary disposal volume limit by two years (through December 31, 1998). This amendment is necessary in order to allow the SF-DODS to remain an option for disposal of dredged material from authorized projects, while documentation addressing comprehensive long term dredged material management for the region is being completed. The amendment is intended to provide the region with continued access to an environmentally appropriate dredged material disposal alternative. It is emphasized that this action does not constitute or imply EPA Region 9's or the Corps San Francisco District's approval of actual ocean disposal of dredged materials. Before a permit allowing such ocean disposal may be issued, alternatives to ocean disposal must be considered and a need for the disposal established under the Marine, Protection, Research, and Sanctuaries Act (MPRSA). EPA Region 9 or the Corps San Francisco District will deny permits when either agency determines that feasible environmentally preferable alternatives are available, including beneficial use.

Under today's final rule, the SF–DODS will remain designated as an available alternative for the disposal of suitable dredged material removed from the San Francisco Bay region and other nearby harbors or dredging sites for two years (through December 31, 1998). However, EPA is not setting a permanent annual disposal volume limit at this time, as originally envisioned in the August 11, 1994 site designation Final Rule. Instead, EPA is extending the existing interim management of the site at a new and reduced temporary disposal volume limit of 4.8 million cubic yards per year. A decision on a permanent disposal volume limit will be made by the end of this extension period, based on the comprehensive dredged material management planning process or based on a separate alternatives-based EPA evaluation of the need for ocean disposal. All other aspects of the August 11, 1994 SF-DODS designation Final Rule, including the provisions of the Site Management and Monitoring Plan (SMMP) will remain in full effect.

EFFECTIVE DATE: This final regulation becomes effective on December 30, 1996.

ADDRESSES: Send questions or comments to: Mr. Allan Ota, Ocean Disposal Coordinator, U.S. Environmental Protection Agency, (EPA) (WTR-2), 75 Hawthorne Street, San Francisco, California 94105, telephone (415) 744-1980.

FOR FURTHER INFORMATION CONTACT: Mr. Allan Ota, Ocean Disposal Coordinator, U.S. Environmental Protection Agency, Region 9 (WTR-2), 75 Hawthorne Street, San Francisco, California 94105, telephone (415) 744-1980.

SUPPLEMENTARY INFORMATION: In addition to the proposed rule (61 FR 54112), the primary supporting documents for this designation amendment are the *Final Environmental Impact Statement (EIS) for Designation of a Deep Water Ocean Dredged Material Disposal Site off San Francisco, California* (August 1993), the *Long-Term Management Strategy (LTMS) for the Placement of Dredged Material in the San Francisco Bay Region, Draft Policy Environmental Impact Statement/Programmatic Impact Report* (April, 1996), and the SF-DODS designation Final Rule [40 CFR 228.12(b)(70), 59 FR 41243 (August 11, 1994), subsequently republished as 40 CFR 228.15(l)(3), 59 FR 61128 (November 29, 1994), all of which are available for public inspection at the following locations:

1. EPA Region 9, Library, 75 Hawthorne Street, 13th Floor, San Francisco, California.
2. ABAG/MTC Library, 101 8th Street, Oakland, California.
3. Alameda County Library, 3121 Diablo Avenue, Hayward,California.
4. Bancroft Library, University of California, Berkeley, California.
5. Berkeley Public Library, 2090 Kittredge Street, Berkeley,California.
6. Daly City Public Library, 40 Wembley Drive, Daly City,California.
7. Environmental Information Center, San Jose State University,125 South 7th Street, San Jose, California.
8. Half Moon Bay Library, 620 Correas Street, Half Moon Bay,California.
9. Marin County Library, Civic Center, 3501 Civic Center Drive,San Rafael, California.
10. North Bay Cooperative Library, 725 Third Street, Santa Rosa,California.
11. Oakland Public Library, 125 14th Street, Oakland, California.
12. Richmond Public Library, 325 Civic Center Plaza, Richmond,California.
13. San Francisco Public Library, Civic Center, Larkin & McAllister, San Francisco, California.
14. San Francisco State University Library, 1630 Holloway Avenue,San Francisco, California.
15. San Mateo County Library, 25 Tower Road, San Mateo,California.
16. Santa Clara County Free Library, 1095 N. Seventh Street, San Jose, California.
17. Santa Cruz Public Library, 224 Church Street, Santa Cruz,California.
18. Sausalito Public Library, 420 Litho Street, Sausalito,California.
19. Stanford University Library, Stanford, California.

A. Regulated Entities

Entities potentially regulated by this action are persons or entities seeking permits to dump material into ocean waters at the SF–DODS, under the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. 1401 et seq.. The rule would primarily be of relevance to parties in the San Francisco area seeking permits from the U.S. Army Corps of Engineers for the ocean dumping of dredged material at the SF–DODS as well as the U.S. Army Corps of Engineers itself. Potentially regulated categories and entities seeking to use the SF–DODS include:

Category	Examples of potentially regulated entities
Industry	Ports seeking dredged material ocean dumping permits for SF–DODS use. Marinas seeking dredged material ocean dumping permits for SF–DODS use. Shipyards seeking dredged material ocean dumping permits for SF–DODS use. Berth owners seeking dredged material ocean dumping permits for SF–DODS use.

Category	Examples of potentially regulated entities
State/local/ tribal governments.	Local governments owning ports or berths seeking dredged material ocean dumping permits for SF–DODS use.
Federal	US Army Corps of Engineers for its projects proposing to use the SF–DODS.
Government	Federal agencies seeking dredged material ocean dumping permits for SF–DODS use.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by the action. This table lists types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether your organization is potentially regulated by this action, you should carefully consider whether your organization is subject to the requirement to obtain an ocean dumping permit in accordance with the Purpose and Scope provisions of Section 220.1 of Title 40 of the Code of Federal Regulations, and you wish to use the SF–DODS. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION, CONTACT** section.

B. Background

Section 102(c) of the MPRSA of 1972, as amended, 33 U.S.C. Sections 1401 et seq., gives the Administrator of EPA authority to designate sites where ocean dumping may be permitted. By publication of a Final Rule in the Federal Register on August 11, 1994 (59 FR 41243), EPA Region 9 designated SF–DODS as an ocean dredged material disposal site under the MPRSA, and readers are referred to that rulemaking for further information on the site. In that Final Rule, EPA designated SF–DODS for continued use for a period of 50 years, with an interim capacity of six million cubic yards of dredged material per calendar year until December 31, 1996. It was assumed that by that date, a comprehensive evaluation of long term dredged material management needs for the overall San Francisco Bay region would have been conducted, which would have evaluated the potential for alternatives to ocean disposal, and which could therefore serve as a basis for establishing a permanent disposal volume limit for SF–DODS.

Since the August 11, 1994 site designation Final Rule, significant effort has in fact gone toward development of a comprehensive dredged material management approach for the region. In particular, the multi-agency draft Policy Environmental Impact Statement/ Programmatic Environmental Impact Report entitled *Long-Term Management Strategy (LTMS) for the Placement of Dredged Material in the San Francisco Bay Region* (LTMS draft EIS/R) was published on April 17, 1996. The LTMS draft EIS/R evaluates the overall dredged material management needs and disposal or reuse potential for the San Francisco Bay area over the next 50 years, including not only ocean disposal, but also in-Bay disposal (placement at designated sites within the San Francisco estuary that are managed under Section 404 of the Clean Water Act), and upland or wetland disposal or reuse. The policy alternatives evaluated in the LTMS draft EIS/R include varying levels of dredged material disposal or reuse in each of these three placement environments. The potential environmental and socioeconomic effects of each policy alternative are evaluated in the LTMS draft EIS/R. Selection of one of the alternative policy approaches set forth in the LTMS draft EIS/R could therefore serve as an appropriate basis for designating a permanent disposal volume limit for SF–DODS, as originally envisioned.

However, the LTMS Final EIS/R process is not yet complete. Public comments on the LTMS draft EIS/R were accepted through July 19, 1996, and over 60 substantive comment letters were received, many of which suggested that significant changes should be made before finalizing the EIS/R. Several comment letters expressed the view that the programmatic document was inadequate and that a revised draft EIS/ R should be prepared. Other comment letters recommended that a detailed Management Plan, outlining the specific actions that state and federal agencies would take to implement any of the alternatives in the draft EIS/R, should be prepared prior to finalizing the programmatic EIS/R. It thus is apparent that an LTMS final EIS/R and Record of Decision will not be available in time to serve as the basis for establishing a permanent disposal volume limit for the SF–DODS before the December 31, 1996 expiration of the interim period specified in the August 11, 1994 site designation Final Rule.

Because of this situation, and in order to provide for a maximum of public comment opportunities about the overall policy approach that should be selected for long-term dredged material management(including the role of ocean disposal), EPA published a Proposed Rule (61 FR 54112) on October 17, 1996 to extend the period during which the SF–DODS would be managed under a temporary disposal volume limit. In that proposed rule, options were presented to solicit public comment both on the appropriate length for a new temporary extension, and for an appropriate temporary disposal volume limit.

A range of approaches to determining an appropriate temporary disposal volume limit for SF-DODS was presented by EPA in the proposed rule. These included: (1) Revising the disposal volume limit based on an updated estimate of overall dredging and potential ocean disposal needs for the San Francisco area; (2) revising the disposal volume limit based on one of the alternatives presented in the LTMS draft EIS/R; (3) revising the disposal volume limit to accommodate only those specific projects currently approved for ocean disposal (plus an additional volume to accommodate a limited number of new projects in the near term); and (4) leaving unchanged the existing disposal volume limit of six million cubic yards per year. As discussed in the preamble to the proposal, based on the site designation EIS, original August 1994 site designation rulemaking, and subsequent site monitoring results, no significant adverse environmental impacts are expected in association with the original interim disposal volume limit of six million cubic yards per year. All of the proposed rule's options for a continued temporary disposal volume limit reflected either a decrease, or no change, in potential disposal activity at the SF-DODS.

Five options also were presented in the proposed rule regarding extension of the date for management of the site under the temporary capacity limit. These options included extension periods of six months, one year, 18 months, two years, and an indefinite period tied to completion of the LTMS final EIS/R. EPA specifically solicited public comments on this range of options for an extended temporary site management period, as well as comments addressing other interim site management periods or alternatives that involve no extension at all.

C. Description of Final Rule

After considering the comments received on the proposed rule and the current status of the LTMS EIS/R, today's final rule reduces the temporary volume capacity from 6 million cubic yards per year to 4.8 million cubic yards per year and extends site availability under that capacity for two years (through December 31, 1998). This is done in the final rule by amending 40 CFR 228.15(l)3) to reflect the new temporary volume limit and date.

Extending site use at this time under a temporary disposal volume limit will allow the LTMS EIS/R process to continue, without precluding final selection of any of the LTMS EIS/R's overall dredged material management alternatives. Other than establishing an interim disposal volume limit and setting a new timeframe for designating a permanent disposal volume limit, the provisions of the August 11, 1994 site designation Final Rule would be unchanged by today's amendments. Responses to the comments received on the proposal and its options are presented in Section D below.

D. Response to Comments on the Proposed Rule

A total of eleven letters and one telephone call commenting on the proposed rule were received. These included letters from two federal and two state agencies, two Bay area ports, one port association, two dredging/port industry associations, three environmental groups (signing one letter), and a natural resources law firm representing area fishermen's organizations. In addition, a ''no comment'' phone call was received from one federal agency. Finally, one letter incorporated by reference the commentor's earlier comments on the original (1994) site designation action, and on the LTMS draft Policy EIS/ Programmatic EIR.

Citing information similar to that provided in the proposed rule, all nine of the agency, port, and industry comment letters supported Volume Option 4: Retain existing six million cubic yard per year interim disposal volume limit for the SF-DODS. All but one of these commenters also supported either Extension Option 1: Two-year extension to interim site management, or the potentially longer time period under Extension Option 5: Unspecified period of interim site management (one agency comment letter did not specify a preferred time-frame). In contrast, the other commenters supported substantially lower disposal volume limits (a variation of Volume Option 3: Interim disposal volume limit based on specific projects currently approved for ocean disposal, that would allow no more than four million cubic yards of disposal per year), and a shorter extension period (Extension Option 4: Six-month extension to interim site management). EPA's response to these comments is presented in the following paragraphs.

Establish a Permanent Annual Disposal Volume Limit Now

Three of the comment letters recommended that EPA issue a final (permanent) annual ocean disposal volume limit now, rather than extend interim site management any longer. These commenters noted their agreement with the statement in the proposed rule that sufficient information now exists for EPA to establish a permanent limitation, based on publication of the LTMS draft Policy EIS/Programmatic EIR, public comments received pursuant to that draft EIS/EIR, and site monitoring conducted to date. One commenter supported a permanent disposal volume limit of one- to two-million cubic yards per year based on the LTMS draft EIS/ EIR alternatives; other commenters did not specify a preference for the size of a permanent disposal volume limit.

Response. EPA agrees that sufficient technical information exists on which to appropriately base a final (permanent) annual disposal volume limit for the SF-DODS. However, as discussed in the preamble to the proposed rule, EPA prefers to extend the existing, interim management of the disposal site while the consideration of permanent region-wide dredged material disposal alternatives continues via the LTMS process. It is unfortunate that the LTMS Policy EIS/Programmatic EIR was not finalized as originally envisioned before the end of the initial interim site management period. However, the purposes behind providing an interim site management period in the first place—i.e., to better consider long-term management options and to maximize public input opportunities—remain relevant today. In the event that the LTMS EIS/EIR process is still not completed by the end of the new extended interim site management period, EPA expects to resolve the issue of a final (permanent) disposal volume limit based on an independent evaluation of the information available at that time.

Interim Disposal Volume Limit of Six Million Cubic Yards Per Year is Excessive

Commenters criticized a disposal volume limit of six million cubic yards per year and argued that a maximum of four million cubic yards per year should be set. They raised several specific arguments, including: (1) The original designated volume limit of six million cubic yards per year was excessive and flawed; (2) the LTMS draft Policy EIS/ Programmatic EIR uses a revised (lower) estimate of 4.8 million cubic yards of sediment per year that on average may be suitable for ocean disposal, but even this estimate was conservative; (3) EPA has provided no evidence that there is any need for ocean disposal in excess of four million cubic yards per year (there is no demonstrated need to provide allowance for projects in addition to those anticipated at this time; (4) it is inappropriate to define ocean disposal needs based on the lack of currently available alternatives; and (5) reducing the disposal limit at this time would not prejudice the ongoing LTMS process, whereas not reducing it in light of the LTMS's own new dredging estimates would prejudice the process. Each of these comments is addressed in the following paragraphs.

(1) The original (six million cubic yard per year) disposal limit was excessive and flawed at the time of the original site designation in 1994. In addition, the modeling at that time, which indicated that six million cubic yards per year could be disposed without adverse environmental impact, is irrelevant, since the legal standard requires EPA to minimize ocean disposal.

Response. EPA's original site designation EIS and rulemaking were based on the most up-to-date information that was appropriate to use at the time. The primary document supporting the original site designation for the SF-DODS was the Environmental Impact Statement (EIS) for Designation of a Deep Water Ocean Dredged Material Disposal Site off San Francisco, California. The draft EIS was published by EPA in December, 1992, and the final EIS was published in August, 1993. A proposed rule for site designation was subsequently published in the Federal Register on March 18, 1994, and the site designation final rule was published on August 11, 1994. The site designation became effective on September 12, 1994.

During the two years between publication of the draft EIS and the final designation of the ocean disposal site, new estimates of long-term dredging were being developed under the LTMS process. They were not, however, finalized for use in the final site desigation process. A series of base closure decisions during this general timeframe necessitated re-evaluation of long-term dredging needs. A final report was prepared, based on dredging project information as current as 1993, but was not published until 1995. This final report, Analysis of San Francisco Regional Dredging Quantity Estimate, Dredging Project Profiles, and Placement Profiles, containing the new dredging estimates was published on September 28, 1995 (and incorporated as Appendix E in the LTMS draft Policy EIS/Programmatic EIR, dated April, 1996). Hence new, finalized estimates of long-term dredging needs were not completed, nor was there consensus on their use, at the time of the original site designation. EPA therefore evaluated (in part via computer modeling) the potential effects of six million cubic yards of disposal in one year as a reasonable worst-case scenario. Since this evaluation showed that significant adverse effects would not be expected at that level of disposal, lower disposal levels similarly would not be expected to cause significant effects. EPA believes that the modeling studies conducted for the original site designation therefore remain relevant to today's action to extend interim site use at 4.8 million cubic yards per year.

EPA has always recognized the need for caution in using any estimates of long-term, average dredging needs as the basis for site management decisions. Notwithstanding any overall disposal limit that may be set, project-by-project review must still occur and the need for ocean disposal must be determined in each case. EPA and the USACE will not approve any disposal that would be expected to cause significant adverse environmental effects individually or cumulatively. In this regard, too, the modeling studies showing that there should be no significant adverse environmental impacts from six million cubic yards per year of disposal at SF–DODS remain relevant. Today's new lower estimates could conceivably be superseded at some future date by higher estimates, if circumstances change substantially. If this were to occur, it would be appropriate to evaluate whether a higher level of ocean disposal could occur without causing significant adverse environmental effects. (The existing modeling results would not be adequate to establish whether disposal levels higher than six million cubic yards per year might be environmentally acceptable.) However, even if a higher disposal ''need'' were to exist in the future, higher levels of disposal would not be allowed if they would result in the Ocean Dumping Criteria being violated.

(2) The new long-term estimate of dredged material potentially suitable for ocean disposal which was used in the LTMS draft Policy EIS/Programatic EIR is 4.8 million cubic yards per year. Even that figure is conservative, because there is no evidence that more than four million cubic yards needs ocean disposal. Therefore an interim disposal limitation of no more than four million cubic yards per year should be established for the SF–DODS.

Response. EPA believes that the best and most appropriate current estimate of the long-term, average volume of dredged material that may be suitable for ocean disposal is 4.8 million cubic yards per year, as documented in the LTMS draft Policy EIS/Programmatic EIR. This volume represents a ''high-end'' estimate, taking into account projects and trends reasonably foreseeable at this time, and thus reflects a reasonable worst-case scenario. However, it is also an estimated average, and may not be sufficient in years of especially high dredging if alternative disposal sites are not available. For example, there are currently two large dredging projects authorized to use the SF–DODS and, if these are conducted simultaneously, four million cubic yards could in fact be disposed at the site in one year (1997). There is thus immediate ''evidence'' that at least four million cubic yards may occasionally need ocean disposal. However, a disposal limit set at four million cubic yards per year might not allow any other projects to use the SF–DODS in 1997, which could result in more disposal at existing sites within San Francisco Bay than would otherwise be necessary. In contrast, a disposal limit of 4.8 million cubic yards per year as represented by Volume Option 1 in the Proposed Rule (or the greater limits under Volume Options 3 and 4) would continue to allow consideration of ocean disposal as a potentially practicable alternative for new proposed projects.

(3) Four million cubic yards per year would allow currently authorized projects to proceed; there is no evidence of any need to provide for other than currently authorized projects at this time.

Response. As discussed in the response to the immediately preceding comment, a four million cubic yard per year disposal volume limit at the SF–DODS could in some circumstances (possibly as early as 1997) limit the range of practicable alternatives for new proposed projects. This in turn could result in more disposal at existing sites within San Francisco Bay than would otherwise be necessary. Of course, opportunities for beneficial reuse and upland disposal are also evaluated on a project-by-project basis. However, as documented in the LTMS draft Policy EIS/Programmatic EIR, beneficial reuse and upland disposal opportunities are generally very limited at the present time. The LTMS draft EIS/EIR therefore discussed the likelihood that the majority of dredged material generated in the near term would have to be managed at aquatic disposal sites (i.e., at the SF–DODS in combination with existing San Francisco Bay disposal sites), until additional beneficial reuse or upland disposal sites become available. It is EPA's determination that, in general and to the extent practicable, disposal of suitable dredged material at the SF–DODS is environmentally preferable to disposal at existing sites within San Francisco Bay. EPA therefore believes that restricting disposal at the SF–DODS to only currently approved projects during the extended interim use period may result in cumulative effects that could otherwise be avoided.

(4) It is inappropriate to define ocean disposal needs based on the lack of currently available alternatives.

Response. As discussed in the LTMS draft Policy EIS/Programmatic EIR, it is expected that in the near term management of dredged material from the San Francisco Bay area will require a greater emphasis on aquatic disposal sites than on beneficial reuse or upland disposal sites, due to lack of available opportunities for such reuse or upland diposal at this time. It is therefore appropriate to establish disposal volume limits that are sufficient to manage the reasonably foreseeable aquatic disposal needs, provided that no significant adverse environmental effects would occur at that level of disposal. (Modeling studies and subsequent site monitoring have in fact indicated that no significant adverse environmental effects are expected at the SF–DODS at disposal volumes even at the level of six million cubic yards per year.)

Over time, as the LTMS participants seek additional beneficial reuse or upland disposal sites, less overall reliance on aquatic disposal is anticipated. In the meantime, the primary alternative to ocean disposal is disposal at the existing designated sites within San Francisco Bay. As noted in the response to the immediately preceding comment, it is EPA's determination that, in general and to the extent practicable, disposal of suitable dredged material at the SF–DODS is environmentally preferable to disposal at existing sites within San Francisco Bay. Availability of in-Bay sites should therefore be limited to projects where a practicable alternatives analysis allows use of such sites. Thus, EPA's decision about a disposal volume limit for the SF–DODS is based not only on the current lack of beneficial reuse or upland disposal alternatives, but also on the current limited availability of alternative aquatic disposal sites within San Francisco Bay, and the relative risks, impacts, and management opportunities afforded at those sites compared to the SF–DODS. In addition, project-by-project review must still occur and the need for ocean disposal must be determined in each case. Notwithstanding any overall disposal limit that may be set, EPA and the USACE will not approve any disposal at SF–DODS that would be expected to cause significant adverse environmental effects individually or cumulatively.

(5) Reducing the disposal limit at this time would not prejudice the ongoing LTMS process, whereas not reducing it in light of the LTMS's own new dredging estimates could be viewed as negative.

Response. EPA agrees that the revised LTMS estimate of long-term, average dredging quantities for the San Francisco Bay area reflects substantial new information that was not fully available at the time of the original SF–DODS designation. EPA has therefore applied this new information under the same approach that was used in the original designation action, and has determined that an annual disposal volume limit of 4.8 million cubic yards is appropriate. Use of this information, which was developed as part of the LTMS process, should not prejudice final decisions made as a result of the LTMS process. Final decisions will continue to be based on the most current information developed in that process. Prejudice is more likely to occur if EPA does not apply the most up-to-date information developed in that process.

Interim Site Management Period Should Not Exceed Six Months

Comments supporting the Proposed Rule's Extension Option 4: Six-month extension to interim site management, were based on two main considerations. First, that a six-month extension would allow for a total of over one year since the LTMS draft Policy EIS/ Programmatic EIR was published (and approximately eight years since the LTMS process was initiated), which should be sufficient time to complete a final EIS/EIR. Second, that there is no need to tie the SF-DODS extension period decision to the timing of the Record of Decision following the LTMS final EIS/EIR. Each of these issues is addressed in the following responses.

(1) A six-month extension would allow for a total of over one year since the LTMS draft Policy EIS/ Programmatic EIR was published (and approximately eight years since the LTMS process was initiated). This should be sufficient time to produce a final EIS/EIR.

Response. Over 60 letters, comprising over 1,000 individual comments, were received on the LTMS draft Policy EIS/ Programmatic EIR. Many of these comments recommended that substantive revisions be made before the EIS/EIR is be finalized. In addition, unlike more typical ''project'' EIS/EIRs, responding to the comments received on the policy/program issues will require the collaboration and consensus of all the state and federal LTMS agencies. This process is more time-consuming than if the proposed action, and all the specific decisions needed to define and implement it, were to be within the authority of a single agency. Similarly, the experience of the LTMS agencies to date has been that evaluation of the policy/program issues in this process cannot be carried out through contractual support. Since this is a policy EIS/EIR, the majority of the analysis and written revisions must be done by agency staff. All available staff resources from each of the LTMS agencies are being assigned to finalizing the EIS/EIR (along with the related draft Management Plan). If the Policy EIS/ Programmatic EIR is finalized earlier than expected, a permanent disposal volume limit for the SF-DODS can be established earlier than the end of the two-year extension period.

(2) There is no need to tie the SF-DODS extension period to the timing of the Record of Decision following the LTMS final EIS/EIR. Response. EPA agrees that the overall process could be accelerated, without significantly affecting public input, by publishing the proposed rule for a permanent disposal volume limit at the same time as the LTMS final EIS/EIR is published. The comment periods for the two actions could thus occur simultaneously, and the permanent disposal volume limit could become effective at the same time that the Record of Decision is signed by the federal agencies, rather than weeks to months later.

The LTMS Agencies Should Apply More Resources to Accelerate Finalizing the LTMS EIS/EIR

Some commenters recommended that the LTMS agencies accelerate the overall LTMS EIS/EIR schedule, thus allowing for a shorter interim management period for the SF–DODS, by applying additional staff and other resources to the EIS/EIR. In particular, they noted that the LTMS agencies have moved forward with implementation of a pilot joint-agency Dredged Material Management Office (DMMO) for permit application processing, before the EIS/ EIR has been finalized and before other important documents (such as the Site Management and Monitoring Implementation Manual for the SF–DODS) have been prepared.

Response. With the exception of staff resources assigned to DMMO, all the available staff resources from each of the LTMS agencies are being assigned to finalizing the EIS/EIR (along with the related draft Management Plan). EPA recognizes that this leaves limited the resources available to produce other documents—such as the SMMP Implementation Manual—as quickly as would be desirable. Staff assigned to the DMMO are addressing current permit application information as it comes in. These applications and related reports would have to be evaluated by each of the member agencies, whether this is done individually or jointly under the auspices of the DMMO. The DMMO is expected to reduce the overall amount of time the agencies spend on directing and reviewing sediment evaluations for dredging projects, thus freeing resources that would otherwise not be available for the EIS/EIR effort. Thus, little or no benefit could be gained by delaying the establishment of the DMMO, or reducing staff allocated to it.

The LTMS Agencies Should Apply More Resources to Establishing Beneficial Reuse Alternatives

One commenter also recommended that the LTMS agencies apply more resources to identifying and implementing beneficial reuse or upland disposal alternatives. Such alternatives would presumably reduce the need for the two-year interim timeframe and/or the 4.8 million cubic yards per year interim disposal volume limit for the SF–DODS. In particular, the commenter noted that a new potential opportunity for large-scale reuse of dredged material in the Sacramento-San Joaquin River Delta has been suggested in another forum (the CalFed process), and that this new possibility should be pursued vigorously by the agencies.

Response. EPA agrees that a greater potential for beneficial reuse than projected by the LTMS draft EIS/EIR may exist, including the particular opportunity referred to by this commenter. Beneficial reuse has been identified as one of the issues that will be addressed for the final LTMS Policy EIS/Programmatic EIR. The LTMS agencies intend to explore ways to maximize the coordination among the programs that are looking into such opportunities, in order to maximize the beneficial reuse of Bay area dredged material to the extent practicable over time. Other beneficial reuse opportunities may be identified during the interim management period for the SF–DODS, as well. To the extent that such opportunities become available, EPA and the USACE will require that they are evaluated in the practicable alternatives analysis for projects seeking aquatic disposal during the interim management period for the SF–DODS.

Other Comments Incorporated by Reference

One letter incorporated by reference the commentor's earlier letters about the original (1994) SF–DODS designation action, and about the LTMS draft Policy EIS/Programmatic EIR.

Response. EPA responded to the comments received regarding the original SF–DODS designation as a part of the Response to Comments section of that final rule, published in the Federal Register on August 11, 1994. EPA intends to respond fully to the commenter's letter about the LTMS draft Policy EIS/Programmatic EIR as a part of the overall response to comments on that document now being prepared by the LTMS agencies. Today's extension of the interim site management period for the SF–DODS is more limited in scope and purpose than the actions under consideration in the LTMS process. Moreover, the purpose of today's extension is to allow for the programmatic LTMS EIS/EIR process to be completed, including responding to comments received. Today's action in no way prejudices the ability to respond to the commenter's letter on the LTMS EIS/EIR, and in no way precludes the selection of any alternative evaluated in that document. Therefore, it is appropriate that the comments in the referenced letter are not addressed as part of today's action, to the extent that they coincide with the comments addressed herein.

E. Compliance With Other Laws and Executive Orders

Consistency With the Coastal Zone Management Act

EPA prepared a Coastal Consistency Determination (CCD) document based on the evaluations presented in the August, 1993 site designation EIS. The CCD evaluated whether the proposed action—designation of ''Alternative Site 5'' (now SF–DODS) as described in the site designation EIS as an ocean disposal site for up to 50 years, and with an annual capacity of six million cubic yards of dredged material meeting ocean disposal criteria—would be consistent with the provisions of the Coastal Zone Management Act. The CCD was formally presented to the California Coastal Commission (Commission) at their public hearing on April 12, 1994. The Commission staff report recommended that the Commission concur with EPA's CCD, and the Commission voted unanimously to concur on the CCD without revision.

Since the approved CCD was based on 50 years of site use at up to six million cubic yards of dredged material per year, and since these parameters are not exceeded by this action, this final rule extending interim disposal site management does not require additional Commission review.

Endangered Species Act Consultation

During the development of the August, 1993 site designation EIS, EPA consulted with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) pursuant to provisions of the Endangered Species Act, regarding the potential for designation and use of any of the alternative ocean disposal sites under study to jeopardize the continued existence of any federally listed threatened or endangered species. This consultation process is fully documented in the August, 1993 site designation EIS. NMFS and FWS concluded that none of the three alternative disposal sites, including Alternative Site 5, if designated and used for disposal of dredged material meeting ocean disposal criteria as described in the EIS, would jeopardize the continued existence of any federally listed threatened or endangered species.

This consultation was based on site use at up to six million cubic yards of dredged material per year, for 50 years. Since these parameters are not exceeded by this action, and since conditions have not changed for any of the listed or candidate threatened or endangered species potentially affected by disposal site use, this final rule extending interim disposal site management does not require additional Endangered Species Act consultation.

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is ''significant,'' and therefore subject to 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, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This final rulemaking should have minimal impact on permittees. The final rule merely extends the period of time during which the existing SF–DODS may be used under existing interim management provisions. It thus has been determined that this final rule is not a ''significant regulatory action'' under the terms of Executive Order 12866, and is therefore not subject to OMB review.

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

The Regulatory Flexibility Act (RFA) provides that, whenever an agency promulgates a final rule under 5 U.S.C. 553, an agency must prepare a regulatory flexibility analysis (RFA) unless the head of the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities (5 U.S.C. §§ 604 & 605). EPA has determined that this final rule will not have a significant economic impact on small entities since the amended site designation will only have the effect of providing a continuing disposal option for dredged material. The final rule merely extends the current period of interim management of the SF–DODS. Consequently, EPA's action will not impose any additional economic burden on small entities such as small private dredging operations that seek authorization for the dumping of dredged materials. For this reason, the Regional Administrator certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, that the final rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501 et seq., is intended to minimize the reporting and record-keeping burden on the regulated community, as well as to minimize the cost of Federal information collection and dissemination. In general, the Act requires that information requests and record-keeping requirements affecting ten or more non-Federal respondents be approved by the Office of Management and Budget. Since this final rule does not establish or modify any information or record-keeping requirements, it is not subject to the requirements of the Paperwork Reduction Act.

The Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local, or tribal governments or sections 202 and 205 of the UMRA. As is explained elsewhere in this preamble, the final rule merely extends the period of time during which the existing SF–DODS may be managed by the Federal government under existing interim provisions. Accordingly, it imposes no new enforceable duty on any State, local or tribal governments or the private sector. Even if this final rule did contain a Federal mandate, it would not result in annual expenditures of $100 million or more for State, local, and tribal governments in the aggregate, or the private sector. Thus this final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

For the foregoing reasons, EPA also has determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Thus the requirements of Section 203 of UMRA do not apply to this rule.

Compliance With Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., generally requires that substantive rules be published 30 days prior to their effective date except:

''(1) A substantive rule which grants or recognizes an exemption or relieves a restriction; * * * or (3) as otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d).

EPA is issuing today's final rule as effective December 30, 1996, under the provisions of 5 U.S.C. 553(d). As is explained elsewhere in this preamble, today's final rule is intended to assure that the SF–DODS remains available for use as a disposal alternative for suitable dredged material. In the absence of today's rule, after December 31, 1996, Federal projects and permit applicants that need to use the ocean disposal alternative (including the Port of Oakland project already using the site) would not be able to use the SF–DODS unless the additional step of site selection under MPRSA § 103 was undertaken by the USACE. By extending the current deadline, and avoiding this result, today's final rule has the effect of removing a restriction and thus meets the exception specified in 5 U.S.C. 553(d). In addition, the Agency believes today's rule meets the ''good cause'' exception of 5 U.S.C. 553(d)(3). As previously noted, failure to extend the current deadline before it expires could adversely affect the Port of Oakland Harbor project, which is currently authorized to dispose of project dredged material at the SF–DODS, and which received such authorization after environmental assessment, demonstration of a need for ocean disposal, and opportunity for public comment. Issuing today's final rule as immediately effective would avoid potential disruption of this ongoing and already authorized project. At the same time, issuance of the final rule as immediately effective would *not* result in additional use of the site by other potential dumpers. Because issuance of an immediately-effective rule is necessary to avoid disruption of an already approved, ongoing, and environmentally acceptable use of the SF–DODS on which the public has already had the opportunity to comment, and an immediate effective date does not result in usage by any other dumpers, the Agency has determined that there is good cause within the meaning of 5 U.S.C. 553(d)(3) to issue this rule as effective December 30, 1996.

List of Subjects in 40 CFR Part 228

Environmental Protection, Water Pollution Control.

Dated: December 20, 1996

Alexis Strauss,

Acting Regional Administrator, EPA Region 9.

In consideration of the foregoing, Subchapter H of Chapter I of Title 40 is amended as set forth below.

PART 228—[AMENDED]

1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

§ 228.15 [Amended]

2. Section 228.15, paragraphs (l)(3)(vii) and (l)(3)(x) are amended by removing the words ''December 31, 1996'' each time they occur, and adding in their place, ''December 31, 1998''.

3. Section 228.15, paragraph (l)(3)(vii) is amended by removing the words ''6 million cubic yards'' and adding in their place, ''4.8 million cubic yards''.

[FR Doc. 96–32976 Filed 12–27–96; 8:45 am]
BILLING CODE 6560–50–P

federal register

Monday
December 30, 1996

Part VI

Environmental Protection Agency

40 CFR Part 61

National Emissions Standards for Radionuclide Emissions From Facilities Licensed by the Nuclear Regulatory Commission and Federal Facilities not Covered by Subpart H; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[FRL-5670-5]

RIN 2060–AE 39

National Emissions Standards for Radionuclide Emissions From Facilities Licensed by the Nuclear Regulatory Commission and Federal Facilities not Covered by Subpart H

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: EPA is rescinding 40 CFR part 61, subpart I (subpart I) as it applies to Nuclear Regulatory Commission (NRC) or NRC Agreement State licensed facilities other than commercial nuclear power reactors. Subpart I is a National Emission Standard for Hazardous Air Pollutants (NESHAPs) which was published on December 15, 1989 and which limits radionuclide emissions to the ambient air from NRC-licensed facilities. As required by section 112(d)(9) of the Clean Air Act as amended in 1990, EPA has determined that the NRC regulatory program for licensed facilities other than commercial nuclear power reactors protects public health with an ample margin of safety, the same level of protection that would be afforded by continued implementation of subpart I.

DATES: This rule is effective December 30, 1996. Under section 307(b)(1) of the Clean Air Act, judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit no later than February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Gale Bonanno, Center for Federal Guidance and Air Standards and Communications, Radiation Protection Division, 6602J, Office of Radiation and Indoor Air, Environmental Protection Agency, Washington, DC 20460 (202) 233-9219, or Eleanor Thornton, at the same address (202) 233-9773.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Entities affected by this action include facilities, other than commercial nuclear power generators, licensed by the Nuclear Regulatory Commission (NRC) or an NRC Agreement State. Subpart I continues to apply to federal facilities not owned or operated by the Department of Energy (DOE) (''non-DOE'' federal facilities) and not licensed by the NRC. Facilities owned or operated by the Department of Energy are regulated under 40 CFR part 61 subpart H. The Agency notes that radionuclide NESHAPs subparts other than subpart I continue to apply as stated in each regulation to the owners and operators of uranium mill tailings piles, e.g., 40 CFR part 61 subpart W. This action does not affect regulation of radionuclides under statutes other than the CAA, e.g. Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601).

Affected categories and entities include:

Category	Examples of facilities
NRC-Licensees	Uranium fuel cycle (those engaged in the conversion of uranium ore to produce electric power, e.g., uranium mills, fuel fabrication plants). Facilities licensed to use or possess nuclear materials such as hospitals, medical research facilities, radiopharmaceutical manufacturers, laboratories, etc.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of facilities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in § 1.100 of today's rule which amends part 61 of Title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular facility, consult the persons listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Docket

Docket A-92-50 (cross-referenced with Dockets A-79-11 & A-92-31) contains the rulemaking record. The docket is available for public inspection between the hours of 8 A.M. and 5:30 P.M., Monday through Friday, in room M1500 of Waterside Mall, 401 M Street, SW, Washington, DC 20460. A reasonable fee may be charged for copying. The fax number is 202-260-4400.

Table of Contents

I. Background

A. Regulatory History

On October 31, 1989, EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAPs) under Section 112 of the Clean Air Act to control radionuclide emissions to the ambient air from a number of different source categories. 54 FR 51654 (December 15, 1989). Subpart I of 40 CFR part 61 covers two groups of facilities: (1) Facilities licensed and regulated by the Nuclear Regulatory Commission (NRC) and individual Agreement States (''NRC licensed facilities''), and (2) federal facilities which are not licensed by the NRC and are not owned or operated by the Department of Energy (''non-DOE federal facilities''). The first group is diverse, and includes facilities which have received a license to use or possess nuclear materials such as hospitals, medical research facilities, radiopharmaceutical manufacturers, laboratories and industrial facilities, as well as facilities involved in the uranium fuel cycle (the conversion of uranium ore to electric power) such as uranium mills and fuel fabrication plants. EPA estimates there are approximately 22,000 such NRC and Agreement State licensed facilities in the United States (this figure includes those facilities using only sealed sources).

The present rulemaking concerns all NRC licensed facilities other than commercial nuclear power reactors, which are the subject of a separate rulemaking (60 FR 46206, Sept. 5, 1995). Non-DOE federal facilities not licensed by the NRC are not affected in any way by the present rulemaking. Subpart I limits radionuclide emissions from NRC licensed facilities to the ambient air to that amount which would cause any member of the public to receive in any year an effective dose equivalent (ede) no greater than 10 millirem (mrem), of which no more than 3 mrem ede may be from radioiodine. These limits were established pursuant to an EPA policy for section 112 pollutants first announced in the benzene NESHAP (54 FR 38044, September 14, 1989), utilizing the two-step process outlined in the vinyl chloride decision. *Natural Resources Defense Council* v. *EPA*, 824 F.2d 1146, (D.C. Cir. 1987)(*Vinyl Chloride*).

When subpart I was originally promulgated in December 1989, EPA simultaneously granted reconsideration of the subpart based on information received late in the rulemaking on the subject of duplicative regulation by NRC and EPA of NRC licensed facilities and on the potential negative effects of the standard on nuclear medicine. EPA established a comment period to receive further information on these subjects, and granted a 90-day stay of subpart I as permitted by Clean Air Act (CAA) section 307(d)(7)(B), 42 U.S.C. 7607 (d)(7)(B). That stay expired on March 15, 1990, and was subsequently extended on several occasions. (See 55 FR 10455, March 21, 1990; 55 FR 29205, July 18, 1990; and 55 FR 38057, September 17, 1990).

EPA later stayed subpart I for NRC and Agreement State licensees other than nuclear power reactors while EPA was collecting the additional information necessary to make a determination under section 112(d)(9) of the 1990 CAA Amendments. See 56 FR 18735 (April 24, 1991), and 40 CFR 61.109(a). However, on September 25, 1992, the U.S. Court of Appeals for the DC Circuit issued a decision that EPA had exceeded its authority by staying subpart I while the Agency was collecting information needed to make a determination under section 112(d)(9). *Natural Resources Defense Council* v. *Reilly*, 976 F.2d 36 (D.C. Cir. 1992)(*NRDC*). The stay for licensees other than nuclear power reactors expired before the NRDC decision could be implemented on November 15, 1992, and subpart I took effect for these licensees on November 16, 1992. EPA subsequently issued a notice confirming the effectiveness of subpart I for licensees other than nuclear power reactors. See 59 FR 4228 (January 28, 1994).

B. Clean Air Act Amendments of 1990

In 1990, Congress enacted legislation comprehensively amending the CAA, which included a section addressing the issue of regulatory duplication between EPA and NRC. CAA section 112(d)(9) provides that, ''[N]o standard for radionuclide emissions from any category or subcategory of facilities licensed by the Nuclear Regulatory Commission (or an Agreement State) is required to be promulgated under [section 112] if the Administrator determines, by rule, and after consultation with the Nuclear Regulatory Commission, that the regulatory program established by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act for such category or subcategory provides an ample margin of safety to protect the public health.'' This provision enables EPA to eliminate duplication of effort between EPA and NRC in instances where EPA can determine that the NRC program provides protection of public health equivalent to that required by the CAA.

C. Reconsideration of Subpart I

After the adoption of section 112(d)(9), EPA reviewed the information available to the Agency, including the information provided during the Agency's reconsideration of subpart I, to decide whether it could determine for particular categories of NRC licensees that the NRC regulatory program protects public health with an ample margin of safety. EPA's initial analysis focused on two general issues: (1) whether the NRC regulatory program in practice results in sufficiently low doses to protect the public health with an ample margin of safety; and (2) whether the NRC program is sufficiently comprehensive and thorough and administered in a manner which will continue to protect public health in the future.

After reviewing the available information for licensees other than nuclear power reactors, EPA concluded that it lacked sufficient information concerning actual air emissions from these facilities to make the substantive determination contemplated by section 112(d)(9). Accordingly, EPA undertook an extensive study in order to determine the doses resulting from radionuclide emissions at facilities other than nuclear power reactors. As discussed in detail in section II.A.1, EPA surveyed a randomly selected subset of all licensed facilities, as well as a group of ''targeted'' facilities chosen because of an expectation that they would have higher air emissions. See Draft Background Information Document, ''NESHAPs Rulemaking on Nuclear Regulatory Commission and Agreement State Licensees Other Than Nuclear Power Reactors'' EPA-430-R-92-011 (November 1992), Docket Entry A-92-50, II-B-1.

After evaluating the results of its study, reviewing the then current NRC regulatory program, and considering the likely effect of revisions of the NRC program which were pending at that time and of additional measures which NRC had agreed to adopt pursuant to a Memorandum of Understanding (MOU) with EPA (see section II.A.2), EPA proposed to rescind subpart I for NRC and Agreement State licensees other than nuclear power reactors on December 1, 1992. See 57 FR 56877 (December 1, 1992).

II. Rationale for Final Rule to Rescind 40 CFR Part 61, Subpart I for NRC and Agreement State Licensees

A. 1992 Proposal to Rescind Subpart I for Licensees Other Than Nuclear Power Reactors

The 1992 proposal to rescind subpart I for NRC licensees other than nuclear power reactors was based on EPA's extensive study of those licensees and on commitments made by NRC in an MOU with EPA. *See* 57 FR 56877 (December 1, 1992).

1. EPA Study of Air Emissions From NRC Licensed Facilities

In order to determine whether NRC licensees other than nuclear power reactors were in compliance with those emission limits deemed necessary by EPA to protect public health, EPA undertook a comprehensive study to determine the doses that resulted from emissions from these facilities. See Draft Background Information Document, ''NESHAPs Rulemaking on Nuclear Regulatory Commission and Agreement State Licensees Other Than Nuclear Power Reactors'' EPA-430-R-92-011 (November 1992), Docket Entry A-92-50, II-B-1. A major component of this study was a survey and analysis of a randomly selected subset of the approximately 6,000 NRC and Agreement State licensees using unsealed sources. These consist of hospitals, radiopharmaceutical manufacturers and distributors, and laboratories for which the doses and other emissions data were not well characterized. In order to gather the necessary information, EPA sent a letter under the authority of section 114 of the CAA to the selected facilities requiring them to submit specific information concerning their emissions and proximity to the exposed population. Doses were then determined by EPA using the COMPLY computer program which was specified in subpart I for determining compliance with the standard. EPA also investigated a group of ''targeted'' facilities selected for their potential to cause high doses.

EPA obtained Office of Management and Budget approval to send questionnaires to as many as 670 of the approximately 6,000 facilities, requesting release rates and the other necessary parameters. Since facilities handling only sealed sources do not present the potential for airborne emissions, they had been exempted from the NESHAP and were also excluded from analysis in the EPA study. Because EPA could not accurately determine in advance whether a given NRC or Agreement State licensee handled only sealed sources and would therefore be excluded from the analysis, the Agency over sampled in order to obtain the required number of responses.

A sample of at least 300 facilities was needed in order to be 95 percent confident that EPA could establish a dose level below which the doses caused by air emissions from 99 percent of the facilities lie. Over 600 letters were sent to a random subset of NRC or Agreement State licensees. Responses were submitted by all but three facilities and 367 of the responses were determined to be from facilities using unsealed sources.

The COMPLY computer program was used to estimate doses to the most exposed individuals located near the facilities. The National Oceanic and Atmospheric Administration's data base was used for meteorological data for the sites. Many facilities were contacted to obtain clarification or site-specific information. The dose to the nearest resident to each facility was calculated from the facility-specific information taken from the questionnaire and using meteorological data from the closest weather station.

A second component of the study was the targeted facilities, which fell into three sub-groups: (a) facilities determined to have potential for large emissions and which were not fully characterized in previous evaluations (examples included research reactors, rare earth producers, waste incinerators, low level waste facilities, and large university hospitals); (b) facilities with potential for large emissions which were more adequately characterized in previous assessments (these included fuel cycle facilities such as uranium mills, fuel fabrication plants, UF6 conversion plants); (c) atypical activities for which no formal evaluations had been made (these included activities such as depleted uranium weapons testing).

For facilities in sub-group (a), the data needed to characterize the emissions and doses were obtained from existing NRC docket information, supplemented as necessary with requests for missing data under authority of CAA section 114. The results of the previous assessments for facilities in sub-group (b) were summarized and updated to include more recent information. For the third sub-group, EPA reviewed the activity in question to ascertain the potential for significant airborne emissions, and evaluated the doses for these activities found to involve potentially significant emissions.

After evaluating both the randomly surveyed 367 facilities and the specifically targeted facilities using the COMPLY computer program, EPA determined that the highest estimated dose received by any member of the public from airborne emissions of radionuclides from any facility was 8.0 mrem/yr ede. Thus, none of the facilities evaluated appeared to cause a dose exceeding the levels established by the Administrator in the radionuclides NESHAPs. The median dose for the population is 0.00069 mrem/yr. *See* Draft Background Information Document, ''NESHAPs Rulemaking on Nuclear Regulatory Licensees Other Than Nuclear Power Reactors'' EPA 430–R–92–011 (November 1992), Docket Entry A–92–50, II–B–1 at 4–11. When the results of the survey were statistically extrapolated to the entire population of NRC or Agreement State licensees, EPA concluded that emissions from virtually all of the facilities were expected to be below the limits established by EPA. After evaluating the results of the study, EPA concluded that current emissions by NRC and Agreement State licensees other than nuclear power reactors result in doses less than the level found by EPA to provide an ample margin of safety to protect the public health.

2. Memorandum of Understanding (MOU) Between EPA and NRC

In an MOU executed on September 4, 1992, NRC committed to take several actions to implement ''As Low As Reasonably Achievable'' (ALARA) requirements for NRC licensees other than nuclear power reactors. This MOU was published on December 22, 1992, at 57 FR 60778.

Although the NRC regulatory program included mandatory dose limits that were higher than those established by subpart I, EPA's study demonstrated that the actual operation of the existing NRC program had resulted in lower doses to the public than those which would be allowed under subpart I. The steps established by the MOU reflected an expectation by EPA that new mandatory ALARA requirements would operate to constrain future increases in radionuclide emissions by NRC licensees which might otherwise be permissible under the NRC program.

Under the provisions of the MOU, NRC agreed to develop and issue a regulatory guide on the design and implementation of a radiation protection program to ensure that doses resulting from effluents from licensed facilities would remain ALARA. *See* section II.B.2 below. NRC agreed that the guide would describe the types of administrative programs and objectives which would be considered acceptable in satisfying the requirements of 10 CFR 20.1101(b), and establish a specific design goal of 10 mrem/yr ede to the maximally exposed individual for radionuclide air emissions from affected NRC and Agreement State licensees. *See* NRC Regulatory Guide 8.37, ''ALARA Levels for Effluents from Materials Facilities,'' July 1993, Docket Entry A–92–50, II–F–4.

B. Events Subsequent to the 1992 Proposal

1. Changes to NRC Regulatory Program After the 1992 Proposal

After EPA published its 1992 proposal to rescind subpart I, major revisions to NRC's regulations at 10 CFR Part 20 became effective. NRC's revised rule (effective January 1994) implements 1987 Presidential guidance on occupational radiation protection and the recommendations of scientific organizations to establish risk-based limits and a system of dose limitation in accordance with the guidance published by the International Commission on Radiation Protection (ICRP). In adopting the risk-based methodology, the NRC reduced the allowable dose limit for members of the public from 500 mrem/yr ede to 100 mrem/yr ede from all pathways, which is then subject to further reduction under the ALARA provisions. Of the 100 mrem/yr ede, NRC allows only 50 mrem/yr ede by the air pathway, according to their Derived

Air Concentration tables, which is then subject to further reduction under the ALARA provisions.

Another significant revision of Part 20 codified the ALARA principle, which previously was only general guidance for NRC licensees other than nuclear power reactors. All licensees must now conduct operations in a manner that keeps doses to both workers and members of the public ALARA. This is defined to mean:

making every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest.

10 CFR 20.1003. 56 FR 23360, 23392 (May 21, 1991).

2. EPA Concerns Regarding Basis for Required Statutory Finding Under Section 112(d)(9)

Based on the record compiled as part of its proposal to rescind subpart I for NRC licensees other than nuclear power reactors, EPA was able to conclude that the vast majority of NRC and Agreement State licensees were in compliance with the 10 mrem/yr standard established by subpart I. However, after reviewing the language of the final Regulatory Guide issued by NRC pursuant to the September 4, 1992 MOU, EPA concluded that there was no element in the NRC regulatory program which expressly required or assured that licensees other than nuclear power reactors would maintain air emissions of radionuclides below EPA's 10 mrem/yr standard. See NRC Regulatory Guide 8.37, ''ALARA Levels for Effluents from Materials Facilities,'' July 1993, Docket Entry A–92–50, II–F–4. Thus, it was not possible for the Agency to determine that radionuclide emissions to the ambient air would consistently and predictably remain below the EPA standard in the future if EPA were to proceed with rescission, or that NRC or the individual Agreement States would be in a position to require a particular licensee who did exceed 10 mrem/yr to reduce radionuclide emissions.

Another concern regarding the adequacy of the NRC program to support rescission of subpart I for licensees other than nuclear power reactors arose as part of an investigation by the General Accounting Office (GAO) of NRC's administration of its Agreement State program. Licenses for facilities other than nuclear power reactors are often administered by individual Agreement States rather than by NRC. In a report entitled ''Nuclear Regulation: Better Criteria and Data Would Help Ensure Safety of Nuclear Materials,'' the GAO found that ''NRC lacks criteria and data to evaluate the effectiveness of its two materials programs [agreement and non-agreement state],'' and that ''For agreement-state programs, NRC does not have specific criteria or procedures to determine when to suspend or revoke an inadequate or incompatible program.'' GAO/RCED–93–90 Nuclear Materials Regulation at 3 (April 1993). In subsequent Congressional testimony concerning the GAO findings, the NRC Commissioners acknowledged that NRC criteria and procedures should be improved, and stated that NRC was developing new criteria to assess the adequacy and compatibility of individual Agreement State programs, and new procedures which would govern suspension and termination of Agreement State programs.

As contemplated by CAA section 112(d)(9), EPA and NRC entered into consultations intended to resolve these concerns. The ALARA program, which requires NRC licensees to reduce emissions to the extent feasible below the mandatory ceiling in 10 CFR Part 20, was the principal focus of subsequent discussions between EPA and NRC. In these discussions, EPA and NRC discussed various NRC proposals for a rule which would ''constrain'' emissions from NRC licensees other than nuclear power reactors, either by establishing a rebuttable presumption that emissions causing a dose exceeding 10 mrem/yr are not ALARA, or by expressly finding that ALARA requires licensees to maintain emissions at or below the 10 mrem/yr level. During the course of these discussions, a new concern also emerged as to whether the NRC policies on Agreement States which were under development would enable NRC to require that a ''constraint level'' be a mandatory element of compatibility. See letter from Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, to NRC Chairman Ivan Selin, July 6, 1994, Docket Entry A–92–50, IV–C–4.

On July 22, 1994, NRC proposed a ''constraint level'' rule which would have required each licensee to develop an ALARA program to maintain or achieve emissions resulting in a dose at or below 10 mrem/yr or, in the alternative, to ''justify'' a conclusion that emissions resulting in a dose exceeding 10 mrem/yr are ALARA. See letter from NRC Chairman Ivan Selin to EPA Administrator Carol M. Browner, July 22, 1994, Docket Entry A–92–50, IV–D–74. That correspondence also noted that new procedures to assure the adequacy and compatibility of Agreement States were under development, and indicated that NRC would also propose to require Agreement States to adopt the proposed ''constraint level'' rule as a matter of compatibility.

After reviewing the ''constraint level'' rule proposed by NRC on July 22, 1994, EPA concluded that the proposed provision permitting licensees to ''justify'' emissions in excess of 10 mrem/yr left uncertainty as to whether NRC or an individual Agreement State might accept or countenance as ALARA emissions resulting in a dose exceeding 10 mrem/year. As a consequence, EPA was concerned that it would still not be able to determine that future radionuclide emissions from affected licensees would be consistently and predictably at levels resulting in a dose below 10 mrem/yr, or that NRC or an individual Agreement State would be able to compel a licensee to reduce emissions if the 10 mrem/yr level were exceeded. EPA then advised NRC that EPA did not consider it prudent to proceed with rescission of subpart I for NRC licensees other than nuclear power reactors based on a record which might not adequately support the legal determination required by section 112(d)(9). Docket Entry A–92–50, IV–C–4.

3. NRC Actions Responsive to EPA Concerns

On December 21, 1994, after further considering the concerns expressed by EPA, NRC proposed to EPA a ''constraint'' rule construing ALARA as requiring each licensee to limit air emissions to a level resulting in a dose no greater than 10 mrem/yr. *See* letter from NRC Chairman Ivan Selin to EPA Administrator Carol M. Browner, December 21, 1994, Docket Entry A–92–50, IV–D–26. Under this proposal, exceeding the NRC constraint level would not itself be a violation, but any licensee exceeding the 10 mrem/yr constraint would be required to report the exceedance and to take corrective measures to prevent a recurrence. On March 14, 1995, NRC confirmed that it intended to make the proposed constraint rule a matter of Division Level 2 compatibility, which requires each Agreement State to incorporate in its program provisions at least as stringent as those established by the NRC rule. See letter from Robert M. Bernero, Director of the NRC Office Of

Nuclear Material Safety and Safeguards, to Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, March 14, 1995, Docket Entry A–92–50, IV–D–27.

NRC has also taken steps which address concerns regarding the adequacy of criteria and procedures for the Agreement State program. NRC published a draft policy statement concerning adequacy and compatibility criteria, 59 FR 37269 (July 21, 1994), and a draft policy statement setting forth procedures which permit suspension or termination of individual Agreement State programs. 59 FR 40059 (August 5, 1994). In the March 14, 1995 letter, NRC assured EPA that the final policy statement on compatibility criteria would be consistent with the NRC proposal to make the NRC ‘‘constraint level’’ rule a matter of Division Level 2 compatibility.

After reviewing the proposed rule described in the December 21, 1994 letter and the additional assurances provided in the March 14, 1995 letter, EPA advised NRC that it had concluded that adoption by NRC of the proposals and policies set forth in these letters should be sufficient to resolve the Agency's stated concerns regarding its ability to make the finding required to support rescission under CAA Section 112(d)(9). See letter from EPA Administrator Carol M. Browner to NRC Chairman Ivan Selin, March 31, 1995, Docket Entry A–92–50, IV–C–5. In that correspondence, EPA also stated its intent to publish a notice requesting supplementary comment concerning the proposed rule to rescind subpart I for NRC licensees other than nuclear power reactors in conjunction with the publication by NRC of its proposed constraint rule.

4. EPA's Notice Reopening the Comment Period

EPA published a notice reopening the comment period for the rulemaking to rescind subpart I. 60 FR 50161, (September 28, 1995). The Notice reaffirmed EPA's proposal to rescind subpart I, described the expected proposed revisions to the NRC program which would support EPA's rescission, and invited additional comment on the sufficiency of the revisions to the NRC program to support the finding required by section 112(d)(9). The Agency extended the period for submitting comments in response to the Notice until February 22, 1996, to allow the public time to review NRC's proposed constraint rule prior to submitting comments to EPA. NRC published the proposed constraint rule on December 13, 1995. 60 FR 63984.

5. NRC Constraint Level for Air Emissions of Radionuclides and NRC Agreement State Policies and Procedures

On December 10, 1996, Commissioners adopted a final ‘‘constraint’’ rule modifying the NRC radiation protection program codified at 10 CFR part 20. 61 FR 65120. The final regulations adopted by NRC establish a constraint of 10 mrem/yr total effective dose equivalent (TEDE)[1] for dose to members of the public from air emissions of radionuclides from NRC licensed facilities other than commercial nuclear power reactors. 10 CFR section 20.1101(d). A dose constraint is defined as ‘‘a value above which specified licensee actions are required.’’ 10 CFR section 20.1003, as amended. Thus, the final rule codifies a numerical value, 10 mrem/yr TEDE, for NRC's application of its ALARA principles contained in 10 CFR part 20 for radioactive air emissions from NRC licensees other than commercial nuclear power reactors. In the event that the 10 mrem/yr constraint is exceeded, the exceedance must be reported to NRC by the licensee within 30 days and the licensee must also provide a description of the circumstances of the exceedance and describe the corrective steps that have been or will be taken to ensure that the exceedance will not reoccur. 10 CFR section 20.2203(b)(l)(iv); 61 FR at 65121. NRC regulations provide for licensees to propose corrective steps and NRC will approve such actions (e.g., installation of filters, installation of a new pump, etc.) if appropriate to effectuate a decrease in dose. 10 CFR section 20.1101(d); 61 FR at 65123. *See also Memorandum* to Docket A–92–50 from Gale Bonanno, Workgroup Chair, December 16, 1996, Docket Entry A–92–50, IV–B–1 (analyzing final ‘‘constraint’’ rule).

The final constraint rule has been assigned a Division Level 2 compatibility. 61 FR at 65126. Thus, the Agreement States must address the constraint rule in their regulations, but they may adopt more restrictive requirements than the constraint rule. The Commission plans to revise and finalize draft NRC Regulatory Guide 8.37 as Regulatory Guide 4.20 at the time of implementation of their rule. This Regulatory Guide will outline methods for demonstrating compliance with the constraint level and the elements of the report required to be submitted in the event the constraint level is exceeded. This Guide will also express the Commission's belief that based on EPA's study and NRC's ongoing licensing and inspection program, the constraint level for doses to members of the public from air emissions of radionuclides as codified at section 20.1101(d) is easily achievable by all materials licensees.

In addition, the Commission recently approved, in principle, final policy statements entitled ‘‘Statement of Principles and Policy for the Agreement State Program’’ and ‘‘Policy Statement on Adequacy and Compatibility of Agreement State Programs’’. 60 FR 39463 (August 2, 1995). These documents describe the principles of the Agreement State program including the roles and responsibilities of NRC and the States in administering the program, and outline a general framework for determining which NRC program elements and requirements should be implemented by the Agreement States.

NRC provided additional information to EPA regarding the Commission's authority to suspend or terminate Agreement State programs. *See* letter from Martin Malsch, NRC Deputy General Counsel to Ramona Trovato, Director of EPA's Office of Radiation and Indoor Air, November 19, 1996, Docket Entry A–92–50, IV–G–8. As discussed above, the Commissioners approved the final ‘‘constraint’’ rule as a matter of Division 2 compatibility, meaning that Agreement States ‘‘will have to include an essentially identical or more restrictive legally binding generic requirement in their regulatory program.’’ *Id*. The correspondence notes that in the event an Agreement State adopts a standard which is less stringent than the constraint rule, ‘‘NRC would be legally authorized to take a variety of actions with respect to the State program, including probation, suspension or termination of the program.’’ *Id*.

Moreover, periodic reviews of the Agreement State programs are conducted by NRC to ensure that those programs are compatible with NRC's regulatory program and adequate to protect the public health. *Id*. The review process and criteria for such reviews are contained in NRC's Integrated Materials Performance Evaluation Program (IMPEP) issued on September 12, 1995, a copy of which is contained in the docket for this rulemaking. As noted in the correspondence, procedures were provided to the Commissioners on April 25, 1996, which will be applied by NRC if circumstances warrant the future suspension or termination of Agreement State programs. *Id*. The correspondence

[1] NRC expresses dose in total effective dose equivalent (TEDE), while subpart I expresses dose in effective dose equivalent (EDE). These two terms are equivalent.

thus concludes that ''the IMPEP, together with designation of the constraint rule as category 2 for compatibility purposes, provide objective criteria to be used in assessing Agreement State regulation of air emissions and would provide a satisfactory legal basis for any NRC action required to address deficiencies in Agreement State programs including, if necessary, suspension or revocation of the Agreement State program.'' *Id. at 2*

III. Final Rule to Rescind 40 CFR Part 61, Subpart I for NRC and Agreement State Licensees

A. EPA Determination Under CAA Section 112(d)(9)

Section 112(d)(9) authorizes EPA to decline to regulate radionuclide emissions from NRC licensees under the CAA provided that EPA determines, by rule, and after consultation with NRC, that the regulatory scheme established by NRC protects the public health with an ample margin of safety. The legislative history of section 112(d)(9) provides clear guidance as to what is meant by ''an ample margin of safety to protect the public health'' and what process the Administrator should follow in making that determination in a rulemaking proceeding under section 112(d)(9). The Conference Report accompanying S.1630 points out that the ''ample margin of safety'' finding under section 112(d)(9) is the same ''ample margin of safety'' requirement that governed the development of standards promulgated under section 112 of the CAA prior to its amendment in 1990. The conferees also made clear that the process the Administrator is expected to follow in making any such determination under section 112(d)(9) is the process ''required under the decision of the U.S. Court of Appeals in *NRDC* v. *EPA,* 824 F.2d 1146 (D.C. Cir. 1987) (*Vinyl Chloride*).'' H. Rep. No. 101–952, 101st Cong., 2d Sess. 339 (1990), reprinted in 1 A Legislative History of the Clean Air Act Amendments of 1990, at 1789 (1993) (hereinafter ''Legislative History CAAA90'').

From the language of section 112(d)(9), it is apparent that where EPA has already specifically determined what level of emissions must be achieved to provide an ''ample margin of safety,'' that level is the benchmark by which EPA must evaluate the adequacy of the NRC program. EPA specifically found when it promulgated 40 CFR part 61, subpart I, that 10 mrem/yr would provide the requisite ''ample margin of safety.'' EPA conducted a two-step ''ample margin of safety'' analysis when it promulgated subpart I in 1989, and EPA hereby incorporates that analysis by reference as part of its present finding.

As EPA interprets section 112(d)(9), the Agency may rescind the subpart I NESHAP as it applies to NRC licensed facilities other than commercial nuclear power reactors if the Agency (1) consults with NRC, (2) engages in public notice and comment rulemaking, and (3) finds that the separate NRC regulatory program provides an equivalent level of public health protection (i.e., an ample margin of safety) as would be provided by implementation of subpart I. While a rulemaking to rescind a standard applicable to NRC licensees may commence prior to incorporation of all necessary elements in the NRC regulatory program, the elements of the NRC program must be deemed adequate by EPA to fully satisfy the statutory standard at the time EPA takes final action.

Section 112(d)(9) does not require exact equivalence between the EPA and NRC programs applicable to a particular category of licensees before EPA may decline to regulate radionuclide air emissions from that category. This construction of section 112(d)(9) was expressly affirmed by the Court of Appeals in its unpublished Memorandum opinion denying the petition for review of EPA's rescission of subpart I as applied to nuclear power reactors. Unpublished Opinion, *Sierra Club, et al.,* v. *Environmental Protection Agency,* No.95–1562 (D.C. Cir. October 22, 1996) at 4. Section 112(d)(9) requires that EPA conclude that implementation of the NRC program as a whole will achieve substantive protection of the public health equivalent to or better than that which would be achieved by enforcement of the EPA standard. Thus, if the NRC program as a whole will assure that air emissions from all affected licensees remain below the EPA standard, the NRC program may be deemed to provide an ample margin of safety, regardless of whether this results from enforcement by NRC of a single numerical standard.

Based on its study of NRC and Agreement State licensees, EPA has already determined that current air emissions from such licensees cause doses which are in compliance with the 10 mrem/yr standard in subpart I. However, as EPA construes section 112(d)(9), EPA must also evaluate the ability of the NRC and Agreement State program to assure that emissions remain below the level required to provide an ''ample margin of safety.'' Thus, in deciding whether EPA may decline to regulate a particular category or subcategory of NRC or Agreement State licensees presently regulated under subpart I, EPA construes section 112(d)(9) as requiring that EPA determine: (1) that emissions from NRC licensees (or Agreement State licensees when authority to regulate the licensees has been assumed by the State) in that category or subcategory will be consistently and predictably at or below a level resulting in a dose of 10 mrem/yr, and (2) that NRC (or the Agreement States) can and will require any individual licensee in that category or subcategory with emissions that cause a dose exceeding 10 mrem/yr to reduce the emissions sufficiently that the dose will not exceed 10 mrem/yr.

EPA has previously concluded that radionuclide emissions to the ambient air from NRC and Agreement State licensees other than nuclear power reactors are generally well below the level that would result in a dose exceeding 10 mrem/yr. EPA experience in administration of subpart I since it became effective confirms this conclusion. Out of the thousands of licensees subject to the standard, only 16 facilities reported radionuclide air emissions exceeding the EPA standard for calendar year 1993 and only one facility reported emissions exceeding the EPA standard for calendar year 1994. No facilities reported exceeding the subpart I 10 mrem/yr standard for calendar year 1995. See Memorandum to Docket A–92–50 from Byron Bunger, December 18, 1996, Docket Entry A–92–50, IV–B–2 (Appendix to final rulemaking describing EPA's experience implementing Subpart I). Most of the reported exceedances were resolved through EPA approval of appropriate site-specific adjustments to the input parameters for COMPLY, the computer code used for calculating doses. The one exceedance not resolved through adjustments to the input parameters for COMPLY was satisfactorily resolved by the facility.

EPA concludes that the final adoption by NRC of the NRC constraint rule and the satisfactory resolution by NRC of prior deficiencies in NRC Agreement State policies and procedures resolve all remaining concerns regarding the adequacy of the NRC program to provide an ''ample margin of safety'' and support the requisite determination for rescission under CAA section 112(d)(9). Promulgation of the NRC constraint rule assures that radionuclide emissions by the affected licensees will be consistently and predictably below a level which would result in a dose exceeding 10 mrem/yr, and that NRC can require an individual licensee who exceeds the 10 mrem/yr level to take corrective actions to reduce emissions. By making the NRC constraint rule a matter of Division Level 2 compatibility, NRC has assured EPA that those licensees regulated by individual Agreement States also will be subject to the 10 mrem/yr constraint level and will be required to report and correct any exceedances of that level. Finally, the adoption by NRC of policies establishing specific criteria for adequacy and compatibility, and procedures for suspension or termination of Agreement State programs resolves the Agency's concerns regarding the ability of NRC to act if it determines that an Agreement State program is inadequate or incompatible.

EPA is confident that NRC has the capability to enforce the provisions of the constraint rule through its inspection and enforcement programs. According to NRC, NRC's inspection program is based on conducting on-site inspections of each licensee's facility at frequencies determined partly by the size of the operation and the amount of radioactive materials the licensee is authorized to possess. Inspection frequencies appear to vary from a high of once per year for large licensees to once every five years for very small licensees. However, EPA understands that the majority of licensees authorized to possess any significant amounts of radioactive materials are inspected at frequencies ranging from one to three years. The Agency also notes that inspection frequencies may be adjusted by NRC as needed, and increased for licensees who have been subjected to certain NRC enforcement actions.

NRC's enforcement program is addressed in the NRC's Enforcement Policy, NUREG-1600, ''General Statement of Policy and Procedure for NRC Enforcement Actions,'' (60 FR 34381, June 30, 1995). All violations identified through inspections and investigations are subject to civil enforcement action and may also be subject to criminal prosecution. After an apparent violation is identified, the severity is evaluated in order to determine the appropriate enforcement sanction. Severity levels range from Level I for the most significant violations, to Level IV for those of more than minor concern. Minor violations are not subject to formal enforcement action. The NRC uses three primary enforcement sanctions: Notices of Violation, civil penalties, and orders. A Notice of Violation (NOV) sets forth one or more violations of a legally binding requirement and normally requires a response from the licensee describing the reasons for the violation, the corrective steps taken or planned, and the date when actions will be complete. A civil penalty is a monetary fine considered for Severity Level III violations and are normally assessed for Severity Level I and II violations and knowing and conscious violations of the reporting requirements of Section 206 of the Energy Reorganization Act. In addition to NOVs and civil penalties, orders may be used to modify, suspend, or revoke licenses. Orders may require additional corrective actions, such as removing specified individuals from licensed activities or requiring additional controls or outside audits. Persons adversely affected by orders that modify, suspend, or revoke a license, or that take other action may request a hearing.

In addition to the inspection and enforcement programs, NRC conducts periodic reviews of the Agreement State radiation control programs. During those reviews, the NRC staff evaluates whether (1) the Agreement State has a compatible regulatory program, (2) the Agreement State is periodically conducting inspections of licensed activities involving agreement material to provide reasonable assurance of safe licensee operations and to determine compliance with its regulatory requirements, and (3) the Agreement State is taking timely enforcement action against licensees, when necessary, through legal sanctions authorized by state statutes and regulations.

Based on the above analysis, EPA is today determining that the NRC regulatory program for licensees other than commercial nuclear power reactors provides an ample margin of safety to protect the public health under CAA section 112(d)(9).

IV. Summary of Major Comments and Responses to Comments From 1992 NPRM and Notice Reopening Comment Period

This section briefly describes the major comments EPA received in response to the Agency's rulemaking to rescind subpart I for NRC and Agreement State licensed facilities other than commercial nuclear power reactors. EPA received numerous written comments in response to the December 1, 1992, proposal and the September 28, 1995, notice inviting additional comments. The Agency also received comments during public hearings conducted on January 14, 1993 and February 29, 1996. Additionally, the Agency received comments on the specific issue of whether to rescind subpart I for facilities other than commercial nuclear power reactors during the comment period for other rulemakings, e.g., the proposed stays discussed above. The Agency stated at the time of those rulemakings that such comments would be addressed in the context of this rulemaking on rescission. Comments received by the Agency during the pendency of this rulemaking, together with relevant comments received in other rulemakings, are addressed in the Response to Comments Document which has been placed in the docket for this rulemaking.

A major concern expressed by commenters relates to the lack of any provision in the Atomic Energy Act (AEA) equivalent to the broad authority to file citizen suits provided by Clean Air Act section 304. Commenters asserted that the absence of a citizen suit provision applicable to the NRC regulatory program would prevent a determination by EPA that the EPA and NRC regulatory programs are equally stringent. While EPA believes that this difference in the respective enabling statutes of the two agencies could be properly considered by EPA as one factor in deciding whether or not to exercise its discretion to rescind, EPA does not believe that this difference precludes the substantive finding required by section 112(d)(9). When Congress adopted section 112(d)(9), Congress was aware that the CAA includes citizen suit authority and that the AEA has no comparable provisions. Despite this difference, Congress clearly envisioned that circumstances might be such that EPA would make the finding required by section 112(d)(9) of the CAA. EPA notes that the same argument concerning the absence of citizen suit authority was recently rejected by the District of Columbia Court of Appeals in an unpublished opinion upholding the Agency's rescission of subpart I for nuclear power reactors. Unpublished Opinion, *Sierra Club, et al.*, v. *Environmental Protection Agency*, No.95-1562 (D.C. Cir. October 22, 1996).

In making today's ample margin of safety determination under section 112(d)(9), the Agency considered whether future emissions from licensees will be consistently and predictably at or below a level resulting in a dose of 10 mrem/yr and whether, in the event a licensee exceeds that level, NRC or an Agreement State can and will require the licensee to reduce emissions. In the event that the NRC regulatory program does not assure that licensee emissions result in doses at or below 10 mrem/ year, any interested person may petition EPA to initiate a rulemaking to reinstate subpart I. Furthermore, EPA can act on its own initiative to reconsider the rescission if new information indicates that the public health is not protected with an ample margin of safety.

Some commenters were also concerned about the regulatory authority of the states and how actions such as this rescission, taken pursuant to section 112(d)(9), might affect the states' authority under the CAA to establish radionuclide air emission standards. This issue was addressed in a July 2, 1993, letter from Robert M. Bernero, Director of the Office of Nuclear Material Safety and Safeguards to Margo Oge, Director of EPA's Office of Radiation and Indoor Air. Docket Entry A-92-50, IV-D-21. Mr. Bernero stated that the NRC Office of General Counsel has examined the CAA, and relevant portions of the legislative history, ''and has concluded that the passage of the 1990 CAA amendments had no effect on the preexisting power of the States under section 116 [sic] to establish radionuclide air emission standards, regardless of any action EPA might take pursuant to section 112(d)(9).'' EPA concurs with NRC's construction. NRC has also stated in the preamble to the final constraint rule that ''[T]he Commission believes that [CAA section 112(d)(9] clarifies that EPA's determination regarding NRC and Agreement State licensees has no effect on the existing authority of States to impose air emission standards that are more stringent than those of EPA.'' Furthermore, as noted earlier, the Commission's designation of the constraint rule as a Division Level 2 matter of compatibility allows the Agreement States to set more stringent standards than the NRC constraint rule. 61 FR 65120, 65126 (December 10, 1996). In addition, this issue was extensively discussed by the Senate during floor debate for the 1990 CAA amendments. Passage of the ''Simpson Amendment'' (section 112(d)(9)) failed on the first vote due to concerns that the amendment somehow affected states' rights and the question of state authority had to be addressed before the amendment ultimately succeeded in passage. As explained by Senator Burdick, ''Section 112(d)(9) provides for State authority for radionuclide emissions in the same manner and to the same extent as does existing section 116'' of the CAA, which contains the provision that ''nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of air pollutants ***'' April 3, 1990 Congressional Record S3798.

Some commenters object to the EPA rescission based on the argument that the NRC constraint rule is not an enforceable standard. As discussed above, section 112(d)(9) does not require exact equivalence between the EPA and NRC regulatory programs before EPA may decline to regulate radionuclide emissions from a particular category or subcategory of NRC licensees. Rather, section 112(d)(9) requires EPA to determine that the NRC regulatory program as a whole will protect public health to the same or greater level as would implementation of subpart I. The study conducted by EPA as described above, the Agency's experience in implementing subpart I since it became effective in 1992, and NRC's recent adoption of the constraint rule and Agreement State policies provide ample basis for EPA to conclude that public health will be protected to the same level as would be achieved through continued implementation of subpart I. Although the NRC constraint level is not like the EPA standard in subpart I, in that exceeding the constraint is not itself an actionable violation, the constraint level is a value above which licensees must take actions to reduce emissions. Thus, EPA may conclude that future doses to members of the public caused by emissions of radionuclides from this category of facilities will be predictably and consistently at or below 10 mrem/yr and that NRC can and will take action in the event a facility exceeds the 10 mrem/yr level.

Commenters also expressed concern that the constraint rule does not limit doses from radioiodine to the 3 mrem/yr level of subpart I. Doses resulting from emissions of radioiodines were specifically considered as part of the EPA study described in detail above. The study demonstrated that no facility surveyed emitted a level of radioiodines causing a dose above 1 mrem/yr, and extrapolation of the survey data indicated that no licensed facility was expected to have emissions exceeding the EPA standard. Based on all of the information now available concerning the activities of NRC and Agreement State licensees, EPA believes that it is very unlikely that any licensee who is in compliance with the constraint level for all radionuclides of 10 mrem/yr will have radioiodine emissions exceeding the present EPA standard. Accordingly, EPA does not consider the absence of a separate limit for radioiodines in the NRC program to be a factor which will prevent the NRC program from providing an ample margin of safety.

Some commenters expressed an additional concern regarding the adequacy of the constraint rule based on the fact that Agreement States have three years in which to adopt the constraint rule after it has been finally adopted by NRC. The commenters are apparently concerned that there will be up to a three year gap in regulatory coverage in some individual Agreement States before a state version of the constraint rule can be adopted. EPA understands this hypothetical concern, but believes that it is misplaced for the following reason. The general ALARA requirement is already legally enforceable in every Agreement State. Whatever the opinion of any individual Agreement State in the past as to what ALARA requires an individual licensee to do, the constraint rule constitutes an authoritative conclusion by NRC that ALARA consistently requires that each licensee at least achieve emissions no greater than 10 mrem/yr. In light of the expert determination by NRC that licensees can readily achieve levels less than 10 mrem/yr, it would be difficult if not impossible for individual Agreement States to properly construe existing ALARA requirements less stringently. While EPA does not expect any individual Agreement State to accept emissions exceeding 10 mrem/year as ALARA, even before adoption of that State's own constraint level, were this to occur EPA would initiate consultations with NRC concerning the adequacy of that State's program and consider taking action to reimpose an EPA standard if the problem were not promptly corrected. EPA also notes that existing radionuclide standards adopted under State authority are not affected by today's rescission.

The Agency also received several comments on the differences in compliance calculation methodologies between NRC and EPA. The computer code used to calculate compliance with Subpart I, COMPLY, considers inhalation, immersion, ingestion, and exposure to contaminated ground. Commenters question how the NRC constraint level, which only considers inhalation and immersion, could provide an ample margin of safety to protect the public health. As explained above, EPA does not believe that section 112(d)(9) requires that every program element in the NRC program be exactly equivalent to the corresponding element in the EPA program. Such a construction would frustrate the evident Congressional intent to relieve licensees of duplicative regulation. Rather, section 112(d)(9) requires only that EPA conclude that the regulatory programs as a whole will provide the same level of protection of public health. While there are differences in the calculation methodologies used by EPA and NRC, EPA does not expect the differences in the manner in which doses are calculated to lead to significant differences in the resultant level of protection of public health. While 16 facilities reported exceeding the subpart I standard for calendar year 1993, that number decreased significantly with no facilities reporting exceedances for calendar year 1995. See Memorandum to Docket A-92-50 from Byron Bunger, December 18, 1996, Docket Entry A-92-50, IV-B-2 (Appendix for final rulemaking describing EPA's experience implementing subpart I).

Another commenter was concerned that subpart I controls emissions of NARM [Naturally Occurring and Accelerator Produced Radioactive Materials] that are not subject to NRC licensing. EPA recognizes that emissions of NARM by NRC licensees are not formally subject to NRC licensure. However, although subpart I is nominally applicable to emissions of both licensed materials and NARM, EPA did not adopt subpart I in the first place based on any concern that emissions of unlicensed radionuclide materials by NRC licensees would present any hazard to public health. However, the definition of public dose in 10 CFR 20.1003 states: ''Public dose means the dose received by a member of the public from exposure to radiation and/or radioactive material released by a licensee, or to any other source of radiation under the control of the licensee. Public dose does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, or from voluntary participation in medical research programs.'' The section on ''any other source of radiation under the control of the licensee'' suggests that NRC licensees are required to protect the public from most NARM co-mingled with their licensed material, but not background radiation.'' Moreover, in a letter to EPA, NRC stated that such emissions already are controlled and will continue to be controlled to levels which protect the public with an ample margin of safety. See Docket Entry A-92-50, IV-D-21. NRC explained that ''At NRC-licensed facilities, as a practical matter, licensees will control NARM emissions as if they were byproduct material emissions.'' Id. at p. 2.

V. Judicial Review

Any petition for judicial review of the final rule must be filed in the United States Court of Appeals for the District of Columbia on or before February 28, 1997. Only an objection to this rule which was raised with reasonable specificity during the period for public comment (including public hearings) may be raised as part of any petition for judicial review.

VI. Miscellaneous

A. Paperwork Reduction Act

There are no information collection requirements in this final rule.

B. Executive Order 12866

Under Executive Order 12866, (58 FR 57735, October 4, 1993) the Agency must determine whether this regulation, if promulgated, is ''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 result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This action is a significant regulatory action as that term is defined in Executive Order 12866, since it raises novel legal or policy issues. Thus, EPA has determined that rescinding subpart I as it applies to facilities licensed by the NRC or NRC Agreement States which are not engaged in the generation of commercial nuclear power is a ''significant regulatory action'' under the terms of Executive Order 12866 due to the presence of novel policy issues and is therefore subject to OMB review.

C. 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 (SBREFA), 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 ''major'' as defined by 5 U.S.C. 804(2) because it will not result in an annual effect on the economy of $100 million or more; there is no major increase in costs or prices to consumers, industries, governments or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation and United States firms'' ability to compete with foreign counterparts.

D. Regulatory Flexibility Analysis

EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. EPA has also determined that this rule will not have a significant impact on a substantial number of small entities. Today's final action is deregulatory; effectively reducing the regulatory burden on NRC licensees other than commercial nuclear power reactors by rescinding the applicable regulatory requirements.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act'') requires that the Agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditure by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year. Section 203 requires the Agency to establish a plan for obtaining input from and informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule.

Under section 205 of the Unfunded Mandates Act, the Agency must identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a budgetary impact statement must be prepared. The Agency must select from those alternatives the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule, unless the Agency explains why this alternative is not selected or the selection of this alternative is inconsistent with law.

The Agency has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative because this final rule is estimated to result in expenditures by State, local, and tribal governments or the private sector of less than $100 million in any one year. Because small governments will not be significantly or uniquely affected by this rule, the Agency is not required to develop a plan with regard to small governments. As discussed in the preamble, the final rule has the effect of reducing overall regulatory burdens on

NRC licensed facilities other than commercial nuclear power reactors.

List of Subjects in 40 CFR Part 61

Environmental protection, Air pollution control, Benzene, Hazardous substances, Radionuclides, Radon, Vinyl Chloride.

Dated: December 20, 1996.

Carol M. Browner,

Administrator.

Part 61 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 61—[AMENDED]

1. The authority citation for part 61 continues to read as follows:

Authority: 42 U.S.C. 7401, 7412, 7414, 7416, 7601.

2. Part 61 is amended by revising the heading for subpart I and by revising § 61.100 to read as follows:

Subpart I—National Emission Standards for Radionuclide Emissions From Federal Facilities Other Than Nuclear Regulatory Commission Licensees and Not Covered by Subpart H

§ 61.100 Applicability.

The provisions of this subpart apply to facilities owned or operated by any Federal agency other than the Department of Energy and not licensed by the Nuclear Regulatory Commission, except that this subpart does not apply to disposal at facilities regulated under 40 CFR part 191, subpart B, or to any uranium mill tailings pile after it has been disposed of under 40 CFR part 192, or to low energy accelerators.

§ 61.101 [Amended]

3. Section 61.101 is amended by removing paragraphs (a) and (e) and redesignating paragraphs (b), (c), (d) and (f) as (a), (b), (c), and (d) respectively.

§ 61.107 [Amended]

4. Section 61.107 is amended by removing and reserving paragraph (c)(1).

[FR Doc. 96–32977 Filed 12–27–96; 8:45 am]

BILLING CODE 6560–50–P

federal register

Monday
December 30, 1996

Part VII

The President

Executive Order No. 13032—Further Amendment to Executive Order No. 12964

Federal Register
Vol. 61, No. 251
Monday, December 30, 1996

Presidential Documents

Title 3—

The President

Executive Order 13032 of December 26, 1996

Further Amendment to Executive Order No. 12964

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App.), and to facilitate the work of the Commission on United States-Pacific Trade and Investment Policy, it is hereby ordered that Executive Order 12964 of June 21, 1995, as amended by Executive Order 12987 of January 31, 1996, is further amended in section 2 by deleting in the first sentence ''December 31, 1996'' and inserting ''February 28, 1997'' in lieu thereof.

THE WHITE HOUSE,
December 26, 1996.

[FR Doc. 96–33336
Filed 12–27–96; 10:25 am]
Billing code 3195–01–P

Reader Aids

Federal Register

Vol. 61, No. 251

Monday, December 30, 1996

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–523–5227**
Laws	
For additional information	**523–5227**
Presidential Documents	
Executive orders and proclamations	**523–5227**
The United States Government Manual	**523–5227**
Other Services	
Electronic and on-line services (voice)	**523–4534**
Privacy Act Compilation	**523–3187**
TDD for the hearing impaired	**523–5229**

ELECTRONIC BULLETIN BOARD

Free Electronic Bulletin Board service for Public Law numbers, Federal Register finding aids, and list of documents on public inspection. **202–275–0920**

FAX-ON-DEMAND

You may access our Fax-On-Demand service. You only need a fax machine and there is no charge for the service except for long distance telephone charges the user may incur. The list of documents on public inspection and the daily Federal Register's table of contents are available using this service. The document numbers are 7050-Public Inspection list and 7051-Table of Contents list. The public inspection list will be updated immediately for documents filed on an emergency basis.

NOTE: YOU WILL ONLY GET A LISTING OF DOCUMENTS ON FILE AND NOT THE ACTUAL DOCUMENT. Documents on public inspection may be viewed and copied in our office located at 800 North Capitol Street, N.W., Suite 700. The Fax-On-Demand telephone number is: **301–713–6905**

FEDERAL REGISTER PAGES AND DATES, DECEMBER

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

4 ... 68647
5 ... 68641
101 ... 65180
102 ... 65180, 65182, 65323
402 ... 67942
403 ... 67942
404 ... 67942
405 ... 67942
406 ... 67942
408 ... 67942
409 ... 67942
1952 ... 66593
4000 ... 67942
4001 ... 63988
4011 ... 65473
4022 ... 65473, 67942
4041 ... 67942
4043 ... 63988
4044 ... 65474, 65476
4065 ... 63988

Proposed Rules:

Ch. XXV ... 68697
1926 ... 66002
2704 ... 66961
4007 ... 66247

30 CFR

917 ... 66220
936 ... 67213
943 ... 67216

Proposed Rules:

56 ... 66348
57 ... 66348
62 ... 66348
70 ... 66348
71 ... 66348
250 ... 66639, 66966
290 ... 67515
870 ... 64220
915 ... 67967

31 CFR

Ch. V ... 64289
209 ... 68155
596 ... 67943

Proposed Rules:

103 ... 67260

32 CFR

269 ... 67944
318 ... 63712
706 ... 67726

Proposed Rules:

203 ... 68184

33 CFR

100 ... 64991, 64993, 64994, 65332, 67946
110 ... 63715
117 ... 64995, 67947
157 ... 64618
165 ... 67948, 68155, 68156
334 ... 64996

Proposed Rules:

100 ... 64645
110 ... 68197
117 ... 67970, 68198, 68689
165 ... 67971
334 ... 67265

34 CFR

86 ... 66225, 68821

Proposed Rules:

668 ... 66854

36 CFR

223 ... 64815

Proposed Rules:

223 ... 64569, 68690
242 ... 67274
1190 ... 64832
1191 ... 64832

37 CFR

1 ... 64027
251 ... 63715
252 ... 63715
257 ... 63715
259 ... 63715

Proposed Rules:

202 ... 64042

38 CFR

2 ... 68665
3 ... 67949, 68665
14 ... 68665
17 ... 63719
19 ... 68666

39 CFR

111 ... 61618, 67218

Proposed Rules:

3001 ... 67760

40 CFR

9 ... 66226, 67950
39 ... 64290
52 ... 64028, 64029, 64291, 65955, 66602, 66606, 66607, 66609, 67232, 67229, 67466, 67469
61 ... 64463, 68972
63 ... 64463, 64572, 65334, 66226, 68384
70 ... 63928, 64463, 64622
76 ... 67112, 68821
81 ... 64294
82 ... 64424, 68506
131 ... 64816,65183
180 ... 63721, 67472
228 ... 68964
271 ... 67474
300 ... 65186, 65957, 67233, 67234, 67655, 68157
435 ... 66086
712 ... 65186
716 ... 65186
721 ... 63726

Proposed Rules:

22 ... 65268
50 ... 65496, 65638, 65716, 67763
51 ... 65752, 65764, 67274
52 ... 64042, 64304, 64307, 64308, 64647, 65504, 66003, 66642, 67275, 67515, 67516, 68199
53 ... 65780
55 ... 66003
58 ... 65780
63 ... 68406, 68430
70 ... 64042, 64651
72 ... 68340
73 ... 68340
74 ... 68340
75 ... 68340
76 ... 68821
77 ... 68340
78 ... 68340
81 ... 64308
82 ... 64045
117 ... 65268
122 ... 65268
123 ... 65268
124 ... 65268
125 ... 65268
132 ... 66007
144 ... 65268
270 ... 65268
271 ... 65268
300 ... 67677, 67975, 68695
799 ... 67516

41 CFR

Ch. 301 ... 65635
105–70 ... 67234
301 ... 67951
301–1 ... 64997
301–4 ... 68158
301–7 ... 64997, 68158
301–8 ... 64997, 68158
301–11 ... 64997, 68158
301–17 ... 64997
302–2 ... 68158

42 CFR

57 ... 65477
401 ... 63740
403 ... 63740
405 ... 63740
411 ... 63740
412 ... 66919
413 ... 63740, 66919
447 ... 63740
489 ... 66919
493 ... 63740

Proposed Rules:

Ch. IV ... 68697

43 CFR

12 ... 68666
426 ... 66754
427 ... 66754

Proposed Rules:

418 ... 64832
426 ... 66827
1810 ... 67517
2200 ... 64658
2210 ... 64658
2240 ... 64658
2250 ... 64658
2270 ... 64658
2800 ... 66008
2920 ... 66008
4100 ... 66008
4300 ... 66008
4700 ... 66008
5460 ... 66008
5510 ... 66008
6300 ... 66968
8200 ... 66008
8340 ... 66008
8350 ... 66008
8360 ... 66008
8370 ... 66008
8560 ... 66008, 66968
9210 ... 66008
9260 ... 66008

44 CFR

65 ... 66923, 66925
67 ... 66926

Proposed Rules:

67 ... 66974

45 CFR

301 ... 67235
302 ... 67235
303 ... 67235
304 ... 67235
306 ... 67235
307 ... 67235
801 ... 64998
1610 ... 63749
1617 ... 63754
1632 ... 63755
1633 ... 63756

46 CFR

8 ... 68510
16 ... 66612
28 ... 68161
31 ... 64618, 68510
35 ... 64618
71 ... 68510
91 ... 68510
107 ... 68510
125 ... 66613
501 ... 66616
502 ... 66616
504 ... 66616
514 ... 66616
552 ... 66616
560 ... 66616
572 ... 64822

Proposed Rules:

10 ... 66642
15 ... 66642
384 ... 67764
586 ... 68200

47 CFR

1 ... 63758, 66931
2 ... 63758
15 ... 63758
20 ... 66931
24 ... 63758
51 ... 66931
61 ... 65336
64 ... 65341
68 ... 65341
69 ... 65341
73 ... 63759, 64999, 65478, 66228, 66229, 66618, 67727, 67728, 68162
90 ... 66931
97 ... 63758

Proposed Rules:

Ch. I ... 63774, 63778
0 ... 67978
1 ... 64045, 67978
5 ... 68698
21 ... 67275
63 ... 68702
73 ... 63809, 63810, 63811, 64309, 64660, 65008, 65192, 65508, 65509, 66248, 66249, 66250, 66978, 66987, 67274, 67765, 68201
76 ... 67275, 68201
90 ... 68698

48 CFR

Ch. 1 ... 67408, 67430
1 ... 67409, 67430
4 ... 67411, 67412, 67430
9 ... 67409
12 ... 67418, 67430
14 ... 67409
16 ... 67418
19 ... 67409, 67419, 67420, 67422, 67430
22 ... 67409
31 ... 67422, 67423, 67424,

49 CFR

50 CFR

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT TODAY

AGRICULTURE DEPARTMENT
Commodity Credit Corporation
Export programs:
Agricultural commodities; foreign donation programs; published 11-29-96

AGRICULTURE DEPARTMENT
Organization, functions, and authority delegations:
Secretary of Agriculture; published 12-30-96

COMMERCE DEPARTMENT
Export Administration Bureau
Export licensing:
Commerce control list--
Encryption items transferred from U.S. Munitions List to the Commerce Control List; published 12-30-96

ENVIRONMENTAL PROTECTION AGENCY
Air programs:
National emission standards for hazardous air pollutants--
Radionuclide emissions from licensed facilities; published 12-30-96
Air quality implementation plans; approval and promulgation; various States:
Indiana; published 10-30-96
Rhode Island; published 10-30-96
Texas et al.; published 10-30-96
Hazardous waste:
State underground storage tank program approvals--
Massachusetts; published 10-31-96
Water pollution control:
Ocean dumping; site designations--
Pacific Ocean offshore San Francisco Deep Ocean Disposal Site; published 12-30-96

FEDERAL COMMUNICATIONS COMMISSION
Radio stations; table of assignments:
Wisconsin; published 12-2-96

FEDERAL DEPOSIT INSURANCE CORPORATION
Conflict of interests
Contractors suspension and exclusion and contracts termination; published 12-30-96

HEALTH AND HUMAN SERVICES DEPARTMENT
Food and Drug Administration
Food additives:
Adjuvants, production aids, and sanitizers--
Triisopropanolamine; published 12-30-96
Human drugs:
Pediatric use subsection of professional labeling requirements; revision; published 12-30-96

INTERIOR DEPARTMENT
Administrative and Audit Requirements and Cost Principles for Assistance Programs; published 12-30-96

LABOR DEPARTMENT
Wage and Hour Division
Wage rates predetermination procedures; and construction and nonconstruction contracts; labor standards provisions:
Davis-Bacon helper regulations suspension continuation; published 12-30-96

SECURITIES AND EXCHANGE COMMISSION
Securities:
Cash tender and exchange (odd-lot) by issuers; published 12-30-96

STATE DEPARTMENT
International Traffic in Arms regulations; encryption items removal from U.S. Munitions List, transfer to Commerce Control List; published 12-30-96

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Airworthiness directives:
de Havilland; published 11-22-96
Dornier; published 11-22-96
Fokker; published 11-22-96
HB Aircraft; published 11-6-96

TREASURY DEPARTMENT
Internal Revenue Service
Income taxes:
Inventory and natural resources produced in one jurisdiction and sold in another jurisdiction; source of income from sales; published 11-29-96
Correction; published 12-12-96

VETERANS AFFAIRS DEPARTMENT
Adjudication; pensions, compensation, dependency, etc.:
Legal services, General Counsel; miscellaneous amendments; published 12-30-96
Board of Veterans Appeals:
Appeals regulations and rules of practice--
Unnecessary provisions elimination; published 12-30-96
Organization, functions, and authority delegations:
Under Secretary of Health et al.; subpoena authority and means of service description; published 12-30-96

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Tomatoes grown in--
Florida; comments due by 12-30-96; published 11-29-96
Walnuts grown in--
California; comments due by 12-30-96; published 11-29-96

AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Exportation and importation of animals and animal products:
Ruminants and swine from countries where foot-and-mouth disease or rinderpest exists; zoological park quarantine; comments due by 12-30-96; published 10-31-96
Interstate transportation of animals and animal products (quarantine):
Brucellosis in cattle and bison--
State and area classifications; comments due by 12-30-96; published 10-31-96
Livestock market approval for cattle, bison, horses and swine; hog cholera obsolete regulations removed; comments due by 12-30-96; published 10-31-96

AGRICULTURE DEPARTMENT
Commodity Credit Corporation
Export programs:
Supplier credit guarantee program; comments due by 12-30-96; published 7-1-96

AGRICULTURE DEPARTMENT
Federal Crop Insurance Corporation
Administrative regulations:
Federal Crop Insurance Act--
Procedures for determining eligibility for program participation; comments due by 12-30-96; published 10-31-96

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone--
Gulf of Alaska groundfish; comments due by 12-30-96; published 12-4-96
Gulf of Mexico and South Atlantic coastal migratory pelagic resources; comments due by 12-31-96; published 12-16-96

ENERGY DEPARTMENT
Contract appeals:
Organization, functions and authorities overview; comments due by 12-30-96; published 10-30-96

ENVIRONMENTAL PROTECTION AGENCY
Air pollutants, hazardous; national emission standards:
Aerospace manufacturing and rework facilities; comments due by 12-30-96; published 10-29-96
Air quality implementation plans; approval and promulgation; various States:
North Dakota et al.; correction; comments due by 12-30-96; published 11-29-96
Superfund program:
Toxic chemical release reporting; community right-to-know--

Chemical use; comments due by 12-30-96; published 10-1-96

Water pollution control:

Water quality standards--

Idaho human health criteria for arsenic; comments due by 12-30-96; published 11-29-96

FEDERAL COMMUNICATIONS COMMISSION

Radio stations; table of assignments:

Illinois; comments due by 12-30-96; published 11-26-96

South Dakota; comments due by 12-30-96; published 11-26-96

Wyoming; comments due by 12-30-96; published 11-26-96

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Food additives:

Polymers--

1,2-benzisothiazolin-3; comments due by 12-30-96; published 11-29-96

INTERIOR DEPARTMENT

Fish and Wildlife Service

Alaska National Wildlife Refuges:

Administration of special use permits; comments due by 12-31-96; published 11-1-96

SMALL BUSINESS ADMINISTRATION

Business loan policy:

Sale of unguaranteed portion of loan; comments due by 12-30-96; published 11-29-96

TRANSPORTATION DEPARTMENT

Coast Guard

Merchant marine officers and seamen:

Marine licensing, registry certification, and merchant mariner documentation; user fees; comments due by 12-30-96; published 10-31-96

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Air carrier certification and operations:

Digital flight data recorder upgrade requirements; comments due by 12-30-96; published 12-10-96

Airworthiness directives:

Beech; comments due by 12-30-96; published 10-23-96

Boeing; comments due by 12-30-96; published 11-18-96

Jetstream; comments due by 12-30-96; published 11-20-96

McDonnell Douglas; comments due by 12-30-96; published 11-20-96

Schweizer; comments due by 12-30-96; published 10-30-96

Class E airspace; comments due by 12-31-96; published 11-8-96

TRANSPORTATION DEPARTMENT

Research and Special Programs Administration

Pipeline safety:

Onshore oil pipeline response plans; hearing; comments due by 12-31-96; published 11-29-96

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Financial Asset Securitization Investment Trusts; comments due by 12-31-96; published 11-4-96

VETERANS AFFAIRS DEPARTMENT

Medical benefits:

Medical care for survivors and dependents of veterans; comments due by 12-31-96; published 11-1-96

CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

A "●" precedes each entry that is now available on-line through the Government Printing Office's *GPO Access* service at http://www.access.gpo.gov/nara/cfr. For information about *GPO Access* call 1-888-293-6498 (toll free).

A checklist of current CFR volumes comprising a complete CFR set, also appears in the latest issue of the LSA (List of CFR Sections Affected), which is revised monthly.

The annual rate for subscription to all revised volumes is $883.00 domestic, $220.75 additional for foreign mailing.

Mail orders to the Superintendent of Documents, Attn: New Orders, P.O. Box 371954, Pittsburgh, PA 15250–7954. All orders must be accompanied by remittance (check, money order, GPO Deposit Account, VISA, or Master Card). Charge orders may be telephoned to the GPO Order Desk, Monday through Friday, at **(202) 512–1800** from 8:00 a.m. to 4:00 p.m. eastern time, or FAX your charge orders to **(202) 512-2250**.

Title	Stock Number	Price	Revision Date
1, 2 (2 Reserved)	(869–028–00001–1)	$4.25	Feb. 1, 1996
3 (1995 Compilation and Parts 100 and 101)	(869–028–00002–9)	22.00	[1] Jan. 1, 1996
4	(869–028–00003–7)	5.50	Jan. 1, 1996
5 Parts:			
1–699	(869–028–00004–5)	26.00	Jan. 1, 1996
700–1199	(869–028–00005–3)	20.00	Jan. 1, 1996
1200–End, 6 (6 Reserved)	(869–028–00006–1)	25.00	Jan. 1, 1996
7 Parts:			
0–26	(869–028–00007–0)	22.00	Jan. 1, 1996
27–45	(869–028–00008–8)	11.00	Jan. 1, 1996
46–51	(869–028–00009–6)	13.00	Jan. 1, 1996
52	(869–028–00010–0)	5.00	Jan. 1, 1996
53–209	(869–028–00011–8)	17.00	Jan. 1, 1996
210–299	(869–028–00012–6)	35.00	Jan. 1, 1996
300–399	(869–028–00013–4)	17.00	Jan. 1, 1996
400–699	(869–028–00014–2)	22.00	Jan. 1, 1996
700–899	(869–028–00015–1)	25.00	Jan. 1, 1996
900–999	(869–028–00016–9)	30.00	Jan. 1, 1996
1000–1199	(869–028–00017–7)	35.00	Jan. 1, 1996
1200–1499	(869–028–00018–5)	29.00	Jan. 1, 1996
1500–1899	(869–028–00019–3)	41.00	Jan. 1, 1996
1900–1939	(869–028–00020–7)	16.00	Jan. 1, 1996
1940–1949	(869–028–00021–5)	31.00	Jan. 1, 1996
1950–1999	(869–028–00022–3)	39.00	Jan. 1, 1996
2000–End	(869–028–00023–1)	15.00	Jan. 1, 1996
8	(869–028–00024–0)	23.00	Jan. 1, 1996
9 Parts:			
1–199	(869–028–00025–8)	30.00	Jan. 1, 1996
200–End	(869–028–00026–6)	25.00	Jan. 1, 1996
10 Parts:			
0–50	(869–028–00027–4)	30.00	Jan. 1, 1996
51–199	(869–028–00028–2)	24.00	Jan. 1, 1996
200–399	(869–028–00029–1)	5.00	Jan. 1, 1996
400–499	(869–028–00030–4)	21.00	Jan. 1, 1996
500–End	(869–028–00031–2)	34.00	Jan. 1, 1996
11	(869–028–00032–1)	15.00	Jan. 1, 1996
12 Parts:			
1–199	(869–028–00033–9)	12.00	Jan. 1, 1996
200–219	(869–028–00034–7)	17.00	Jan. 1, 1996
220–299	(869–028–00035–5)	29.00	Jan. 1, 1996
300–499	(869–028–00036–3)	21.00	Jan. 1, 1996
500–599	(869–028–00037–1)	20.00	Jan. 1, 1996
600–End	(869–028–00038–0)	31.00	Jan. 1, 1996
13	(869–028–00039–8)	18.00	Mar. 1, 1996
14 Parts:			
1–59	(869–028–00040–1)	34.00	Jan. 1, 1996
60–139	(869–028–00041–0)	30.00	Jan. 1, 1996
140–199	(869–028–00042–8)	13.00	Jan. 1, 1996
200–1199	(869–028–00043–6)	23.00	Jan. 1, 1996
1200–End	(869–028–00044–4)	16.00	Jan. 1, 1996
15 Parts:			
0–299	(869–028–00045–2)	16.00	Jan. 1, 1996
300–799	(869–028–00046–1)	26.00	Jan. 1, 1996
800–End	(869–028–00047–9)	18.00	Jan. 1, 1996
16 Parts:			
0–149	(869–028–00048–7)	6.50	Jan. 1, 1996
150–999	(869–028–00049–5)	19.00	Jan. 1, 1996
1000–End	(869–028–00050–9)	26.00	Jan. 1, 1996
17 Parts:			
1–199	(869–028–00052–5)	21.00	Apr. 1, 1996
200–239	(869–028–00053–3)	25.00	Apr. 1, 1996
240–End	(869–028–00054–1)	31.00	Apr. 1, 1996
18 Parts:			
1–149	(869–028–00055–0)	17.00	Apr. 1, 1996
150–279	(869–028–00056–8)	12.00	Apr. 1, 1996
280–399	(869–028–00057–6)	13.00	Apr. 1, 1996
400–End	(869–028–00058–4)	11.00	Apr. 1, 1996
19 Parts:			
1–140	(869–028–00059–2)	26.00	Apr. 1, 1996
141–199	(869–028–00060–6)	23.00	Apr. 1, 1996
200–End	(869–028–00061–4)	12.00	Apr. 1, 1996
20 Parts:			
1–399	(869–028–00062–2)	20.00	Apr. 1, 1996
●400–499	(869–028–00063–1)	35.00	Apr. 1, 1996
500–End	(869–028–00064–9)	32.00	Apr. 1, 1996
21 Parts:			
●1–99	(869–028–00065–7)	16.00	Apr. 1, 1996
●100–169	(869–028–00066–5)	22.00	Apr. 1, 1996
●170–199	(869–028–00067–3)	29.00	Apr. 1, 1996
●200–299	(869–028–00068–1)	7.00	Apr. 1, 1996
●300–499	(869–028–00069–0)	50.00	Apr. 1, 1996
●500–599	(869–028–00070–3)	28.00	Apr. 1, 1996
●600–799	(869–028–00071–1)	8.50	Apr. 1, 1996
●800–1299	(869–028–00072–0)	30.00	Apr. 1, 1996
●1300–End	(869–028–00073–8)	14.00	Apr. 1, 1996
22 Parts:			
1–299	(869–028–00074–6)	36.00	Apr. 1, 1996
300–End	(869–028–00075–4)	24.00	Apr. 1, 1996
23	(869–028–00076–2)	21.00	Apr. 1, 1996
24 Parts:			
0–199	(869–028–00077–1)	30.00	May 1, 1996
200–219	(869–028–00078–9)	14.00	May 1, 1996
220–499	(869–028–00079–7)	13.00	May 1, 1996
500–699	(869–028–00080–1)	14.00	May 1, 1996
700–899	(869–028–00081–9)	13.00	May 1, 1996
900–1699	(869–028–00082–7)	21.00	May 1, 1996
1700–End	(869–028–00083–5)	14.00	May 1, 1996
25	(869–028–00084–3)	32.00	May 1, 1996
26 Parts:			
§§ 1.0-1–1.60	(869–028–00085–1)	21.00	Apr. 1, 1996
§§ 1.61–1.169	(869–028–00086–0)	34.00	Apr. 1, 1996
§§ 1.170–1.300	(869–028–00087–8)	24.00	Apr. 1, 1996
§§ 1.301–1.400	(869–028–00088–6)	17.00	Apr. 1, 1996
§§ 1.401–1.440	(869–028–00089–4)	31.00	Apr. 1, 1996
§§ 1.441-1.500	(869-028-00090-8)	22.00	Apr. 1, 1996
§§ 1.501–1.640	(869–028–00091–6)	21.00	Apr. 1, 1996
§§ 1.641–1.850	(869–028–00092–4)	25.00	Apr. 1, 1996
§§ 1.851–1.907	(869–028–00093–2)	26.00	Apr. 1, 1996
§§ 1.908–1.1000	(869–028–00094–1)	26.00	Apr. 1, 1996
§§ 1.1001–1.1400	(869–028–00095–9)	26.00	Apr. 1, 1996
§§ 1.1401–End	(869–028–00096–7)	35.00	Apr. 1, 1996

Title	Stock Number	Price	Revision Date
2–29	(869–028–00097–5)	28.00	Apr. 1, 1996
30–39	(869–028–00098–3)	20.00	Apr. 1, 1996
40–49	(869–028–00099–1)	13.00	Apr. 1, 1996
50–299	(869–028–00100–9)	14.00	Apr. 1, 1996
300–499	(869–028–00101–7)	25.00	Apr. 1, 1996
500–599	(869–028–00102–5)	6.00	[4] Apr. 1, 1990
600–End	(869–028–00103–3)	8.00	Apr. 1, 1996
27 Parts:			
1–199	(869–028–00104–1)	44.00	Apr. 1, 1996
200–End	(869–028–00105–0)	13.00	Apr. 1, 1996
28 Parts:			
1-42	(869–028–00106–8)	35.00	July 1, 1996
43-end	(869-028-00107-6)	30.00	July 1, 1996
29 Parts:			
0–99	(869–028–00108–4)	26.00	July 1, 1996
100–499	(869–028–00109–2)	12.00	July 1, 1996
500–899	(869–028–00110–6)	48.00	July 1, 1996
900–1899	(869–028–00111–4)	20.00	July 1, 1996
1900–1910 (§§ 1900 to 1910.999)	(869–028–00112–2)	43.00	July 1, 1996
1910 (§§ 1910.1000 to end)	(869–028–00113–1)	27.00	July 1, 1996
1911–1925	(869–028–00114–9)	19.00	July 1, 1996
1926	(869–028–00115–7)	30.00	July 1, 1996
1927–End	(869–028–00116–5)	38.00	July 1, 1996
30 Parts:			
1–199	(869–028–00117–3)	33.00	July 1, 1996
200–699	(869–028–00118–1)	26.00	July 1, 1996
700–End	(869–028–00119–0)	38.00	July 1, 1996
31 Parts:			
0–199	(869–028–00120–3)	20.00	July 1, 1996
200–End	(869–028–00121–1)	33.00	July 1, 1996
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–190	(869–028–00122–0)	42.00	July 1, 1996
191–399	(869–028–00123–8)	50.00	July 1, 1996
400–629	(869–028–00124–6)	34.00	July 1, 1996
630–699	(869–028–00125–4)	14.00	[5] July 1, 1991
700–799	(869–028–00126–2)	28.00	July 1, 1996
800–End	(869–028–00127–1)	28.00	July 1, 1996
33 Parts:			
1–124	(869–028–00128–9)	26.00	July 1, 1996
125–199	(869–028–00129–7)	35.00	July 1, 1996
200–End	(869–028–00130–1)	32.00	July 1, 1996
34 Parts:			
1–299	(869–028–00131–9)	27.00	July 1, 1996
300–399	(869–028–00132–7)	27.00	July 1, 1996
400–End	(869–028–00133–5)	46.00	July 1, 1996
35	(869–028–00134–3)	15.00	July 1, 1996
36 Parts			
1–199	(869–028–00135–1)	20.00	July 1, 1996
200–End	(869–028–00136–0)	48.00	July 1, 1996
37	(869–028–00137–8)	24.00	July 1, 1996
38 Parts:			
0–17	(869–028–00138–6)	34.00	July 1, 1996
18–End	(869–028–00139–4)	38.00	July 1, 1996
39	(869–028–00140–8)	23.00	July 1, 1996
40 Parts:			
●1–51	(869–028–00141–6)	50.00	July 1, 1996
●52	(869–028–00142–4)	51.00	July 1, 1996
●53–59	(869–028–00143–2)	14.00	July 1, 1996
60	(869-028-00144-1)	47.00	July 1, 1996
●61–71	(869–028–00145–9)	47.00	July 1, 1996
●72–80	(869–028–00146–7)	34.00	July 1, 1996
●81–85	(869–028–00147–5)	31.00	July 1, 1996
86	(869–026–00149–9)	40.00	July 1, 1995
●87-135	(869–028–00149–1)	35.00	July 1, 1996

Title	Stock Number	Price	Revision Date
●136–149	(869–028–00150–5)	35.00	July 1, 1996
●150–189	(869–028–00151–3)	33.00	July 1, 1996
●190–259	(869–028–00152–1)	22.00	July 1, 1996
●260–299	(869–028–00153–0)	53.00	July 1, 1996
●300–399	(869–028–00154–8)	28.00	July 1, 1996
●400–424	(869–028–00155–6)	33.00	July 1, 1996
●425–699	(869–028–00156–4)	38.00	July 1, 1996
●700–789	(869–028–00157–2)	33.00	July 1, 1996
●790–End	(869–028–00158–7)	19.00	July 1, 1996
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
18, Vol. II, Parts 6–19		13.00	[3] July 1, 1984
18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–028–00159–9)	12.00	July 1, 1996
101	(869–028–00160–2)	36.00	July 1, 1996
102–200	(869–028–00161–1)	17.00	July 1, 1996
201–End	(869–028–00162–9)	17.00	July 1, 1996
42 Parts:			
●1–399	(869–026–00163–4)	26.00	Oct. 1, 1995
●400–429	(869–028–400164–5)	34.00	Oct. 1, 1996
430–End	(869–026–00165–1)	39.00	Oct. 1, 1995
43 Parts:			
●1–999	(869–028–00166–1)	30.00	Oct. 1, 1996
1000–3999	(869–026–00167–7)	31.00	Oct. 1, 1995
4000–End	(869–026–00168–5)	15.00	Oct. 1, 1995
●44	(869–026–00169–3)	24.00	Oct. 1, 1995
45 Parts:			
●1–199	(869–028–00169–6)	28.00	Oct. 1, 1996
200–499	(869–028–00170–0)	14.00	[6] Oct. 1, 1995
●500–1199	(869–028–00171–8)	30.00	Oct. 1, 1996
1200–End	(869–026–00173–1)	26.00	Oct. 1, 1995
46 Parts:			
●1–40	(869–026–00174–0)	21.00	Oct. 1, 1995
41–69	(869–026–00175–8)	17.00	Oct. 1, 1995
●70–89	(869–026–00176–6)	8.50	Oct. 1, 1995
90–139	(869–026–00177–4)	15.00	Oct. 1, 1995
140–155	(869–026–00178–2)	12.00	Oct. 1, 1995
156–165	(869–026–00179–1)	17.00	Oct. 1, 1995
166–199	(869–026–00180–4)	17.00	Oct. 1, 1995
●200–499	(869–028–00180–7)	21.00	Oct. 1, 1996
500–End	(869–026–00182–1)	13.00	Oct. 1, 1995
47 Parts:			
0–19	(869–026–00183–9)	25.00	Oct. 1, 1995
20–39	(869–026–00184–7)	21.00	Oct. 1, 1995
40–69	(869–026–00185–5)	14.00	Oct. 1, 1995
70–79	(869–026–00186–3)	24.00	Oct. 1, 1995
80–End	(869–026–00187–1)	30.00	Oct. 1, 1995
48 Chapters:			
1 (Parts 1–51)	(869–026–00188–0)	39.00	Oct. 1, 1995
1 (Parts 52–99)	(869–026–00189–8)	24.00	Oct. 1, 1995
2 (Parts 201–251)	(869–026–00190–1)	17.00	Oct. 1, 1995
2 (Parts 252–299)	(869–026–00191–0)	13.00	Oct. 1, 1995
3–6	(869–026–00192–8)	23.00	Oct. 1, 1995
7–14	(869–026–00193–6)	28.00	Oct. 1, 1995
15–28	(869–028–00193–9)	38.00	Oct. 1, 1996
29–End	(869–026–00195–2)	19.00	Oct. 1, 1995
49 Parts:			
1–99	(869–026–00196–1)	25.00	Oct. 1, 1995
100–177	(869–026–00197–9)	34.00	Oct. 1, 1995
178–199	(869–026–00198–7)	22.00	Oct. 1, 1995
200–399	(869–026–00199–5)	30.00	Oct. 1, 1995
400–999	(869–026–00200–2)	40.00	Oct. 1, 1995
1000–1199	(869–026–00201–1)	18.00	Oct. 1, 1995

Title	Stock Number	Price	Revision Date
●1200–End	(869–028–00201–3)	15.00	Oct. 1, 1996
50 Parts:			
1–199	(869–026–00203–7)	26.00	Oct. 1, 1995
200–599	(869–026–00204–5)	22.00	Oct. 1, 1995
600–End	(869–026–00205–3)	27.00	Oct. 1, 1995
CFR Index and Findings Aids	(869–028–00051–7)	35.00	Jan. 1, 1996
Complete 1996 CFR set		883.00	1996
Microfiche CFR Edition:			
Subscription (mailed as issued)		264.00	1996
Individual copies		1.00	1996
Complete set (one-time mailing)		264.00	1995
Complete set (one-time mailing)		244.00	1994

[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1996. The CFR volume issued April 1, 1990, should be retained.

[5] No amendments to this volume were promulgated during the period July 1, 1991 to June 30, 1996. The CFR volume issued July 1, 1991, should be retained.

[6] No amendments were promulgated during the period October 1, 1995 to September 30, 1996. The CFR volume issued October 1, 1995 should be retained.