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Vol. 62 No. 9
Pages 1827–2006

federal register

Tuesday
January 14, 1997

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Reader Aids

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Rules and Regulations

Federal Register

Vol. 62, No. 9

Tuesday, January 14, 1997

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 96–ACE–11]

Amendment to Class E Airspace, Sioux City, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This section corrects an inadvertent typographical error in the effective date of a final rule, correction that was published in the Federal Register on November 29, 1996 (61 FR 60526) Airspace Docket No. 96–ACE–11.

EFFECTIVE DATE: 0901 UTC, January 30, 1997.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Operations Branch, ACE–530C, Federal Administration, 601 E. 12th St., Kansas City, MO 64106; telephone (816) 426–3408.

SUPPLEMENTARY INFORMATION:

History

The FAA published a direct final rule correction in the Federal Register on November 29, 1996 (61 FR 60526). In order to meet the publication date of the Omaha Sectional Aeronautical Chart, the effective date has been corrected to January 30, 1997.

Correction to Final Rule

Accordingly, pursuant to the authority delegated to me, the effective date for the Class E Airspace area at Sioux City, IA as published in the Federal Register on November 29, 1996, (61 FR 60526) (Federal Register Document 96–30520; page 60526, column 3) is corrected as follows:

§ 71.71 [Corrected]

* * * * *

ACE IA E5 Sioux City, IA [Corrected]

By Removing ‘‘Effective Date: 0901 UTC, January 31, 1997,’’ and substituting ‘‘Effective Date: 0901 UTC, January 30, 1997’’.

* * * * *

Issued in Kansas City, MO, on December 6, 1996.

H.J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 97–845 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–M

14 CFR Part 71

[Docket No. 96–ACE–24]

Amendment to Class E Airspace, Sidney, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends the Class E airspace area at Sidney Municipal Airport, Sidney, NE. The Federal Aviation Administration has developed a Standard Instrument Approach Procedure (SIAP) based on the Global Positioning System (GPS). The effect of this rule is to provide additional controlled airspace for aircraft departing the Sidney Municipal Airport.

DATES: Effective date: May 22, 1997.

Comment date: Comments must be received on or before February 21, 1997.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Operations Branch, Air Traffic Division, ACE–530, Federal Aviation Administration, Docket Number 96–ACE–24, 601 East 12th St., Kansas City, MO 64106.

The official docket may be examined in the Office of the Assistant Chief Counsel for the Central Region at the same address between 9:00 a.m. and 3:00 p.m., Monday through Friday, except federal holidays.

An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Operations Branch, ACE–530C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; telephone (816) 426–3408.

SUPPLEMENTARY INFORMATION: The FAA has developed Standard Instrument Approach Procedures (SIAP) utilizing the Global Positioning System (GPS) at Sidney Municipal Airport, Sidney, NE. The amendment to Class E airspace at Sidney, NE, will provide additional controlled airspace to segregate aircraft operating under Visual Flight Rules (VFR) from aircraft operating under Instrument Flight Rules (IFR) procedures while arriving or departing the airport. The area will be depicted on appropriate aeronautical charts thereby enabling pilots to either circumnavigate the area, continue to operate under VFR to and from the airport, or otherwise comply with IFR procedures. Class E airspace areas extending from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. The amendment will enhance safety for all flight operations by designating an area where VFR pilots may anticipate the presence of IFR aircraft at lower altitudes, especially during inclement weather conditions. A greater degree of safety is achieved by depicting the area on aeronautical charts. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comments is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the Federal Register indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the Federal Register, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 96–ACE–24.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

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

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, the Federal Aviation Administration amends part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—AMENDED

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9D, Airspace Designations and Reporting Points, dated September 4, 1996, and effective September 16, 1996, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE NE E5 Sidney, NE [Revised]

Sidney Municipal Airport, NE
(lat. 41°06′05″ N., long. 102°59′07″ W.)
Sidney VORTAC
(lat. 41°05′48″ N., long. 102°58′59″ W.)

That airspace extending upward form 700 feet above the surface within a 6.6-mile radius of the Sidney Municipal Airport and within 4 miles southwest and 6 miles northeast of the 126° radial of the Sidney VORTAC extending from the 6.6-mile radius to 10.5 miles southeast of the VORTAC and within 4 miles northeast and 6 miles southwest of the 323° radial of the Sidney VORTAC extending from 6.6-miles radius to 10.5 miles northwest of the VORTAC; that airspace in the state of Colorado extending upward from 1,200 feet above the surface within 4 miles southwest and 6 mile northeast of the 126° radial of the Sidney VORTAC 10.5 miles southeast of the VORTAC

* * * * *

Issued in Kansas City, MO, on December 17, 1996.

Herman, J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 97–846 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Docket No. 96–ACE–22]

Amendment to Class E Airspace, Alliance, NE

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action amends the Class E airspace area at Alliance Municipal Airport, Alliance, NE. The Federal Aviation Administration has developed a Standard Instrument Approach Procedure (SIAP) based on the Global Positioning System (GPS). The effect of this rule is to provide additional controlled airspace for aircraft departing the Alliance Municipal Airport.

DATES: Effective date: May 22, 1997.

Comment date: Comments must be received on or before February 21, 1997.

ADDRESSES: Send comments regarding the rule in triplicate to: Manager, Operations Branch, Air Traffic Division, ACE–530, Federal Aviation Administration, Docket Number 96–ACE–22, 601 East 12th St., Kansas City, MO 64106.

The official docket may be examined in the Office of the Assistant Chief Counsel for the Central Region at the same address between 9:00 a.m. and 3:00 p.m., Monday through Friday, except federal holidays.

An informal docket may also be examined during normal business hours in the Air Traffic Division at the same address listed above.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Operations Branch, ACE–530C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106: telephone: (816) 426–3408.

SUPPLEMENTARY INFORMATION: The FAA has developed Standard Instrument Approach Procedures (SIAP) utilizing the Global Positioning System (GPS) at Alliance Municipal Airport, Alliance, NE. The amendment to Class E airspace at Alliance, NE, will provide additional controlled airspace to segregate aircraft operating under Visual Flight Rules (VFR) from aircraft operating under Instrument Flight Rules (IFR) procedures while arriving or departing the airport. The area will be depicted on appropriate aeronautical charts thereby enabling pilots to either circumnavigate the area, continue to operate under VFR to and from the airport, or otherwise comply with IFR procedures. Class E airspace areas extending from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9D, dated September 4, 1996, and effective September 16, 1996, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. The amendment will enhance safety for all flight operations by designating an area where VFR pilots may anticipate the presence of IFR aircraft at lower altitudes, especially during inclement weather conditions. A greater degree of safety is achieved by depicting the area on aeronautical charts. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the Federal Register indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the Federal Register, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a final rule and was not preceded by a notice of proposed rulemaking, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 96–ACE–22.'' The postcard will be date stamped and returned to the commenter.

Agency Findings

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

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

Accordingly, the Federal Aviation Administration amends part 71 of the Federal Aviation Regulations (14 CFR part 71) as follows:

PART 71—AMENDED

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389; 14 CFR 11.69.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9D, Airspace Designations and Reporting Points, dated September 4, 1996, and effective September 16, 1996, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE NE E5 Alliance, NE [Revised]

Alliance Municipal Airport, NE
(lat. 42°03′12″ N., long. 102°48′13″ W.)
Alliance VOR/DME
(lat. 42°03′20″ N., long. 102°48′16″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Alliance Municipal Airport and within 3 miles each side of the 145° radial of the Alliance VOR/DME extending from the 6.8-mile radius to 10.5 miles southeast of the VOR/DME and within 3 miles each side of the 302° radial of the Alliance VOR/DME extending from the 6.8-mile radius to 8.7 miles northwest of the VOR/DME.

* * * * *

Issued in Kansas City, MO, on December 17, 1996.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 97–847 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 648

[Docket No. 960910252–6329–02; I.D. 082296B]

RIN 0648–AI77

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Amendment 5

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 5 to the Fishery Management Plan for the Atlantic Sea Scallop Fishery (FMP). The final rule closes a 9 mi² (23.31 km²) site to transiting and fishing with other than hand gear for an 18-month period to allow for the conduct of a NMFS-sponsored sea scallop aquaculture research project, provides for exemptions from the closure for vessels using certain gear types and for vessels participating in the project, and provides for temporary exemptions for vessels participating in the project from certain fishing regulations that might inhibit or prevent their performing any activity necessary for project operations. The intended effect of this action is to support the aquaculture research project and prevent conflicts between fishing gear and project equipment for the limited duration of the project.

EFFECTIVE DATE: February 13, 1997 through July 15, 1998.

ADDRESSES: Copies of Amendment 5, its regulatory impact review (RIR), the initial regulatory flexibility analysis contained within the RIR, and the environmental assessment are available from Christopher Kellogg, Acting Executive Director, New England Fishery Management Council, Suntaug Office Park, 5 Broadway, Saugus, MA 01906–1097.

Comments regarding burden-hour estimates for collection-of-information requirements contained in this final rule should be sent to Dr. Andrew A. Rosenberg, Regional Administrator, 1 Blackburn Drive, Gloucester, MA 01930, and the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, D.C. 20502 (Attention: NOAA Desk Officer).

FOR FURTHER INFORMATION CONTACT: Paul H. Jones, Fishery Policy Analyst, 508–281–9273.

SUPPLEMENTARY INFORMATION: Amendment 5 to the FMP was prepared by the New England Fishery Management Council (Council). A notice of availability for the amendment when it was proposed, was published on August 29, 1996 (61 FR 45395), and a proposed rule to implement it was published on September 20, 1996 (61 FR 49428). Details of this action were described in the preamble to the proposed rule and are not repeated here.

Approved Management Measures

This final rule establishes a 9 mi² (23.31 km²) area closure approximately 12 mi (22.22 km) southwest of the island of Martha's Vineyard, MA (hereinafter called the Sea Scallop Experimental Area), to transiting and fishing with other than handgear for an 18-month period to allow for the conduct of a NMFS-sponsored (Saltonstall-Kennedy (NOAA Award NA 66FD0027)) sea scallop aquaculture research project and provides for exemptions from the closure for vessels using certain gear types and for vessels participating in the project.

Additionally, this final rule provides the Regional Administrator (RA) with authority to temporarily exempt a vessel participating in the project from any specific Federal fishing regulation which inhibits or prevents the vessel from performing any activity necessary for project operations, such as regulations prohibiting the use of nonconforming fishing gear or the possession of scallops when not fishing under a DAS allocation.

This action prohibits fishing other than with handgear within the Sea Scallop Experimental Area for 18 months. However, fishing with gear other than gillnet and mobile, i.e., trawls and dredges such as lobster pots, longline, and any other gear determined by the RA as not likely to interfere with the research project, will be allowed in the area pursuant to an Allowable Gear Permit (AGP) issued by the RA. This permit requirement will enable the RA to inform vessel operators of the location of the research equipment and avoid potential conflicts between fishery and project activities. Fishers authorized to fish in the Sea Scallop Experimental Area under an AGP may also be required periodically to remove their gear or may be required to set their gear a certain minimum distance from research project activities. At least 2 weeks notice will be provided to vessel operators of any requirement to relocate fishing gear.

All vessels will be allowed to transit the area at any time, provided their fishing gear is properly stowed.

Vessels participating in the project will be allowed to fish within and transit the Sea Scallop Experimental Area pursuant to an EFP issued by the RA. Such EFP may exempt such vessel from specific Federal fishing regulations which may inhibit or prevent that vessel from performing any activity necessary for project operations such as regulations prohibiting the use of non-conforming fishing gear or the possession of scallops when not fishing under a DAS allocation. Vessels issued an EFP are exempt from DAS requirements for any trip transiting to and from, and conducted exclusively within, the Sea Scallop Experimental Area, and for the portion of any trip used to transport sea scallops from the fishing grounds to the area. The EFP also may allocate and authorize the use of up to 2 additional DAS for the collection of sea scallops from the fishing grounds for transportation to the Sea Scallop Experimental Area. Vessels issued an EFP must comply with all conditions and restrictions specified in the permit.

Comments and Responses

Written comments were received from one individual.

Comment: The commenter expressed concern about lobster gear that is typically fished in a portion of the Sea Scallop Experimental Area for about 6 months per year, and whether the project managers will be able to work around lobster gear during the research project period.

Response: The Regional Administrator will issue AGPs to lobster pot vessels interested in fishing within the Sea Scallop Experimental Area. Lobster fishers may be required to remove their gear periodically or may be required to set fishing gear a certain minimum distance from research project activities. The AGP program provides a means by which to communicate the dates and specific locations of project equipment and activities to those who are fishing in the area. At least 2 weeks notice will be provided prior to activities that would require removal of fishing gear. A minimum of 4 weeks notice will be provided in the event that more than 25 percent of the closed area is involved. NMFS will continue to stress to the principal NOAA grant investigators for the project that communication between fishers and project managers be maintained for the duration of the project to prevent conflicts.

Changes From the Proposed Rule

Changes were made to § 648.56(a) to clarify which permits are required for vessels participating in the sea scallop aquaculture research project or fishing within the Sea Scallop Experimental Area, but not participating in the project. Editorial simplifications and clarifications were made throughout the rule.

Classification

The Regional Administrator determined that this final rule is necessary for the conservation and management of the Atlantic sea scallop fishery and that it is consistent with the Magnuson-Stevens Act Fishery Conservation and Management Act (Magnuson-Stevens Act) and other applicable law.

This final rule has been determined to be significant for the purposes of E.O. 12866. The action raises a novel legal or policy issue arising out of a legal mandate under the Magnuson-Stevens Act, in that it may be viewed as setting a precedent for establishing other aquaculture efforts in the exclusive economic zone.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration when this rule was proposed that it would not have a significant economic impact on a substantial number of small entities. The comment received and the changes made to the rule do not change the basis for that certification. Accordingly, a regulatory flexibility analysis was not prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number.

This rule contains one new collection-of-information requirement subject to the PRA. This collection-of-information requirement has been approved by OMB, and the OMB control number and public reporting burden are listed as follows: Sea Scallop Experimental Area authorization request, (0.5 hours/response) under OMB Control Number 0648–0321.

The estimated response time includes the time needed for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding this burden estimate, or any other aspect of the collection-of-information to NMFS and OMB (see **ADDRESSES**).

NMFS reinitiated consultation on the Atlantic Sea Scallop FMP on October 7, 1996. This consultation will consider new information concerning the status of the northern right whale. The Regional Administrator has determined that the implementation of Amendment 5, pending completion of that consultation, will not result in any irreversible or irretrievable commitment of resources that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures.

List of Subjects

15 CFR Part 909

Reporting and recordkeeping requirements.

50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: January 8, 1997.

Charles Karnella,

Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 15 CFR chapter IX and 50 CFR chapter VI are amended as follows:

15 CFR CHAPTER IX

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT; OMB CONTROL NUMBERS

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. In § 902.1, in paragraph (b), the table is amended by adding, in numerical order, the following entry to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * * * *	
50 CFR	
* * * * *	
648.56	–0321
* * * * *	

50 CFR CHAPTER VI

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

3. The authority citation for part 648 continues to read as follows:

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

4. In § 648.14, paragraph (a)(96) is added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(96) Fish within or transit, with other than handgear, the Scallop Experimental Area defined in § 648.56(a)(1), except as provided for in § 648.56 (a)(2) and (a)(3).

* * * * *

5. Section 648.56 is added to subpart D to read as follows:

§ 648.56 Scallop research project.

(a)(1) *Scallop experimental area.* From February 13, 1997 through July 15, 1998, no fishing vessel or person on a fishing vessel may fish within or transit, with other than handgear, the area known as the Sea Scallop Experimental Area, as defined by straight lines connecting the following points in the order stated, except as provided for in paragraphs (a)(2) and (a)(3) of this section:

Point	Latitude	Longitude
1	41°11.8′ N.	70°50′ W.
2	41°11.8′ N.	70°46′ W.
3	41°08.8′ N.	70°46′ W.
4	41°08.8′ N.	70°50′ W.

(2) *Exemptions.* A fishing vessel and persons on a fishing vessel may fish within or transit the Sea Scallop Experimental Area:

(i) With pot gear and traps, longline gear, or any other gear, provided such pot gear and traps, longline gear, or other gear is determined by the Regional Director as not likely to interfere with the sea scallop aquaculture research project in the Sea Scallop Experimental Area, and provided such vessel has been issued an allowed gear permit (AGP) under paragraph (a)(4)(i) of this section; or

(ii) If such vessel has been issued an experimental fishing permit (EFP) under paragraph (a)(4)(i) of this section to participate in the sea scallop aquaculture research project in the Sea Scallop Experimental Area.

(3) *Transiting.* Vessels that are not exempted from the prohibition against fishing within or transiting the Sea Scallop Experimental Area under paragraph (a)(2) of this section may transit such area provided their gear is stowed in accordance with the provisions of § 648.81(e).

(4) *Allowed gear and experimental fishing permits*—(i) *Allowed gear permits.* The Regional Director may issue an AGP to any vessel to fish within and transit the Sea Scallop Experimental Area with the gear specified in paragraphs (a)(2)(i) of this section. Vessels issued an AGP may be required to move their gear within, or remove their gear from, the area upon notification by the Regional Director and must comply with any additional conditions and restrictions specified in the permit.

(ii) *Experimental fishing permits.* The Regional Director may issue an EFP under the provisions of § 648.12, if consistent with the provisions of paragraph (a)(4)(iv) of this section, to any vessel participating in the sea scallop aquaculture research project to fish within and transit the Sea Scallop Experimental Area. Such an EFP may exempt such vessel from specific Federal fishing regulations which may inhibit or prevent that vessel from performing any activity necessary for project operations such as regulations prohibiting the use of non-conforming fishing gear or the possession of scallops when not fishing under a DAS allocation. Vessels issued an EFP shall be exempted from DAS requirements as specified in the FMP for any trip in which the vessel engages exclusively in project activities such as bottom surveying, biological sampling, or use of non-regulated hand gear outside the Sea Scallop Experimental Area. The EFP also may allocate and authorize the use of up to 2 additional DAS for project activities relating to scallop seeding. Vessels issued an EFP must comply with all conditions and restrictions specified in the permit.

(iii) A vessel with an AGP or EFP must carry the permit on board the vessel while fishing in the Sea Scallop Experimental Area or participating in the scallop aquaculture project.

(iv) The Regional Director may not issue an AGP or EFP unless he determines that issuance is consistent with the objectives of the FMP, the provisions of the Magnuson-Stevens Act, and other applicable law and will not:

(A) Have a detrimental effect on the sea scallop resource and fishery;

(B) Create significant enforcement problems; or

(C) Have a detrimental effect on the scallop project.

(5) *Application.* An application for an AGP or EFP must be in writing to the Regional Director and be submitted at least 30 days before the desired effective date of the permit. The application must include, but is not limited to, the following information:

(i) The date of application.

(ii) The applicant's name, current address, telephone number and fax number if applicable.

(iii) The current vessel name, owner address, and telephone number.

(iv) The vessel's Federal permit number.

(v) The USCG documentation number.

(vi) The species (target and incidental) expected to be harvested.

(vii) The gear type, size, buoy colors, trap identification markings and amount of gear that will be used; and exact time(s) fishing will take place in the Sea Scallop Experimental Area.

(viii) The signature of the applicant.

(b) [Reserved]

[FR Doc. 97–872 Filed 1–13–97; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 560

Iranian Transactions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice; extension of time to report.

SUMMARY: The Office of Foreign Assets Control of the U.S. Department of the Treasury is extending to May 30, 1997, the deadline for submission of quarterly reports pursuant to § 560.603 of the Iranian Transactions Regulations for the quarters ending December 31, 1996, and March 31, 1997.

EFFECTIVE DATE: January 10, 1997.

FOR FURTHER INFORMATION CONTACT: Loren L. Dohm, Chief, Blocked Assets Divison (tel.: 202/622–2440), or William B. Hoffman, Chief Counsel (tel.: 202/622–2410), Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document is available as an electronic file on *The Federal Bulletin Board* the day of publication in the Federal Register. By modem, dial 202/515–1387 and type ''/GO FAC,'' or call 202/512–1530 for disk or paper copies. This file is available for downloading without charge in WordPerfect 5.1, ASCII, and Adobe Acrobat™ readable (*.PDF) formats. For Internet access, the address for use with the World Wide Web (Home Page), Telnet, or FTP protocol is: fedbbs.access.gpo.gov. The document is also accessible for downloading in ASCII format without charge from Treasury's Electronic Library (''TEL'') in the ''Business, Trade and Labor Mall'' of the FedWorld bulletin board. By modem, dial 703/321–3339, and select the appropriate self–expanding file in TEL. For Internet access, use one of the following protocols: Telnet = fedworld.gov (192.239.93.3); World Wide Web (Home Page) = http://www.fedworld.gov; FTP = ftp.fedworld.gov (192.239.92.205). Additional information concerning the programs of the Office of Foreign Assets Control is available for downloading from the Office's Internet Home Page: http://www.ustreas.gov/treasury services/fac/fac.html, or in fax form through the Office's 24–hour fax–on–demand service: call 202/622–0077 using a fax machine, fax modem, or (within the United States) a touch–tone telephone.

Notice

On November 15, 1996, the Office of Foreign Assets Control (''OFAC'') published an amendment to § 560.603 of the Iranian Transactions Regulations, 31 CFR Part 560 (the ''Regulations''), which imposes reporting requirements on United States persons with foreign affiliates (See 61 FR 58480). Any report required to be submitted to OFAC pursuant to § 560.603 of the Iranian Transactions Regulations for the quarter ending December 31, 1996, or for the quarter ending March 31, 1997, may be filed up to but no later than May 30, 1997.

Issued: January 7, 1997.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: January 7, 1997.

James E. Johnson,

Assistant Secretary (Enforcement)

[FR Doc. 97–974 Filed 1–10–97; 12:08 pm]

BILLING CODE 4810–25–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 1, 2, 21, 22, 60, 61, 62, 147, 262, 272, 707, 763

[FRL–5674–2]

Technical Amendments to Revise Addresses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical amendment.

SUMMARY: The EPA is revising the address for its Region 5 office, and those of the environmental agencies of the States of Illinois, Michigan and Ohio in 40 CFR Parts, 1, 2, 21, 60, 61, 62, 147, 272, 707, and the appendices to 40 CFR Parts 22, 262, and 763 because of changes in office locations. This document does not change the substantive requirements of the standards.

EFFECTIVE DATE: This action becomes effective January 14, 1997.

FOR FURTHER INFORMATION CONTACT: John Gaitskill, United States Environmental Protection Agency, Region 5, Chicago, Illinois 60604–3590, (312) 886–6795.

SUPPLEMENTARY INFORMATION: This rule makes editorial changes to various environmental regulations in title 40 to replace obsolete addresses and organization names with appropriate new ones.

List of Subjects

40 CFR Part 1

Environmental protection, Organization and functions (Government agencies).

40 CFR Part 2

Freedom of information.

40 CFR Part 21

Small businesses.

40 CFR Part 22

Administrative practice and procedure.

40 CFR Part 60

Administrative practice and procedure, Reporting and recordkeeping requirements.

40 CFR Part 61

Reporting and recordkeeping requirements.

40 CFR Part 62

Administrative practice and procedure.

40 CFR Part 147

Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 262

Reporting and recordkeeping requirements.

40 CFR Part 272

Intergovernmental relations.

40 CFR Part 707

Reporting and recordkeeping requirements.

40 CFR Part 763

Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 30, 1996.

Valdas V. Adamkus,

Regional Administrator.

Therefore, Title 40 of the Code of Federal Regulations is amended as follows:

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: 5 U.S.C. 552.

§ 1.7 [Amended]

2. Section 1.7, paragraph (b)(5) is amended by replacing ''230 South Dearborn Street'' with ''77 West Jackson Boulevard''.

PART 2—PUBLIC INFORMATION

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

Authority: 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 205, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C. 300j-4, 300j-9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 8(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136h, 136j, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1414(f), 1418); secs. 104 and 115, Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9604 and 9615); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

§ 2.106 [Amended]

4. Section 2.106, paragraph (b)(5) is amended by replacing ''230 Dearborn Street'' with ''77 West Jackson Boulevard''.

PART 21—SMALL BUSINESS

5. The authority citation for part 21 continues to read as follows:

Authority: 15 U.S.C. 636, as amended by Pub. L. 92–500.

§ 21.3 [Amended]

6. Section 21.3, paragraph (a) table is amended replacing ''230 South Dearborn St.'' with ''77 West Jackson Boulevard''.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

7. The authority citation for part 22 continues to read as follows:

Authority: 15 U.S.C. 2615; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547(d), 7601 and 7607(a); 7 U.S.C. 136(l) and (m); 33 U.S.C. 1319, 1415 and 1418; 42 U.S.C. 6912, 6928 and 6991(e); 42 U.S.C. 9609; 42 U.S.C. 11045.

Appendix to Part 22 [Amended]

8. The appendix to Part 22 is amended by replacing ''230 South Dearborn St.'' with ''77 West Jackson Boulevard''.

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

9. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7414, 7416, 7429, and 7601.

10. Section 60.4 is amended by revising the Region V address in paragraph (a); and by revising paragraphs (b)(O), (b)(P), (b)(X), (b)(KK)(ii), (b)(KK)(iii), (b)(KK)(iv), (b)(KK)(vi), (b)(KK)(ix), (b)(KK)(xii), and (b)(KK)(xiii) to read as follows:

§ 60.4 Address.

* * * * *

(a) * * *

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Director, Air and Radiation Division, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL 60604–3590.

* * * * *

(b) * * *

(O) State of Illinois, Bureau of Air, Division of Air Pollution Control, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, IL 62794–9276.

(P) State of Indiana, Indiana Department of Environmental Management, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, Indiana 46206–6015.

* * * * *

(X) State of Michigan, Air Quality Division, Michigan Department of Environmental Quality, P.O. Box 30260, Lansing, Michigan 48909.

* * * * *

(KK) * * *

(ii) Stark County: Air Pollution Control Division, 420 Market Avenue North, Canton, Ohio 44702–3335.

(iii) Butler, Clermont, Hamilton, and Warren Counties: Air Program Manager, Hamilton County Department of Environmental Services, 1632 Central Parkway, Cincinnati, Ohio 45210.

(iv) Cuyahoga County: Commissioner, Department of Public Health & Welfare, Division of Air Pollution Control, 1925 Saint Clair, Cleveland, Ohio 44114.

* * * * *

(vi) Clark, Darke, Greene, Miami, Montgomery, and Preble Counties: Director, Regional Air Pollution Control Agency (RAPCA) 451 West Third Street, Dayton, Ohio 45402.

* * * * *

(ix) Allen, Ashland, Auglaize, Crawford, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Marion, Mercer, Ottawa, Paulding, Putnam, Richland, Sandusky, Seneca, Van Wert, Williams, Wood (except

City of Rossford), and Wyandot Counties: Ohio Environmental Protection Agency, Northwest District Office, Air Pollution Control, 347 Dunbridge Rd., Bowling Green, Ohio 43402.

* * * * *

(xii) Champaign, Clinton, Highland, Logan, and Shelby Counties: Ohio Environmental Protection Agency, Southwest District Office, Air Pollution Unit, 401 East Fifth Street, Dayton, Ohio 45402–2911.

(xiii) Delaware, Fairfield, Fayette, Franklin, Knox, Licking, Madison, Morrow, Pickaway, and Union Counties: Ohio Environmental Protection Agency, Central District Office, Air Pollution Control, 3232 Alum Creek Drive, Columbus, Ohio, 43207–3417.

* * * * *

PART 61—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

11. The authority citation for Part 61 continues to read as follows:

Authority: 42 U.S.C. 7401, 7412, 7414, 7416, 7601.

12. Section 61.04 is amended by revising the Region V address in paragraph (a); and by revising paragraphs (b)(O), (b)(P), (b)(X), (b)(KK)(ii), (b)(KK)(iii), (b)(KK)(iv), (b)(KK)(vi), (b)(KK)(ix), (b)(KK)(xii) and (b)(KK)(xiii) to read as follows:

§ 61.04 Address.

* * * * *

(a) * * *

Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin), Director, Air and Radiation Division, U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, IL 60604–3590.

* * * * *

(b) * * *

(O) State of Illinois, Bureau of Air, Division of Air Pollution Control, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, IL 62794–9276.

(P) State of Indiana, Indiana Department of Environmental Management, 100 North Senate Avenue, P.O. Box 6015, Indianapolis, Indiana 46206–6015.

* * * * *

(X) State of Michigan, Air Quality Division, Michigan Department of Environmental Quality, P.O. Box 30260, Lansing, Michigan 48909.

* * * * *

(KK) * * *

(ii) Stark County: Air Pollution Control Division, 420 Market Avenue North, Canton, Ohio 44702–3335.

(iii) Butler, Clermont, Hamilton, and Warren Counties: Air Program Manager, Hamilton County Department of Environmental Services, 1632 Central Parkway, Cincinnati, Ohio 45210.

(iv) Cuyahoga County: Commissioner, Department of Public Health & Welfare, Division of Air Pollution Control, 1925 Saint Clair, Cleveland, Ohio 44114.

* * * * *

(vi) Clark, Darke, Greene, Miami, Montgomery, and Preble Counties: Director, Regional Air Pollution Control Agency (RAPCA), 451 West Third Street, Dayton, Ohio 45402.

* * * * *

(ix) Allen, Ashland, Auglaize, Crawford, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Marion, Mercer, Ottawa, Paulding, Putnam, Richland, Sandusky, Seneca, Van Wert, Williams, Wood (except City of Rossford), and Wyandot Counties: Ohio Environmental Protection Agency, Northwest District Office, Air Pollution Control, 347 Dunbridge Rd., Bowling Green, Ohio 43402.

* * * * *

(xii) Champaign, Clinton, Highland, Logan, and Shelby Counties: Ohio Environmental Protection Agency, Southwest District Office, Air Pollution Unit, 401 East Fifth Street, Dayton, Ohio 45402–2911.

(xiii) Delaware, Fairfield, Fayette, Franklin, Knox, Licking, Madison, Morrow, Pickaway, and Union Counties: Ohio Environmental Protection Agency, Central District Office, Air Pollution Control, 3232 Alum Creek Drive, Columbus, Ohio, 43207–3417.

* * * * *

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

13. The authority citation for Part 62 continues to read as follows:

Authority: 42 U.S.C. 7413 and 7601.

§ 62.10 [Amended]

14. Section 62.10 table is amended by replacing ‘‘Federal Building, 230 South Dearborn St., Chicago, Ill, 60606’’ with ‘‘Mail Code A–17J, 77 West Jackson Blvd, Chicago, IL 60604–3590’’.

PART 147—STATE UNDERGROUND INJECTION CONTROL PROGRAMS

15. The authority citation for Part 147 continues to read as follows:

Authority: 42 U.S.C. 300h; and 42 U.S.C. 6901 *et seq.*

§ 147.750 [Amended]

16. Section 147.750(a) introductory text is amended by replacing ‘‘230 South Dearborn Street’’ with ‘‘77 West Jackson Boulevard’’.

§ 147.2500 [Amended]

17. Section 147.2500(a) introductory text is amended by replacing ‘‘230 South Dearborn Street’’ with ‘‘77 West Jackson Boulevard’’.

PART 262—STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

18. The authority citation for Part 262 is revised to read as follows:

Authority: 42 U.S.C. 6906, 6912, 6922, 6923, 6925, 6937 and 6938.

Appendix to Part 262 [Amended]

19. Item 19 in the appendix to Part 262 is amended by replacing ‘‘230 South Dearborn St’’ with ‘‘77 West Jackson Blvd’’.

PART 272—APPROVED STATE HAZARDOUS WASTE MANAGEMENT PROGRAMS

20. The authority citation for Part 272 continues to read as follows:

Authority: Secs. 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6912(a), 6926, and 6974(b).

§ 272.1151 [Amended]

21. In 272.1151 paragraph (a)(1)(ii) is amended by replacing the address ‘‘U.S. EPA Region V, Office of RCRA, Regulation Development Section, 230 S. Dearborn St., 13th Floor, Chicago IL. Phone: Ms. Judy Greenberg, (312) 886–4179;’’ with ‘‘U.S. EPA, Region V, Waste, Pesticides and Toxics Division, Program Management Branch, 7th floor, 77 West Jackson Boulevard, Chicago, IL. Phone: Ms. Judy Feigler, (312) 886–4179;’’

PART 707—CHEMICAL IMPORTS AND EXPORTS

22. The authority citation for Part 707 continues to read as follows:

Authority: 15 U.S.C. 2611(b) and 2612.

§ 707.20 [Amended]

23. Section 707.20(c)(2)(ii) is amended by revising ‘‘230 South Dearborn Street’’ to read ‘‘77 West Jackson Blvd’’.

PART 763—ASBESTOS

24. The authority citation for Part 763 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607(c), 2643, and 2646.

Appendix D to Subpart E of Part 763 [Amended]

25. Appendix D to subpart E of Part 763 is amended under the Region V heading by replacing ‘‘230 S. Dearborn Street’’ with ‘‘77 West Jackson Boulevard’’.

[FR Doc. 97–874 Filed 1–13–97; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 63

[AD–FRL–5676–6]

RIN 2060–AD–56 and RIN 2060–AE–37

National Emission Standards for Hazardous Air Pollutants Emissions: Group I Polymers and Resins and Group IV Polymers and Resins

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: On September 5, 1996, the EPA issued the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Group I Polymers and Resins (61 FR 46906), and on September 12, 1996, the EPA issued the Group IV Polymers and Resins NESHAP (61 FR 48208). This action corrects an error in the final Group I Polymers and Resins NESHAP, by extending the compliance date for heat exchange systems. In addition, this action extends the compliance date for equipment leaks for both the Group I and Group IV Polymers and Resins NESHAP, to allow time necessary for affected sources to respond to the amendments to the hazardous organic NESHAP (HON) equipment leak provisions promulgated on December 26, 1996, which are directly referenced in both subparts U and JJJ.

DATES: The direct final rule will be effective March 5, 1997. However, if significant adverse comments on any amendment to these rules are received by February 13, 1997, then the effective date of that amendment will be delayed, the EPA will publish a timely withdrawal of that amendment, and all public comments received will be addressed in a subsequent final rule. For additional information concerning comments, see the parallel proposal notice found in the Proposed Rules Section of this Federal Register.

ADDRESSES: Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A–92–44 (Group I Polymers and Resins) and/or Docket Number A–92–45 (Group IV Polymers and Resins), Room M–1500, U.S. Environmental Protection Agency, 401 M Street, SW, Washington, D.C. 20460. Comments may also be submitted electronically by sending electronic mail (e-mail) to: a-and-r-docket@epamail.epa.gov.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rosensteel, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5608.

SUPPLEMENTARY INFORMATION: This document is available in Docket No. A–92–44 and Docket No. A–92–45, or by request from the EPA's Air and Radiation Docket and Information Center (see **ADDRESSES**), and is available for downloading from the Technology Transfer Network (TTN), the EPA's electronic bulletin board system. The TTN provides information and technology exchange in various areas of emissions control. The service is free, except for the cost of a telephone call. Dial (919) 541–5742 for up to a 14,000 baud per second modem. For further information, contact the TTN HELP line at (919) 541–5348, from 1:00 p.m. to 5:00 p.m., Monday through Friday, or access the TTN web site at: http://ttnwww.rtpnc.epa.gov.

Regulated entities. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Producers of elastomers and thermoplastics.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by the amendments discussed in this direct final rule. If you have questions regarding the applicability of this direct final rule to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The information presented in this preamble is organized as follows:

I. Background

The HON, which was promulgated on April 22, 1994 (59 FR 19402), regulates emissions of certain organic hazardous air pollutants (HAP) from synthetic organic chemical manufacturing industry (SOCMI) production processes. On September 5, 1996 (61 FR 46906), and September 12, 1996 (61 FR 48208), the EPA published the Group I Polymers and Resins NESHAP and the Group IV Polymers and Resins NESHAP, respectively. These regulations were promulgated as subparts U and JJJ in 40 CFR part 63. Due to the similarities in HAP emissions and emission controls at SOCMI facilities and elastomer (Group I Polymers and Resins) and thermoplastic (Group IV Polymers and Resins) production facilities, the HON provisions were used in the development of regulations for elastomer and thermoplastic production facilities. In fact, both the Polymers and Resins I and IV NESHAP directly reference sections of the HON. These sections include the HON equipment leak provisions (40 CFR 63, subpart H) and heat exchange provisions (§ 63.104).

The HON equipment leak provisions are referenced in §63.502 of subpart U and §63.1331 of subpart JJJ. Since the HON heat exchange provisions require the monitoring of cooling water to detect leaks in heat exchange equipment, these provisions were also referenced in the equipment leaks section, § 63.502, of subpart U. Subpart JJJ contains § 63.1328, which specifically addresses heat exchange systems and references the HON (§ 63.104).

The final rules require existing sources to comply with the equipment leaks provisions by March 5, 1997 for Group I Polymers and Resins, and by March 12, 1997 for Group IV Polymers and Resins. These dates represent six months from the promulgation of the final rules. Both regulations also allow longer periods (up to 3 years from the respective promulgation dates) for compliance with the surge control vessel, bottom receiver, and compressor provisions under certain circumstances.

The final rule for Group I Polymers and Resins also requires the owner or operator to comply with the heat exchange system requirements by March 5, 1997. The Group IV Polymers and Resins rule requires compliance with the heat exchange system requirements by September 12, 1999, which is three years from the promulgation date of subpart JJJ.

The final HON rule provided that existing sources must be in compliance with the provisions of subparts F and G by April 22, 1997, which represents a date three years from the promulgation date. Subpart F contains the heat exchange system requirements referenced by subpart U, meaning that the HON allowed 3 years for SOCMI facilities to comply with these provisions. The HON contained a tiered compliance schedule for subpart H (equipment leaks), and the first group of sources were required to be in compliance by October 24, 1993 (six months after the promulgation date).

On December 26, 1996, in conformance with a settlement agreement reached with the Chemical Manufacturers Association (CMA) and the Dow Chemical Company, the EPA promulgated amendments to the HON rule. This action promulgated significant changes to § 63.104 (heat exchange systems) and some amendments to subpart H (equipment leaks), as well as substantial revisions to other provisions. For those HON provisions directly referenced in subparts U and JJJ, the promulgated amendments apply to affected Polymers and Resins I and IV sources.

On November 25, 1996 the EPA published an Advanced Notice of Proposed Rulemaking (ANPR) (61 FR 59849) informing the public of the intent to propose amendments to the recently promulgated Group I Polymers and Resins NESHAP and Group IV Polymers and Resins NESHAP that are necessary due to the HON amendments. However, it is anticipated that proposal of these subpart U and JJJ amendments will occur in mid-1997, which will be after the compliance dates for the equipment leaks provisions for both Polymers and Resins NESHAP and the heat exchange system provisions for the Polymers and Resins I NESHAP.

II. Summary of and Rationale for Proposed Revisions

A. Summary of Revisions

The NESHAP for Group I Polymers and Resins provided that existing sources must be in compliance with the requirements of § 63.502, which references the HON equipment leaks provisions and the HON heat exchange system provisions, no later than March 5, 1997, unless a compliance extension was granted. Similarly, the Group IV Polymers and Resins NESHAP provided that existing sources must be in compliance with the requirements of § 63.1331, which references the HON equipment leak provisions, no later than March 12, 1997, unless a compliance extension was granted.

This direct final rule changes the subpart U and subpart JJJ compliance date provisions in two significant respects. For Polymer and Resins I (subpart U), the compliance date for heat exchange systems is being extended from March 5, 1997, to September 5, 1999. This change is contained in § 63.481(d)(6) of this direct final rule.

In addition, this direct final rule extends the compliance date for Group I Polymers and Resins equipment leaks until July 31, 1997, and extends the compliance date for Group IV Polymers and Resins equipment leaks until July 31, 1997. These changes are included in § 63.481(d) and in § 63.1311(d) of this direct final rule.

B. Rationale

1. Heat Exchange Systems

The EPA never intended that owners and operators of affected subpart U sources would have to be in compliance with the heat exchange system provisions by 6 months after promulgation of the rule. As discussed above, the equipment leak section of subpart U (§ 63.502) references both the HON equipment leaks section (subpart H) and the HON heat exchange system (§ 63.104) provisions. Section 63.481 of subpart U, specifies that affected existing sources must be in compliance with the provisions of § 63.502 by March 5, 1997 (i.e., 6 months after promulgation). This compliance date was selected to be consistent with the HON compliance date for the first tier of sources. However, this compliance date also applies to heat exchange systems, since § 63.502(f) contains the reference to the HON heat exchange provisions. This was not intended by the EPA. The intention was to make the compliance date for heat exchange systems consistent with the HON (i.e., 3 years from the promulgation date). The EPA's intention is evident in the Polymers and Resins IV regulation (subpart JJJ). Section 63.1311 of subpart JJJ requires compliance with the heat exchange system provisions of § 63.1328 no later than September 12, 1999 (3 years after the promulgation date for that rule). While this was also the EPA's intention in subpart U, the structure of subpart U caused the inadvertent establishment of a 6-month heat exchange system compliance date. In the HON and in subpart JJJ, the 3 year compliance deadline was selected because the EPA considered that amount of time to be necessary for owners and operators of affected sources to complete the planning, design, and engineering needed to develop the technology to comply with the requirements, as well as to perform the installation and start-up of new equipment. Therefore, the rationale for the revision to the heat exchange system compliance date in subpart U is that the compliance date in the promulgated rule was never intended to be March 5, 1997. Rather, the EPA meant to be consistent with the HON compliance date for the same provisions.

2. Equipment Leaks

In this direct final rule, the EPA is extending the compliance date for equipment leaks (subparts U and JJJ) due to the fact that the amendments to the HON (on which the equipment leaks provisions are based) were promulgated on December 26, 1996. This may cause confusion for owners and operators of affected sources, regarding which HON equipment leak provisions (subpart H) they must be in compliance with by March 5 and March 12, 1997. For this reason, the EPA is extending the compliance date for equipment leaks until 6 months after the publication of the equipment leak provision amendments to subpart H. Since the subpart H amendments were signed by the Administrator on December 26, 1996 and will be published in January 1997, this rule extends the compliance dates in both § 63.1311(d) of subpart JJJ and § 63.481(d) of subpart U to July 31, 1997.

Section 112(i)(3) of the Act provides that existing sources are to be in compliance with applicable emission standards ''as expeditiously as practicable, but in no event later than 3 years after the effective date of such standard.'' The September 5, 1996 and September 12, 1996 final rules specified a compliance date applicable to equipment leaks that was six months from the issuance of those rules. This direct final rule extends those compliance dates to approximately 6 months after finalization of the amendments to the equipment leak provisions in subpart H. The EPA believes this compliance date is reasonable due to the fact that no changes to the equipment leak provisions in subparts U and JJJ are anticipated, except for the addition of a paragraph parallel to the proposed amendment to § 63.100(e)(3) of subpart F, which provides greater flexibility by allowing specific items of equipment that are managed by different administrative organizations to be aggregated with any process unit within the affected source.

The EPA believes that the revised compliance dates will provide sufficient time for all sources to come into compliance with the equipment leak provisions as amended in the HON on December 26, 1996. However, should any source be unable to meet that compliance date because of the need to install controls that cannot be installed by that date, such source may request an extension of up to one year in accordance with section 112(i)(3)(B) of the Act, as discussed in § 63.182(a)(6) of subpart H.

III. Impacts

The extension on the compliance dates for heat exchange systems at subpart U affected sources and for equipment leaks at either subpart U or subpart JJJ affected sources will not affect the estimated emissions reduction or the control cost for the rule.

IV. Administrative

A. Paperwork Reduction Act

For both the Group I and Group IV Polymers and Resins NESHAP, the information collection requirements were submitted to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act,* [44 U.S.C. 3501 et seq.]. The OMB approved the information collection requirements for the Group IV Polymers and Resins NESHAP and assigned those standards the OMB control number 2060–0351. 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 the EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The EPA has amended 40 CFR Part 9, Section 9.1, to indicate the information collection requirements contained in the Group IV Polymers and Resins NESHAP.

An Information Collection Request (ICR) document for the Group I Polymers and Resins I NESHAP was prepared by the EPA (ICR No. 1746.01) but has not yet been approved by the OMB. A copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division (2137), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, or by calling (202) 260–2740.

The amendments to the NESHAP contained in this direct final rule should have no impact on the information collection burden estimates made previously. Therefore, the ICRs have not been revised.

B. Executive Order 12866

Under Executive Order (E.O.) 12866, the EPA 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 in State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, the OMB notified the EPA that it considered both the Group I Polymers and Resins NESHAP and the Group IV Polymers and Resins NESHAP ''significant regulatory actions'' within the meaning of the Executive Order. The EPA submitted those actions to the OMB for review. Changes made in response to suggestions or recommendations from the OMB were documented and included in the public record.

These amendments to those NESHAP provide affected sources more time in which to comply with the equipment leaks provisions of those rules, and provide Group I Polymers and Resins more time in which to comply with the heat exchange systems provisions. The amendments contained in this direct final rule do not add any additional control requirements. Therefore, this direct final rule was classified ''non-significant'' under Executive Order 12866 and was not required to be reviewed by OMB.

C. Regulatory Flexibility Act

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this direct final rule. The EPA has also determined that this rule will not have a significant economic impact on a substantial number of small entities. See the September 5, 1996 Federal Register (61 FR 46906) and the September 12, 1996 Federal Register (61 FR 48208) for the basis for this determination. The compliance date changes to the two rules do not impose any economic burden for any regulated entity.

D. Unfunded Mandates

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

The EPA has determined that this direct final rule does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

E. Submission to Congress and the General Accounting Office

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

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 9, 1997.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, part 63 of Chapter I of title 40 of the Code of Federal Regulations is amended as follows.

PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

1. The authority citation for part 63 continues to read as follows:

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

Subpart U—National Emission Standards for Hazardous Air Pollutant Emissions: Group I Polymers and Resins

2. Section 63.481 is amended by revising paragraphs (d) introductory text, (d)(2) introductory text and (d)(2)(iv); and by adding paragraph (d)(6) to read as follows:

§ 63.481 Compliance schedule and relationship to existing applicable rules.

* * * * *

(d) Except as provided for in paragraphs (d)(1) through (d)(6) of this section, existing affected sources shall be in compliance with § 63.502 no later than July 31, 1997, unless an extension has been granted pursuant to section

112(i)(3)(B) of the Act, as discussed in paragraph § 63.182(a)(6) of subpart H.

* * * * *

(2) Compliance with the compressor provisions of § 63.164 of subpart H shall occur no later than March 5, 1998, for any compressor meeting all the criteria in paragraphs (d)(2)(i) through (d)(2)(iv) of this section.

* * * * *

(iv) The owner or operator submits the request for a compliance extension to the U.S. Environmental Protection Agency (EPA) Regional Office at the addresses listed in § 63.13 of subpart A no later than June 16, 1997. The request for a compliance extension shall contain the information specified in § 63.6(i)(6)(i)(A), (B), and (D) of subpart A. Unless the EPA Regional Office objects to the request for a compliance extension within 30 calendar days after receipt of the request, the request shall be deemed approved.

* * * * *

(6) Compliance with the heat exchange system provisions of § 63.104 of subpart F, as required in § 63.502(f), shall occur no later than September 5, 1999.

* * * * *

Subpart JJJ—National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins

3. Section 63.1311 is amended by revising paragraphs (d) introductory text, (d)(2) introductory text, and (d)(2)(ii) to read as follows:

§ 63.1311 Compliance schedule and relationship to existing applicable rules.

* * * * *

(d) Except as provided for in paragraphs (d)(1) through (d)(5) of this section, existing affected sources shall be in compliance with § 63.1331 no later than July 31, 1997, unless an extension has been granted pursuant to section 112(i)(3)(B) of the Act, as discussed in § 63.182(a)(6).

* * * * *

(2) Compliance with the compressor provisions of § 63.164 shall occur no later than March 12, 1998, for any compressor meeting all the criteria in paragraphs (d)(2)(i) through (d)(2)(ii) of this section.

* * * * *

(ii) The owner or operator submits the request for a compliance extension to the U.S. Environmental Protection Agency (EPA) Regional Office at the addresses listed in § 63.13 no later than June 16, 1997. The request for a compliance extension shall contain the information specified in § 63.6(i)(6)(i)(A), (B), and (D). Unless the EPA Regional Office objects to the request for a compliance extension within 30 calendar days after receipt of the request, the request shall be deemed approved.

* * * * *

[FR Doc. 97–988 Filed 1–13–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 36

RIN 1018–AC02

Visitor Service Authorizations on Alaska National Wildlife Refuges

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Fish and Wildlife Service (Service) adopts regulations to implement Section 1307 of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). This action is necessary to establish the procedures for granting historical use, Native Corporation, and local preferences in the selection of commercial operators who provide visitor services other than hunting and fishing guiding on National Wildlife Refuge System lands in Alaska. This rulemaking provides guidance in the solicitation, award and renewal of competitively offered visitor service authorizations on National Wildlife Refuges in Alaska.

DATES: This rule is effective February 13, 1997.

ADDRESSES: Regional Director, Alaska Region, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503.

FOR FURTHER INFORMATION CONTACT: David G. Patterson, Regional Public Use Specialist, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, Alaska 99503; Telephone (907) 786–3389.

SUPPLEMENTARY INFORMATION:

Background

The ANILCA (16 U.S.C. 3101 *et seq.*) was signed into law on December 2, 1980. Its broad purpose is to provide for the disposition and use of a variety of federally owned lands in Alaska. Section 1307 of ANILCA (16 U.S.C. 3197) contains two provisions concerning persons and entities who are to be given special rights and preferences with respect to providing ''visitor services'' in certain lands under the administration of the Secretary of the Interior, in this context, units of the National Wildlife Refuge System. The term ''visitor service'' is defined in section 1307 as ''* * * any service made available for a fee or charge to persons who visit a conservation system unit, including such services as providing food, accommodations, transportation, tours, and guides excepting the guiding of sport hunting and fishing.''

Subsection (a) of Section 1307 states as follows: Notwithstanding any other provision of law, the Secretary [of the Interior], under such terms and conditions as he determines are reasonable, shall permit any persons who, on or before January 1, 1979, were engaged in adequately providing any type of visitor service [as defined in subsection (c)] within any area established as or added to a conservation system unit to continue providing such type of service and similar types of visitor services within such area if such service or services are consistent with the purposes for which such unit is established or expanded (16 U.S.C. 3197).

Subsection (b) of Section 1307 states as follows: Notwithstanding provisions of law other than those contained in subsection (a), in selecting persons to provide (and in the contracting of) any type of visitor service for any conservation system unit, except sport fishing and hunting guiding activities, the Secretary [of the Interior]—

(1) shall give preference to the Native Corporation which the Secretary determines is most directly affected by the establishment or expansion of such unit by or under the provisions of this Act; and

(2) shall give preference to persons whom he determines, by rule, are local residents * * * (16 U.S.C. 3197).

Subsection (b) also provides to Cook Inlet Region, Incorporated (CIRI), in cooperation with Village Corporations within the Cook Inlet Region when appropriate, the right of first refusal to provide new visitor services within the Kenai National Moose Range, (Kenai National Wildlife Refuge), within the Cook Inlet Region.

The Alaska National Wildlife Refuge System is managed by the U.S. Fish and Wildlife Service under the National Wildlife Refuge System Administration Act (16 U.S.C. 668dd–668ee), Refuge Recreation Act (16 U.S.C. 460k–4), and the Alaska National Interest Lands Conservation Act (ANILCA) (84 Stat. 2371 et seq.; codified as amended in scattered sections of 16 U.S.C., 43 U.S.C., 48 U.S.C.).

The Secretary of the Interior is authorized under the National Wildlife Refuge System Administration Act to provide for visitor services within the refuge system which he determines are compatible with the purposes for which the area was established as a refuge (16 U.S.C. 668dd(b)(1)). In accordance with that authority, provision is made in the Fish and Wildlife Service refuge regulations for operation of public use facilities and services on national wildlife refuges by concessionaires or cooperators under appropriate contracts or legal agreements (50 CFR 25.61). This rule provides the procedures for selecting the providers of services and facilities, excluding sport fishing and hunting guiding activities, to the public on national wildlife refuges in Alaska under section 1307 of ANILCA. These procedures apply only when a visitor services permit must be issued competitively.

Summary of Public Involvement

For the convenience of the public and to enhance the public involvement process, the National Park Service and the U.S. Fish and Wildlife Service agreed to publish simultaneously the draft regulations implementing section 1307 of ANILCA and to undertake a joint public involvement effort. The public comment period was open from April 25 to June 26, 1995, and then, in response to numerous requests, reopened from July 13 to September 11, 1995. The Fish and Wildlife Service conducted public meetings jointly with the National Park Service in Anchorage and Fairbanks. The meetings were mostly informational with one official statement presented by a Native Corporation. National Wildlife Refuge field offices made individual contacts, conducted informational public meetings, and held open houses.

The Fish and Wildlife Service received written comments from 28 different groups or individuals. Eight of those commenters addressed Fish and Wildlife Service issues specifically, while 20 of the commenters addressed issues of both agencies. The National Park Service received an additional 28 written comments from groups or individuals addressing specific park issues. All written comments received by one agency were shared with the other agency in the event a response addressed both agencies. Of the 28 written comments received by the Fish and Wildlife Service, 11 were from Alaska Native organizations, eight from visitor service providers, three from individuals, two from non-tourism related businesses, two from special interest groups, one from federal government, and one from state government. The following analysis applies only to those 28 comments affecting national wildlife refuges. The comments are discussed on a section by section basis.

Analysis of Public Comments

Comments touched on a wide range of topics. A significant number of comments addressed the statute (ANILCA) rather than the regulations, or offered opinions reflecting personal choices rather than identifying problems or potential improvements, or example, ''preferences are not fair'' or ''are not appropriate.'' Also significant was the number of commenters stating that the regulations discriminate against Natives or Native entities. On the other hand a significant number of commenters stated that the regulations give Natives an unfair advantage in providing visitor services. The view was raised by several persons that giving preferences does not always allow the selection of the best qualified provider or the safest service, and that preferences discourage non-preferred providers from submitting bids.

One commenter requested that subsistence use of refuges be specifically protected. Title 8 of ANILCA provides that protection does not need to be addressed in these regulations. The same commenter stated that the local Native Corporation should be given a right of first refusal for any visitor service provided in that refuge. Section 1307 of ANILCA does not provide for that right. Paragraph (b) does require the Secretary of the Interior to ''(1) * * * give preference to the Native Corporation which the Secretary determines is most directly affected by the establishment or expansion of such unit by or under the provisions of this Act).''

In the draft regulations the terms ''new visitor services'' and ''future visitor services'' were used interchangeably. Regulations implementing section 1307 of ANILCA apply to all new visitor services, except hunting and fishing guiding, offered by a competitive bidding process on all national wildlife refuges in Alaska. The term ''new visitor services'' is used consistently throughout the final regulations.

Section 36.37(b) Definitions

The definition of ''adequate services'' was subjective and lacked standards, according to some commenters. The term was not used in the text of the draft regulations as published in the Federal Register; it has been deleted from the list of definitions.

Numerous commenters felt that the definitions for ''controlling interest'' and ''historical operator'' should include family members and partners in those situations where a refuge permit holder providing a visitor service is no longer able to provide the service because of death or illness. The policy of the Service in Alaska is that refuge permits will carry a right-of-survivorship during the term of the permit. If an individual permittee dies or becomes physically or mentally incapacitated, the permit will automatically pass to a qualified spouse, immediate family member, or prior existing business partner. This policy is not limited to permits issued pursuant to these regulations.

A diversity of commenters were concerned about the definition of ''local area'' and identified two predominant issues: (1) the size of a community should have no bearing on whether it is local; and (2) because of the relationship of the people to the land, a distance of 35 miles from the refuge boundary could exclude communities from visitor service areas which impact them directly, while at the same time include communities that have no socio-economic ties to the location where a visitor service would be offered. Regarding the first issue, the Service agrees that ''local'' should be determined by proximity, not size. The requirement that a community have a population of 5,000 or fewer persons in order to be considered local has been deleted from the final regulation. Regarding the second issue, different suggestions were offered. The large size of many of the refuges causes the external boundary to be an inadequate reference point when determining ''local area.'' In response to the numerous comments the Service reevaluated the issue and concluded that ''local area'' should be defined using the location of the visitor service as the reference point. The final regulation defines ''local area'' as follows: ''Local area means that area in Alaska within 100 miles of the location within a refuge where any of the visitor service is authorized.''

Likewise a significant portion of the comments addressed the definition of ''local resident,'' both for individuals and for corporations. Numerous opinions were offered, the most common being that any resident of the State of Alaska should be considered local. More of the comments related to corporations than to individuals. A sample of the comments include: ''corporations should be treated the same as an individual;'' ''Native Corporations should be allowed to form joint ventures with non-preferred providers;'' ''a Native Corporation should be considered local within its regional corporation boundary;'' ''a corporation should be considered local if the majority of the shareholders are local;'' ''if the majority of stockholders of a corporation are local, there should be no requirement for the corporation to be headquartered locally;'' and, ''a corporation should not be considered as having changed because of a change in the stockholder roster.''

The purpose of paragraphs (b)(1) and (b)(2) of section 1307 of ANILCA was to provide assurance that the designation of the wildlife refuges would not negate economic opportunity for the persons and businesses located within the vicinity of those refuges, and who have direct socio-economic ties to the resources within the refuges. ANILCA acknowledges the probability that some Native Corporations having direct socio-economic ties to a refuge may not be considered local by definition. Identification of the ''most directly affected Native Corporation'' was to protect the economic interests of those Native Corporations in existence at the time of the passage of ANILCA, and that had social or economic ties to a particular refuge. Designation of ''most directly affected Native Corporation'' provides a preference to those Native Corporations. A local preference and a most directly affected Native Corporation preference are equal in value and are not additive. A Native Corporation that is eligible for a local preference receives no additional preference by requesting designation as most directly affected Native Corporation.

After reviewing the draft regulations in light of the comments received, the Service agreed that the treatment of corporations in the definition of local resident was not equitable to the treatment received by individuals. The definition for local resident has been rewritten so that location of the headquarters is not a factor in determining ''local corporation.'' Paragraph 36.37(b)(4)(ii) now reads as follows: ''For corporations. A corporation in which the controlling interest is held by an individual or individuals who qualify as 'local resident(s)' within the meaning of this section. For non-profit corporations a majority of the board members and a majority of the officers must qualify as 'local residents.' ''

Some commenters expressed concern that non-local persons could move to a community immediately prior to submitting an offer to provide a visitor service and thereby receive a local preference. Other commenters expressed concern that a business located outside the local area could arrange to have a local resident submit an offer on its behalf and thereby receive a local preference. Both these scenarios appeared to be contrary to the spirit of ANILCA. Responding to those concerns the Service has further altered the definition of ''local resident'' to include a requirement that individuals ''* * * have maintained a primary, permanent residence and business within the local area for the past twelve consecutive months * * * .''

Although not in response to a specific comment, the Service added a definition for ''a responsive offer'' to help clarify the process used to identify preferred operators.

Section 36.37(c) Visitor Services Existing On or Before January 1, 1979, ''historical operators''

Several comments reflected confusion regarding the ability of a historical operator to increase the scope and level of visitor services pursuant to section 1307. Paragraph (c)(1) states that a historical operator may be permitted by the Refuge Manager to increase the scope or level of visitor services provided prior to January 1, 1979, but under separate authority. No historical operating rights shall be obtained in such increase. Paragraph (c)(2) states that a historical operator may apply for a permit or amended permit to provide similar visitor services pursuant to section 1307. For clarification the following sentence has been relocated within the paragraph: ''Granting the request will not result in an increase in the scope or level of service in excess of those provided by the requesting historical operator as of January 1, 1979.''

Concerns were expressed by several commenters that the time allowed for non-delivery of visitor services in paragraph (c)(4) of the draft regulations was not adequate to provide for certain legitimate circumstances. After reviewing the comments the Service agreed that eleven (11) months was not an appropriate time period to allow for non-delivery of services. The time frame has been increased to twenty-four (24) months and is reflected in paragraph (c)(5) of the final regulations. Twenty-four (24) months accommodates a situation in which a visitor service provider may only have a one month season. If that provider is unable to offer the service the following season for reasons beyond his control, he would then be twenty-three (23) months without providing the visitor service.

Section 36.37(d) Visitor Services Initially Authorized After January 1, 1979, ''preferred operators''

Many of the comments reflected confusion regarding the relationship between local preference and preference for most directly affected Native Corporation. The following sentence has been added to paragraph (d)(1) for clarity: ''Preferences for most directly affected Native Corporation(s) and local residents are equal and are not additive.''

Numerous commenters, especially those attending the public meetings in Anchorage and Fairbanks, demonstrated concern and confusion regarding the use of the terms ''best offer'' and ''meeting the terms of the best offer.'' To many people the term ''best offer'' implies a monetary bid. When the Service issues a prospectus, bidders are required to describe in detail the service they would be providing. As an example, this description might include types of equipment, means of transportation, personnel qualifications, safety measures, methods of communication, length of time required, and other aspects of service delivery specified in the prospectus. The bid, or response to the prospectus, constitutes an ''offer'' and is evaluated by a panel. After reviewing the comments, the Service recognizes that ''meeting the terms of the best offer'' would be difficult to evaluate and could lead to unfair comparisons. The term in the final regulations has been changed as suggested from ''meeting the terms of the best offer'' to ''substantially equal to the terms of the best offer.'' Also a definition of ''best offer'' has been added to §36.37(b).

Several commenters expressed concern that Native Corporations were not treated equitably by paragraph (d)(4) of the draft regulations which required a Native Corporation to document total ownership of the business entity making an offer in order to qualify for a preference. A local corporation, however, only needed to document a controlling interest in the business entity making an offer in order to qualify for a preference. The paragraph has been changed so that both Native Corporations and local corporations are required to document a controlling interest in the entity making the offer. In the case of a joint venture, corporations with a preference must document a controlling interest in the joint venture.

Section 36.37(e) Preference to Cook Inlet Region, Incorporated (CIRI)

In response to a request by CIRI the comma was deleted before ''when appropriate'' in the first sentence of paragraph (e)(1) in order to be consistent with the statutory language. The second sentence of paragraph (e)(2) was more appropriately placed in subsection (b) Definitions. Also in paragraph (e)(2) the draft regulations required an offer to document total ownership by CIRI and/or the village corporation in the entity making the offer. This wording has been changed to require documentation of a controlling interest by CIRI rather than a total ownership.

Section 36.37(f) Most Directly Affected Native Corporation Determination

Many of the comments directed to this paragraph were addressed in the comment section for paragraph 36.37(b) Definitions.

A few comments stated that ''most affected Native Corporation'' status should be determined by historical use. Section 1307 of ANILCA provided a preference to help offset potential economic impacts caused by the establishment of the refuges. Other sections of ANILCA provide for continued subsistence and other traditional uses. Socio-economic impacts are among the criteria identified in the regulations and are to be used in the determination of ''most directly affected Native Corporation.'' Historical use would be considered as it relates to socio-economic impacts. Wording has been added to paragraph (f)(1)(iii) to accommodate historical and traditional use.

One comment suggested that the criteria for determination of ''most directly affected Native Corporation'' should include land ownership in the vicinity of the refuge and not merely within or adjacent to the refuge.

The Service has decided to maintain the wording as it appears in the draft regulations. As stated earlier in the comment analysis, section 1307 of ANILCA was intended to help offset potential economic impacts caused by the establishment of the refuges. Providing a preference to all individuals or corporations experiencing consequences would defeat the intent of mitigating the impacts to those most directly affected. In the case of Native Corporations, although more than one may be determined most directly affected, the intent is to provide a preference to those that are affected ''most directly.'' Native Corporations owning land within or adjoining a refuge boundary certainly have greater potential to be impacted. The Service does not believe it is appropriate to diminish the opportunity for preference afforded those Native Corporations by expanding the criteria to include additional Native Corporations. Neither does the Service believe it to be appropriate to automatically provide a ''most directly affected'' preference to a Native Corporation based solely on its proximity to the refuge boundary.

Although one Native Corporation comment requested automatic preference for the Regional Corporation within whose boundary a visitor service was being proposed, the Service believes that all Native Corporation requests for preference should be reviewed equitably.

Paragraph (f)(3) of the draft regulations contained a sentence allowing joint ventures between preferred operators. Several commenters stated the concern that the wording was too limiting and that preferred operators should be permitted to enter into joint ventures with non-preferred businesses. Other commenters expressed concern that non-Native, non-local businesses would use a preferenced corporation or individual as a front to respond to a visitor service solicitation, thereby receiving the preference. In evaluating these two perspectives the Service concluded that the spirit of section 1307 of ANILCA could easily be violated by providing for joint ventures between preferenced and non-preferenced providers unless limits were placed on the manner in which the joint venture could be structured. Forbidding joint ventures between preferenced and non-preferenced providers, however, may exceed appropriate limits. In order to accommodate the expressed need for expanded opportunities to form joint ventures, the sentence in paragraph (f)(3) limiting joint ventures has been deleted.

The subject of joint ventures has been addressed by rewriting paragraph (d)(4) to read ''An offer from a Native Corporation or a local corporation under this section must document its controlling interest in the entity or, in the case of a joint venture, all partners making the offer.'' Preferenced providers wishing to access the experience and/or resources of non-preferenced providers are encouraged to enter into alternative arrangements with those providers. Such arrangements must result in the preferenced provider making the offer and being responsible for the delivery of the visitor service, as well as being accountable for the performance of the permit terms and conditions. Contracting the services of the non-preferenced provider would be an example of such an arrangement.

The draft regulations did not clearly state the intent to provide multiple opportunities to apply for ''most directly affected Native Corporation.'' This has been clarified by adding paragraph (f)(5) to the regulations.

Section 36.37(g) Appeal Procedures

To maintain consistency of appeal procedures related to permits on national wildlife refuges in Alaska, this section of the draft regulations has been rewritten and adopts the procedures set forth in 50 CFR 36.41 Permits.

Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Service has had an authorization number 1018–0014, from the Office of Management and Budget (OMB) that has expired. The Service has received an emergency extension through June 30, 1997, and is likewise working on a long-term (three year), authorization request which will be submitted before the emergency authorization expires.

This collection of information will be achieved through the use of a USFWS Application Form, which will be modified pursuant to 50 CFR 13.12(b), to address the specific requirements of this final rule. The information collection requirements needed for the proper use and management of all Alaska National Wildlife Refuges is contained in 50 CFR 36.3. The information is being collected to assist the Service in administering these recreation programs and, particularly, in the issuance of permits and the granting of statutory or administrative benefits.

This collection of information will establish whether the applicant is fully qualified to receive the benefits of a refuge permit. The information such as name, address, phone number, depth of experience, qualifications, time in residence, knowledge of function, and affiliations, requested in the application form is required to obtain a benefit.

The likely respondents to this collection of information will be individual Alaska citizens and local and native corporations who wish to be considered to receive a refuge permit. This information will be needed by the USFWS to determine whether a given individual or corporation qualifies. A refuge permit will be approved for five (5) years. Permits shall be noncompetively renewed by the refuge manager for a period of five additional years upon showing permitee compliance with all applicable permit terms and conditions, and a satisfactory record of performance. The annual burden of reporting and record keeping should be less than 40 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information. The estimated number of likely respondents is less than ten (10), yielding a total annual reporting and record keeping burden of four hundred (400) hours or less.

Direct comments regarding the burden estimate or any other aspect of the form to the Service Information Collection Clearance Officer, Fish and Wildlife Service, Mail Stop 224, Arlington Square, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240, and to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for the Interior Department (1018–0014), Washington, D.C. 20503.

Economic Analysis

Service review has revealed that this rulemaking will establish the procedures for granting historical use, Native Corporation, and local preferences in the selection of commercial operators who provide visitor services other than hunting and fishing guiding on National Wildlife Refuge System lands in Alaska. This rule provides guidance in the solicitation, award, and renewal of competitively offered visitor service authorizations on refuges in Alaska. ANILCA provides assurance that designation of the wildlife refuges would not negate economic opportunity for the persons and businesses located within the vicinity of those refuges, and who have direct socio-economic ties to the resources within the refuges.

It is estimated that the need for new visitor services will result in less than five (5) special use permits per year statewide. There is a high probability that local visitor service providers, exercising their right under section 1307(b) of ANILCA, would be awarded more permits than companies without the preference. This preference will have a positive impact on the local areas by increasing the economic base of these communities. This impact, while important in relation to the total economic level of the local area, is very small in actual dollar value. It is anticipated that each of the projected new permits issued annually will generate between $50,000 and $200,000 in revenue, depending on the service provided. Therefore, this rule would have no ''significant'' economic impact on the local communities or local governmental entities.

This rulemaking has been reviewed by the Office of Management and Budget under Executive Order 12866. A review under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) has revealed that this rulemaking would not have a significant effect on a substantial number of small entities, which include businesses, organizations, or governmental jurisdictions.

Unfunded Mandates

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

Civil Justice Reform

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

Environmental Considerations

In accordance with 516 DM 2, Appendix 1, the Service claims a categorical exclusion to this rulemaking as this is pursuant to ''policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature,'' and as this rulemaking establishes procedures to allow new and continuing services on Alaska refuge units.

Primary Author

The primary author of this rule is David G. Patterson, Regional Public Use Specialist, Fish and Wildlife Service, Alaska Region.

List of Subjects 50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and record keeping requirements, and Wildlife refuges.

The U.S. Fish and Wildlife Service amends Part 36 of Chapter I of Title 50 of the Code of Federal Regulations as follows:

PART 36—[AMENDED]

1. The authority citation for Part 36 continues to read as follows:

Authority: 16 U.S.C. 460k et seq., 668dd et seq., 742(a) et seq., 3101 et seq., 44 U.S.C. 3501 et seq.

2. A new Section 36.37 is added to subpart D of part 36 to read as follows:

§ 36.37 Revenue producing visitor services.

(a) Applicability.

(1) Except as otherwise provided for in this paragraph, the regulations contained in this section apply to new visitor services provided within all National Wildlife Refuge areas in Alaska.

(2) The rights granted by this section to historical operators, preferred operators, and Cook Inlet Region, Incorporated, are not exclusive. The Refuge Manager may authorize other persons to provide visitor services on refuge lands. Nothing in this section shall require the Refuge Manager to issue a visitor services permit if not otherwise mandated by statute to do so. Nothing in this section shall authorize the Refuge Manager to issue a visitor services permit to a person who is not capable of carrying out its terms and conditions in a satisfactory manner.

(3) This section does not apply to the guiding of sport hunting or sport fishing.

(b) Definitions. The following definitions shall apply to this section:

(1) *Best Offer* means a responsive offer that best meets, as determined by the Refuge Manager, the selection criteria contained in a competitive solicitation for a visitor services permit.

(2) *Controlling interest, in the case of a corporation* means an interest, beneficial or otherwise, of sufficient outstanding voting securities or capital of the business, so as to permit exercise of final managerial authority over the actions and operations of the corporation, or election of a majority of the Board of Directors of the corporation.

(3) *Controlling interest in the case of a partnership, limited partnership, joint venture or individual entrepreneurship* means a beneficial ownership of or interest in the entity so as to permit the exercise of final managerial authority over the actions and operations of the entity.

(4) *Controlling interest in other circumstances* means any arrangement under which a third party has the ability to exercise general management authority over the actions or operations of the business.

(5) *Historical operator* means any person who:

(i) On or before January 1, 1979, was lawfully engaged in adequately providing any type of visitor service in a refuge within the scope of paragraph (c) of this section;

(ii) Has continued to lawfully provide that visitor service; and

(iii) Is otherwise determined by the Refuge Manager to have a right to continue to provide such services or similar services pursuant to paragraph (c) of this section.

(6) *Local area* means that area in Alaska within 100 miles of the location

within a refuge where any of the visitor service is authorized.

(7) *Local resident* means:

(i) For *individuals.* Those individuals that have maintained their primary, permanent residence and business within the local area for the past twelve (12) consecutive months and whenever absent from this primary, permanent residence, have the intention of returning to it. Factors demonstrating the location of an individual's primary, permanent residence and business may include, but are not limited to, the permanent address indicated on licenses issued by the State of Alaska, tax returns, and voter registrations.

(ii) For *corporations.* A corporation in which the controlling interest is held by an individual or individuals who qualify as ''local resident(s)'' within the meaning of this section. For non-profit corporations a majority of the board members and a majority of the officers must qualify as ''local residents.''

(8) *Native Corporation* means the same as defined in section 102(6) of ANILCA.

(9) *Preferred operator* means a local resident or Native Corporation which is entitled to a preference under this section in the award of a permit, and as otherwise provided under section 1307(b) of ANILCA.

(10) A *responsive offer* means one which is timely made and meets the terms and conditions of the solicitation document.

(11) *Similar visitor service* means that visitor service authorized by the Refuge Manager to be provided on a refuge and determined by the Refuge Manager, on a case by case basis, to be similar to an established service being provided by a historical operator.

(12) *Visitor service* means any service or activity made available for a fee, commission, brokerage, or other compensation to persons who visit a refuge, including such services as providing food, accommodations, transportation, tours, and guides excepting the guiding of sport hunting and fishing. This also includes any activity where one participant/member or group of participants pays more in fees than the other participants (non-member fees, etc.), or fees are paid to the organization which are in excess of the bona fide expenses of the trip.

(13) *Right of first refusal* means, as it relates to section 1307(a) of ANILCA, a reasonable opportunity for a historical operator to review a description of the new similar service and the terms and conditions upon which it is to be provided to determine if the historical visitor service operator wishes to provide the service. As it relates to section 1307(c) of ANILCA, it refers to the opportunity for Cook Inlet Region, Incorporated to have the first opportunity to provide new visitor services on the Kenai National Wildlife Refuge in the Cook Inlet Region.

(c) Visitor services existing on or before January 1, 1979, ''historical operators''.

(1) A historical operator shall have a right to continue to provide visitor services or similar services within such area, under appropriate terms and conditions, so long as such services are determined by the Refuge Manager to be consistent with the purposes for which the refuge was established. A historical operator must obtain a permit from the refuge manager to conduct the visitor services. The permit shall be for a fixed term and specified area, and shall contain such terms and conditions as are in the public interest. Failure to comply with the terms and conditions of the permit may result in cancellation of the authorization and consequent loss of historical operator rights under this section. Nothing in this section shall prohibit the Refuge Manager from permitting persons, in addition to historical operators, to provide visitor services in the refuge at the Refuge Manager's discretion so long as historical operators are permitted to conduct a scope or level of visitor services equal to or greater than those provided prior to January 1, 1979, under terms and conditions consistent with this section. A historical operator may be permitted by the Refuge Manager, under separate authority, to increase the scope or level of visitor services provided prior to January 1, 1979, but no historical operating rights shall be obtained in such increase.

(2) A historical operator may also apply to the Refuge Manager for a permit or amended permit to provide similar types of visitor services. Granting the request will not result in an increase in the scope or level of service in excess of those provided as of January 1, 1979, by the requesting historical operator. The Refuge Manager shall grant the request if such visitor services are determined by the Refuge Manager to be:

(i) Consistent with the management of refuge resources and the purposes for which the refuge area was established;

(ii) Similar to the visitor services provided by the historical operator prior to January 1, 1979; and

(iii) Consistent with the legal rights of any other person.

(3) When a historical operator permit has expired, and if the visitor services permitted by it were adequately provided and consistent with the purposes of the refuge as determined by the Refuge Manager, the Refuge Manager shall renew the permit for a fixed term consistent with such new terms and conditions as are in the public interest. Should a historical operator decline to accept an offer of renewal, its rights as a historical operator shall be considered as terminated.

(4) If the Refuge Manager determines that permitted visitor services must be curtailed or reduced in scope or season to protect refuge resources, or for other purposes, the Refuge Manager shall require the historical operator to make such changes in visitor services. If more than one historical operator providing the same type of visitor services is required to have those services curtailed, the Refuge Manager shall establish a proportionate reduction of visitor services among all such historical operators, taking into account historical operating levels and other appropriate factors, so as to achieve a fair curtailment of visitor services among the historical operators. If the level of visitor services must be so curtailed that only one historical operator feasibly may continue to provide the visitor services, the Refuge Manager shall select one historical operator to continue to provide the curtailed visitor services through a competitive selection process.

(5) The rights of a historical operator shall terminate if the historical operator fails to provide the visitor services under the terms and conditions of a permit issued by the Refuge Manager or fails to provide the visitor services for a period of more than twenty four (24) consecutive months.

(6) The rights of a historical operator under this section shall terminate upon a change, after January 1, 1979, in the controlling interest of the historical operator through sale, assignment, devise, transfer or otherwise.

(7) The Refuge Manager may authorize other persons to provide visitor services in a refuge in addition to historical operators, as long as such other persons conduct the services in a manner compatible with the purposes of the refuge.

(d) Visitor services initially authorized after January 1, 1979, ''preferred operators''.

(1) In selecting persons to provide, and in permitting any type of visitor service, excepting guided hunting or fishing, the Refuge Manager will give a preference to preferred operators determined qualified to provide such visitor services. Preferences for most directly affected Native Corporation(s) and local residents are equal and are not additive.

(2) In selecting persons to provide any type of visitor service for refuges subject to a preferred operator preference under this section, the Refuge Manager will publicly solicit competitive offers for persons to apply for a permit, or the renewal of a permit, to provide such visitor service pursuant to Service procedures. Preferred operators must submit a responsive offer to such solicitation in order to effect their preference. If, as a result of the solicitation, an offer from a person other than a preferred operator is determined to be the best offer and that offeror is determined to be capable of carrying out the terms of the permit, the preferred operator which submitted the most responsive offer shall be given an opportunity to substantially equal the best offer received by amending its offer. If the amended offer of the preferred operator is considered by the Refuge Manager as being substantially equal to the terms of the best offer, the preferred operator, if determined to be capable of carrying out the terms of the permit, shall be awarded the visitor service permit. If the preferred operator fails to meet these requirements, the Refuge Manager shall award the permit to the person who submitted the best offer in response to the solicitation. The Native Corporation(s) determined to be ''most directly affected'' under this section and local residents have equal preference.

(3) Nothing in this section shall prohibit the Refuge Manager from authorizing persons other than preferred operators to provide visitor services in refuge areas so long as the procedures described in this section have been followed with respect to preferred operators. Preferred operators are not entitled by this section to provide all visitor services in a qualified refuge.

(4) An offer from a Native Corporation or a local corporation under this section must document its controlling interest in the entity or in the case of a joint venture, all partners, making the offer.

(5) The preferences described in this section may not be sold, assigned, transferred, or devised, directly or indirectly.

(e) Preference to Cook Inlet Region, Incorporated (CIRI).

(1) Cook Inlet Region, Incorporated, in cooperation with village corporations within Cook Inlet Region when appropriate, shall have a right of first refusal to provide new visitor services within that portion of the Kenai National Moose Range (Kenai National Wildlife Refuge) within the boundaries of Cook Inlet Region. The CIRI shall have ninety (90) days from receipt of a prospectus in which to exercise its right.

(2) In order to exercise this right of first refusal, CIRI must submit an offer responsive to the terms of a visitor services solicitation. If CIRI makes such an offer and is determined by the Refuge Manager to be capable of carrying out the terms of the special use permit, it shall be awarded the permit. If it does not, the permit may be awarded to another person pursuant to a showing that such other person can carry out the conditions of the special use permit in a manner compatible with the purposes of the refuge. An offer being made by CIRI under this section must document controlling interest by CIRI when made in cooperation with village corporations within the Cook Inlet Region. The CIRI right of first refusal shall have precedence over the rights of preferred operators.

(3) The right of first refusal described in this section may not be sold, transferred, devised, or assigned, directly or indirectly.

(f) Most directly affected Native Corporation determination.

(1) Prior to the issuance of a solicitation document for any new visitor service in a refuge, the Refuge Manager shall provide an opportunity for any Native Corporation interested in providing visitor services within that refuge to submit an application to the Refuge Manager to be determined ''most directly affected'' Native Corporation. The application shall include but not be limited to, the following information:

(i) The name, address, and telephone number of the Native Corporation, the date of incorporation, its articles of incorporation and structure, and the name of the applicable refuge area;

(ii) The location of the corporation's population center or centers;

(iii) An assessment of the socioeconomic impacts, including historical and traditional use, and their effects on the Native Corporation as a result of the expansion or establishment of the refuge; and

(iv) Any other information the Native Corporation believes is relevant.

(2) Upon receipt of all applications from interested Native Corporations, the Refuge Manager will determine the ''most directly affected'' Native Corporation based on, but not limited to, the following criteria:

(i) The number of acres of surface land within and adjoining the refuge that the Native Corporation owns, or which has been selected under the Alaska Native Claims Settlement Act, unless such selection is determined to be invalid or is relinquished;

(ii) The distance and accessibility from the Native Corporation's population center and/or business address to the applicable refuge; and

(iii) The socio-economic impacts, including historic and traditional use, and their effects as a result of the expansion or establishment of the refuge.

(3) In the event that more than one Native Corporation is determined to be equally affected, each such Native Corporation shall be considered as a preferred operator under this section.

(4) The Refuge Manager's ''most directly affected'' Native Corporation determination or when requested, the Regional Director's appeal decision for a refuge is applicable for all new visitor services in that refuge.

(5) Any Native Corporation that has not applied for a most directly affected Native Corporation determination may apply for a determination upon issuance of a future solicitation for a new visitor service. A corporation determined to be most directly affected for a refuge will maintain that status for all future visitor service solicitations.

(g) Appeal procedures.

Any person(s) who believe that they have been improperly denied rights with respect to providing visitor services under this section may appeal the denial to the Regional Director. Such an appeal must be submitted in writing within forty-five (45) days of receipt of the denial from which an appeal is sought. The appeals process as defined in 50 CFR Subpart F, 36.41 (b) will apply with exception of the period of time allowed to file an appeal.

Dated: September 10, 1996.

George T. Frampton, Jr.,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 97–884 Filed 1–13–97; 8:45 am]

BILLING CODE 4310–55–P

Proposed Rules

Federal Register

Vol. 62, No. 9

Tuesday, January 14, 1997

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

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 200

Filing of a Petition for Rulemaking: Packer Livestock Procurement Practices

AGENCY: GIPSA, Agriculture.

ACTION: Notice of receipt of petition for rulemaking.

SUMMARY: The U.S. Department of Agriculture (USDA) has received a petition for rulemaking from the Western Organization of Resource Councils (WORC). The petition requests the Secretary to initiate rulemaking under the Packers and Stockyards Act to restrict certain livestock procurement practices by meat packers. USDA is soliciting public comment on the petition and will utilize these comments in assessing the need for the requested rulemaking. This notice provides all interested parties an opportunity to participate in that process.

DATES: Comments concerning this petition are invited and must be received on or before April 14, 1997.

ADDRESSES: Send an original and two copies of comments to the Acting Deputy Administrator, Packers and Stockyards Programs, GIPSA, USDA, Stop 3641, 1400 Independence Avenue, SW, Room 3039–S, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: Tommy Morris, Director, Packer and Poultry Division, (202) 720–7063.

SUPPLEMENTARY INFORMATION:

Background

In early 1995, prices for cattle dropped sharply and steadily declined. Various groups in the industry, mainly cattle producers, urged Congress and USDA to take action to improve conditions. USDA has undertaken several initiatives to respond to the concerns of the industry.

On February 14, 1996, USDA released a congressionally-mandated study on concentration in the red meat industry.[1] The study included projects on the beef sector that included examining cattle procurement markets, price determination, captive supplies, and the effects of concentration on cattle prices. Although the study confirmed the existence of concentration in the red meat industry, it provided no definitive evidence that concentration had an appreciable effect on cattle prices.

Following release of the study, the Advisory Committee on Agricultural Concentration was appointed by the Secretary to review the study and a number of other issues involving concentration in agriculture. The Advisory Committee submitted its recommendations and findings on June 6, 1996.[2] The recommendations of the majority report included increased monitoring and enforcement of antitrust and regulatory policy, limiting packer activities regarding price differentiation, improving collection and reporting of market data, and value-based pricing. The Advisory Committee also submitted three minority reports. The recommendations of the minority reports included taking additional action to address the concerns of producers relating to the adverse effect of concentration on the cattle industry, increased reporting of export data, and educating producers about the current market environment.

On July 31, 1996, the Secretary announced the first in a series of actions by USDA to improve competition in the livestock industry. These actions address two of the major areas of recommendations made by the Advisory Committee. These first actions, taken to immediately address the concerns of many livestock producers, include price reporting initiatives that will broaden the coverage of market transactions reported and improve the timeliness and availability of information on the growing international trade in livestock and meat products.

[1] Concentration in the Red Meat Packing Industry, Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, USDA, February 1996.

[2] Concentration in Agriculture: A Report of the USDA Advisory Committee on Agricultural Concentration, Agricultural Marketing Service, USDA, June 1996.

The Petition

Independent of USDA's activities, the Secretary received a petition for rulemaking submitted by the Western Organization of Resource Councils (Petitioner) on October 12, 1996. The Petitioner requests that USDA issue rules under the authority of the Packers and Stockyards Act that would prohibit packers from procuring cattle for slaughter through the use of a forward contract unless certain specified conditions are met and that would prohibit packers from owning and feeding cattle, unless the cattle are sold for slaughter in an open, public market.

The Petitioner

The Petitioner represents that it is a federation of grassroots organizations located in Colorado, Idaho, Montana, North Dakota, South Dakota, and Wyoming that was formed in 1979. The various organizations are composed of affiliated citizen groups in 42 communities across the region. The 6,000 members of these groups are farmers, ranchers, small business owners, and working people who seek to protect natural resources, family farms, and rural communities. They include both cattle ranchers and beef consumers.

Need for the Suggested Rules

The Petitioner has submitted this petition for rulemaking because it believes that packers' direct ownership and feeding of cattle for slaughter and their procurement of slaughter supplies through formula or basis-priced forward contracts have decreased prices paid to cattle producers. The Petitioner also believes that because cattle sold through formula or basis-priced forward contracts are not traded publicly and packer-fed cattle are not sold publicly, these practices unjustly discriminate against some producers and provide unreasonable preferences to others. According to the Petitioner, these practices are in violation of Section 202 of the Packers and Stockyards Act and should be restricted through rules.

Request for Comments

USDA is seeking public comment on the petition from academia, all segments of the industry (including, for example, producers, marketing firms, meat packing firms) and other interested parties, including small entities that may be affected by implementation of the Petitioner's proposal. Small entities are defined as firms that meet the following standards: (1) beef cattle producers, except feedlots, with annual receipts of $500,000 or less for beef cattle sales; (2) beef cattle feedlots with annual receipts of $1.5 million or less for beef cattle sales; and (3) meat packing plants with 500 employees or less.

Comments received on the petition will provide the Secretary of Agriculture with additional information to consider in determining whether or not the rulemaking requested by the Petitioner should be undertaken. The submission of comments that address the following questions would be particularly helpful. These questions are suggested merely as the framework for your comments.

1. What competitive or other economic effects would implementing the rules that WORC is asking USDA to propose (hereinafter ''proposed rules'') have on individual businesses and the cattle and beef industry as a whole?

2. What are the competitive effects of formula or basis-priced forward contracting and packer feeding on cattle producers, feedlots, meat packers, meat wholesalers and retailers, and consumers?

3. What would be the effects of implementing the proposed rules on the structure, conduct, and competitive performance of the cattle producing, cattle feeding, meat packing, wholesaling and retailing industries? What would be the effect on the structure, conduct and competitive performance of livestock and meat markets? In answering these questions, what do you consider to be the relevant markets and how do you define them?

4. How do formula or basis-priced forward contracting and packer feeding affect cattle prices? Do formula or basis-priced forward contracting and packer feeding have adverse competitive effects or other adverse economic effects? Are there competitive benefits or other economic benefits associated with use of formula or basis-priced forward contracting and packer feeding that would not support implementing the proposed rules?

5. Do the research studies cited by the Petitioner support its position that the formula or basis-priced forward contracting and packer feeding practices outlined in the petition result in competitive harm or other economic harm to cattle producers and that the practices harm competition in beef packing? Are there other studies that USDA should consider?

6. Does sufficient evidence exist to find that the formula or basis-priced forward contracting and packer feeding practices outlined in the petition violate Section 202 of the Packers and Stockyards Act? If so, what is that evidence?

7. Is regulatory action needed?

8. Are the proposed rules too broad or too restrictive?

9. Do the proposed rules adequately address the concerns raised by the Petitioner?

10. Are there alternatives to rulemaking that would address the concerns raised by the Petitioner?

Please include any data, analyses, or other empirical evidence that supports your position. USDA is also particularly interested in receiving comments from the academic community on this petition, including available theory, research and other information.

USDA has sought extensive public comment from all members of the agriculture sector while addressing concentration in agriculture and strongly encourages participation in this important process.

Done at Washington, D.C. this 8th day of January 1997.

James R. Baker,

Administrator, Grain Inspection, Packers and Stockyards Administration.

Petition Received

On October 12, 1996, USDA received the following petition asking USDA to issue rules to restrict certain livestock procurement practices. The appendices forwarded with this petition are available for review at USDA, GIPSA, Packers and Stockyards Programs, 1400 Independence Avenue, SW, Room 3039–S, Washington, D.C. 20250. Copies may be obtained by writing or calling that office at (202) 720–7063 or 720–7051. The petition is hereby published in order that USDA may obtain public comment on this requested regulatory action.

Petition for Rule-Making on Captive Supply Procurement Practices Under the Packers and Stockyards Act

Submitted by The Western Organization of Resource Councils

October 8, 1996.

Introduction

The Western Organization of Resource Councils (WORC) petitions Secretary of Agriculture, Dan Glickman, to exercise his authority under the Packers and Stockyards Act to issue rules restricting packers' use of certain procurement practices to acquire captive supplies of slaughter cattle. WORC requests that the Secretary issue rules that:

1. Prohibit packers from procuring cattle for slaughter through the use of a forward contract, unless the contract contains a firm base price that can be equated to a fixed dollar amount on the day the contract is signed and the forward contract is offered or bid in an open, public manner.

2. Prohibit packers from owning and feeding cattle, unless the cattle are sold for slaughter in an open, public market.

Packers' direct ownership and feeding of cattle for slaughter and their procurement of slaughter supplies through forward contracts have decreased prices paid to cattle producers. In addition, because forward contracts are not traded publicly and packer-fed cattle are not sold publicly, these practices unjustly discriminate against some producers and provide unreasonable preferences to others. Thus, these practices are in violation of Section 202 of the Packers and Stockyards Act (7 U.S.C. § 192) and should be restricted through rules.

The Western Organization of Resource Councils (WORC) is a federation of grassroots organizations: the Western Colorado Congress (Colorado), the Idaho Rural Council (Idaho), the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Northern Plains Resource Council (Montana) and the Powder River Basin Resource Council (Wyoming). WORC was formed in 1979.

These six organizations are composed of affiliated citizens' groups in 42 communities across the region. The 6000 members of these groups are farmers, ranchers and small business and working people who seek to protect natural resources, family farms and rural communities. They include both cattle ranchers and beef consumers.

Language of Rules

This petition for rule-making is submitted pursuant to the Administrative Procedures Act, 5 U.S.C. § 553(e) and USDA regulation 7 CFR § 1.28. The statute provides that ''each agency shall give an interested person the right to petition for the issuance, amendments, or repeal of a rule.'' [1] In addition, the USDA regulations provide that interested persons can petition USDA officials to issue, amend or repeal a rule.[2] WORC asks that the Secretary publish the following proposed rule in the Federal Register and invite public comment both in writing and at USDA-sponsored informal public hearings:

[1] 5 U.S.C. § 553(e).

[2] 7 CFR § 1.28.

Restrictions on the Use of Captive Supply Procurement Practices

1. Restrictions on Use of Forward Contracts

No packer shall procure cattle for slaughter through the use of a formula or basis price forward contract. All forward contracts used by packers for purchase of cattle slaughter supplies shall contain a firm base price that can be equated to a specified dollar amount at the time the contract is entered into and be offered or bid in an open, public manner.

(a) The term ''forward contract'' means any contract, whether oral or written, for purchase of cattle that provides for their delivery to a packer at a date more than seven days after the date the contract is entered into, without regard to whether the contract is for a specified lot of cattle or for a specified number of cattle during a certain period such as a week, month or year.

(b) The term ''formula or basis price'' means any price term that establishes a base from which the purchase price is calculated by reference to a price that will not be reported until a date after the day the forward contract is entered into. For example: (1) ''formula price contract'' would include a contract in which the base is the average reported cash price for some day or week in the future, and (2) ''basis price contract'' would include a contract in which the base is determined with reference to a futures market price that will not be determined until some future date.

(c) This section permits the use of forward contracts under which producers will be paid more or less than the firm base price, when the adjustments to the base are for quality, grade or other value factors that are readily verifiable market factors and are outside the control of the packer/buyer.

(d) The phrase ''offered or bid in an open, public manner'' means that the offer or bid is made in a forum (1) to which both potential buyers and sellers in general have access, (2) designed to solicit more than one blind bid, and (3) that allows sellers and buyers to witness bids made and accepted. For example, a forward contract could be traded in an electronic market to which both cattle sellers and buyers in general have access.

2. Restrictions on Packer Ownership of Cattle

No packer shall own and feed cattle unless those cattle are sold for slaughter in an open, public market.

(a) This provision does not apply to cattle owned by a packer for fewer than seven days before slaughter.

(b) This provision applies to cattle owned by a packer without regard to whether they are fed at a packer owned facility or on contract at a facility owned by another.

(c) The term ''public market'' means a forum (1) to which both potential cattle buyers and sellers in general have access, (2) which is designed to solicit more than one blind bid, and (3) which allows sellers and buyers to witness bids made and accepted. The term ''public market'' includes, but is not limited to, live auction markets, video auction markets and electronic markets.

Explanation of the Rule

A. Forward Contracts

The forward contract provision of this rule prohibits packers from using ''formula or basis price'' forward contracts. This does not mean that packers can no longer use forward contracts to procure slaughter supplies. In fact, packers and producers could still enter into contracts in which the price is set through a formula if there is a firm base price which can be equated with a specific dollar amount when the contract is entered into. The difference is that the base price could not be the average reported cash price at some future date or a reference to a futures price that will not be determined until some future date. This part of the proposed rule attempts to eliminate the problem identified by the minority report of the USDA Advisory Committee on Agricultural Concentration:

> The problem with formula pricing, as it is currently used, is not a problem of value pricing. Rather, the problem lies in the base from which the carcass value is calculated. In all the methods currently used, the packer has the power to artificially lower the base price from which premiums and discounts are calculated.
>
> When the futures market is used to establish a base, the packers are heavy players on both sides. Their futures market activities, whatever the motivation and whether the packers are long or short in the market, affect the price they pay for formula cattle and, ultimately, for negotiated sales. . . .
>
> When the formula is based upon the average spot price for the preceding period, that base has three weaknesses which can be used to artificially lower the price received by the producer. First, formula producers and packers claim that the best cattle are sold on a formula basis. That means that the pool of cattle sold on a spot basis is below average in quality. Thus, the ''average'' market price upon which the formula cattle are sold is, in reality, a below-average price. Second, the base price is again determined in large part by the packers' own market activities. They determine what price is bid for non-contract cattle. If they bid low for non-formula cattle, their price for formula cattle will likewise be lower. Regardless of whether packers act consciously in this manner, it is in their best interest to do so. . . . Finally . . . the use of captive supply thins the market.[3]

As a result of this finding the minority report recommended that ''formula contracts as they are presently constituted should be banned'' and ''value-based pricing must be based upon readily verifiable market factors outside the control of the packer/buyer.'' [4]

The proposed rule on forward contracts also requires that all forward contracts for procurement of slaughter supplies must be ''offered or bid in an open, public manner.'' Under the proposed rule, in addition to containing a firm base price, all forward contracts must be offered or bid publicly to producers in general. This addresses another recommendation of the Advisory Committee on Agricultural Concentration minority report—that value-based pricing ''must be made uniformly available within the limits of the packers' purchasing needs.''

Requiring firm-base price, publicly bid forward contracts for slaughter supplies is a constructive reform. It meets the packers' need for orderly procurement and provides them assurance that their competition is not ''stealing'' cattle (assurance that only public bidding can provide). By allowing forward contracts with firm base prices to continue, it meets the needs of the cattle producers' lenders' for security and solid cash flow projections for their loans. Further, it meets the entire industry's need for timely, accurate, value-based, competitive price discovery.

A system of firm-base price, publicly bid forward contracts for slaughter supplies is friendly to smaller feeders, who are at the greatest disadvantage in direct ''negotiation'' and most easily pressured into exploitative, captive supply contract arrangements. It is friendly to custom feeders who have a hard time attracting investors in today's manipulated market. And it is friendly to the basic cow/calf and feeder cattle markets, because it would work against the current severe discounting of feeder prices in response to the volatility of the fat cattle market. Finally, it would make retained ownership by the cow/calf or feeder operator throughout the fed cattle stage a viable option. Currently, retained

[3] Concentration in Agriculture: A report of the USDA Advisory Committee in Agricultural Concentration, Agricultural Marketing Service, USDA, June 1996, p. 31.

[4] *Id.* at 31.

ownership involves an intolerable and unnecessary degree of price risk.

Under this proposal feeders will not lose the ability to enter into forward contracts. With the use of hedges and options, up-to-date price reports from USDA and a public open-bid market for slaughter supplies, feeders could forward contract at any point in the feeding process.

To make this system work, there needs to be a formally organized market in firm-base price bid forward contracts—a bit like a NASDAQ exchange for livestock. The able, ambitious people in the marketing sector of the livestock industry certainly can provide this vital market service. Several examples exist today of functioning electronic markets for agricultural commodities. The most applicable of these is BeefEx, or the Beef Exchange, an electronic exchange set up by the operators of the cotton exchange in Lubbock, Texas. There is also an electronic market for fed cattle in Canada (TEAM).

B. Packer Ownership of Cattle

Under the proposed rule setting restrictions on packer ownership and feeding of cattle, packers could still feed their own cattle but they would be required to offer them for sale publicly. This could be done through a livestock auction yard, an electronic market or some other equivalent method of soliciting blind, open bids. Presumably, in most cases, a packer would outbid the other packers for its own animals. By requiring the public sale of those cattle, their value and impact on overall cattle prices would be properly reflected in the market. The physical movement of cattle and the packers ability to coordinate production and plan slaughter would be the same as now. The only difference would be that market demand for cattle would be publicly expressed and the true price discovered in the market.

As with forward contracts, packer-fed cattle can be publicly offered through electronic exchanges or some other equivalent method. There is widespread recognition that electronic markets could improve competition and provide better price discovery if all parties would participate. Historically, however, packers have been reluctant to do so, especially when they have benefited from less than perfect price discovery under the status quo.

C. Public Market

The requirements that packer-fed cattle and firm-base price forward contracts be traded publicly means that they are traded in a market forum in which both buyers and sellers have general access. It does not mean that more than one bid must be made before the sale is completed. Rather, it means that the bid is made in a forum designed to solicit more than one bid and which allows other sellers and buyers to witness the bids made and accepted. The proposed rule does not limit any producer's ability to accept a bid, as long as it is a firm-base price bid and the offer and acceptance are made openly and in such a way that anyone can offer and anyone can buy.

Standards for Issuance of Informal Rules

Final agency rules are accorded and assumption of procedural and substantive regularity.[5] This deferential standard of review of an agency's final rule decision ''presumes the validity of agency action and prohibits the reviewing court from substituting its judgment for that of the agency.'' [6]

Courts will defer to the agency's interpretation of statutory language that it has been charged with implementing when: (1) the action is within the agency's scope of authority, (2) the action is not arbitrary and capricious, and (3) the agency has followed required procedures.[7]

The arbitrary and capricious standard of review is a narrow one.[8] Under this narrow review standard, USDA's action to issue a rule need merely be rationally based on an administrative record: the agency's action can be set aside as arbitrary and capricious ''only where it is not supportable on any rational basis.'' [9] An agency decision which demonstrates that the agency examined relevant data and articulated ''a rational connection between the facts found and the choice made'' will not be reversed under this standard.[10]

[5] Colorado Health Care Ass'n v. Colorado Dept. of Social Services, 842 F.2d 1158 (10th Cir. 1988); McLeod v. I.N.S., 802 F.2d 89 (3rd Cir. 1986); Diaz-Soto v. I.N.S., 797 F.2d 262 (5th Cir. 1986); Organized Fisherman of Florida V. Hodel, 775 F.2d 1544 (11th Cir. 1985); Air Pollution Control District of Jefferson County, Kentucky v. U.S. EPA, 739 F.2d 1071 (6th Cir. 1984); and National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442 (D.C. Cir. 1984).

[6] Manasota-88, Inc. V. Thomas, 799 F.2d 687, 691 (11th Cir. 1986).

[7] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, (1971); and Ethyl Corp. v. E.P.A., 541 F.2d 1 (D.C. Cir. 1976).

[8] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

[9] United States v. Means, 858 F.2d 404, 409 (8th cir. 1988), *cert. denied*, 492 U.S. 910 (1989) (quoting Brotherhood of Railway and Airline Clerks v. Burlington Northern Inc., 722 F.2d 380, 380 (8th Cir. 1983)).

[10] *See*, Motor Vehicles Mfrs. Ass'n v. State Farm Insurance Agency, 463 U.S. 29, 43 (1983).

The following extensive discussion of economic studies, the Packers and Stockyards Act's legislative history, the statutory language and case law provides all of the necessary factual and legal bases for issuance of this proposed rule. The numerous cited economic studies present a substantial factual basis for the rules. The legislative history and case law demonstrate that there is a rational connection between the facts established in the studies and the decision to issue the proposed rules pursuant to section 202 of the Packers and Stockyards Act, 7 U.S.C. § 192.

Economic Evidence Supporting the Proposed Rule

A. Impact of Concentration on Prices

Fifteen years ago the top four firms in steer and heifer slaughter controlled about 35% of the market, five years ago the four-firm concentration ratio for steer and heifer slaughter was about 70 percent, today it is over 80 percent.[11] These figures are measured on a national basis. However, when concentration is measured in smaller geographic market areas it is often even higher than when measured on such a broad basis. Two studies from Oklahoma State University demonstrate this point, as the author of those studies reports:

> The four largest buyers of fed cattle in the Southern Plains (Southwest Kansas, Oklahoma Panhandle, and Texas Panhandle) bought 81 percent of fed cattle purchases in a study using 1979 data and 96 percent of fed cattle purchases in a similar study ten years later. Both percentages are considerably higher than the four-firm concentration ratio of U.S. steer and heifer slaughter for the same years, 34.5 percent in 1979 and 70.4 percent in 1989.[12]

When just four packing firms have such a large share of the steer and heifer slaughter market, their individual buying decisions may have an effect on prices paid to cattle producers. Such effects may occur whether or not the packers deliberately take actions to manipulate prices. As Dr. John Helmuth has stated: ''Economic studies show that

[11] Helmuth, John W., Buyer concentration in Livestock Markets: Trends, Impacts, and Implications, Iowa State University, Address to Dakota Rural Action, July 10–12, 1995, at 1.

[12] Ward, Clement E., Meatpacking Industry Changes: Causes and Consequences, Department of Agricultural Economics, Division of Agricultural Sciences and Natural Resources, Oklahoma State University, A.E. Paper 92137, December 1992, at 4, citing Ward, Clement E. Relationship Between Fed Cattle Market Shares and Prices Paid by Beefpackers in Localized Markets, Western Journal of Agricultural Economics 7(1982): 79–86: and Ward, Clement E. Inter-firm Differences Between Fed Cattle Prices in the Southern Plains, American Journal of Agricultural Economics, 74(1992): 2 480–85.

when the four-firm concentration ratio gets over 40% firms start to have enough market power to have some control over price. By the time it gets to 80% they have as much power as a monopoly would have.'' [13]

The Center for Rural Affairs reports on a series of economic studies examining concentration's effect on prices:

There is a large body of economic research establishing a high positive relationship between the level of concentration among sellers and prices buyers must pay. About three-fourths of the more than 70 studies undertaken in this field in general conclude that concentration is related to prices (Weiss 1988). Although this research relates to situations in which the concentration level is high among sellers (called oligopoly) rather than among buyers (called oligopsonies), the basic theory is the same on both sides of the market. Higher levels of concentration should result in price levels that favor the more concentrated side of the market—higher prices for concentrated sellers (oligopolies), lower prices for concentrated buyers (oligopsonies).[14]

There is now also a considerable amount of research on the relationship of packer concentration and prices paid to livestock producers. This research strongly suggests that significantly depressed market prices have accompanied increases in concentration in regional markets. The Center for Rural Affairs reported on several of these studies that used data from periods when the meatpacking industry was much less concentrated than it is today:

One study (Quail 1986) analyzed the impact of market concentration on fed cattle prices in 13 regional markets between 1971 and 1980. Among the study's conclusions:

For every 10 percentage point increase in market share held by the top four firms in a market, fed cattle prices dropped $.14 per cwt.;

In the four major regional markets, the four leading packers controlled from 67% to 97% of the market in 1980 and in each case there was a statistically significant negative correlation between concentration and market prices;

The increase in packer concentration between 1971 and 1980 is estimated to have cost cattle feeders $.19 per cwt., or $45.2 million in 1980 alone;

The price-depressing effect of buyer concentration averaged about 1.7% over the period 1976–1980;

If the four leading packers in the four leading regions had had only 40% of the market between 1976 and 1980, instead of the 55% to 85% they actually averaged, average cattle prices would have been $.47 higher and cattle feeders would have had $82 million more income.

Another study (Menkhaus et al 1981) analyzed the impact of concentration on fed cattle prices in twelve major cattle feeding states in 1972 and 15 states in 1977. It found that in both years more concentrated markets yielded lower fed cattle prices. In 1972, for each 10 percentage point increase in the share of the market procured by the top four packers, the price of choice steers fell $.145 per cwt., and in 1977, $.22 per cwt. This amounts to a price depressing effect of about 1.2% in 1972 and 1.6% in 1977.

Ward (1981) considered the relationship between number of buyers and prices paid for fed cattle in 31 feedlots or marketing agencies in six regional markets in July, 1979. He found such a relationship in one of the four markets. In that market, each additional bidder raised prices $.22 to $.28 per cwt.

Not all studies reach such clear conclusions. Using the same data from July, 1979, Ward (1982) analyzed the relationship between market shares held by packers in local markets and prices paid for fed cattle in those markets. He concluded that larger packers were not depressing prices in local markets and found no evidence of lower prices in more concentrated markets.

But Ward (1983) did find that when there was a sudden change in the local hog market structure caused by the closing of Oklahoma's only pork plant, prices at the Oklahoma City terminal market in the year following the plant closing averaged $.63 to $1.05 lower per cwt. than in Kansas City and Omaha terminals and direct trade markets in interior Iowa-Southern Minnesota in the year following the plant closing.[15]

Two more recent studies, one published in December 1990 by Bruce W. Marion, Frederick E. Geithman and Gwen Quail, and one published by John R. Schroeter and Azzeddine Azzam in 1991, on the relationship between regional fed cattle prices and meatpacking concentration, also demonstrate that higher levels of concentration were associated with lower prices paid for fed cattle.[16]

In addition, in April, 1994, Bruce Marion of the University of Wisconsin released an update of his earlier study which found that as concentration increases prices paid to farmers decrease. This study is worth quoting:

The results of this article support the hypothesis that packer monopsony power had a significant negative effect on cattle prices during the 1971–86 period * * * the presence of monopsony power is evident in regional live cattle markets throughout the period and is slightly stronger in the latter half than in the first half of the period.

For several regions on which most of our analysis was done, cattle prices were estimated to be about 3 percent less in the most concentrated region/year compared to the least concentrated region/year.[17]

As John Helmuth has pointed out in reference to this study, such a ''three percent difference is more than $20 per head on $70/cwt cattle.[18]

A study conducted by Clement E. Ward after a series of mergers and acquisitions in 1987 found that the Big Three packers paid significantly lower prices for fed cattle in the Southern Plains and in subregions of the Southern Plains (Southwest Kansas, North Texas and Oklahoma Panhandle, and South Texas Panhandle) than did their competitors as a group. However, there were differences among the Big Three in how much they paid for fed cattle. Each firm did not pay lower prices than competing firms.[19]

Additional recent studies have found that packers do exercise monopsony powers to distort prices paid to livestock producers. These studies are described in a November 1995 report issued by the Center for Rural Affairs:

Azzam and Pagoulatos (1990) found that packers exercise market power to both raise the prices they receive for meat and to lower the price they pay for livestock, but that the

[13] Helmuth, John W. (1995), *supra* note 9 at 1.

[14] Strange, Marty, Nancy L. Thompson, Competition and the Livestock Market: Report of a Task Force Commissioned by the Center For Rural Affairs, Center For Rural Affairs, Walthill, Nebraska, April 1990, at 10.

[15] From Competition and the Livestock Market: Report of a Task Force Commissioned by the Center for Rural Affairs, Walthill, Nebraska, Wes Sandall et al., Center for Rural Affairs, Walthill, Nebraska, April, 1990, at 10, 11, citing (1) Quail, Gwen, Bruce Marion, Frederick Geithman, and Jeffrey Marquardt, 1986, The Impact of Packer Buyer Concentration on Live Cattle Prices, Working Paper 89, NC–117, University of Wisconsin-Madison; (2) Menkhaus, Dale J., and James S. St. Clair, and Zahedi Ahmaddaud, 1981, The Effects of Industry Structure on Price: A Case in the Beef Industry, Western Journal of Agricultural Economics, 6(1981): 147–53; (3) Ward, Clement E. 1981, Short-Period Pricing Models for Fed Cattle and Impacts of Wholesale Carcass Beef and Live Cattle Futures Market Prices, Southern Journal of Agricultural Economics, 13(1981): 125–32; (4) Ward, Clement, E. 1982, Relationship Between Fed Cattle Market Shares and Prices Paid by Beefpackers in Localized Markets, Western Journal of Agricultural Economics, 7(1982): 79–86; and (5) Ward, Clement E. 1983, Price Impacts of a Structural Change in Pork Processing: A Case Study in Oklahoma, Oklahoma State University, Current Farm Economics, 56(1983): 3–9.

[16] Ward, Clement E. (1992) *supra* note 12 at 7, citing Marion, Bruce W., Frederick E. Geithman, and Gwen Quail, Monopsony Power in an Industry in Disequilibrium: Beef Packing, 1971–1986, University of Wisconsin, WP–96, December 1990: Azzam, Azzeddine M. and John R. Schroeter, Implications of Increased Regional Concentration and Oligopsonistic Coordination in the Beef Packing Industry, Western Journal of Agricultural Economics. 16(1991): 374–81.

[17] Marion, Bruce W. and Frederick E. Geithman, Concentration-Price Relations in Regional Fed Cattle Markets, Food Marketing Policy Center, Research Report No. 25, April 1994, University of Connecticut, Department of Agriculture and Resource Economics, pp. 19–21.

[18] Helmuth, John W. (1995) *supra* note 11 at 4.

[19] Ward, Clement E., (December, 1992) at 7 citing Ward, Clement E., Timm J. Bliss, Forward Contracting of Fed Cattle: Extent, Benefits, Impacts, and Solutions, Blacksburg, VA: Research Institute on Livestock Pricing, Research Bulletin 4–89, November 1989).

degree of market power they had was significantly higher in the livestock procurement side of the market than in the wholesale meat market.* * *

Azzam and Schroeter (1991) next considered regional procurement markets for beef. They found that packers used market power to depress prices an estimated one percent, considerably less than other studies in this field. But they noted that even a half percent decline in cattle prices would increase packer profits about 35 percent and reduce cattle feeder profits about $4.40/head, or nearly 9 percent. Using a different methodology for data over the same time period 1988–91, Azzam (1992) also found that beef packers have market power to lower cattle prices, but not to raise meat prices in the wholesale market.

Stieger, Azzam, and Brorsen (1993) found that packers typically price cattle on the difference between the wholesale price they receive for boxed beef or carcasses and their average processing cost. That difference is called the marketing margin. As anticipated supply of cattle decreases, making it more difficult for packers to keep their plants fully operating and therefore raising their average processing costs, they ''markdown'' cattle bids—that is, they increase their marketing margin in order to cover their increased cost. They may be paying more for cattle in an absolute sense, but not as much more as they are worth in the short supply situation. In effect, they are pricing the cattle below their marginal value. The statistical analysis indicated that between 1972 and 1986, fed cattle were priced significantly below their marginal value during 31 of 59 quarters. On average, this markdown was 1.31 percent, or 17 percent of the marketing margin, and amounted to $1.54 per hundredweight of retail meat. The authors estimate that was worth about $62 million to the packers.[20]

These studies provide a sufficient basis for USDA to find that monopsony power of the packers is likely to have the effect of manipulating prices by depressing the prices paid to cattle producers.

B. Impact of Packer Feeding on Prices

Other studies have examined whether particular slaughter cattle procurement practices effect prices paid to producers. One Packers and Stockyards Division study that examined the price impacts from packer-feeding in the mid-1960s explains how an oligopsonistic packer that feeds its own cattle can adversely affect prices paid to other producers for slaughter supplies: [21]

It is the oligopsonistic packer that is able to utilize its packer feeding operations to influence the price of fed cattle in a local market. Only the oligopsonistic packer can do that, and the possible effects of packer feeding on the price of cattle are confined largely to the markets where oligopsony exists.* * * [W]hen a degree of oligopsony exists, a packer's own supply of fed cattle can be used to restrict market purchases and exploit the market by paying lower prices than otherwise would have been paid. The amount of the price effect will depend on the extent of the packer's oligopsony influence as well as on how readily suppliers and local feeders can divert their marketings to other markets.

An oligopsonistic packer that has a supply of cattle in its feedlots can use those cattle as a bargaining tool. Its fed cattle serve as a standby reserve in its price negotiations. Livestock sellers know that such a packer can fulfill his slaughtering needs at a particular time by transferring his own cattle to his plant, instead of buying cattle on the market. And since such a packer is—by definition—large enough to exert an influence on the local market, its management of its fed cattle during the price negotiations has an effect on the local market price. Stated simply, in the short run, packer feeding can confer an extra degree of market power on an oligopsonistic packer.[22]

This study found that packer-fed cattle caused a significant decline in the local market price when the packer had some oligopsonistic power:

Packer-fed cattle transferred to the plant of the sample packer had a persistent depressing effect on the local price for Choice steers compared with prices at other markets. During the first five or six months of the year, the local price was consistently below the average for other markets, about in proportion to the number of packer-fed shipments to plant. As Packer-fed shipments to plant declined from a level of about 1,100 head a week early in the year to about 100 head in the 15th week, the local price approached the level of prices at other markets. From mid-year until the 38th-42nd weeks, packer-fed shipments generally declined to a low level (zero in the 40th week) and prices at the local market improved to the point that they exceeded the seven-market average by about $.50 per cwt in the 40th week. Then, as packer-fed shipments to plant increased during the last 10 or 12 weeks of the year, the price situation at the market deteriorated in comparison to other markets.[23]

* * * * *

Regression analysis of the data * * * confirmed the conclusion that packer-fed shipments to plant depressed the local price relative to prices at other markets. A 100-head increase in packer-fed shipments to plant, on average, lowered the local average price for Choice steers relative to other markets for the entire week by about $.06 cwt. Or, a 100 head decrease in packer-fed shipments to plant allowed the local price to improve by about $.06 per cwt. compared to the other markets. Since packer-fed shipments varied from zero to over 1,000 head per week, packer feeding affected the local weekly price by as much as $.50 per cwt.[24]

This study went on to find that in a competitive market ''feeding done by an individual packer can have no appreciable effect on the price of cattle.'' [25]

This study provides sufficient basis for USDA to find that packer ownership and feeding of its own slaughter supplies is likely to have the effect of manipulating prices by depressing the prices paid to cattle producers.

C. Forward Contract Impact on Price

Other recent studies have found that forward contracting for fed cattle supplies has a depressing effect on prices. A study that estimated the short-run price impacts of forward contracting in the southwest Kansas marketing region during six months of 1990 found:

Over the six months, for the level of contracted cattle, contract deliveries were associated with $0.15/cwt to $0.31/cwt reduced transaction prices. When forward contract shipment levels were relatively high, changes in forward contract shipments had a larger impact on transaction prices than during periods when shipments were low.[26]

The authors of this study point out that these results may be related to the market condition during the data collection period of May through November 1990, during which time cattle supplies were very low. They suggested that ''the relatively small supplies of cattle when compared to existing slaughter capacity are providing a safety net against any market power levied by the larger packing firms.'' [27]

A recent report issued by the Grain Inspection and Packers and Stockyards Administration show that from April 5, 1992 to April 3, 1993, the packers' use of forward contracts and marketing agreements to procure slaughter cattle

[20] From From the Carcass to the Kitchen: Competition and the Wholesale Meat Market, Strange, Marty and Higby, Annette, Center for Rural Affairs, Walthill, Nebraska, November 1995, citing (1) Azzam, Azzeddine, and Emilio Pagoulatos, 1990, Testing Oligopolistic and Oligopsonistic Behavior: An Application to the U.S. Meat-Packing Industry, Journal of Agricultural Economics 41(3): 362–370; (2) Azzam, Azzeddine, and John Schroeter, 1991, Implications of Increased Regional Concentration and Oligopsonistic Coordination in the Beef Packing Industry, Western Journal of Agricultural Economics 16(2): 374–381; (3) Azzam, Azzeddine, 1992, Testing the Competitiveness of Food Price Spreads, Journal of Agricultural Economics 43(2): 248–256; and (4) Stieger, Kyle W., and Azzeddine Azzam and B. Wade Brorsen, 1993, Markdown Pricing and Cattle Supply in the Beef Packing Industry, American Journal of Agricultural Economics 75:549–558.

[21] Aspelin, Arnold and Gerald Engelman, Packer Feeding of Cattle; its volume and significance, Packers and Stockyards Division, Consumer and Marketing Service, USDA, Marketing Research Report No. 776, Nov. 1966.

[22] *Id.* at 10.

[23] *Id.* at 13.

[24] *Id.* at 16.

[25] *Id.* at 22.

[26] Schroeder, Ted C., Rodney Jones, James Minert and Andrew P. Barkley; ''The Impact of Forward Contracting on Fed Cattle Transaction Prices'', Review of Agricultural Economics, Vol. 15, No. 2, May 1993, pp. 326–337, at page 335.

[27] *Id.* at 335.

had a depressing effect on prices to producers.[28] The report states:

Increased deliveries of forward-contracted cattle were associated with reduced prices in the cash market while increasing inventories of forward-contracted cattle were associated with increased cash-market prices.

Daily increases in the rate of deliveries of forward-contracted and marketing agreement cattle had a slightly negative effect on daily cash-market prices. . . .

Prices paid for cattle delivered under forward contracts on a given day were about $3.00 per cwt lower (dressed-weight basis) than prices for similar cattle on the cash market.

Increases in cash market price were found to lead to increases in the monthly quantities of the volume of forward-contracted, and marketing agreement cattle used by large plants. Cash-market price variability is positively associated with the volume of forward-contracted and marketing agreement cattle used by large plants.

This report demonstrates that when cash-market prices increased, packers increased their inventories of forward-contracted cattle. When deliveries of that forward-contract inventory increased, the cash-market price for cattle declined.

These statistics provided sufficient basis for the USDA to make a finding that the current use of forward contracts is likely to have the effect of manipulating prices by depressing the cash-market prices paid to cattle producers.

D. Use of Formula-Priced Forward Contracts

Forward contracts generally are not traded publicly. In practice they are often offered only to certain producers providing those producers with preferential treatment over other producers. The recent GIPSA report, Concentration in the Red Meat Packing Industry, does not directly address whether forward contracts and marketing agreements (marketing agreements as defined by the report are included in the definition of forward contract in the proposed rule) are offered by packers on a preferential basis to certain cattle producers. However, it does provide some insight into who actually enters into forward contracts.[29] The report states:

Small firms use spot markets almost exclusively, whereas the Big Three packers are more likely to use alternative procurement methods. Con Agra, Excel, and IBP account for 73 percent of spot market transactions, but [for] 88 percent of marketing agreements and 95 percent of forward contracts. * * *

The largest feedlots are also more likely than small feedlots to use alternative procurement strategies. Feedlots handling more than 32,000 cattle per year accounted for 26 percent of spot marketing transactions, but [for] 39 percent of forward contracts, 64 percent of marketing agreements. * * * Most forward contracts (73 percent) were priced on the basis of carcass weight, while formula pricing was used for most marketing agreements. * * * The Big Three firms handled 93 percent of the formula-priced lots and 83 percent of the carcass-weight arrangements.[30]

The report clearly demonstrates that the Big Three packing firms and the largest feedlots account for the vast majority of the formula-priced agreements. This is particularly important given the study's finding that ''market agreement cattle brought prices about 54 cents above spot market prices.''[31]

This data suggests that in practice the largest feedlots have preferential access to marketing agreements—and therefore to an assured market for their cattle. And that this preferential status does not only ensure market access in the long term but also provides a price advantage not available to producers not offered the marketing agreements.

This study provides sufficient basis to find that current use of the marketing-agreement types of forward contracts is likely to result in an undue and unreasonable advantage for certain large-scale producers, providing them over the long term with preferential access and a higher price than are afforded other producers.

E. Captive Supply Decisions and Impact on Price

The Concentration in the Red Meat Packing Industry report issued by the Grain Inspection and Packers and Stockyards Administration in February 1996, despite its many flaws, does demonstrate that the use of captive supply procurement methods in the cattle industry causes a decline in the cash-market price for cattle. It shows that packers increase their captive supply inventories when cash-market prices increase. The report also demonstrates that as packers increase the deliveries of captive supplies, the cash-market prices decline. The report states:

The overall effect of captive supplies on prices paid for cattle in the cash market was negative but small * * *.

Increases in cash market price were found to lead to increases in the monthly quantities of packer-fed, forward-contracted, and marketing agreement cattle used by large plants. Cash-market price variability is positively associated with the volume of forward-contracted and marketing agreement cattle used by large plants * * *.

The findings indicate that expected higher prices increase the volume of packer feeding and other captive supply used, whereas expectations of falling prices lead to decreases * * *.

The overall effect of increased use of captive supply on shortrun prices paid for cattle in the cash market appears to be negative but small.[32]

This study provides sufficient basis for USDA to find that current practices with regard to captive supply use by packers, including formula-priced forward contracts and packer ownership and feeding of its own slaughter supplies are likely to have the effect of manipulating prices by depressing cash-market prices paid to cattle producers.

F. Impact of Number of Buyers on Price

Clement E. Ward has also recently summarized another line of relevant research designed to determine the effects which number of buyers had on livestock prices. He states:

A number of studies of the experimental electronic livestock markets have given us additional insight into the relationship between concentrated market structure and prices for livestock. Holder (1979) found that slaughter lamb prices were $.70 per cwt. higher after introduction of a telemarket. Ward (1984) studied the relationship between the number of bidders in an Oklahoma teleauction and prices paid for slaughter lambs between 1979 and 1982, and found that each additional bidder added $1.10 per cwt. to prices paid and widened the price difference between the teleauction and live auction at San Angelo, Texas, by $.60 per cwt. Finally, Rhodus et al. (1985) analyzed the impact of an electronic market on hog prices in Ohio compared with direct trade markets in Indiana, the market in Peoria, Illinois, and a major order-buying company operating in Ohio. They concluded that average prices paid through the electronic market were $.94 higher than order-buyer prices at Peoria and $.99 higher than Indiana direct trades by order-buyers.[33]

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[28] Concentration in the Red Meat Packing Industry, Grain Inspection and Packers and Stockyards Administration, USDA, February 1996, pp. 25–31.

[29] Concentration in the Red Meat Packing Industry, Grain Inspection and Packers and Stockyards Administration, USDA, February 1996, pp. 15–23.

[30] *Id.* at 16–17 [emphasis added].

[31] *Id.* at 22.

[32] Concentration in the Red Meat Packing Industry, Grain Inspection and Packers and Stockyards Administration, USDA, February 1996, pp. 30–31.

[33] From Competition and the Livestock Market: Report of a Task Force Commissioned by the Center for Rural Affairs, Walthill, Nebraska, Wes Sandall et al., Center for Rural Affairs, Walthill, Nebraska, April 1990, citing (1) Holder, David L., Benefits of a Sheep and Lamb Teleauction in Virginia and West Virginia, U.S. Department of Agriculture, Economics, Statistics, and Cooperatives Service, selected paper for the Southern Agricultural Economics Association meetings, February, 1979; (2) Ward, Clement E., An Empirical Study of Price

Continued

The Center for Rural Affairs also has reported on studies designed to determine the effects which number of buyers had on livestock prices:

Generally, fewer buyers mean less demand for slaughter livestock and less buyer competition, both of which lead to lower livestock prices * * *. Three independent studies (Love and Shuffett; Ward 1983; Hayenga, et al.) found that when hog slaughtering plants were closed in Kentucky, Oklahoma, and Iowa, slaughter hog prices in markets adjacent to the plants declined either absolutely or relative to other markets. In some cases, markets adjusted after a period of weeks to price levels close to those existing prior to plant closing.

Conversely, more buyers generally mean more demand for slaughter livestock and more buyer competition, both of which lead to higher prices * * *. Hayenga, et al. found that slaughter hog prices increased for a time when new hog slaughtering plants opened in Iowa. The adoption of electronic markets, giving more buyers better access to livestock offered for sale, has typically resulted in higher livestock prices. Such studies include electronic markets for slaughter lambs in Virginia and Oklahoma (Holder; Ward 1984), hogs in Ohio (Rhodus, et al.) and feeder cattle in Texas (Sporleder and Colling). Number of buyers bidding on fed cattle was found to have a positive effect on fed cattle transaction prices in three separate studies (Ward 1981, 1992; Schroeder, et al.).[34]

Discovery and Competition for Slaughter Lambs, Western Journal of Agricultural Economics, 9 (1984): 135–44; and (3) Rhodus, W. Timothy, E. Dean Baldwin, and Dennis R. Henderson, Pricing Accuracy and Efficiency in a Pilot Electronic Hog Market, American Journal of Agricultural Economics, 71 (1989): 874–82.

[34] From Meatpacking Industry Changes: Causes and Consequences, December 1992, Agricultural Economics A.E. Paper 92137, Department of Agricultural Economics, Division of Agricultural Sciences and Natural Resources, Oklahoma State University, citing (1) Love, Harold G. and D. Milton Shuffett, Short-Run Price Effects of a Structural Change in a Terminal Market for Hogs, Journal of Farm Economics, 47(1965): 803–812; (2) Ward, Clement E., Price Impacts of a Structural Change in Pork Processing—A Case Study in Oklahoma, Oklahoma Agricultural Experiment Station, Current Farm Economics, 56 (1983): 3–9; (3) Hayenga, Marvin L., Ronald E. Deiter, and Christobal Montoya, Price Impacts Associated with the Closing of Hog Slaughtering Plants, North Central Journal of Agricultural Economics, 8 (1986: 237–42; (4) Holder, David L., Benefits of a Sheep and Lamb Teleauction in Virginia and West Virginia, U.S. Department of Agriculture, Economics Statistics, and Cooperative Service, selected paper for the Southern Economics Association meetings, February 1979; (5) Ward, Clement E., An Empirical Study of Price Discovery and Competition for Slaughter Lambs, Western Journal of Agricultural Economics, 9 (1984): 135–44; (6) Rhodus, W. Timothy, E. Dean Baldwin, and Dennis R. Henderson, Pricing Accuracy and Efficiency in a Pilot Electronic Hog Market, American Journal of Agricultural Economics, 71 (1989): 874–82; (7) Sporleder, Thomas L. and Phil L. Colling, Competition and Price Relationships for an Electronic Market, Texas A&M University, Department of Agricultural Economics, selected paper for the American Agricultural Economics Association meetings, August 1986; (8) Ward, Clement E., Short-Period Pricing Models for Fed Cattle and Impacts of wholesale Carcass Beef and Live Cattle Futures Market Prices, Southern Journal of Agricultural Economics, 13 (1981): 125–32; (9) Ward, Clement E., Inter-firm Differences Between Fed Cattle Prices in the Southern Plains, American Journal of Agricultural Economics, 74 (1992): 2 480–85; and (10) Schroeder, Ted, Rodney James, James Mintert, and Andrew Barkley, Short-Run Price Impacts of Packer-Controlled Cattle Supplies, Manhattan, KS: Invited Paper, Western Agricultural Economics Association meetings, July 1990.

These studies regarding the impact of the number of buyers on livestock prices provide sufficient basis for a finding that use of a public market, where buyers and sellers in general have access for trading of forward contracts and packer-fed cattle, will improve prices paid to cattle producers.

G. Conclusion From Economic Studies

The economic studies discussed above provide substantial evidence supporting findings that the current use of forward contracts and packer-owned cattle to procure captive slaughter supplies are likely to have the effect of manipulating prices by depressing those prices paid to cattle producers. These studies also support a finding that the trading of forward contracts and packer-owned cattle in a public market designed to encourage more bidders on cattle is likely to improve prices paid to producers.

The following discussion of the legislative history, statutory language and case law interpretation of the Packers and Stockyards Act establishes that this evidence is sufficient basis for issuing the proposed rules restricting packer feeding of its own slaughter supplies and use of forward contracts.

Legal Authority To Issue Proposed Rule

Under the Packers and Stockyards Act, the Secretary of Agriculture clearly has the authority to issue rules regulating packer captive supply livestock procurement methods to ensure compliance with Section 202 of the Act (7 U.S.C. § 192). In fact, the legislative history of the Act demonstrates that he has the *obligation* to issue rules necessary to ensure that packers continue to comply with Section 202 as the industry structure and procurement practices change.

A. Legislative History of the Packers and Stockyards Act

1. Context of the Packing Industry at the Time the Act was Passed

Legislative history shows that the concentration levels in the beef packing industry at the time the Packers and Stockyards Act was enacted 75 years ago were *lower* than the concentration level today. Representative Voight, in the debate on the House bill, cited the concentration figures from the Federal Trade Commission report:

It appears from the report of the Federal Trade Commission that in 1916 the Big Five's percentage of interstate slaughter was as follows: cattle 82.2, calves 76.6, hogs 61.2, sheep and lamb 86.4. * * * In view of the steady growth of the business of the Big Five it is reasonable to assume that at this date these figures should be raised from 5 to 10 percent. I conclude, therefore, that at the present time the Big Five's percentage of interstate slaughter is between 75 and 80 per cent * * * the monopoly of the Big five becomes very apparent.[35]

In contrast, today, four firms, rather than five, control well over 80 percent of the steer and heifer slaughter.[36]

At the time the Act was passed Congress was also very concerned about the fact that the packers were continuing to charge wholesalers increasingly higher prices even while prices paid to producers were low. Representative McLaughlin and Senator Kendrick introduced figures in their respective houses that demonstrated that despite the fact that the packers were paying producers the same price for cattle in April 1921, as they had paid in February, 1916, they were charging the wholesalers 52.6 percent higher prices in 1921 than in 1916.[37] Similarly, over the last twenty-five years we have seen a steady climb in the percentage of the retail meat dollar that goes to packers. The annual average percent of the retail dollar going to packers in 1970 was 12.7. This figure fluctuated over the following twenty-five years, with a general trend upward, until in 1995 the packers share of the retail dollar was 25.5 percent. During this same period producers' share of the retail dollar dropped from 64 percent in 1970 to 49 percent in 1995.[38]

Seventy-five years ago when Congress recognized trends in the packing industry that virtually mirror those we see today it acted to pass the most comprehensive anti-trust legislation ever enacted in this country. The powers granted under that Act should be vigorously administered today to prevent the kind of harm to producers that the Act was written to address.

[35] 61 Cong. Rec. 1863 (1921).

[36] Helmuth, John W., (1995), *supra* note 10 at 1.

[37] 61 Cong. Rec. 1877–1878, and 2618–2619 (1921).

[38] ''Beef Price Spread Data'' Table 10—Estimated Historical Series for Beef, Choice Yield Grade 3: Retail, Wholesale and Farm Values, Price Spreads, and Farmers' Share. USDA, Economic Research Service, Stock No. 90006.

2. Extraordinarily Broad Rule-making Power

Upon thorough review of the legislative history of the Packers and Stockyards Act there can be no doubt that Congress meant to grant the Secretary the broadest possible rule-making authority over the livestock procurement practices of the packers.

The extraordinarily broad scope of the regulatory authority granted to the Secretary under the 1921 Act was expressed in the House report as follows:

A careful study of the bill, will, I am sure, convince one that it and existing laws, given the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards and all activities connected therewith; that it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.[39]

The Congressional intention to give the Secretary of Agriculture complete regulatory powers over the packers and all their activities was emphasized throughout the debate on the bill.[40] Similarly, the intention to pass the ''most far-reaching measure and extend further than any previous law into the regulation of privates business'' was also an often repeated point in the debate.[41]

The conference report on the bill emphasized, in the strongest terms possible, the Congressional intent to grant the Secretary extraordinary regulatory powers—''Congress intends to exercise in the bill, the fullest control of packers and stockyards which the Constitution permits''.[42]

3. Authority to Regulate to Prevent and Compel

The legislative history also makes it clear that Congress intended that the Secretary use his regulatory powers aggressively to *prevent* packer practices made illegal by the Act. Repeatedly the bill was described as giving the Secretary the authority ''to *prevent* packers * * * from engaging in an unfair, unjustly discriminatory, or deceptive practice or device.'' [43] Representative Voight of Wisconsin, who strongly favored the bill, stated that it could be used to *prevent* unlawful practices by the packers and to *compel* them to employ lawful business practices:

The bill is sufficiently broad so that, if vigorously administered, the Secretary can prevent combination among packer and can *compel* them and all others connected with the industry to do business in a lawful and proper way. * * * the Secretary under this bill is given the *power to make rules* that will make them [packers] do business on the level.[44]

The legislative history makes clear that Congress intended the Secretary to exercise his extraordinarily broad regulatory powers to prevent conditions under which packers could gain control of the livestock market, and, thereby, induce healthy competition. The report on the Hearings on several of the bills debated states that the Act seeks ''to prohibit the particular conditions under which monopoly is built up, and to prevent a monopoly in the first place and to induce healthy competition.'' [45]

4. Authority to Issue Substantive Rules

There was extensive debate in the Senate over whether the regulatory body should be allowed to issue rules or regulations for which the packers could be held civilly and criminally liable. This debate was ultimately resolved when the Senate amended the House bill by adding a *second* provision granting the Secretary authority to issue rules and regulations necessary to carry out the provisions of the Act. The conference report on the bill explains how the two houses dealt with this double grant of authority to issue rules and regulations:

On Amendment No. 17: This amendment adds to the House bill a provision empowering the Secretary of Agriculture to 'make such rules, regulations, and orders as may be necessary to carry out the provisions of this act.'. The House bill did not contain this specific provision, but did make applicable to the jurisdiction and powers of the Secretary of Agriculture in enforcing the act the powers given to the Federal Trade Commission by section 6 of the Federal Trade Commission Act, one of the provisions of which authorized that commission to make rules and regulations for the enforcement of the act, the two being substantially the same; and the House recedes.[46]

Representative Haugen, the chief author of the bill that eventually was enacted, also similarly references this amendment in his comments on the conference report.[47]

Maybe as significant as the double grant of authority to issue rules, for purposes of determining Congressional intent with regard to the type of rules proposed in this petition, is the fact that the Senate defeated an amendment that would have limited the Secretary's authority to issue rules only ''as to procedures.'' [48] During the debate on this proposed amendment Senator Walsh from Montana clearly stated that the intent of the bill without this amendment was to allow the Secretary to issue substantive type rules that are consistent with the act's provisions. He also emphasized that courts would have the full authority to review such rules through a review of any order issued by the Secretary requiring a packer to comply with the rule.

I may say that a further examination of the general statutes does not reveal any statute making criminal the act which is denounced as unlawful. Accordingly the only procedure which can be instituted on charges of having violated an order, rule, or regulation is the procedure recited in the proposed act. If the Secretary * * * believes that the rule, regulation or order comes under the act, of course he will make the order; but that will be ineffective until it is passed upon by the court, and the court will pass upon the question as to whether the rule, regulation, or order falls under the provisions of this act so as to make disobedience of its contempt.[49]

Senator Walsh's reference to procedures for bringing charges for violations of the Act is to the provision of the bill that is now codified at 7 U.S.C. § 193. This is the statutory provision the Secretary uses to bring charges against packers for violating the unfair and deceptive trade practices section of the Act, 7 U.S.C. § 192. Senator Walsh's statement, thus, indicates that Congress intended that the Secretary would issue substantive rules defining what packers must do to comply with this provision of the Act, and that packers would be adequately protected from arbitrary rule-making by having access to review of the rule by the courts. Senator Walsh's statements demonstrate that Congress clearly envisioned that the Secretary would be issuing precisely the type of substantive rule that is proposed in this petition.

5. Purpose to Protect Producers Interest

A primary purpose for passage of the Packers and Stockyards Act was to protect the interest of the producer. This intention is clearly expressed in the

[39] House Report No. 77, 67th Cong., 1st Sess. 2 (1921) (emphasis added).

[40] See also 61 Cong. Rec. 1799, 1801, 4738, 8310 (1921).

[41] See also 61 Cong. Rec. 1801, 1805–1806, 1887–1888 (1921).

[42] Conference Report, H.R. Rep. No. 324, 67 cong. 1st Sess., at 3 and 5–6. Statement of the Managers on the Part of the House; 61 Cong. Rec. 4778, 4779 (1921).

[43] H.R. Rep. No. 77, 67th Cong. 1st Sess. 2 (1921); 61 Cong. Rec. 1799 (1921).

[44] 61 Cong. Rec. 1868 (1921) (emphasis added).

[45] Hearings on H.R. 14, H.R. 232, H.R. 5032, and H.R. 5692 Before the House Committee on Agriculture, 67th Cong. 1st Sess., ser. D, 26 (1921).

[46] 61 Cong. Rec. 4780 (1921).

[47] 61 Cong. Rec. 4782 (1921).

[48] See 61 Cong. Rec. 2674–2675 (1921).

[49] 61 Cong. Rec. 2675 (1921).

legislative history. Representative Tincher stated:

It is my judgment that the passage of this bill, that its proper administration, will permit the meat producer to exist; that it will reduce the amount paid out between the producer and the consumer to such an extent that it will make the business for the producer more profitable, and not be injurious to the consumer.[50]

Similarly, Representative Voight of Wisconsin expressed the sincere belief that this bill would benefit producer and consumer alike:

I think if this monopoly of the Big Five is done away with, and the laws of trade are given a chance to function, it is going to benefit producer and consumer alike; genuine competition will benefit both.[51]

In an early case interpreting the Act the U.S. Supreme Court recognized that one of its primary purposes was to protect producers' from the packers' control over prices paid for livestock:

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys.[52]

The Eighth Circuit Court of Appeals has more recently stated

One of the purposes of the Packers and Stockyards Act is to safeguard farmers and ranchers against receiving less than the true market value of their livestock.[53]

Courts have held that the Act should be liberally enforced in order to accomplish its purpose of protecting producers interests:

The Act is remedial legislation and is to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of the middleman.[54]

6. Authority to Regulate to Ensure Open, Competitive Markets

Congress recognized that to protect producers' interests the Secretary must be granted the authority to regulate packer practices to ensure open, competitive markets for livestock. When the Act was passed in 1921 virtually the sole source of supply for slaughter cattle was through the stockyards. So Congress not only emphasized regulation of the packers but also of the stockyards as the public market of that day.

Congress, however, did make clear its intention was to ensure open, competitive markets for buying and selling livestock no matter where those markets occurred. Rep. Haugen of Iowa, whose bill was ultimately enacted with only minor modification, introduced the conference report to the House on August 9, 1921. In his discussion of the rejected Senate amendments he indicated that buying or selling ''in commerce live stock at the stockyard'' was equivalent to being a buyer or seller of ''live stock in commerce''.

Representative Jones from Texas, a strong supporter of the Act, most clearly stated the importance of open, competitive markets for the producer:

The producer must always sell in a market that he does not control. He buys at the other man's price. His only hope of securing a fair price lies in an open, competitive market.[55]

Congress knew well that the only way open, competitive markets for livestock and meat could be maintained was if the Secretary was given the authority to regulate practices of one sector of the industry that could adversely affect other sectors. Congress recognized that one of the most significant aspects of this legislation was that it authorized regulation of unfair practices as between the packer and the producer and between the packer and the consumer. In response to a question as to how this Act strengthened the authorities under the Federal Trade Commission Act, Representative Anderson stated:

As to the intent of ''unfair competition'' [in the FTC Act] it only includes acts which constitute a violation of the rights of the competitor, and it must be a method which is used by a competitor on the same plane. * * * For instance, the method of competition used by a manufacturer which we might think was a violation of the moral rights of the wholesaler would not be a violation of the Federal Trade Commission Act, because the interpretation of that is that it must be unfair as between competitors who stand on the same plane. This goes further than that, as it affects the public interest to a large extent, and the unfair competition or unfair competition or unfair practice as between the packer and the general public, the packer and the producer, or the packer and any other agency connected with the marketing of livestock.[56]

Congressional commitment to maintaining open and competitive markets for livestock was reemphasized throughout the amendments to the Act in later years. In 1924 the Act was amended to increase the authority of the Secretary to sanction violators. The House Report notes that the Secretary personally appeared to the committee and urged strengthening the law to enable him to confront ''conditions that are detrimental to the open, competitive marketing of livestock.'' [57]

When enacting the 1958 amendments Congress noted significant changes in the meatpacking industry and the environment in which it operates. The House report stated ''[e]qually significant (as the development of 1400 to 1500 country auctions and markets) is the growth which has taken place in country buying—buying by packers or livestock dealers direct from the producer * * * today a common practice in almost every part of the country and more than 40 percent of all livestock sold moves in this manner.'' [58] This report also makes clear that Congress intended the 1958 Act amendments to ensure that the Secretary had jurisdiction over ''all livestock marketing involved in interstate commerce including country buying of livestock.'' [59]

In 1976, Congress again strengthened the Act to give the Secretary greater powers in regulating the packers. Further changes in the pattern of livestock marketing between 1958 and 1976 led to these amendments. Following the 1958 amendment, ''packers continued to push to acquire slaughter livestock at its source,'' and by 1976 it was estimated that ''well over 80% of all slaughter livestock is purchased by the packers directly from producers and custom feedlots.'' [60]

In 1978, when Congress amended the Act with regard to rates and charges at auction markets, it again expressed the importance of securing competitive livestock markets for producers. ''The continued availability of competitive, reasonably priced, and conveniently located livestock marketing channels is essential, particularly for small producers.'' [61]

The legislative history clearly establishes that Congress intended to grant the Secretary the authority to regulate packer practices necessary to ensure open, competitive markets for livestock. When marketing conditions changed over time, Congress amended the Act to ensure the Secretary would continue to be able to address packer practices even in the context of country

[50] 61 Cong. Rec. 1809 (1921).

[51] 61 Cong. Rec. 1868 (1921).

[52] Stafford v. Wallace, 258 U.S. 495, 515–516, 42 S. Ct. 397, 401 (1922).

[53] Bosma v. USDA, 754 F.2d 804, 808 (8th Circuit 1984), citing H. Rep. No. 1048, 85th Cong. 2d Session, reprinted in 1958 U.S. Code Cong. and Admin. News, 5212, 5213.

[54] Swift & Co. v. United States, 393 F.2d 247, 253 (7th Cir. 1968); citing Stafford v. Wallace, 258 U.S. at 521; and Safeway Stores, Inc. v. Freeman, 369 F.2d 952, 956 (1966); see also, Farrow v USDA, 760 F.2d 211, 214 (8th Circuit 1984).

[55] 61 Cong. Rec. 1861 (9121).

[56] 61 Cong. Rec. 1805 (1921).

[57] H.R. Rep. 77 on Packer Act Amendment of 1924 at 3.

[58] H.R. Rep No 1048, 85th Cong., 1st Sess 3 (1957).

[59] *Id*. at 5.

[60] Sen. Rep. No. 94–932, 94th Cong, 2d Sess. 4 (1976).

[61] 1978 USCAAN 2204, Senate Report.

buying direct from feedlots or producers.

7. Obligation to Adjust Rules to Changes in Industry Structure

While in 1921 the stockyards were the public market which Congress wanted to ensure would be made open and competitive, Congress had the foresight to recognize that in the long-term industry marketing practices might change. It structured the Act to grant the Secretary authority to take action that would ensure open, competitive markets as the industry changed over time. In doing so Congress intentionally placed the obligation on the Secretary of Agriculture to monitor the packing industry and adjust regulatory controls to ensure compliance with the purposes of the Act as industry structure changed. Congress recognized that enacting a statutory list of specific prohibited packer practices would not further one of its primary goals—to structure an act that would keep pace with the changing structure of the livestock industry. Congressman Anderson of Minnesota, a member of the House Committee on Agriculture and a sponsor of one of the bills that led to the Act, stated during the debates in the House that:

> Industry is progressive. The methods of industry and the manufacture and distribution change from day to day, and no positive iron-clad rule of law can be written upon the statute books which will keep pace with the progress of industry. So we have not sought to write into this bill arbitrary and iron-clad rules of law. We have rather chosen to lay down certain more or less definite rules, rules which are sufficiently flexible to enable the administrative authority to keep pace with the changes of methods in distribution and manufacture and in industry in the country.[62]

Congressman Anderson later noted that ''the provisions of this legislation as to the packers must be more or less elastic in order that they may keep pace with the state and development of the industry.'' [63]

8. Legislative History Conclusion

The legislative history establishes that Congress intended that the Secretary use his authority under the Act to protect the interests of livestock producers through regulation of packer practices that threaten an open, competitive markets for livestock. It also shows that Congress intended that the Secretary do this in part through issuance of substantive rules that will *prevent* packer practices prohibited by the Act and *compel* lawful action by packers. Congress expected the Secretary to vigorously enforce the Act according to these principles, adjusting the rules and enforcement policies to keep pace with the state and development of the industry even as numbers of cattle purchased directly from feedlots and producers increased. The legislative history demonstrates that Congress clearly intended the Secretary to issue substantive rules of the nature proposed in this petition.

B. Statutory Authority for Rule Making

The statutory language granting the Secretary of Agriculture these extraordinarily comprehensive regulatory powers, including the authority to issue substantive regulations regarding packer practices, is found at 7 U.S.C. §§ 228(a) and 222. Section 228 states:

> *The Secretary may make such rules, regulations and orders as may be necessary to carry out the provision of the Act* * * *.[64]

Section 222 grants the Secretary of Agriculture all of the enforcement powers held by the Federal Trade Commission under Title 15 Section 46, 48, and 50.[65] Section 46(a) authorizes the Secretary ''to make rules and regulations for the purpose of carrying out the provisions'' of the Act.

When issuing regulations in 1974, the Packers and Stockyards Administration acknowledged that these two statutory sections granted it the authority to issue *substantive* rules:

> The position of the Administration is that the general rule-making authority contained in section 407 of the Packers and Stockyards Act (7 U.S.C. § 228) and section 6(g) of the Federal Trade Commission Act (15 U.S.C. § 46) authorizes the Secretary to issue substantive as well as procedural and advisory regulations necessary to carry out the provisions of the Act.[66]

Courts have also recognized that the Secretary has the authority to issue legislative rules under the Packers and Stockyards Act. These legislative rules have the force and effect of law. See, e.g., *United States* v. *Marshall Durbin & Co.*, No. CV 84–PT–1920–S (ND Ala Sept. 11, 1985), where the court recognized that the Secretary has the authority to issue legislative rules having the force and effect of law, but held that a poultry weighing regulation should be regarded as an interpretive rule, since the Secretary did not comply with the notice and comment procedures of the Administrative Procedure Act.

One court has specifically addressed the Secretary's rule-making authority under Section 202 of the Act. In *Central Coast Meats* v. *USDA*, 541 F.2d 1325 (1976), the court held that USDA did not have the authority under § 202(a) to enforce a rule that made it a *per se* violation for a packer to own a dealer or vice-versa. The court based this holding on its understanding that 202 (c) and (d) specifically addressed the evils of packers' acting as dealers and it clearly contemplated that packers could act as dealers in certain circumstances.[67] This decision would not prohibit the issuance of the rules proposed in this petition. The rules proposed here do not create the type of *per se* prohibition the court was concerned with in the *Central Coast Meats* decision. These proposed rules do not make packers' use of forward contracts a *per se* violation. Nor do they make packer feeding a *per se* violation. Rather, these rules identify the circumstances under which forward contracts and packer feeding result in violations of the Act.

Forward contracts that are formula-priced fail to establish the value paid for an animal on the day it is committed. This allows an opportunity for the manipulation of the price between the day the livestock is committed and the date it is delivered. Forward contracts which are not traded publicly create preferences for those producers offered those contracts over those not offered such contracts. Such preference of one producer over others is likely to injure the competitive position of those not receiving the offer and this violates Section 202(b) of the Act.

The proposed rule's requirement that all forward contracts contain a firm-base price and be traded in an open, public manner eliminates the circumstances under which forward contract use violates § 202 of the Act. Similarly, packer feeding of its own slaughter supplies can have the effect of reducing prices paid to producers on the cash market. Such practice also provides a preference to the persons owning the packer as well as owning the cattle. Thus a packer's feeding of its own slaughter supplies is likely to affect a manipulation of price and also likely to injure the other cattle producers' ability to compete with the packer. The proposed rule that packer owned and fed cattle be sold in public markets eliminates the circumstance in which packer feeding results in violations of the Act. Rather than establishing a *per se* violation of the Act, the proposed rules are explicitly designed to address the specific circumstances under which forward contracts and producer

[62] 61 Cong. Rec. 1887 (1921).

[63] 61 Cong. Rec. 1888(1921).

[64] 7 U.S.C. § 228(a) (emphasis added).

[65] 7 U.S.C. § 222.

[66] 39 Fed. Reg. 17529, 17537 (May 17, 1974) (emphasis added.)

[67] *Id.* at 1327.

ownership and feeding of cattle result in violations of the Act.

Both the legislative history and the statutory language of the Packers and Stockyards Act make it clear that the Secretary has extraordinarily broad authority to issue substantive rules regulating packer practices.

C. Statutory Authority for Captive Supply Rules

The types of packer practices that are to be regulated through the Secretary's rulemaking authority were set out in Section 202 of the Act, 7 U.S.C. § 192. This section establishes that:

It shall be unlawful with respect to livestock * * * for any packer * * * to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device; or

(b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or * * *

(e) Engage in any course of business or do any act for purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce.

D. Assertion That Secretary Lacks Rule-making Authority Is Wrong

Despite the Congressional grant of extraordinarily broad rule-making authority and its intent that the Secretary amend its rules as necessary to ensure packer compliance with the Act as industry structure changes, the Secretary has asserted that he has no authority to issue rules prohibiting packer captive supply procurement practices. In Secretary Glickman's letter dated October 3, 1995, to Representative Pat Williams, he asserts that the Grain Inspection and Packers and Stockyards Administration's policy is ''to promote fair and open competition among packers and not to dictate or regulate the specific methods and terms of sale to be utilized.'' The Secretary cites Swift & Co. v. Wallace, 105 F.2d 848 (7th Cir. 1939), to support this policy. He states that the court in that case noted that Section 202 ''does not purport to confer upon the Secretary of Agriculture any authority directly to regulate prices, or discounts, or sales methods; and clearly does not contemplate the exercise of any authority to establish uniformity of practice with respect thereto.''

This was the Secretary's response to a request from several congressmen to fully consider the Western Organization of Resource Council's request that rules of the nature proposed in this petition be issued.

The Secretary's reliance on the Swift case as justification for not issuing rules prohibiting these practices is misplaced. The Swift decision does not support his assertion that he has no authority to regulate these packer practices. In fact, the court in Swift explicitly states that the Secretary has the authority to restrict packer practices that violate Section 202 of the Packers and Stockyards Act.[68] This decision makes clear that the only limitation on the Secretary's authority to regulate packer practices is that restricted practices must be in violation of the Act.

1. Swift Case Analysis

a. Holdings in Swift Decision

In the Swift case, Swift had been granting longer credit terms and better discounts to the institutional trade (hotels, restaurants, clubs, steamship lines, and public institutions) than it offered to purveyors (those businesses which buy meat products from packers and then resell them to the institutional trade). USDA issued a cease and desist order that required Swift to:

[C]ease and desist from engaging in the unfair, unjustly discriminatory and deceptive practice and device of denying to any buyer of packer products the same terms of credit that are extended to any other buyer, of substantially the same credit rating purchasing packer products of like kind, quantity and quality, under substantially the same circumstances.[69]

The Court of Appeals found a problem with the form of the cease and desist order issued by USDA. It held that USDA acted outside its authority under the Packers and Stockyards Act in issuing an order that required Swift to grant uniform terms of credit and discounts to all customers.[70]

2. Legal Analysis

a. Swift Decision is Not Controlling Law in Most of the Country

The Swift decision cited by the Secretary is controlling law only in the Seventh Circuit, which includes Wisconsin, Illinois, and Indiana. While other courts may consider the Swift decision when deciding similar issues, it is not controlling law in other federal circuits. Other federal courts may decide the issue differently.

Since the Swift decision was issued by 1939, it has been cited only once by the Seventh Circuit for the proposition the Secretary uses it for.[71] However, the Armour decision does not give any more insight into what the Swift court meant by the quote Secretary Glickman now cites. No other courts have cited the case for this specific proposition. However, the case is cited often to support other principles regarding the Packers and Stockyards Act.

b. In Context, the Quote Does Not Support the Secretary's Position

When the quote cited by the Secretary is read in its proper context in the Swift decision, it is clear that it does not support the Secretary's general refusal to prohibit the packer practices as requested. Two important principles expressed by the court shed light on the intent of the quoted language. First, the court of appeals recognized the Secretary's authority to prohibit and restrict practices that are found to violate Section 202 of the Packers and Stockyards Act. Second, the reference to the lack of authority to establish uniformity of practice is to the court's finding that the form of the cease and desist order in that case was improper because the Act does not authorize the Secretary to change an unjustly discriminatory or unreasonable preferential practice into a fair practice through an affirmative mandate that the practice be applied uniformly to all affected.

(1) USDA Has the Authority to Restrict Unlawful Packer Practices

The quote cited by the Secretary is as follows:

The foregoing language does not purport to confer upon the Secretary of Agriculture any authority directly to regulate prices, or discounts, or sales methods; and clearly does not contemplate the exercise of any authority to establish uniformity of practice in respect thereto.[72]

The sentence immediately following this quote recognizes that the Secretary does have the authority to regulate practices if ''in fact'' they constitute unfair, unjustly discriminatory, or deceptive practices, or if they provide undue or unreasonable preference or advantage as between persons or localities. The court states:

Differences of variations in prices, or in the terms of credit, or amounts of discount, or in practices do not come within the ban of the act unless they in fact constitute engaging in or using an unfair or unjustly discriminatory or deceptive practice or device in commerce or unless they constitute a making or giving, in commerce, of an undue or unreasonable

[68] Swift & Co. V. Wallace, 105 F.2d 848, at 853 and 863.

[69] Swift & Co. v. Wallace, 105 F.2d 848, at 862 (7th Cir. 1939).

[70] *Id.* at 863.

[71] See Armour & Co. v. United States, 402 F.2d 712 (7th Cir. 1968).

[72] Swift & Co. v. Wallace, 105 F.2d 848, at 853 (7th Cir. 1939).

preference or advantage, or result in undue or unreasonable prejudice or disadvantage as between persons or localities.[73]

Later in the decision, the court makes clear that the Secretary has the authority to restrict packer practices that violate Section 202. The court states:

If a practice in respect to the giving of discount or terms of credit in fact constitutes an undue and unreasonable preference or advantage, or subjects some person or locality to undue and unreasonable prejudice or disadvantage, then clearly the Secretary of Agriculture has the power to restrict the practice to the point where it is fair and reasonable * * *[74]

Clearly, the court recognized that once USDA finds that a particular packer practice violates Section 202, it has the authority to restrict that practice until it is fair and reasonable. The economic studies discussed above demonstrate that current use of formula-priced forward contracts and packer ownership and feeding of its own slaughter supplies likely affect a manipulation of prices paid to producers and provide certain producers competitive advantages and preferences that are in violation of § 202 of the Act. The proposed rule restricts these practices only to the extent necessary to make them fair and reasonable and to prevent violation of the Act.

(2) Regulating Uniform Packer Practices

The court in the Swift case also held that the cease and desist order issued by the Secretary went beyond his authority because it was in effect an affirmative command to require ''uniformity'' of discount terms, terms of credit, and trade practices.[75] The court interpreted the cease and desist order issued by USDA to affirmatively require Swift to give discounts and particular terms of credit to any customer as a condition to being permitted to continue giving terms of credit or discounts that were found unreasonable and prejudicial. The court held that once a discount, term of credit, or practice was found to be undue or unreasonable preference, or unjustly discriminatory, the Secretary did not have the authority to change the practice into a proper practice by requiring it to be extended to all others who may be affected thereby. It held that the Secretary does have the power to restrict a practice to the point where it is fair and reasonable but does not have the power to change the unreasonable preference into a fair practice by affirmatively mandating that it be applied uniformly to all affected.[76] The court states:

If a practice in respect to the giving of discount or terms of credit in fact constitutes an undue and unreasonable preference or advantage, or subjects some person or locality to undue and unreasonable prejudice or disadvantage, then clearly the Secretary of Agriculture has the power to restrict the practice to the point where it is fair and reasonable; but we do not believe that the Secretary has the power to change a practice, which is assumed to be unreasonable and to create an unreasonable preference, into a proper practice by requiring it to be extended to all others who may be affected.[77]

The reference to the lack of authority to establish uniform practices in the quote used by Secretary Glickman is explained by this statement. All that the Swift court meant was that the Secretary does not have the authority to affirmatively mandate that for an unlawful practice to become lawful, it must be applied uniformly.

The Secretary's assertion that the Swift case supports his decision not to issue rules prohibiting the packer practices requested by the Western Organization of Resource Councils is wrong. The proposed rule restricts packer captive supply procurement methods only to the extent necessary to stop violation of the Act. The proposed rule does not mandate terms of sale through forward contracts or packer-owned cattle. Unlike the cease and desist order in the Swift case which required offering the same terms of credit to all buyers, the proposed rule does not require packers to buy all cattle on the same price terms. Forward contracts must be traded publicly, but the firm-base price does not have to be the same for all cattle. Similarly, packer-owned and fed cattle must be sold in a public market, but the cattle do not all have to be sold on the same terms.

E. Incipiency Theory of Enforcement

The legislative history of the Packers and Stockyards Act indicates that the Act seeks ''to prohibit the particular conditions under which monopoly is built up, and to prevent a monopoly in the first place and to induce healthy competition.'' [78]

Such legislative history has been interpreted by courts to mean that one of the purposes of the Packers and Stockyards Act is to prevent ''potential injury by stopping unlawful practices in their incipiency'' and that ''proof of a particular injury is not required'' to permit regulation of packer practices.[79]

Several courts have affirmed the principle that the Secretary has the authority to prevent unlawful practices in their incipiency but require that before doing so he must find either some non-competive intent or some likelihood of competitive injury.[80] These cases do not require the Secretary to find actual injury. He is only required to demonstrate a likelihood that injury of the sort the Act is designed to prevent will occur. As the Court of Appeals for the Ninth Circuit has stated:

Unfair practices under Section 202 are not confined to those where competitive injury has already resulted, but include those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of trade.[81]

In *Bosma* v. *USDA,* the Ninth Circuit Court of Appeals quoted its Central Coast Meats, Inc. holding that the department must show that the challenged conduct ''is likely to produce the sort of injury the Act is designed to prevent.'' [82] The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation.[83] However, the court also held that the failure of the auction operator to inform consignors that he was the actual purchaser of the livestock was ''inherently unfair'' and ''it may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm.'' [84]

Similarly, in a case involving an agreement by two competitors not to compete for certain cows at an auction market, the Eight Circuit Court of Appeals held that ''actual injury'' need not be proven because the ''purpose of the Act is to halt unfair trade practices in their incipiency, before the harm is suffered.'' [85] The court stated that ''the Secretary need only establish the likelihood that an arrangement will

[73] *Id.* at 853.

[74] *Id.* at 863.

[75] *Id.* at 862–63.

[76] *Id.*.

[77] *Id.* at 863.

[78] Hearing on H.R. 14, H.R. 232, H.R. 5032, and H.R. 5692 Before the House Committee on Agriculture, 67th Cong, 1st Sess., ser. D, 26 (1921).

[79] Daniels v. United States, 242 F.2d 39, 42 (7th Cir. 1957), *cert. denied*, 354 U.S. 939, *reh'g denied*, 355 U.S. 852 (1957); Bowman v. USDA, 363 F.2d 81, 185 (5th Cir. 1966), quoting *Daniels.*

[80] See Armour & Company v. United States, 402 F.2d 712, 717 (7th Cir. 1968), which describes how several previous Seventh Circuit opinions incorporated this concept, including Swift & Co. v. Wallace, 105 F.2d 848 (7th Cir. 1939); *Wilson & Co.* v. *Benson*, 286 F.2d 891 (7th Cir. 1961); Swift & Co. v. United States, 408 F.2d 849 (7th Cir. 1962); see also Corona Livestock v. USDA, 607 F.2d 811, 815 (9th Cir. 1979).

[81] De Jong Packing Co. v. USDA, 618 F.2d 1329, 1336–37 (9th Cir. 1980) (emphasis added).

[82] Bosma v. USDA, 754 F.2d 804, 808 (9th Cir. 1984), (emphasis added).

[83] *Id.* at 808–809.

[84] *Id.*

[85] Farrow v. USDA, 760 F.2d 211, 215 (8th Cir. 1985).

result in competitive injury to establish a violation.[86] The court agreed with the judicial officer that ''a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act.'' [87] The court concluded that ''this is so even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it has that result.'' [88]

These cases firmly establish that the Secretary may take action to prevent unlawful packer practices in their incipiency if he finds that these practices are reasonably likely to produce the sort of injury the Act is intended to prevent. The economic studies discussed above provide a sufficient factual basis for finding that the packers current use of forward contracts and packers' feeding of their own slaughter supplies in today's concentrated markets are likely to cause reductions in prices paid to producers and result in undue preferences for certain producers over others.

The incipiency theory of enforcement of the Packers and Stockyards Act can be applied in the rule-making process as well as in an administrative complaint proceeding. In the rulemaking process the Secretary makes the necessary findings with regard to the packer practices in general, whereas in an administrative complaint proceeding the necessary finding would be made as to a particular situation. The captive supply procurement practices addressed by the proposed rule are so widespread that restrictions on USDA's resources will not permit them to be addressed effectively through individual administrative complaints. These practices can only be addressed effectively through issuance of a rule.

F. The Relevance of Competition in an Undue Preference Case

The Seventh Circuit Court of Appeals has held that when considering whether a packer practice provides an undue and unreasonable preference or is unjustly discriminatory, the effect on competition as between the party alleged to have obtained the preferential treatment and the party alleged to have been discriminated against is of primary importance. Even good faith competition between packers will not prevent a finding of discrimination or unreasonable preference if the parties preferred or discriminated against are not other packers.[89]

[86] *Id.*

[87] *Id.* at 214.

[88] *Id.*

[89] See, e.g., Swift & Co. v. Wallace, 105 F.2d 848, at 855–857 (7th Cir. 1939).

In this Seventh Circuit case, Swift had been granting longer credit terms and better discounts to the institutional trade (hotels, restaurants, clubs, steamship lines, and public institutions) than it offered to purveyors (those businesses which buy meat products from packers and then resell them to the institutional trade). The Seventh Circuit Court of Appeals set aside USDA's ruling that the discounts and terms of credit at issue were in violation of Section 202 of the Packers and Stockyards Act.[90] The court found that USDA had not properly taken into account the issue of competition when making its decision.[91] Under the court's analysis, the purveyors that claimed they were being discriminated against were competitors of the packer, not competitors of the institutional trade. Both the packers and the purveyors sold meat to the institutional trade. The preferential credit terms and discounts, however, were given to the institutional trade. The court found that an important aspect of ''competition'' to be concerned about in an unjustly discriminatory or unreasonable preference case would be that between the party preferred and the party claiming prejudice. The court stated:

> Normally the lack of competition between the parties preferred and the parties claiming to be subjected to discrimination would be a fact of substantial significance for the determination of the existence of ''any undue and unreasonable preference or advantage.'' [92]

Because the purveyors were not competing with the institutional trade, the court found no discrimination between competitors. Thus, it found that USDA had not provided an adequate factual basis for holding the practices to be violations of the Act.

When considering whether the packers' captive supply procurement methods result in undue and unreasonable preferences or unjust discrimination, their effect on the competition between livestock producers must be considered. Because captive supply agreements are offered selectively to livestock producers and provide preferential access to slaughter plants for those who enter into them, they injure the ability to compete of those producers who are not offered such agreements for the sale of their livestock. The proposed rule is designed to restrict use of forward contracts and packer owned and fed cattle only to the extent necessary to prevent unjust discrimination or undue preferences between competing producers. It does so by requiring forward contracts and producer owned and fed cattle to be traded in a public market.

[90] *Id.* at 857.

[91] *Id.* at 854–57.

[92] *Id.* at 857.

G. Secretary Has the Authority to Issue the Proposed Captive Supply Rules

The legislative history discussed above demonstrates that a primary purpose of the Packers and Stockyards Act was to ensure that producers received full value for their livestock. The Secretary was granted the authority to regulate packers to ensure open, competitive livestock markets and, thereby prevent arbitrary depression of prices through the oligopsonistic powers of the packers. See pp. 25–29. This history and the language of the Act also demonstrates that the Secretary has the authority to issue substantive rules to prevent packers from taking any actions prohibited by Section 202 of the Act. See pp. 23–25. The courts have held that Congress intended to give the Secretary the authority to regulate packers' activities so as to stop practices that are likely to cause the type of harm to producers that the Act is designed to address in their incipiency—before the harm is suffered. See pp. 37–39 above.

The above described economic evidence provides a substantial factual basis for finding that the current use of formula-priced forward contracts and direct packer feeding of cattle for slaughter in today's highly concentrated markets is *likely* to cause the type of harm to producers that Congress intended to prohibit under Section 202 of the Act.

Section 202(e) expressly prohibits packers from engaging in ''any course of business'' or doing ''any act'' with ''the effect of manipulating or controlling prices.'' [93] Numerous economic studies cited above indicate that, in general, when packer concentration levels increase producers prices decrease. See pp. 8–13 above. Recent studies support a finding that packers' oligopsonistic power does have a negative impact on producers' prices, costing producers millions of dollars a year. See pp. 8–13 above. For example, one important study found, through statistical analysis that, between 1972 and 1986, fed cattle prices were significantly below their marginal value during 39 of 51 quarters. On average the mark-down was 1.31 percent, or 17 percent of the marketing margin, amounting to $1.54 per hundredweight of retail meat. The authors estimate that this was worth

[93] 7 U.S.C. § 192(e).

about $62 million dollars to the packers. See p. 13 above. While these studies do not identify any specific practices that cause the reduction in prices, they do demonstrate that oligopsonistic packer buying practices, in general, have the effect of manipulating prices paid to producers. These studies establish a substantial factual basis for finding a strong likelihood that general buying practices of oligopsonistic packers will result in producers receiving less than the full value of their livestock. They provide substantial evidence for finding that oligopsonistic packers' buying practices should be restricted under Section 202 of the Act.

Economic studies have also attempted to isolate specific livestock procurement practices to determine their effect on producer prices. One study found that packers' feeding of their own cattle for slaughter has a depressing effects on prices other producers are paid for their livestock. See, pp. 13–15 above. Other studies have shown that packers' use of forward contracts also has depressing effect on prices paid to producers for their livestock. See pp. 15–19 above. Concentration in the Red Meat Packing Industry, issued by the Grain Inspection and the Packers and Stockyards Administration in February, 1996, demonstrates that the use of captive supply procurement methods in the cattle industry is associated with a decline in cash-market price for cattle. It shows that packers increase their captive supply inventories when cash-market prices increase, and as they increase captive supply deliveries from these inventories, cash-market prices decline. See p. 18 above. These studies provide sufficient evidentiary support for a finding that packer feeding of their own slaughter supplies and their use of forward contracts are likely to have the effect of manipulating prices paid to producers in violation of Section 202(e) of the Act. Such practices should, thus, be restricted by regulation.

Section 202(a) of the Act prohibits packers from engaging in any ''unjustly discriminatory'' practice or device.[94] Section 202(b) prohibits packers from giving any person an ''undue or unreasonable preference or advantage'' ''in any respect whatsoever.''[95]

When considering whether packers' feeding of their own slaughter supplies and use of forward contracts constitute undue preferences or unjust discrimination in violation of Section 202 (a) and (b) of the Act, the effect of these practices on competition between livestock producers must be considered. See pp. 39–40 above. Packer feeding of their own slaughter supplies and use of forward contracts are very likely to injure competition between livestock producers. By definition, packers that own and feed cattle for their slaughtering plants provide preferential treatment for their stockholders over other livestock producers. Packer-owned cattle enjoy preferential access to the slaughtering facility; thus the packer-owned cattle are guaranteed a market. This type of activity does injure competition between, the packers and their shareholders on the one hand, and other livestock producers on the other. Similarly, forward contracts which are not traded publicly but offered to certain livestock producers selectively also provide preferential access to slaughter plants for those who enter into them. Livestock producers who are not offered the forward contracts are at a significant competitive disadvantage. That these practices may make the packers more competitive with each other does not control the determination of whether they violate the ''undue and unreasonable preference'' or ''unjustly discriminatory'' language of the Act. Packer feeding of its own cattle for slaughter and forward contracts as they are used today are likely to result in undue preferences and unjust discrimination in violation of Sections 202 (a) and (b) of the Act. Their use should thus be restricted through regulation.

This discussion demonstrates that there is substantial factual and legal basis for issuing rules under Section 202 of the Act restricting the use of forward contracts and packer feeding of its own slaughter supplies. The rules proposed in this petition offer the least intrusive form of restriction on these practices that will ensure compliance with the purposes of the Act. These proposed rules do not prohibit the use of forward contracts, but merely require that the contracts contain a firm-base price and be traded in an open public market. The proposed rules also do not prohibit packers from owning and feeding cattle. The proposed rule only requires that packer-owned cattle be traded in a public market.

These restrictions are designed to protect producers' interests by encouraging open, competitive markets for livestock. They are designed to take advantage of what economic studies suggest encourage competitive markets for livestock—that more bidders for livestock mean higher prices to producers and that electronic or telemarkets markets also increase prices paid for livestock. See pp. 18–20 above. They are designed to provide equitable access to markets for all livestock producers preventing unjust discrimination between livestock producers by packers.

For these reasons WORC requests that Secretary Glickman issue the rule set out above at pp. 2–4.

Attorneys for Western Organization of Resource Councils.

Lynn A. Hayes,

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[FR Doc. 97–739 Filed 1–13–97; 8:45 am]

BILLING CODE 3410–EN–M

[94] 7 U.S.C. § 192(a).

[95] 7 U.S.C. § 192(b).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–NM–60–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Industrie Model A310 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Model A310 series airplanes. This proposal would require repetitive inspections to detect discrepancies or damage of the steady bearing assemblies of the flap transmission system, and replacement of any discrepant or damaged assembly with a new, like assembly. This proposal also would require eventual replacement of all the steady bearing assemblies with new, improved assemblies, which would terminate the repetitive inspection requirement. This proposal is prompted by reports of cracking of the hardened steel inner race, and broken or missing inner races of the steady bearing assemblies. The actions specified by the proposed AD are intended to prevent such discrepancies and damage of the shafts of the steady bearing assemblies, which could cause the shafts to fail; failure of the steady bearing shafts during a subsequent asymmetric stop could result in an uncommanded asymmetric retraction of the flap, and subsequent reduced controllability of the airplane.

DATES: Comments must be received by February 24, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation

Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–60–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–1503; fax (206) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 96–NM–60–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–60–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Général de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on certain Airbus Model A310 series airplanes. The DGAC advises that it has received reports indicating that some steady bearings of the flap transmission system on these airplanes have been found with cracking of the hardened steel inner race, or a broken or missing inner race. The DGAC also advises that it has received reports indicating that the spherical part of a steady bearing assembly was found to be detached from its mounting flange. The cause of these discrepancies is believed to be a design deficiency in the bearing seal that, in certain circumstances, may result in the loss of grease from the bearings.

Such discrepancies and damage of the steady bearing assemblies could weaken the shaft and lead to failure of the shaft in the event of a subsequent asymmetric flap drive failure. Failure of a steady bearing in that situation could result in an uncommanded asymmetric retraction of the flap, and subsequent reduced controllability of the airplane.

Explanation of Relevant Service Information

Airbus has issued Service Bulletin A310–27–2067, Revision 1, dated January 5, 1995, which describes procedures for repetitive visual inspections to detect damage or discrepancies of the steady bearing assemblies of the flap transmission system. The service bulletin also provides instructions for replacement of damaged assemblies with new, like assemblies. The DGAC classified this service bulletin as mandatory and issued French airworthiness directive (CN) 95–073–178(B), dated April 26, 1995, in order to assure the continued airworthiness of these airplanes in France.

Airbus also issued Service Bulletin A310–27–2074, dated November 18, 1994, which describes procedures for replacement of the steady bearing assemblies with new, improved assemblies. The improved assembly is equipped with integral sealing for both the ball bearing and the spherical bearing, which will improve the service life of the bearing assemblies. The service bulletin also describes procedures to install special spherical spacers for steady bearing assembly positions FIN 5486 and FIN 5529 in order to keep the seal lips within the flange. (This Airbus service bulletin references Lucas Liebherr Service Bulletin 551A–27–M551–03, Revision 1, dated February 13, 1995, as an additional source of service information.) The DGAC has approved the technical content of this service bulletin.

FAA's Conclusions

This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require repetitive visual inspections to detect any discrepancy or damage to the steady bearing assemblies of the flap transmission system, and replacement of any damaged or discrepant assembly with a new, like assembly. The proposed AD also would require eventual replacement of all steady bearing assemblies with the new, improved assemblies, which would terminate the repetitive inspection requirement. The actions would be required to be accomplished in accordance with the service bulletins described previously.

Differences Between the Proposal and the Related French CN

Operators should note that, this proposal would differ from the parallel French CN, referenced previously, in that this proposed rule would require the accomplishment of a terminating action (replacement of the steady bearing assemblies with new, like assemblies) for the repetitive inspections. The French CN provides for that action only as optional.

Mandating the terminating action is based on the FAA's determination that long term continued operational safety will be better assured by design changes to remove the source of the problem, rather than by repetitive inspections. Long term inspections may not be providing the degree of safety assurance necessary for the transport airplane fleet. This, coupled with a better understanding of the human factors associated with numerous continual inspections, has led the FAA to consider placing less emphasis on inspections and more emphasis on design improvements. The proposed requirement to accomplish the terminating action is in consonance with these considerations.

Cost Impact

The FAA estimates that 26 Airbus Model A310 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 15 work hours per airplane to accomplish the proposed inspections, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the proposed inspection on U.S. operators is estimated to be $23,400, or $900 per airplane, per inspection cycle.

It would take approximately 8 work hours per airplane to accomplish the proposed replacement, at an average labor rate of $60 per work hour. Required parts would cost approximately $16,872 per airplane. Based on these figures, the cost impact of the proposed replacement on U.S. operators is estimated to be $451,152, or $17,352 per airplane.

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

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Industrie: Docket 96–NM–60–AD.

Applicability: Model A310 series airplanes, on which Airbus Modification 10962 has not been installed; 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 prevent failure of the flap transmission shaft due to damaged steady bearing assemblies, which could cause an uncommanded asymmetric retraction of the flap, and result in reduced controllability of the airplane, accomplish the following:

(a) Prior to the accumulation of 2,000 total landings or within 500 flight hours after the effective date of this AD, whichever occurs later: Perform a visual inspection to detect damage or any discrepancy of the steady bearing assemblies of the flap transmission system, in accordance with Airbus Service Bulletin A310–27–2067, Revision 1, dated January 5, 1995.

(1) If no damage or discrepancy is detected: Repeat the inspection thereafter at intervals not to exceed 2,000 landings, until the requirements of paragraph (b) of this AD are accomplished.

(2) If any damage or discrepancy is detected and the groove depth of the shaft is less than 1 mm (.04 inch): Prior to the accumulation of 50 landings after detection of this discrepancy, replace the steady bearing assembly with a new, like assembly in accordance with Airbus Service Bulletin A310–27–2067, Revision 1, dated January 5, 1995.

(3) If any damage or discrepancy is detected and the groove depth on the shaft is 1 mm or more: Prior to further flight, replace the steady bearing assembly with a new, like assembly, in accordance with Airbus Service Bulletin A310–27–2067, Revision 1, dated January 5, 1995.

(b) Within 5 years after the effective date of this AD, replace all steady bearing assemblies of the flap transmission system with new, improved assemblies, in accordance with Airbus A310–27–2074, dated November 18, 1994. Accomplishment of the replacement constitutes terminating action for the requirements of this AD.

Note 2: Airbus Service Bulletin A310–27–2074 references Lucas Liebherr Service Bulletin 551A–27–M551–03 as an additional source of service information for replacement of the steady bearing assemblies with the new, improved assemblies.

(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, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

Issued in Renton, Washington, on January 7, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–813 Filed 1–13–97; 8:45 am]

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14 CFR Part 39

[Docket No. 96–NM–92–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Model A320 series airplanes. This proposal would require repetitive inspections to detect cracking and delamination of the containers in which the left and right off-wing emergency evacuation slides are stored, and repair, if necessary. If cracking and delamination in excess of certain limits are found, the proposed AD also would require replacement of the slide with a modified slide; and replacement of the discrepant container with a serviceable container. Replacement of the slide with a modified slide would terminate the requirement for repetitive inspections. This proposal is prompted by a report indicating that a slide deployed during flight, which resulted in the loss of the slide and the container door. The actions specified by the proposed AD are intended to prevent the loss of the escape slides during flight, which could make the emergency exits located over each wing unusable and result in damage to the fuselage.

DATES: Comments must be received by February 24, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–92–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Charles Huber, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2589; fax (206) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 96–NM–92–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–92–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Generale de la Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified the FAA that an unsafe condition may exist on certain Airbus Model A320 series airplanes. The DGAC advises that it has received a report indicating that the left off-wing emergency evacuation slide on one airplane inadvertently deployed during flight. A subsequent inspection revealed that both the left off-wing slide and the door to the container in which the slide was stored were missing. Based on the findings of the inspection, it was concluded that the loss of the slide and the container door were the result of the packed slide pressing against (and thereby exerting excessive internal pressure on) the container. This contact and resultant excessive pressure also contributed to delamination of the container door.

A slide is mounted on each side of the airplane in the wing-to-body fairing. Should the slide begin to deploy during flight, air moving over the wing can separate the slide from the airplane. This loss of the slide during flight could make the two emergency exits located over each wing unusable and result in damage to the fuselage.

Explanation of Relevant Service Information

Airbus has issued Service Bulletin A320–25–1161, dated June 21, 1995, which describes procedures for conducting repetitive detailed visual inspections to detect cracking and delamination of the left and right slide containers and container doors, and repair, if necessary. When cracking and delamination of the container or container door exceed certain limits, this service bulletin also describes procedures for replacing a discrepant container with a serviceable container; and for replacing the slide with a modified slide. Accomplishment of the slide replacement would eliminate the need for repetitive inspections of that container and door.

Airbus also has issued Service Bulletin A320–25–1156, dated June 21, 1995, which describes procedures for the replacement of the slide with a modified slide. When the modified slide is packed into its container, there is a 5 mm clearance between the slide and the container door. This modification is intended to keep the packed slide from pressing against the container door, thus alleviating pressure on the door; the modification also would eliminate a cause of delamination of the container door.

The DGAC classified the Airbus service bulletins as mandatory and issued French airworthiness directive (C/N) 95–186–071(B) R1, dated February 14, 1996, in order to assure the continued airworthiness of these airplanes in France.

Note: The Airbus service bulletins reference the following service documents as additional sources of procedural service information:

—Airbus All Operator Telex 25–09, dated January 2, 1995;
—Airbus All Operator Telex 25–09, Revision 1, dated January 2, 1995;
—Air Cruisers Service Bulletin 004–25–37; and
—Air Cruisers Service Bulletin 004–25–38.

(Air Cruisers is the manufacturer of the slide system.)

FAA's Conclusions

This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require repetitive detailed visual inspections to detect cracking and delamination of the container and container door for the left and right escape slides, and repair, if necessary. If damage to the container door exceeds certain limits, the proposed AD would require replacement of the escape slide with a modified slide, and replacement of the discrepant container with a serviceable container. Accomplishment of the slide replacement would constitute terminating action for the repetitive inspections of the container and container door. The actions would be required to be accomplished in accordance with the Airbus service bulletins described previously.

Cost Impact

The FAA estimates that 115 Airbus Model 320 series airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 5 work hours per airplane to accomplish the proposed inspection, at an average labor rate of $60 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $34,500, or $300 per airplane, per inspection.

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

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Industrie: Docket 96–NM–92–AD.

Applicability: Model A320 series airplanes listed in Airbus Service Bulletin A320–25–1156, dated June 21, 1995; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of the off-wing emergency evacuation slides (''escape slides'') during flight, which could make the two emergency exits located over each wing unusable and result in damage to the airplane, accomplish the following:

(a) Within 500 hours time-in-service after the effective date of this AD, perform a detailed visual inspection to detect cracking and delamination of each off-wing container, including the container door, in which an escape slide is stored, in accordance with Airbus Service Bulletin A320–25–1161, dated June 21, 1995.

Note 2: Accomplishment of inspections prior to the effective date of this AD in accordance with Airbus All Operator Telex 25–09, dated January 2, 1995, or Revision 1, dated January 2, 1995; or Air Cruisers Service Bulletin 004–25–38; is considered acceptable for compliance with this paragraph.

(1) If no crack or delamination is found, repeat the detailed visual inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 18 months or 4,000 landings, whichever occurs earlier.

(2) If any crack or delamination is found which does not exceed the limits specified in the service bulletin, prior to further flight, repair the crack or delamination in accordance with this service bulletin.

(3) If any crack or delamination is found which exceeds the limits specified in the, prior to further flight, replace the discrepant container with a serviceable container in accordance with Airbus Service Bulletin A320–25–1161, dated June 21, 1995; and replace the escape slide with a slide modified in accordance with Airbus Service Bulletin A320–25–1156, dated June 21, 1995. Replacement of the slide constitutes terminating action for the repetitive inspections of that container required by paragraph (a)(1) of this AD.

Note 3: Accomplishment of the slide modification prior to the effective date of this AD in accordance with Airbus All Operator Telex 25–09, dated January 2, 1995, or Revision 1, dated January 2, 1995; or Air Cruisers Service Bulletin 004–25–37; is considered acceptable for compliance with this paragraph.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

Issued in Renton, Washington, on January 7, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–812 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 39

[Docket No. 94–SW–26–AD]

Airworthiness Directives; Bell Helicopter Textron, Inc. Model 214B, 214B–1, and 214ST Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to Bell Helicopter Textron, Inc. (BHTI) Model 214B, 214B–1, and 214ST helicopters, that currently establishes a mandatory retirement life of 60,000 high-power events for the main transmission upper planetary carrier (carrier). This action would require changing the method of calculating retirement life for the carrier from high-power events to a maximum accumulated Retirement Index Number (RIN) of 120,000. This proposal is prompted by fatigue analyses and tests that show certain carriers fail sooner than originally anticipated because of the unanticipated high number of lifts or takeoffs (torque events) performed with those carriers in addition to the time-in-service (TIS) accrued under other operating conditions. The actions specified by the proposed AD are intended to prevent fatigue failure of the carrier, which could result in failure of the main transmission and subsequent loss of control of the helicopter.

DATES: Comments must be received by March 17, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–SW–26–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, Texas 76101.

FOR FURTHER INFORMATION CONTACT: Mr. Uday Garadi, Aerospace Engineer, FAA, Rotorcraft Directorate, Rotorcraft Certification Office, Fort Worth, Texas 76193–0170, telephone (817) 222–5157, fax (817) 222–5959.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. 94–SW–26–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 94–SW–26–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Discussion

On June 6, 1994, the FAA issued AD 94–02–05, Amendment 39–8803, (59 FR 32325, June 23, 1994), to require changing the method of calculating the retirement life for the carrier, part number (P/N) 214–040–077–007 and –101, from flight hours to high-power events calculated using the number of takeoffs and external load lifts, removing the 2,500 hours TIS magnetic particle inspection for the carrier, and making the requirements applicable to the Model 214ST as well as the Model 214B and 214B–1 helicopters. That action was prompted by fatigue analyses and tests that show certain carriers fail sooner than originally anticipated because of the unanticipated high number of lifts and takeoffs (torque events) performed with those carriers in addition to the TIS accrued under other operating conditions. The requirements of that AD are intended to prevent fatigue failure of the carrier, which could result in failure of the main transmission and subsequent loss of control of the helicopter.

Since the issuance of that AD, BHTI has issued BHTI Information Letter GEN–94–54, dated April 15, 1994, Subject: Retirement Index Number (RIN) For Cycle Lifed Components, which introduces a different method of accounting for fatigue damage on components that have shortened service lives as a result of frequent torque events. Additionally, BHTI has issued BHTI Alert Service Bulletin (ASB) 214–94–52, which is applicable to Model 214B helicopters, and ASB 214ST–94–66, which is applicable to Model 214ST helicopters, both of which are dated November 7, 1994, and describe procedures for converting flight hours and total number of torque events into a RIN for the carrier, P/N214–040–077–007 and –101. Although ASB 214–94–52 does not state that it applies to Model 214B–1 helicopters, this was an oversight by the manufacturer. That ASB was intended to apply to both Model 214B and 214B–1 helicopters.

Since an unsafe condition has been identified that is likely to exist or develop on other BHTI Model 214B, 214B–1, and 214ST helicopters of the same type design, the proposed AD would supersede AD 94–02–05 to require creation of a component history card using the RIN system and a system for tracking increases to the accumulated RIN, and establish a maximum accumulated RIN for the carrier of 120,000 at which it must be retired.

The FAA estimates that 11 helicopters of U.S. registry would be affected by this proposed AD, that it would take approximately (1) 48 work hours per helicopter to replace the affected part due to the new method of determining the retirement life required by this AD; (2) 2 work hours per helicopter to create the component history card or equivalent record (record); and (3) 10 work hours per helicopter to maintain the record each year, and that the average labor rate is $60 per work hour. Required parts would cost approximately $29,516 per helicopter. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $61,813 for the first year and $60,713 for each subsequent year. These costs assume replacement of the spider in one-sixth of the fleet each year, creation and maintenance of the records for all the fleet the first year, and creation of one-sixth of the fleet's records and maintenance of the records for all the fleet each subsequent year.

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

For the reasons discussed above, I certify that this proposed regulation (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–8803 (59 FR 32325, June 23, 1994), and by adding a new airworthiness directive (AD), to read as follows:

Bell Helicopter Textron, Inc. (BHTI): Docket No. 94–SW–26–AD. Supersedes AD 94–02–05, Amendment 39–8803.

Applicability: Model 214B, 214B–1, and 214ST helicopters with main transmission upper planetary carrier (carrier), part number (P/N) 214–040–077–007 or –101, installed, certificated in any category.

Note 1: This AD applies to each helicopter 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 helicopters that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must use the authority provided in paragraph (e) to request approval from the FAA. This approval may address either no action, if the current configuration eliminates the unsafe condition, or different actions necessary to address the unsafe condition described in this AD. Such a request should include an assessment of the effect of the changed configuration on the unsafe condition addressed by this AD. In no case does the presence of any modification, alteration, or repair remove any helicopter from the applicability of this AD.

Compliance: Required within 25 hours time-in-service (TIS) after the effective date of this AD, unless accomplished previously.

To prevent fatigue failure of the carrier, which could result in failure of the main transmission and subsequent loss of control of the helicopter, accomplish the following:

(a) Create a component history card or equivalent record for the upper planetary carrier (carrier), P/N 214–040–077–007 or –101.

(b) Determine and record the accumulated Retirement Index Number (RIN) to date on the carrier as follows (if the multiplication results in a fraction, round the results up to the next whole number):

(1) For Model 214B or B–1 helicopters:

(i) Multiply the high-power event total to date by 2, or

(ii) If the actual operating hours are *known*, and:

(A) If the type of operation is internal load lift operations only, multiply each operating hour by 7;

(B) If the type of operation involves any external load lift operations and the number of external load lift operations is known, use the table below and multiply the appropriate factor for the average number of external load lift operations by the number of actual operating hours:

Average number of external load lift operations per hour	Factor*
0–2.00	7
2.01–5.00	7
5.01–16.00	14
16.01–27.00	21
Above 27.00	28

*RIN = Factor × Actual Operating Hours.

(C) If the type of operation involves any external load lift operations and the number of external load lift operations is unknown, multiply each actual operating hour by 21; or

(D) If the type of operation is unknown, multiply each actual operating hour by 21.

(iii) If the actual operating hours are *unknown*, assume 900 operating hours per calendar year. Prorate the assumed operating hours for partial years.

(A) If the type of operation is internal only, multiply the assumed operating hours by 7.

(B) If the type of operation involves any external load lift operations and the number of external load lift operations is known, use the table in paragraph (ii)(B) above and multiply the appropriate factor for the average number of external load lift operations by the number of assumed operating hours;

(C) If the type of operation involves any external load lift operations and the number of external load lift operations is unknown, multiply each assumed operating hour by 21.

(D) If the type of operation is unknown, multiply each assumed operating hour by 21.

(2) For Model 214ST helicopters:

(i) Multiply the high-power event total to-date by 2, or

(ii) Multiply the factored flight hour total to-date by 12.

Note 2: BHTI Alert Service Bulletin (ASB) 214–94–52, which is applicable to Model 214B helicopters, and ASB 214ST–94–66, which is applicable to Model 214ST helicopters, both of which are dated November 7, 1994, pertain to this subject.

(c) After compliance with paragraphs (a) and (b) of this AD, and during each operation thereafter, maintain a count of each lift or takeoff performed and at the end of each day's operations, increase the accumulated RIN on the component history card or equivalent record as follows:

(1) For Model 214B and 214B–1 helicopters,

(i) Increase the RIN by 1 for each takeoff.

(ii) Increase the RIN by 1 for each external load lift operation; or, increase the RIN by 2 for each external load lift operation in which the load is picked up at a higher elevation and released at a lower elevation, and the difference in the elevation between the pick up point and the release point is 200 feet or greater.

(2) For Model 214ST helicopters,

(i) Increase the RIN by 2 for each takeoff.

(ii) Increase the RIN by 2 for each external load lift operation; or, increase the RIN by 4 for each external load lift in which the load is picked up at a higher elevation and released at a lower elevation and the difference in elevation between the pick up point and the release point is 200 feet or greater.

(d) Remove the carrier, P/N's 214–040–077–007 or –101, from service on or before attaining an accumulated RIN of 120,000. The carrier is no longer retired based upon flight hours. This AD revises the Airworthiness Limitations section of the maintenance manual by establishing a new retirement life for the carrier of 120,000 RIN.

(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, Rotorcraft Certification Office, FAA, Rotorcraft Directorate. Operators shall submit their requests through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Rotorcraft Certification Office.

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

(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 helicopter to a location where the requirements of this AD can be accomplished.

Issued in Fort Worth, Texas, on January 7, 1997.

Eric Bries,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 97–879 Filed 1–13–97; 8:45 am]

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14 CFR Part 39

[Docket No. 96–NM–185–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Fokker Model F28 Mark 0100 series airplanes. This proposal would require repetitive inspections of certain flanges and finger strips at rib 5.0 of the vertical stabilizer to detect fatigue cracking, and repairs, if necessary. It also would require modifications that would strengthen the torsion box at rib 5.0 and prevent fatigue cracking; one of these modifications would be terminating action for the repetitive inspections. This proposal is prompted by reports indicating that, during full-scale fatigue testing, cracking has been found on the vertical stabilizer of the test article. The actions specified by the proposed AD are intended to detect and prevent fatigue cracking in the subject area, which, if not corrected, could reduce the structural integrity of the vertical stabilizer.

DATES: Comments must be received by February 24, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–185–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Fokker Services B.V., Technical Support Department, P.O. Box 75047, 1117 ZN Schiphol Airport, The Netherlands. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2141; fax (206) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ‘‘Comments to Docket Number 96–NM–185–AD.’’ The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 96–NM–185–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, has notified the FAA that an unsafe condition may exist on certain Fokker Model F28 Mark 0100 series airplanes. The RLD advises that it has received reports indicating that cracks have been found on the vertical stabilizer during the manufacturer's full-scale fatigue tests on the Fokker Model F28 Mark 0100 test article. These fatigue cracks were detected at the bolt holes of the right-hand flange of the torsion box, and in the finger strip on the left-hand flange at rib 5.0 of the vertical stabilizer.

The RLD also advises that it has received reports indicating that subsequent full-scale fatigue tests have detected additional cracks in rib 5.0 of the vertical stabilizer after a stiffener had been added to the torsion box in accordance with Fokker Service Bulletin SBF100–55–018. Although this modification was performed to strengthen this area against fatigue cracking, investigation has shown that the stiffener produces a too-rapid change in the structural strength of the torsion box, which may lead to fatigue cracking in an adjacent area.

Fatigue cracking in the subject area, if not prevented, could reduce structural integrity of the vertical stabilizer.

Explanation of Relevant Service Information

Fokker has issued Service Bulletin SBF100–55–019, Revision 1, dated May 19, 1993, which describes procedures for conducting repetitive eddy current inspections of the flanges and finger strips at rib 5.0 of the vertical stabilizers to detect fatigue cracking, and repair, if necessary.

Fokker also has issued Service Bulletin SBF100–55–018, Revision 1, dated December 27, 1993, which describes procedures for modifying the torsion box at rib 5.0 of the vertical stabilizer by installing stiffening to the rib web and flanges for added strength. This service bulletin also describes procedures for a pre-modification eddy current inspection of the vertical stabilizer to detect cracking, and repair, if necessary, in accordance with Fokker Service Bulletin SBF100–55–019. Accomplishment of this modification eliminates the need for repetitive inspections to detect fatigue cracking.

Additionally, Fokker has issued Service Bulletin SBF100–55–023, dated January 3, 1995, which describes procedures for another modification to strengthen rib 5.0 of the vertical stabilizer. This modification, which entails the cold expansion of holes in the torsion box at rib 5.0, is intended to prevent additional fatigue cracking that could be caused by the earlier installation of the torsion box stiffener.

The RLD classified these service bulletins as mandatory and issued Netherlands airworthiness directives (BLA) 93–069 (A), dated June 1, 1993, and BLA 1995–017 (A), dated February 28, 1995, in order to assure the continued airworthiness of these airplanes in the Netherlands.

FAA's Conclusions

This airplane model is manufactured in the Netherlands and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the RLD has kept the FAA informed of the situation described above. The FAA has examined the findings of the RLD, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require repetitive eddy current inspections to detect fatigue cracking of the left-hand and right-hand flanges and finger strips at rib 5.0 of the vertical stabilizer, and repair, if necessary.

The proposed AD also would require modification of rib 5.0 by the installation of a stiffener to the torsion box; this modification would be preceded by an eddy current inspection to detect fatigue cracking, and repair, if necessary. Accomplishment of this modification would terminate the requirement for repetitive eddy current inspections.

In addition, the proposed AD would require another modification of rib 5.0 by cold-expanding certain bolt holes on the torsion box.

These actions would be required to be accomplished in accordance with the applicable service bulletins described previously.

Differences Between the Proposed Rule and the Service Bulletins

If any cracking is detected during an eddy current inspection of the left-hand and right-hand flanges and finger strips at rib 5.0 of the vertical stabilizer, the proposed rule would require that the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate approve the method of repair. The applicable Fokker service bulletins do not provide instructions for repair, but recommend that Fokker be contacted prior to repairing fatigue cracks at rib 5.0.

Other Related Rulemaking Actions

The FAA has issued AD 91–18–15, amendment 39–8018 (56 FR 43548, September 3, 1991), which requires reinforcement of the left-hand and right-hand flanges of rib 5.0 of the vertical stabilizer by the installation of reinforcing finger clips, in accordance with Fokker Service Bulletin F100–55–014, dated November 29, 1990. That AD was prompted by reports of cracking in the flange of the torsion box at the junction of rib 5.0 and intermediate spar I; it is applicable to Fokker Model F28 Mark 0100 series airplanes having serial numbers 11244 through 11335.

The reinforcement required by AD 91–18–15 is to be installed prior to the accumulation of 6,000 total landings on the airplane, or within 100 days after October 8, 1991 (the effective date of that AD), whichever is later. Under the proposed AD, however, this modification would not have to be installed if the addition of steel reinforcement to the torsion box [as specified in proposed paragraph (b)(2)] is accomplished before an airplane has accumulated 6,000 total landings.

Cost Impact

The FAA estimates that 122 Fokker Model F28 Mark 0100 series airplanes of U.S. registry would be affected by this proposed AD.

Approximately 77 airplanes would be required to conduct repetitive inspections of the left-hand and right-hand flanges and finger strips at rib 5.0 of the vertical stabilizer. It would take approximately 10 work hours per airplane to accomplish each proposed inspection. The average labor rate is $60 per work hour. Based on these figures, the cost impact of the proposed inspection requirement on U.S. operators of these airplanes is estimated to be $46,200, or $600 per airplane, per inspection.

Approximately 77 airplanes also would be required to accomplish the proposed installation of steel reinforcement in the torsion box at rib 5.0 of the vertical stabilizer. It would take approximately 170 work hours per airplane to accomplish this modification (including a pre-modification inspection). The average labor rate is $60 per work hour. Required parts would cost approximately $27,000. Based on these figures, the cost impact of this proposed action on U.S. operators of these airplanes is estimated to be $2,864,400, or $37,200 per airplane.

Approximately 122 airplanes would be required to accomplish the proposed cold expansion of holes in the torsion box at rib 5.0 of the vertical stabilizer. It would take approximately 17 work hours per airplane to accomplish this modification, or approximately 8 work hours per airplane if this proposed action is done at the same time as the proposed installation of steel reinforcement. The average labor rate is $60 per work hour. Required parts would cost approximately $206. Based on these figures, the cost impact of this proposed action on U.S. operators of these airplanes is estimated to be between $83,692 and $149,572, or between $686 and $1,226 per airplane.

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

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Fokker: Docket 96–NM–185–AD.

Applicability: Model F28 Mark 0100 series airplanes having the serial numbers specified in Table 1 of this AD; certificated in any category.

TABLE 1.—SERIAL NUMBERS OF AIRPLANES SUBJECT TO THIS AD

11244 through 11460, inclusive
11463 through 11469, inclusive
11471
11474 through 11483, inclusive
11489 through 11491, inclusive
11497 through 11499, inclusive
11501
11502
11504
11506
11507
11512 through 11515, inclusive
11517
11520

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 detect and prevent fatigue cracking in the vertical stabilizer, which consequently could reduce its structural integrity, accomplish the following:

(a) For airplanes having serial numbers 11244 through 11419, inclusive, and 11421: Except as provided by paragraph (c) of this AD, prior to the accumulation of 8,500 total landings or within 30 days after the effective date of this AD, whichever occurs later, perform an eddy current inspection to detect fatigue cracking in the left-hand and right-hand flanges and finger strips at rib 5.0 of the vertical stabilizer, in accordance with Fokker Service Bulletin SBF100–55–019, Revision 1, dated May 19, 1993.

(1) If no cracking is detected, repeat this inspection thereafter at intervals not to exceed 2,000 landings until the requirements of paragraph (b) of this AD are accomplished.

(2) If any cracking is detected, prior to further flight, repair in accordance with a method approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate.

(b) For airplanes with serial numbers 11244 through 11419, inclusive, and 11421, accomplish the requirements of both paragraphs (b)(1) and (b)(2) of this AD:

(1) Except as provided by paragraph (c) of this AD, prior to the accumulation of 13,500 total landings, or within 6 months after the effective date of this AD, whichever occurs later, perform an eddy current inspection to detect fatigue cracking in the left-hand and right-hand flanges and finger strips at rib 5.0 of the vertical stabilizer, in accordance with Part 1 of the Accomplishment Instructions of Fokker Service Bulletin SBF100–55–018, Revision 1, dated December 27, 1993.

(i) If no cracking is detected, prior to further flight, accomplish the requirements of paragraph (b)(2) of this AD.

(ii) If any cracking is detected, prior to further flight, repair in accordance with a method approved by the Manager, Standardization Branch, ANM–113, and accomplish the requirements of paragraph (b)(2) of this AD.

(2) After accomplishing the requirements of paragraph (b)(1) of this AD, modify rib 5.0 of the vertical stabilizer by installing new stiffening, in accordance with Part 2 of the Accomplishment Instructions of Fokker Service Bulletin SBF100–55–018, Revision 1, dated December 27, 1993. Accomplishment of this modification constitutes terminating action for the repetitive inspections required by paragraph (a) of this AD.

(c) The following exceptions apply with regard to the requirements of paragraphs (a) and (b) of this AD:

(1) Accomplishment of the inspection specified in paragraph (a) and (b)(1) of this AD is not required if the modification specified in paragraph (b)(2) is accomplished prior to the accumulation of 7,300 total landings on the airplane.

(2) Compliance with AD 91–18–15, amendment 39–8018, is not required if the requirements of paragraph (b)(2) of this AD are accomplished prior to the accumulation of 6,000 total landings on the airplane.

(d) For all airplanes: At the applicable times specified in paragraph (d)(1) or (d)(2), modify the Hi-lok bolt holes at rib 5.0 of the vertical stabilizer by cold expansion, in accordance with Fokker Service Bulletin SBF100–55–023, dated January 3, 1995.

(1) For airplanes that have been modified in accordance with the requirements of paragraph (b) of this AD prior to the effective date of this AD: Modify prior to the accumulation of either 10,000 landings after in-service modification, or 10,000 landings after delivery with factory modification, as applicable; or within 30 days after the effective date of this AD, whichever occurs later.

(2) For all other airplanes: Modify concurrent with accomplishing the requirements of paragraph (b) of this AD.

(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, Standardization Branch, ANM–113. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Standardization Branch, ANM–113.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

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

Issued in Renton, Washington, on January 8, 1997.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–883 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[FRL–5676–3]

New Source Performance Standards and Emissions Guidelines: Sewage Sludge Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Additional Information (NAI).

SUMMARY: This action announces the EPA's intention to issue regulations and guidelines under Section 129 of the Clean Air Act for Sewage Sludge Incinerators (SSI) that combust sludge from Publicly Owned Treatment Works and to remove Sewage Sludge Incinerators from the list of Major Source Categories previously scheduled for rule development under Section 112 of the Clean Air Act.

DATES: Comments must be received on or before March 17, 1997.

ADDRESSES: *Comments.* Comments on this notice should be submitted in duplicate, if possible, to: The Air and Radiation Docket and Information Center (6102), ATTN: Docket No. A–96–42, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Docket. Dockets are available for public inspections and copying between 8:00 a.m and 5:30 p.m., Monday through Friday, at the Air and Radiation Docket and Information Center, U.S. EPA, 401 M Street, S.W., Room M1500, Washington, D.C. 20460. The center's telephone number is (202) 260–7548 and the fax number is (202) 260–4400. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Mr. Eugene Crumpler at (919) 541–0881, Emissions Standards Division (MD–13), U.S. EPA, Research Triangle Park, N.C. 27711.

SUPPLEMENTARY INFORMATION: The information in this preamble is organized as follows:

1. Background

The Clean Air Act as amended November 1990, requires under the revisions to Section 112, that the Agency list and promulgate National Emissions Standards for Hazardous Air Pollutants (NESHAP) in order to control, reduce, or otherwise limit the emissions of HAP for categories of major and area sources. Pursuant to the various specific listing requirements in Section 112(c), the Agency published on July 16, 1992 (57 FR 31576) an initial list of 174 categories of major and area sources that would be henceforth subject to emissions standards. Sewage Sludge Incineration (SSI) was one of the 174 categories listed for development of a NESHAP.

Following this initial listing, and pursuant to requirements in Section 122(e), on December 3, 1993 (58 FR 63941), the Agency published a schedule for the promulgation of emission standards for each of the 174 listed source categories. The SSI were listed for promulgation of a NESHAP no later than November 15, 2000. The reader is directed to those two notices for information relating to development of the initial list and schedule.

The Agency published a Notice of Listing of Categories and Regulatory Schedule for Air Emissions From Other Solid Waste Incineration (OSWI) on November 2, 1993 (58 F.R. 58498). The New Source Performance Standards (NSPS) and Emissions Guidelines (EG) for OSWI's are to be developed under section 129 of the Clean Air Act. That notice listed seven categories of OSWIs. The notice established a promulgation date for rulemaking for the seven categories of OSWI's of no later than November 15, 2000. Incineration of sludge from publicly owned waste water treatment works (POTW's) was not listed.

The Agency published an Advanced Notice of Proposed Rulemaking (ANPRM) for NSPS and EG applicable to Industrial and Commercial Waste Incinerators (ICWI) and Other Solid Waste Incinerators (OSWI) on December 28, 1994 (59 FR 66850). That notice announced the EPA's intent to develop NSPS and EG under Section 129 of the Act for the seven OSWI categories and ICWIs. Not included among the listed categories were incinerators used to combust sewage sludge produced at POTWs.

Today's Notice of Additional Information is announcing EPA's oversight in not listing SSI's in the November 2, 1993 listing of OSWI. The Agency, on closer reading of Section 129 of the Act, has now determined that SSI should properly be regulated under Section 129 rather that Section 112. Section 129 requires the EPA to establish NSPS for new and EG for existing facilities, for each category of solid waste incineration units. Section 129 defines a solid waste incineration unit as ''a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels).'' Sludge generated by POTWs is a solid waste from the general public, commercial and industrial establishments.

Regulation of SSI under Section 129 provides for regulation of four criteria pollutants that are not listed as Hazardous Air Pollutants in Section 112. Also Section 129 provides for regulation of both new and existing units and does not have the major source quantity cutoff of Section 112(a)(1). Development of guidelines for operator training and certification of SSI operators is also a requirement of Section 129. These provisions will give the EPA more flexibility in setting rules for different sizes of SSI and will assure the public that the SSI are being operated in a manner that will protect the public health. The promulgation date for an NSPS and EG applicable to SSI remains no later than November 15, 2000.

The Agency also notes that this action announces the EPA's intent to delist SSI from the Section 112(c) source category list and the 112(e) schedule and to add SSI to the list of categories of Other Solid Waste Incinerators. At the time of proposal of the NSPS and EG under Section 129, the SSI will be delisted from the Section 112(c) list and the 112(e) schedule and added to the list of categories and regulatory schedule for Other Solid Waste Incinerators.

Dated: January 8, 1997.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

[FR Doc. 97–873 Filed 1–13–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 63

[AD–FRL–5677–2]

RIN 2060–AD–56 and RIN 2060–AE–37

National Emission Standards for Hazardous Air Pollutants Emissions: Group I Polymers and Resins and Group IV Polymers and Resins

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On September 5, 1996, the EPA promulgated 40 CFR part 63, Subpart U—National Emission Standards for Hazardous Air Pollutants (NESHAP) for Group I Polymers and Resins (61 FR 46906), and on September 12, 1996, the EPA promulgated 40 CFR part 63, Subpart JJJ—Group IV Polymers and Resins NESHAP (61 FR 48208). This action proposes to correct an error in the final Group I Polymers and Resins NESHAP, by extending the compliance date for heat exchange systems. In addition, this action proposes to extend the initial compliance date for equipment leaks for both the Group I and Group IV Polymers and Resins NESHAP, to allow time necessary for affected sources to respond to amendments to the hazardous organic NESHAP (HON) equipment leak provisions promulgated on December 26, 1996, which are directly referenced in both subparts U and JJJ.

Because these amendments are merely extending the compliance date for equipment leaks and heat exchange systems, the EPA does not anticipate receiving adverse comments. Consequently, the proposed revisions to the promulgated rule are also being issued as a direct final rule in the final rules section of this Federal Register. If no significant adverse comments are received by the due date for comments (see DATES section below), no further action will be taken with respect to this proposal, and the direct final rule will become final on the date provided in that action.

DATES: *Comments.* Comments must be received on or before February 13, 1997, unless a hearing is requested by January 24, 1997. If a hearing is requested, written comments must be received by February 28, 1997.

Public Hearing. Anyone requesting a public hearing must contact the EPA no later than January 24, 1997. If a hearing is held, it will take place on January 29, 1997, beginning at 10:00 a.m.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Numbers A–92–44 and A–92–45 (see docket section below), room M–1500, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460. The EPA requests that a separate copy also be sent to the contact person listed below. Comments may also be submitted electronically by sending electronic mail (e-mail) to: a-and-r-docket@epamail.epa.gov.

Public Hearing. If a public hearing is held, it will be held at the EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify Ms. Marguerite Thweatt, U.S. Environmental Protection Agency, Research Triangle Park, N.C. 27711, telephone (919) 541–5607.

Docket. Docket Nos. A–92–44 and A–92–45, containing the supporting information for the original NESHAP and this action, are available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, at the EPA's Air and Radiation Docket and Information Center, Waterside Mall, room M–1500, first floor, 401 M Street SW., Washington, DC 20460, or by calling (202) 260–7548 or 260–7549. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rosensteel, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, telephone number (919) 541–5608.

SUPPLEMENTARY INFORMATION: The Group I Polymers and Resins NESHAP directly reference the heat exchange system provisions (§63.104) of the HON. The EPA intended the subpart U compliance schedule to mirror the compliance schedule in the HON. However, subpart U inadvertently only allows six months for compliance with the heat exchange system provisions (March 5, 1997), while the HON allows three years from its effective date. Therefore, this action proposes to change the subpart U compliance date for heat exchange systems to September 5, 1999, to correct the inadvertent error in the final rule.

In addition, both subparts U and JJJ directly reference the equipment leak provisions of the HON (40 CFR 63, subpart H). Both subparts require that affected sources comply with the equipment leak provisions by 6 months after promulgation—March 5, 1997 for subpart U and March 12, 1997 for subpart JJJ. However, in accordance with a settlement agreement, the EPA promulgated a final rule amending the HON on December 26, 1996. The final amendments to the HON include revisions to the HON equipment leak provisions, which are also applicable, by direct reference, to sources subject to subparts U and JJJ.

This document is available in Docket Nos. A–92–44 and A–92–45 or by request from the EPA's Air and Radiation Docket and Information Center (see ADDRESSES), and is available for downloading from the Technology Transfer Network (TTN), the EPA's electronic bulletin board system. The TTN provides information and technology exchange in various areas of emissions control. The service is free, except for the cost of a telephone call. Dial (919) 541–5742 for up to a 14,000 baud per second modem. For further information, contact the TTN HELP line at (919) 541–5348, from 1:00 p.m. to 5:00 p.m., Monday through Friday, or access the TTN web site at: http://ttnwww.rtpnc.epa.gov.

Regulated entities

Regulated categories and entities include:

Category	Examples of regulated entities.
Industry	Elastomers and Thermoplastics.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by the proposed amendments discussed in this notice. If you have questions regarding the applicability of these proposed amendments to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Electronic Submission of Comments

Electronic comments must be submitted as an ASCII file, avoiding the use of special characters and any form of encryption. Comments will also be accepted on diskette in WordPerfect 5.1 or ASCII file format. All comments in electronic form must be identified by the docket number A–92–44 or A–92–45. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic comments may be filed online at many Federal Depository Libraries.

Administrative

A. Paperwork Reduction Act

For both the Group I and Group IV Polymers and Resins NESHAP, the information collection requirements were submitted to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, [44 U.S.C. 3501 et seq.]. The OMB approved the information collection requirements for the Group IV Polymers and Resins NESHAP and assigned those standards the OMB control number 2060–0351. 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 the EPA's regulations are listed in 40 CFR Part 9 and 48 CFR Chapter 15. The EPA has amended 40 CFR Part 9, Section 9.1, to indicate the information collection requirements contained in the Group IV Polymers and Resins NESHAP.

An Information Collection Request (ICR) document for the Group I Polymers and Resins I NESHAP was prepared by the EPA (ICR No. 1746.01) but has not yet been approved by the OMB. A copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division (2137), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, D.C. 20460, or by calling (202) 260–2740.

The amendments to the NESHAP contained in the direct final rule should have no impact on the information collection burden estimates made previously. Therefore, the ICRs have not been revised.

B. Executive Order 12866 Review

Under Executive Order (E.O.) 12866, the EPA must determine whether the proposed regulatory action is ''significant'' and therefore, subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant'' regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety in State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of the Executive Order, the OMB notified the EPA that it considered both the Group I Polymers and Resins NESHAP and the Group IV

Polymers and Resins NESHAP ''significant regulatory actions'' within the meaning of the Executive Order. The EPA submitted those actions to the OMB for review. Changes made in response to suggestions or recommendations from the OMB were documented and included in the public record.

These proposed amendments to those NESHAP provide affected sources more time in which to comply with the equipment leaks provisions of those rules. These proposed revisions do not add any additional control requirements. Therefore, these amendments were classified ''non-significant'' under Executive Order 12866 and were not required to be reviewed by OMB.

C. Regulatory Flexibility

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this proposed rule. The EPA has also determined that this proposed rule will not have a significant economic impact on a substantial number of small entities. See the September 5, 1996 Federal Register (61 FR 46906) and the September 12, 1996 Federal Register (61 FR 48208) for the basis for this determination. The compliance date changes to the two rules do not impose any economic burden for any regulated entity.

D. Unfunded Mandates

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

The EPA has determined that these proposed amendments do not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Act do not apply to this action.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. §801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, the EPA submitted a report containing this proposed 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 this proposed rule in the Federal Register. This is not a ''major rule'' as defined by 5 U.S.C. §804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Reporting and recordkeeping requirements.

Dated: January 9, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–987 Filed 1–13–97; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 87–268; DA 97–23]

Advanced Television Systems and Their Impact on the Existing Television Service

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of time.

SUMMARY: The Commission is extending the time for filing reply comments relating to the *Sixth Further Notice of Proposed Rule Making* in this proceeding until January 24, 1997. This action will allow the development of a complete record on the matter of channel allotments for operation of digital TV service.

DATES: Reply comments are due on or before January 24, 1997.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Bruce Franca (202–418–2470), Alan Stillwell (202–418–2470) or Robert Eckert (202–428–2470), Office of Engineering and Technology.

SUPPLEMENTARY INFORMATION: 1. On July 25, 1996, the Commission adopted a *Sixth Further Notice of Proposed Rule Making (Sixth FNPRM)* in MM Docket No. 87–268, 61 FR 43209, August 21, 1996, that proposed policies for developing the initial channel allotments for digital TV (DTV) service, proposed procedures for assigning DTV allotments, and plans for spectrum recovery. The *Sixth FNPRM* also contains a draft DTV Table of Allotments. Comments responding to the *Sixth FNPRM* initially were due November 22, 1996. On November 20, 1996, we issued an *Order*, 61 FR 63811, December 2, 1996, extending the date for filing reply comments in response to the *Sixth FNPRM* to January 10, 1997.

2. On January 2, 1997, Sinclair Broadcast Group and Sullivan Broadcasting Company, Inc. (Group Owners) requested that we extend the date for filing reply comments in response to the *Sixth FNPRM* an additional 60 days. The Group Owners submit that this additional time is needed for themselves and other UHF station licensees to finalize and present to the Commission a technically and commercially reasonable solution that creates better coverage parity between UHF and VHF stations and also ameliorates certain seriously adverse effects on UHF television stations inherent in the primary allotment plans now under consideration by the Commission. They argue that any delay in adopting the DTV Table of Allotments that is occasioned by the requested extension would be outweighed by the need for the Commission to have a full record on the effects that its actions in this proceeding have on UHF broadcasters.

3. The Association for Maximum Service Television (MSTV) opposes the Group Owners' request for an extension of the time for filing reply comments. MSTV states that while it is sympathetic with the concerns expressed in the Group Owners request, it believes that those concerns may be addressed without further delaying the DTV allotment proceeding. It argues that it is critical that the Commission conclude this proceeding as promptly as possible so that the transition to DTV may begin. MSTV argues that an across-the-board 60-day extension would delay our rule making action, and that the submission of any proposal could require still another round of comments that would cause further delay. MSTV therefore urges that we deny the Group Owners extension request. As an alternative, it suggests that we state that we will accept late-filed reply comments for four weeks after the current January 10, 1997, due date for reply comments to afford broadcasters the opportunity to evaluate and respond to questions concerning this issue.

4. In comments responding to the Group Owners' request, Motorola

submits that we have already provided interested parties sufficient time to prepare responses to the comments on the *Sixth FNPRM* and that an additional 60 days would constitute an unwarranted delay. It states that expedited decision making on the initial DTV Table of Allotments will facilitate the introduction of DTV services to the public and clarify the status of the broadcast television spectrum and its availability for reallocation. Motorola also submits that while it can appreciate the Group Owners' concerns regarding the permissible transmitting powers provided for their DTV stations, the ramifications of ''service replication'' have been apparent since the release of the Sixth FNPRM in mid-August. It therefore argues that a further delay of two months to address DTV planning factors is unnecessary. Motorola further states that it would not, however, be adverse to a more modest extension of perhaps 15 days, given the intervening holiday season and the large number of comments received in this proceeding.

5. On January 7, 1997, the Association of Federal Communications Consulting Engineers (AFCCE) requested that we extend the date for filing reply comments for at least six weeks. The AFCCE expressed a similar request for extension of time in its comments responding to the *Sixth FNPRM.* The AFCCE states that its objective is not to unduly delay this proceeding, but to request that sufficient time be allotted to the study of major technical issues prior to the adoption of technical standards for the allotment of DTV channels by the Commission. It also submits that it is reviewing the filings of other entities and plans to respond to technical comments where it deems appropriate.

6. In its comments responding to the *Sixth FNPRM,* the engineering consulting firm of du Treil, Lundin and Rackley (DLR) also expresses concerns regarding the significantly higher power that would be authorized for the DTV operations of existing VHF stations that would operate in the UHF band. DLR submits that it is not practical to try to replicate superior VHF propagation characteristics with brute force UHF power. To address this concern, it submits an alternative transition plan that would provide existing stations with DTV facilities that would replicate their existing Grade A contours and would return stations to their existing channels for permanent DTV operation after the transition. DLR requests that we consider a further extension of the date for filing reply comments of not less than 45 days in view of the complexity of these issues and the intervening holiday season. It further states that, due to the extraordinary nature of this proceeding, we should designate a formal period in which to file comments responding to reply comments.

7. We agree with MSTV and Motorola that it is in the public interest to complete this proceeding and license DTV stations without unnecessary delay. At the same time, we believe that it is desirable to provide some additional time for the Group Owners, the AFCCE, DLR, and other interested parties to address in more detail the issues they have raised. We do not believe the approach suggested by MSTV that we accept late-filed comments for up to four weeks beyond the current date for filing reply comments is advisable. Rather, we believe that a two-week additional extension of the date for filing reply comments would provide an adequate period of time for broadcasters to submit additional information addressing the issues discussed in the Group Owners' and AFCCE's extension requests and DLR's comments without delaying our decision in this matter. This two week period will allow the development of a complete record on the matter of channel allotments for operation of digital TV service. We therefore are extending the date for filing reply comments to January 24, 1997. We also agree with MSTV that providing an additional period for parties to respond to reply comments would create unnecessary delay and therefore will not provide for acceptance of replies to reply comments, as requested by DLR.

8. Accordingly, it is ordered that the requests for extension of the time for filing reply comments submitted by the Group Owners, the AFCCE, and DLR ARE GRANTED to the extent indicated herein and that the date for filing reply comments relating to the *Sixth FNPRM* IS EXTENDED to January 24, 1997. This action is taken pursuant to authority provided in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303(r), and Sections 0.31, 0.241 and 1.46 of the Commission's rules, 47 CFR §§ 0.31, 0.241 and 1.46.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–832 Filed 1–13–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 678

[I.D. 010897B]

Atlantic Shark Fisheries

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

ACTION: Public hearings; extension of comment period.

SUMMARY: NMFS will hold public hearings to receive comments from fishery participants and other members of the public on a proposed rule that was published in the Federal Register on December 20, 1996. NMFS is also extending the comment period for the proposed rule.

DATES: Written comments must be received on or before January 24, 1997. All hearings will begin at 7 p.m., as follows:

1. January 22, 1997, in Tampa, FL.
2. January 22, 1997, in Fort Lauderdale, FL.
3. January 23, 1997, in Manteo, NC.
4. January 23, 1997, in Key West, FL.

ADDRESSES: Written comments and requests for special accommodation should be sent to William T. Hogarth, Chief, Highly Migratory Species Management Division (F/SF1), Office of Sustainable Fisheries, National Marine Fisheries Service, 1315 East-West Highway, Room 14853, Silver Spring, MD 20910.

The hearings will be held at the following locations:

1. Tampa—Radisson Bay Harbor Inn (Chart Room), 7700 Courtenay Campbell Causeway, Tampa, FL 33607.
2. Fort Lauderdale—Holiday Inn Beach Galleria (Coral Ballroom), 999 North Atlantic Blvd., Fort Lauderdale, FL 33304.
3. Manteo—North Carolina Aquarium (Auditorium), Airport Road, Manteo, NC 27954.
4. Key West—Holiday Inn La Concha (The Top Room), 430 Duval Street, Key West, FL 33040.

FOR FURTHER INFORMATION CONTACT: C. Michael Bailey or John Kelly, 301-713-2347; fax 301–713–1917.

SUPPLEMENTARY INFORMATION: NMFS has determined that it is necessary to conduct public hearings and that commenters have additional time to submit their comments on the proposed rule (61 FR 67295, December 20, 1996). Therefore, NMFS is extending the comment period on Atlantic sharks from January 21, 1997 to January 24, 1997. The proposed rule, as published, would reduce commercial quotas and recreational bag limits; establish a quota for small coastal sharks; prohibit the directed commercial fishing for, and landing or sale of, five species of sharks; establish a recreational tag-and-release only fishery for white sharks; prohibit filleting of sharks at sea; and restate the requirement for species-specific identification by all owners or operators, dealers, and tournament operators of all sharks landed.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to William T. Hogarth (see **ADDRESSES**) at least 4 days prior to the hearing date.

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

Dated: January 8, 1997.

Bruce Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 97–827 Filed 1–9–97; 10:29 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 62, No. 9
Tuesday, January 14, 1997

AFRICAN DEVELOPMENT FOUNDATION

African Development Foundation; Board of Directors Meeting

TIME: 11:00 a.m.–1:30 p.m.
PLACE: ADF Headquarters.
DATE: Thursday, 16 January 1997.
STATUS: Open.

Agenda

Thursday, January 16, 1997.

11:00 a.m.—Board Luncheon (Board and Staff Only)
11:30 p.m.—Chairman's Report
12:00 noon—President's Report
1:30 p.m.—Adjournment

If you have any questions or comments, please direct them to Ms. Janis McCollim, Executive Assistant to the President, who can be reached at (202) 673–3916.

William R. Ford,
President.

[FR Doc. 97–904 Filed 1–9–97; 4:21 pm]

BILLING CODE 6116–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of opportunity to request administrative review of antidumping or countervailing duty order, finding, or suspended investigation.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended, may request in accordance with §§ 353.22 or 355.22 of the Department of Commerce (the Department) Regulations (19 CFR 353.22/355.22 (1993)), that the Department conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity to Request a Review

Not later than the last day of January 1997, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in January for the following periods:

	Period
Antidumping Proceedings:	
Brazil: Brass Sheet & Strip, A–351–603	1/1/96–12/31/96
Brazil: Stainless Steel Wire Rods, A–351–819	1/1/96–12/31/96
Canada: Brass Sheet & Strip, A–122–601	1/1/96–12/31/96
Canada: Color Picture Tubes, A–122–605	1/1/96–12/31/96
France: Anhydrous Sodium Metasilicate (ASM), A–427–098	1/1/96–12/31/96
France: Stainless Steel Wire Rods, A–427–811	1/1/96–12/31/96
Japan: Color Picture Tubes, A–588–609	1/1/96–12/31/96
Singapore: Color Picture Tubes, A–559–601	1/1/96–12/31/96
South Africa: Brazing Copper Wire & Rod, A–791–502	1/1/96–12/31/96
South Korea: Brass Sheet & Strip, A–580–603	1/1/96–12/31/96
South Korea: Color Picture Tubes, A–580–605	1/1/96–12/31/96
South Korea: Stainless Steel Cooking Ware, A–580–601	1/1/96–12/31/96
Spain: Potassium Permanganate, A–469–007	1/1/96–12/31/96
Taiwan: Stainless Steel Cooking Ware, A–583–603	1/1/96–12/31/96
The People's Republic of China: Potassium Permanganate, A–570–001	1/1/96–12/31/96
Countervailing Proceedings:	
Brazil: Brass Sheet and Strip, C–351–604	1/1/96–12/31/96
Spain: Stainless Steel Wire Rod, C–469–004	1/1/96–12/31/96
South Korea: Stainless Steel Cookware, C–580–601	1/1/96–12/31/96
Taiwan: Stainless Steel Cookware, C–583–604	1/1/96–12/31/96
Suspension Agreements:	
Canada: Potassium Chloride, A–122–701	1/1/96–12/31/96

In accordance with §§ 353.22(a) and 355.22(a) of the regulations, an interested party as defined by § 353.2(k) may request in writing that the Secretary conduct an administrative review. The Department has changed its requirements for requesting reviews for countervailing duty orders. Pursuant to 19 CFR 355.22(a) of the regulations, an interested party must specify the individual producers or exporters covered by the order or suspension agreement for which they are requesting a review (Interim Regulations, 60 FR 25130, 25137 (May 11, 1995)). Therefore, for both antidumping and countervailing duty reviews, the interested party must specify for which individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order it is requesting a review, and the requesting party must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin, and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Seven copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B–099, U.s. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of their requests to the Office of Antidumping/Countervailing Enforcement, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with section 353.3l(g) or 355.3l(g) of the regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the Federal Register a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation,'' for requests received by the last day of January 1997. If the Department does not receive, by the last day of January 1997, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute, but is published as a service to the international trading community.

Dated: January 9, 1997.

Joseph A. Spetrini,

Deputy Assistant Secretary for Group III.

[FR Doc. 97–996 Filed 1–13–97; 8:45 am]

BILLING CODE 3510–DS–M

National Oceanic and Atmospheric Administration

[I.D. 010697A]

Marine Mammals; Scientific Research Permit No. 1024 (P772#69)

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that the Southwest Fisheries Science Center, National Marine Fisheries Service, 8604 La Jolla Shores Drive, La Jolla, CA 92038 [Principal Investigators: Dr. Rennie S. Holt, or his designee(s)] has been issued a permit to take Antarctic pinnipeds for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13130, Silver Spring, MD 20910 (301/713–2289); and

Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Long Beach, CA 90802–4213 (310/980–4001).

SUPPLEMENTARY INFORMATION: On November 18, 1996, notice was published in the Federal Register (61 FR 58677) that a request for a scientific research permit to take Antarctic pinnipeds had been submitted by the above-named organization. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

Dated: December 30, 1996.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97–871 Filed 1–13–97; 8:45 am]

BILLING CODE 3510–22–F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Extension of Restraint Period and Amendment of Import Limits Under Bilateral Agreements Governing Importation of Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textiles and Textile Products and Silk Apparel Produced or Manufactured in the People's Republic of China

January 10, 1997.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs extending a restraint period and amending limits.

EFFECTIVE DATE: January 15, 1997.

FOR FURTHER INFORMATION CONTACT: Jennifer Aldrich, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927–6703. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

In a memorandum dated December 21, 1996, the Governments of the United States and the People's Republic of China agreed to extend the current bilateral agreements for one month, through January 31, 1997.

If no agreement is reached in further negotiations between the Governments of the United States and the People's Republic of China on new bilateral agreements, the U.S. Government would have the authority to implement unilateral limits at reduced levels and permanently deny shipments in excess of those limits.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to extend the applicable restraint period through January 31, 1997, at levels adjusted to reflect the extension.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 60 FR 65299, published on December 19, 1995; and 61 FR 66263, published on December 17, 1996). Also see 60 FR 62413, published on December 6, 1995; and 65292, published on December 19, 1995.

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

January 10, 1997.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directives issued to you on December 24, 1996, by the Chairman, Committee for the Implementation of Textile Agreements, which directed you to count imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products and silk apparel, produced or manufactured in China and exported during the twelve-month period which began on January 1, 1997 and extends through December 31, 1997. Effective on January 15, 1997 the counting period is amended to February 1, 1997 through December 31, 1997.

This directive amends, but does not cancel, the directives issued to you on November 30, 1995 and December 13, 1995, by the Chairman, Committee for the Implementation of Textile Agreements. Those directives concern imports of certain textiles and textile products and silk apparel, produced or manufactured in China and exported during the twelve-month period which began on January 1, 1996 and extended through December 31, 1996.

Effective on January 15, 1997, you are directed to extend the 1996 restraint period through January 31, 1997 at the following adjusted levels, pursuant to a memorandum dated December 21, 1996 between the Governments of the United States and the People's Republic of China:

Category	Thirteen-month limit
Group I	
200, 218, 219, 226, 237, 239, 300/301, 313–315, 317/326, 331, 333–336, 338/339, 340–342, 345, 347/348, 350–352, 359–C [1], 359–V [2], 360–363, 369–D [3], 369–H [4], 369–L [5], 410, 433–436, 438, 440, 442–444, 445/446, 447, 448, 607, 611, 613–615, 617, 631, 633–636, 638/639, 640–643, 644/844, 645/646, 647–652, 659–C [6], 659–H [7], 659–S [8], 666, 669–P [9], 670–L [10], 831, 833, 835, 836, 840, 842 and 845–847, as a group.	1,579,551,907 square meters equivalent.
Sublevels in Group I	
200	743,161 kilograms.
218	12,328,790 square meters.
219	2,488,221 square meters.
226	11,810,342 square meters.
237	1,996,379 dozen.
239	3,131,132 kilograms.
300/301	4,083,400 kilograms.
313	47,536,883 square meters.
314	53,883,456 square meters.
315	173,220,089 square meters.
317/326	22,770,718 square meters of which not more than 4,356,486 square meters shall be in Category 326.
331	5,510,177 dozen pairs.
333	100,092 dozen.
334	346,187 dozen.
335	432,538 dozen.
336	174,814 dozen.
338/339	2,686,449 dozen of which not more than 2,039,309 dozen shall be in Categories 338–S/339–S [11].
340	941,774 dozen of which not more than 470,888 dozen shall be in Category 340–Z [12].
341	739,608 dozen of which not more than 443,765 dozen shall be in Category 341–Y [13].
342	290,385 dozen.
345	147,926 dozen.
347/348	2,725,271 dozen.
350	178,025 dozen.
351	569,421 dozen.
352	2,041,319 dozen.
359–C	634,295 kilograms.
359–V	923,838 kilograms.
360	8,276,611 numbers of which not more than 5,547,550 numbers shall be in Category 360–P [14].
361	4,603,222 numbers.
362	7,936,779 numbers.
363	34,574,410 numbers.
369–D	5,167,972 kilograms.
369–H	5,126,070 kilograms.
369–L	3,522,474 kilograms.
410	2,259,061 square meters of which not more than 1,810,882 square meters shall be in Category 410–A [15] and not more than 1,810,882 square meters shall be in Category 410–B [16].
433	26,322 dozen.
434	14,998 dozen.
435	27,547 dozen.
436	17,141 dozen.
438	29,749 dozen.
440	42,852 dozen of which not more than 24,487 dozen shall be in Category 440–M [17].
442	47,749 dozen.
443	151,588 numbers.
444	227,609 numbers.
445/446	322,252 dozen.
447	87,605 dozen.
448	25,061 dozen.
607	3,352,501 kilograms.
611	5,886,189 square meters.
613	8,221,654 square meters.
614	12,919,741 square meters.
615	26,896,554 square meters.
617	18,792,350 square meters.
631	1,342,338 dozen pairs.
633	61,361 dozen.
634	659,600 dozen.
635	701,167 dozen.
636	595,853 dozen.
638/639	2,680,531 dozen.
640	1,629,587 dozen.
641	1,466,511 dozen.
642	341,221 dozen.
643	549,873 numbers.
644/844	4,007,023 numbers.
645/646	929,501 dozen.
647	1,710,790 dozen.
648	1,222,349 dozen.
649	993,274 dozen.
650	123,665 dozen.
651	849,347 dozen of which not more than 149,533 dozen shall be in Category 651–B [18].
652	2,868,368 dozen.
659–C	449,653 kilograms.
659–H	3,041,248 kilograms.
659–S	669,269 kilograms.
666	3,826,769 kilograms.
669–P	2,184,509 kilograms.
670–L	17,084,850 kilograms.
831	570,501 dozen pairs.
833	30,375 dozen.
835	137,317 dozen.
836	304,511 dozen.
840	524,905 dozen.
842	295,003 dozen.
845	2,670,712 dozen.
846	190,947 dozen.
847	1,385,630 dozen.
Group II	
330, 332, 349, 353, 354, 359–O [19], 431, 432, 439, 459, 630, 632, 653, 654 and 659–O [20], as a group.	131,226,397 square meters equivalent.
Group III	
201, 220, 222, 223, 224–V [21], 224–O [22], 225, 227, 229, 369–O [23], 400, 414, 464, 465, 469, 600, 603, 604–O [24], 606, 618–622, 624–629, 665, 669–O [25] and 670–O [26], as a group.	277,114,624 square meters equivalent.
Sublevel in Group III	
224–V	3,743,666 square meters.
Group IV	
832, 834, 838, 839, 843, 850–852, 858 and 859, as a group.	11,949,795 square meters equivalent.
Levels not in a Group	
369–S [27]	673,208 kilograms.
863–S [28]	9,414,728 numbers.
870	35,502,103 kilograms.

Category	Thirteen-month limit
Silk Apparel Group [29]	
733, 734, 735, 736, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 750, 751, 752, 758 and 759, as a group.	374,946,681 square meters equivalent.
Specific limit within Group.	
740 (Men's and boys' shirts, not knit).	3,578,922 dozen.
741 (Women's and girls' shirts/ blouses, not knit).	8,930,853 dozen.

[1] Category 359–C: only HTS numbers 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025 and 6211.42.0010.

[2] Category 359–V: only HTS numbers 6103.19.2030, 6103.19.9030, 6104.12.0040, 6104.19.8040, 6110.20.1022, 6110.20.1024, 6110.20.2030, 6110.20.2035, 6110.90.9044, 6110.90.9046, 6201.92.2010, 6202.92.2020, 6203.19.1030, 6203.19.9030, 6204.12.0040, 6204.19.8040, 6211.32.0070 and 6211.42.0070.

[3] Category 369–D: only HTS numbers 6302.60.0010, 6302.91.0005 and 6302.91.0045.

[4] Category 369–H: only HTS numbers 4202.22.4020, 4202.22.4500 and 4202.22.8030.

[5] Category 369–L: only HTS numbers 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015 and 4202.92.6090.

[6] Category 659–C: only HTS numbers 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017 and 6211.43.0010.

[7] Category 659–H: only HTS numbers 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090 and 6505.90.8090.

[8] Category 659–S: only HTS numbers 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020.

[9] Category 669–P: only HTS numbers 6305.32.0010, 6305.32.0020, 6305.33.0010, 6305.33.0020 and 6305.39.0000.

[10] Category 670–L: only HTS numbers 4202.12.8030, 4202.12.8070, 4202.92.3020, 4202.92.3030 and 4202.92.9025.

[11] Category 338–S: all HTS numbers except 6109.10.0012, 6109.10.0014, 6109.10.0018 and 6109.10.0023; Category 339–S: all HTS numbers except 6109.10.0040, 6109.10.0045, 6109.10.0060 and 6109.10.0065.

[12] Category 340–Z: only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2050 and 6205.20.2060.

[13] Category 341–Y: only HTS numbers 6204.22.3060, 6206.30.3010, 6206.30.3030 and 6211.42.0054.

[14] Category 360–P: only HTS numbers 6302.21.3010, 6302.21.5010, 6302.21.7010, 6302.21.9010, 6302.31.3010, 6302.31.5010, 6302.31.7010 and 6302.31.9010.

[15] Category 410–A: only HTS numbers 5111.11.3000, 5111.11.7030, 5111.11.7060, 5111.19.2000, 5111.19.6020, 5111.19.6040, 5111.19.6060, 5111.19.6080, 5111.20.9000, 5111.30.9000, 5111.90.3000, 5111.90.9000, 5212.11.1010, 5212.12.1010, 5212.13.1010, 5212.14.1010, 5212.15.1010, 5212.21.1010, 5212.22.1010, 5212.23.1010, 5212.24.1010, 5212.25.1010, 5311.00.2000, 5407.91.0510, 5407.92.0510, 5407.93.0510, 5407.94.0510, 5408.31.0510, 5408.32.0510, 5408.33.0510, 5408.34.0510, 5515.13.0510, 5515.22.0510, 5515.92.0510, 5516.31.0510, 5516.32.0510, 5516.33.0510, 5516.34.0510 and 6301.20.0020.

[16] Category 410–B: only HTS numbers 5007.10.6030, 5007.90.6030, 5112.11.2030, 5112.11.2060, 5112.19.9010, 5112.19.9020, 5112.19.9030, 5112.19.9040, 5112.19.9050, 5112.19.9060, 5112.20.3000, 5112.30.3000, 5112.90.3000, 5112.90.9010, 5112.90.9090, 5212.11.1020, 5212.12.1020, 5212.13.1020, 5212.14.1020, 5212.15.1020, 5212.21.1020, 5212.22.1020, 5212.23.1020, 5212.24.1020, 5212.25.1020, 5309.21.2000, 5309.29.2000, 5407.91.0520, 5407.92.0520, 5407.93.0520, 5407.94.0520, 5408.31.0520, 5408.32.0520, 5408.33.0520, 5408.34.0520, 5515.13.0520, 5515.22.0520, 5515.92.0520, 5516.31.0520, 5516.32.0520, 5516.33.0520 and 5516.34.0520.

[17] Category 440–M: HTS numbers 6203.21.0030, 6203.23.0030, 6205.10.1000, 6205.10.2010, 6205.10.2020, 6205.30.1510, 6205.30.1520, 6205.90.3020, 6205.90.4020 and 6211.31.0030.

[18] Category 651–B: only HTS numbers 6107.22.0015 and 6108.32.0015.

[19] Category 359–O: all HTS numbers except 6103.42.2025, 6103.49.8034, 6104.62.1020, 6104.69.8010, 6114.20.0048, 6114.20.0052, 6203.42.2010, 6203.42.2090, 6204.62.2010, 6211.32.0010, 6211.32.0025, 6211.42.0010 (Category 359–C); 6103.19.2030, 6103.19.9030, 6104.12.0040, 6104.19.8040, 6110.20.1022, 6110.20.1024, 6110.20.2030, 6110.20.2035, 6110.90.9044, 6110.90.9046, 6201.92.2010, 6202.92.2020, 6203.19.1030, 6203.19.9030, 6204.12.0040, 6204.19.8040, 6211.32.0070 and 6211.42.0070 (Category 359–V).

[20] Category 659–O: all HTS numbers except 6103.23.0055, 6103.43.2020, 6103.43.2025, 6103.49.2000, 6103.49.8038, 6104.63.1020, 6104.63.1030, 6104.69.1000, 6104.69.8014, 6114.30.3044, 6114.30.3054, 6203.43.2010, 6203.43.2090, 6203.49.1010, 6203.49.1090, 6204.63.1510, 6204.69.1010, 6210.10.9010, 6211.33.0010, 6211.33.0017, 6211.43.0010 (Category 659–C); 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090, 6505.90.8090 (Category 659–H); 6112.31.0010, 6112.31.0020, 6112.41.0010, 6112.41.0020, 6112.41.0030, 6112.41.0040, 6211.11.1010, 6211.11.1020, 6211.12.1010 and 6211.12.1020 (Category 659–S).

[21] Category 224–V: only HTS numbers 5801.21.0000, 5801.23.0000, 5801.24.0000, 5801.25.0010, 5801.25.0020, 5801.26.0010, 5801.26.0020, 5801.31.0000, 5801.33.0000, 5801.34.0000, 5801.35.0010, 5801.35.0020, 5801.36.0010 and 5801.36.0020.

[22] Category 224–O: all HTS numbers except 5801.21.0000, 5801.23.0000, 5801.24.0000, 5801.25.0010, 5801.25.0020, 5801.26.0010, 5801.26.0020, 5801.31.0000, 5801.33.0000, 5801.34.0000, 5801.35.0010, 5801.35.0020, 5801.36.0010 and 5801.36.0020 (Category 224–V).

[23] Category 369–O: all HTS numbers except 6302.60.0010, 6302.91.0005 and 6302.91.0045 (Category 369–D); 4202.22.4020, 4202.22.4500, 4202.22.8030 (Category 369–H); 4202.12.4000, 4202.12.8020, 4202.12.8060, 4202.92.1500, 4202.92.3015, 4202.92.6090 (Category 369–L); and 6307.10.2005 (Category 369–S)

[24] Category 604–O: all HTS numbers except 5509.32.0000 (Category 604–A).

[25] Category 669–O: all HTS numbers except 6305.32.0010, 6305.32.0020, 6305.33.0010, 6305.33.0020 and 6305.39.0000. (Category 669–P).

[26] Category 670–O: only HTS numbers 4202.22.4030, 4202.22.8050 and 4202.32.9550.

[27] Category 369–S: only HTS number 6307.10.2005.

[28] Category 863–S: only HTS number 6307.10.2015.

[29] Silk handkerchiefs, gloves, hosiery, brassieres and other body supporting garments, scarves, and babies' garments are not included in this agreement.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Troy H. Cribb,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 97–975 Filed 1–10–97; 12:08 pm]

BILLING CODE 3510–DR–F

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

AGENCY: U.S. Consumer Product Safety Commission, Washington, DC 20207.

''FEDERAL REGISTER'' CITATION OF PREVIOUS ANNOUNCEMENT: [insert FR citation].

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10:00 a.m., January 13, 1997.

CHANGES IN MEETING: The meeting concerning Multi-Purpose Lighter Petition CP 96–1 has been canceled.

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: January 8, 1997.

Sadye E. Dunn,

Secretary.

[FR Doc. 97–1012 Filed 1–10–97; 1.56 pm]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Public Hearing And Extension Of Public Comment Period For The Draft Environmental Impact Statement For Disposal And Reuse Of The Naval Air Warfare Center, Aircraft Division, Warminster, Pennsylvania

SUMMARY: Pursuant to Council on Environmental Quality regulations (40 CFR Parts 1500–1508), implementing procedural provisions of the National Environmental Policy Act, the Department of the Navy has prepared and filed on December 20, 1996 with the U.S. Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for the disposal and subsequent reuse of the Naval Air Warfare Center, Aircraft Division (NAWCAD), Warminster, Pennsylvania. The DEIS addresses the environmental consequences of the proposed Community Reuse Plan for the NAWCAD as prepared by the Bucks County Economic Adjustment Committee and Base Reuse Subcommittee (now known as the Federal Lands Reuse Authority of Bucks County) in March of 1995.

ADDRESSES: The Department of the Navy will hold a public hearing to inform the public of the DEIS findings and to solicit comments. The hearing will be held on Tuesday, January 28, 1997, beginning at 7:30 p.m., at the Warminster Township Building, Henry and Gibson Avenues, Warminster, Pennsylvania. Please call the point of contact below or the Township Building in the case of inclement weather.

Federal, state and local agencies and interested parties are invited and urged to attend or be represented at the hearing. Oral statements will be heard and transcribed by a stenographer; however, to assure the accuracy of the record, all statements should be submitted in writing. All statements, both oral and written, will become part of the public record on this action and will be given equal consideration.

Additional copies of the DEIS have been placed in the Warminster Library, 1076 Emma Lane, Warminster, Pennsylvania and the Bucks County Library, 150 South Pine Street, Doylestown, Pennsylvania.

The previously published comment period has been extended to close on February 24, 1997. Written comments on the DEIS should be mailed to the address noted below and must be postmarked not later than February 24, 1997 to be part of the official record. This public hearing and comment period shall also serve as an opportunity for members of the public to express their views on the effect of the proposed Reuse Plan on the property.

FOR FURTHER INFORMATION CONTACT: Additional information concerning this notice may be obtained by contacting Mr. Kurt Frederick (Code 202) Northern Division, Naval Facilities Engineering Command, 10 Industrial Highway, MSC 82, Lester PA 19113, telephone (610) 595–0728, facsimile (610) 595–0778.

Dated: January 9, 1997.

D.E. Koenig,

LCDR, JAGC, USN, Federal Register Liaison Officer.

[FR Doc. 97–849 Filed 1–13–97; 8:45 am]

BILLING CODE 3810–FF–M

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada Test Site

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada Test Site.

DATES: Wednesday, February 5, 1997: 5:30 p.m.–9:00 p.m.

ADDRESS: Community College of Southern Nevada (Cheyenne Avenue Campus), High Desert Conference and Training Center, Room 1422, 3200 East Cheyenne Avenue, North Las Vegas, Nevada 89030–4296, 702–651–4294.

FOR FURTHER INFORMATION CONTACT: Kevin Rohrer, U.S. Department of Energy, Office of Environmental Management, P.O. Box 98518, Las Vegas, Nevada 89193–8513, phone: 702–295–0197.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Advisory Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

February Agenda:

5:30 pm—Call to Order
5:40 pm—Presentations
7:00 pm—Public Comment/Questions
7:30 pm—Break
7:45 pm—Review Action Items
8:00 pm—Approve Meeting Minutes
8:10 pm—Committee Reports
8:45 pm—Public Comment
9:00 pm—Adjourn

Public Participation: The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Kevin Rohrer, at the telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to Kevin Rohrer at the address listed above.

Issued at Washington, DC, on January 7, 1997.

Rachel M. Samuel,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 97–835 Filed 1–13–97; 8:45 am]

BILLING CODE 6450–01–P

Environmental Management Site-Specific Advisory Board, Pantex Plant, Amarillo, Texas

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB), Pantex Plant, Amarillo, Texas.

DATE AND TIME: Tuesday, January 28, 1997: 1:00 p.m.—5:00 p.m.

ADDRESS: Amarillo Association of Realtors, 5601 Enterprise Circle, Amarillo, Texas.

FOR FURTHER INFORMATION CONTACT: Tom Williams, Program Manager, Department of Energy, Amarillo Area Office, P.O. Box 30030, Amarillo, TX 79120 (806) 477–3121.

SUPPLEMENTARY INFORMATION: Purpose of the Committee: The Board provides input to the Department of Energy on Environmental Management strategic decisions that impact future use, risk management, economic development, and budget prioritization activities.

Tentative Agenda

1:00 p.m.—Welcome—Agenda Review—Approval of Minutes
1:15 p.m.—Nominations Subcommittee Report; Approval of Continuing Members
1:30 p.m.—Transition, Funding Mechanism Change Discussion, & Recommendation
5:00 p.m.—Adjourn

Public Participation: The meeting is open to the public, and public comment will be invited throughout the meeting. Written statements may be filed with the Committee either before or after the meeting. Written comments will be accepted at the address above for 15 days after the date of the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Tom Williams' office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the Pantex Public Reading Rooms located at the Amarillo College Lynn Library and Learning Center, 2201 South Washington, Amarillo, TX phone (806) 371–5400. Hours of operation are from 7:45 am to 10:00 pm, Monday through Thursday; 7:45 am to 5:00 pm on Friday; 8:30 am to 12:00 noon on Saturday; and 2:00 pm to 6:00 pm on Sunday, except for Federal holidays. Additionally, there is a Public Reading Room located at the Carson County Public Library, 401 Main Street, Panhandle, TX phone (806) 537–3742. Hours of operation are from 9:00 am to 7:00 pm on Monday; 9:00 am to 5:00 pm, Tuesday through Friday; and closed Saturday and Sunday as well as Federal Holidays. Minutes will also be available by writing or calling Tom Williams at the address or telephone number listed above.

Issued at Washington, DC on January 8, 1997.

Rachel Murphy Samuel,

Acting Deputy Advisory Committee Management Officer.

[FR Doc. 97–836 Filed 1–13–97; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[FERC–715]

Agency Information Collection Under Review by the Office of Management and Budget

January 8, 1997.

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 received public comments from a single entity in response to an earlier Federal Register notice of September 9, 1996 (61 FR 47506) and has replied to these comments in its submission to OMB.

DATES: Comments must be filed on or before February 13, 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 Form No. 715, ''Annual Transmission Planning and Evaluation Report''.

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* 1902–0171. 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 Federal Power Act (FPA). The information reported on FERC Form No. 715 is used to adequately inform potential transmission customers, State Regulatory authorities, and the public of potentially available transmission capacity and transmission constraints on electric transmission systems.

Potential electrical transmission system customers will use the information to determine transmission availability to potential wholesale electric power purchasers. Transmission dependent utilities will use the information to determine transmission availability from alternative wholesale suppliers. The information is consistent with and supports the Commission's policy of encouraging information sharing and dispute resolution between all stakeholders within Regional Transmission Groups. The data reported on Form No. 715 will facilitate analysis and resolution of transmission disputes brought before the Commission.

5. *Respondent Description:* The respondent universe currently comprises approximately 200 public utilities.

6. *Estimated Burden:* 20,000 total burden hours, 200 respondents, 200 responses annually, 100.0 hours per response (average).

Statutory Authority: Sections 202, 203, 205, 206(d), 207, 210, 211, 212, 304(a) and

311 of the Federal Power Act, as amended (49 Stat. 838; 16 U.S.C. 791a–825r).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–825 Filed 1–13–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket Nos. CP96–178–000, CP96–178–002, CP96–248–000, CP96–248–003, CP96–249–000, and CP96–249–003]

Maritimes & Northeast Pipeline, L.L.C. and Portland Natural Gas Transmission System; Notice of Meeting

January 9, 1997.

On January 17, 1997, the Commission staff will meet with Maritimes & Northeast Pipeline, L.L.C. (Maritimes) and Portland Natural Gas Transmission System (PNGTS). The meeting is in response to Maritimes' and PNGTS's Joint Request, filed January 3, 1997, for a pre-filing conference to discuss a joint application proposed to be filed by January 27, 1997. The proposed filing concerns a 30-inch diameter pipeline from Westbrook, Maine to Dracut, Massachusetts that will be jointly owned by Maritimes and PNGTS. In addition, other environmental and scheduling issues will be discussed. The meeting will occur at 9:30 AM, in a room to be designated at the Commission's headquarters, 888 First Street NE, Washington, DC.

Subsequent to the filing of the joint application, the Commission staff will issue a notice to convene a technical conference to be held at a location near the proposed joint project area. The exact time and location will be provided in that notice.

For additional information of a procedural nature, contact Jeff Wright at (202) 208–2239.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–841 Filed 1–13–97; 8:45 am]

BILLING CODE 6717–01–M

Federal Energy Regulatory Commission

[Docket No. ER97–399–000 and Docket No. ER97–449–000]

MP Energy, Inc. and Montana Power Company; Notice of Issuance of Order

January 8, 1997.

On November 7, 1996, MP Energy, Inc. (MP Energy) filed an application for authorization to sell power at market-based rates, and for certain waivers and authorizations. In particular, MP Energy requested that the Commission grant blanket approval under 18 CFR Part 34 of all future issuances of securities and assumptions of liabilities by MP Energy. On January 6, 1997, the Commission issued an Order Conditionally Accepting For Filing Proposed Market-Based Rates (Order), in the above-docketed proceedings.

The Commission's January 7, 1997 Order granted the request for blanket approval under Part 34, subject to the conditions found in Ordering Paragraphs (E), (F), and (H):

(E) Within 30 days of the date of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by MP Energy should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.211 and 385.214 (1996).

(F) Absent a request to be heard within the period set forth in Ordering Paragraph (E) above, MP Energy is hereby authorized to issue securities and assume obligations and liabilities as guarantor, endorser, surety or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of the MP Energy, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(H) The Commission reserves the right to modify this order to require a further showing that neither public nor private interests will be adversely affected by continued Commission approval of MP Energy's issuances of securities or assumptions of liabilities. * * *

Notice is hereby given that the deadline for filing motions to intervene or protests, as set forth above, is February 5, 1997.

Copies of the full text of the Order are available from the Commission's Public Reference Branch, 888 First Street, NE., Washington, DC 20426.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–826 Filed 1–13–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. PR97–3–000]

Olympic Pipeline Company; Notice of Petition for Rate Approval

January 10, 1997.

Take notice that on December 12, 1996, Olympic Pipeline Company (Olympic), filed pursuant to Section 284.123(b)(2) of the Commission's Regulations, a petition for rate approval requesting that the Commission approve as fair and equitable a firm transportation reservation charge of $3.22 per MMBtu and a 100 percent load factor interruptible transportation charge of $0.1060 per MMBtu for transportation services performed by Olympic through its West Chalkley System under Section 311(a)(2) of the Natural Gas Policy Act of 1978 (NGPA).

Olympic states that it is an intrastate pipeline within the meaning of Section 2(16) of the NGPA and it owns and operates an intrastate pipeline system in the State of Louisiana. Olympic proposes an effective date of December 12, 1996.

Pursuant to Section 284.123(b)(2)(ii), if the Commission does not act within 150 days of the filing date, the rate will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for similar transportation service. The Commission may, prior to the expiration of the 150-day period, extend the time for action or institute a proceeding to afford parties an opportunity for written comments and for the oral presentation of views, data, and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene in accordance with Sections 385.211 and 385.214 of the Commission's Rules of Practice and Procedures. All motions must be filed with the Secretary of the Commission on or before January 31, 1997. The petition for rate approval is on file with the Commission and is available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–934 Filed 1–14–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. EG97–23–000, et al.]

Jamaica Energy Operators, Ltd., et al.; Electric Rate and Corporate Regulation Filings

January 6, 1997.

Take notice that the following filings have been made with the Commission:

1. Jamaica Energy Operators, Ltd.

[Docket No. EG97–23–000]

On December 19, 1996, Jamaica Energy Operators, Ltd. (''Applicant''), c/o Wartsila Power Development, Inc., 116 Defense Highway, Suite 502, Annapolis, Maryland 21401, 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.

Applicant is a Jamaican limited liability company formed to operate an electric generating facility located in Old Harbour Bay, Jamaica.

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. Louisville Gas and Electric Company

[Docket No. ER97–880–000]

Take notice that on December 20, 1996, Louisville Gas and Electric Company, tendered for filing copies of service agreements between Louisville Gas and Electric Company and Koch Power Services, Inc. under Rate GSS.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. PacifiCorp

[Docket No. ER97–882–000]

Take notice that on December 23, 1996, PacifiCorp, tendered for filing in accordance with 18 CFR 35 of the Commission's Rules and Regulations, Service Agreements with Minnesota Power & Light Company, Montana Power Company and Washington Water Power Company 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 party, 1 stop bit).

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. Interstate Power Company

[Docket No. ER97–883–000]

Take notice that on December 23, 1996, Interstate Power Company, tendered for filing a Notice of Cancellation of its Rate Schedule FERC No. 147.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. Interstate Power Company

[Docket No. ER97–884–000]

Take notice that on December 23, 1996, Interstate Power Company, tendered for filing a Notice of Cancellation of its Rate Schedule FERC Nos. 144 and 148.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. The United Illuminating Company

[Docket No. ER97–885–000]

Take notice that on December 20, 1996, The United Illuminating Company (UI), tendered for filing proposed changes to its Wholesale Electric Sales Tariff, FERC Electric Tariff, Original Volume No. 2 (Tariff). In these changes, UI proposes to revise Article 5 of the Tariff to address the functional unbundling and open access requirements in the Commission's Order No. 888, Docket No. RM95–8–000, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stat. and Regs. ¶ 31,036 (1996), *reh'g pending.* UI also proposes to revise Articles 4 and 8 of the Tariff and to remove Appendix B from the Tariff.

UI requests an effective date of December 31, 1996, and has therefore requested that the Commission waive its 60-day prior notice requirement. Copies of the filing were served upon all persons that have executed purchase agreements with UI under its Tariff and upon Robert J. Murphy, Executive Secretary, Connecticut Department of Public Utility Control.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. Brooklyn Navy Yard Cogeneration Partners, L.P.

[Docket No. ER97–886–000]

Take notice that on December 23, 1996, Brooklyn Navy Yard Cogeneration Partners, L.P., tendered for filing three initial rate schedules for sales of energy and capacity.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. American Electric Power Service Corporation

[Docket No. ER97–887–000]

Take notice that on December 23, 1996, the American Electric Power Service Corporation (AEPSC), tendered for filing executed service agreements with numerous parties, under the AEP Companies' Point-to-Point Transmission Service Tariffs. The Transmission Tariff has been designated as FERC Electric Tariff Original Volume No. 4, effective July 9, 1996. AEPSC requests waiver of notice to permit the Service Agreements to be made effective for service billed on and after November 20, 1996.

A copy of the filing was served upon the parties and the State Utility Regulatory Commission of Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia and West Virginia.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Central Vermont Public Service Corporation

[Docket No. ER97–888–000]

Take notice that on December 23, 1996, Central Vermont Public Service Corporation (Central Vermont), tendered for filing an amendment to conform its FERC Original Tariff No. 5 to the Commission's Order 888.

Central Vermont requests the Commission to waive its notice of filing requirement to permit the amendment to become effective according to its terms. In support of its requests Central Vermont states that allowing the Service Agreement to become effective as provided will enable the Company and its customers to achieve mutual benefits.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. New England Power Company

[Docket No. ER97–889–000]

Take notice that on December 23, 1996, New England Power Company, filed a Service Agreements and Certificates of Concurrence with Equitable Power Services Company under NEP's FERC Electric Tariffs, Original Volume Nos. 5 and 6.

Comment date: JaT1January 21, 1997, in accordance with Standard Paragraph E at the end of this notice. I8411. Central Hudson Gas & Electric Corporation

[Docket No. ER97–890–000]

Take notice that on December 23, 1996, Central Hudson Gas & Electric Corporation (CHG&E), tendered for filing pursuant to §35.12 of the Federal

Energy Regulatory Commission's Regulation 18 CFR, as an Initial Rate Schedule, a power Sales Tariff whereby Central Hudson may sell capacity and/or energy to electric utilities, as the parties may mutually agree from time to time. The proposed Tariff requires interested purchasers to enter into a Service Agreement with Central Hudson before transactions may commence under this Tariff. Service under this agreement is requested to commence on January 1, 1997.

Central Hudson requests that its Tariff be accepted for filing and allowed to become effective in accordance with its terms as specified. CHG&E has served a copy of the filing upon the New York State Public Service Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. New England Power Company

[Docket No. ER97–891–000]

Take notice that on December 23, 1996, New England Power Company, filed a Service Agreements and Certificates of Concurrence with Northeast Utilities Service Company under NEP's FERC Electric Tariffs, Original Volume Nos. 5 and 6.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. New England Power Company

[Docket No. ER97–892–000]

Take notice that on December 23, 1996, New England Power Company, filed a Service Agreements and Certificates of Concurrence with The Power Company of America, L.P. under NEP's FERC Electric Tariffs, Original Volume Nos. 5 and 6.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. New England Power Company

[Docket No. ER97–893–000]

Take notice that on December 23, 1996, New England Power Company, filed a Service Agreements and Certificates of Concurrence with LG&E Power Marketing, Inc. under NEP's FERC Electric tariffs, Original Volume Nos. 5 and 6.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. New England Power Company

[Docket No. ER97–894–000]

Take notice that on December 23, 1996, New England Power Company, filed a Service Agreements and Certificates of Concurrence with CPS Utilities under NEP's FERC Electric Tariffs, Original Volume Nos. 5 and 6.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. New England Power Company

[Docket No. ER97–895–000]

Take notice that on December 23, 1996, New England Power Company filed a Service Agreements and Certificates of Concurrence with Mansfield Municipal Electric Department under NEP's FERC Electric Tariffs, Original Volume Nos. 5 and 6.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. Southern Indiana Gas and Electric Company

[Docket No. ER97–897–000]

Take notice that on December 23, 1996, Southern Indiana Gas and Electric Company (SIGECO), submitted for filing modifications to the following interconnection agreements:

PSI Energy, Inc., Rate Schedule No. 21
Louisville Gas and Electric Company, Rate Schedule No. 24
Indianapolis Power & Light Company, Rate Schedule No. 25
Hoosier Energy Rural Electric Cooperative, Inc./PSI, Rate Schedule No. 27
Energy, Inc. Big Rivers Electric Corporation, Rate Schedule No. 33
Hoosier Energy Rural Electric Cooperative, Inc./PSI, Rate Schedule No. 43
Energy, Inc., Wabash Valley Power Association, Inc., Rate Schedule No. 45

The proposed modifications are intended to terminate SIGECO's right to make economy sales under each of the agreements.

Copies of this filing have been served upon each of the parties to the interconnection agreements.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. PacifiCorp

[Docket No. ER97–898–000]

Take notice that on December 23, 1996, PacifiCorp, tendered for filing in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, Revision No. 22 to Exhibit A and B, Contract No. 14–06–2437, Contract for Interconnection and Transmission Service, between PacifiCorp and Western Area power Administration (Western), PacifiCorp Rate Schedule FERC No. 45.

Exhibit A specifies the projected maximum integrated demand in kilowatts which PacifiCorp desires to have transmitted to its respective points of delivery by Western. Exhibit B specifies the projected maximum integrated demand in kilowatts which Western desires to have transmitted to its respective points of delivery by PacifiCorp.

PacifiCorp requests an effective date of January 1, 1997 be assigned to Revision No. 22 to Exhibit A and B, this date being consistent with the effective date of the revisions.

Copies of this filing were supplied to Western and the Wyoming Public Service Commission.

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 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. MidAmerican Energy Company

[Docket No. ER97–899–000]

Take notice that on December 23, 1996, MidAmerican Energy Company (MidAmerican), 106 East Second Street, Davenport, Iowa 52801, tendered for filing proposed changes to its Rate Schedule FERC Nos. 64 and 83. The changes consist of the annual adjustment of the transmission service fee for 1996 pursuant to the Transmission Service and Facilities Agreement dated October 2, 1979, as amended, between MidAmerican and Cedar Falls Municipal Electric Utility (Cedar Falls), and the Transmission Service Agreement dated August 26, 1985, as amended, between MidAmerican and Cedar Falls.

MidAmerican proposes an effective date of January 1, 1997 for the rate schedule change and states that good cause exists for this waiver pursuant to the Commission's decision in *Central Hudson Gas & Electric Corporation*, 60 FERC ¶ 61,106 (1992).

Copies of the filing were served upon representatives of Cedar Falls, the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. Virginia Electric and Power Company

[Docket No. ER97–900–000]

Take notice that on December 23, 1996, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement for Non-Firm Point-to-Point Transmission Service between Southern Energy Marketing, Inc. and Virginia Power under the Open

Access transmission Tariff to Eligible Purchasers dated July 9, 1996. Under the tendered Service Agreement Virginia Power will provide non-firm point-to-point service to Southern Energy Marketing, Inc. as agreed to by the parties under the rates, terms and conditions of the Open Access Transmission Tariff.

Copies of the filing were served upon the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. PECO Energy Company

[Docket No. ER97–901–000]

Take notice that on December 23, 1996, PECO Energy Company (PECO), filed a Service Agreement dated December 11, 1996 with Equitable Power Services Company (EPSC) under PECO's FERC Electric Tariff Original Volume No. 5 (Tariff). The Service Agreement adds EPSC as a customer under the Tariff.

PECO requests an effective date of December 11, 1996, for the Service Agreement.

PECO states that copies of this filing have been supplied to EPSC and to the Pennsylvania Public Utility Commission.

Comment date: January 21, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–824 Filed 1–13–97; 8:45 am]

BILLING CODE 6717–01–P

[Docket No. ER94–734–003, et al.]

Southern California Edison Company, et al.; Electric Rate and Corporate Regulation Filings

January 8, 1997.

Take notice that the following filings have been made with the Commission:

1. Southern California Edison Company

[Docket No. ER94–734–003]

Take notice that on December 2, 1996, Southern California Edison Company tendered for filing its report of hourly costs data pursuant to the Commission September 16, 1996, order in Docket No. ER94–734–000.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. Puget Sound Power & Light Company

[Docket No. ER96–2789–003]

Take notice that on December 19, 1996, Colockum Transmission Company, Inc. tendered for filing a Certificate of Concurrence in the above-referenced docket.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. Union Electric Company

[Docket No. ER96–2790–000]

Take notice that on November 29, 1996, Union Electric Company (UE) submitted a request to withdraw its filing dated August 23, 1996 of a First Amendment to the Wholesale Electric Service Agreement and a First Amendment to the Substitute Power Agreement between the City of Perry, Missouri and UE.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. Northern States Power Company (Wisconsin)

[Docket No. ER97–1–000]

Take notice that on December 18, 1996, Northern States Power Company (Wisconsin) tendered for filing an amendment in the above-referenced docket.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. Maine Public Service Company

[Docket No. ER97–208–000]

Take notice that on December 10, 1996, Maine Public Service Company tendered for filing an amendment in the above-referenced docket.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. Maine Public Service Company

[Docket No. ER97–209–000]

Take notice that on December 10, 1996, Maine Public Service Company tendered for filing an amendment in the above-referenced docket.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. South Carolina Gas & Electric Company

[Docket No. ER97–669–000]

Take notice that on December 26, 1996, South Carolina Gas & Electric Company tendered for filing an amendment in the above-referenced docket.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. The Toledo Edison Company

[Docket No. ER97–738–000]

Take notice that on December 10, 1996, The Toledo Edison Company (TE) tendered for filing with the Federal Energy Regulatory Commission agreements TE and TransCanada Power Corp.; International Utility Consultants, Inc.; AES Power, Inc.; Federal Energy Sales, Inc.; Tennessee Power Company, and Citizens Lehman Power Sales.

TE requests that the agreements be allowed to become effective on December 10, 1996.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Allegheny Power Service Corp. on behalf of Monongahela Power, The Potomac Edison Company, and West Penn Power Company (Allegheny Power

[Docket No. ER97–871–000]

Take notice that on December 20, 1996, Allegheny Power Service on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Notices of Termination to terminate economy arrangements in coordination agreements. The arrangements are terminated upon mutual consent of all affected parties. Allegheny Power requests an effective date of December 30, 1996.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Allegheny Power Service Corp.

[Docket No. ER97–896–000]

Take notice that on December 23, 1996, Allegheny Power Service Corp. (Allegheny) tendered for filing copies of service agreements executed by and between Allegheny and each of the operating subsidiaries of Allegheny (Monongahela Power Company, Potomac Edison Company and West Penn Power Company).

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. El Paso Electric Company

[Docket No. ES97–20–000]

Take notice that on January 3, 1997, El Paso Electric Company (El Paso) filed an application, under § 204 of the Federal Power Act, seeking authorization to issue not more than 313,000 shares of its Series A Preferred Stock, at quarterly intervals during the period from February 1, 1997 through February 1, 1999. Not more than 40,000 shares would be issued each quarter. The Preferred Stock would be issued for the purpose of making payments in kind in lieu of cash dividends on its outstanding Preferred Stock, consistent with the terms of the Preferred Stock issued pursuant to El Paso's Fourth Amended Stand Alone Plan of Reorganization.

Comment date: January 22, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. Cinergy Services, Inc.

[Docket No. OA97–107–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI and The City of Logansport, Indiana.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Logansport Municipal Utilities, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. Cinergy Services, Inc.

[Docket No. OA97–108–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interchange Agreement between PSI and Baltimore Gas & Electric.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Baltimore Gas & Electric Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. Cinergy Services, Inc.

[Docket No. OA97–109–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI and Kentucky Utilities Company.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Kentucky Utilities Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. Cinergy Services, Inc.

[Docket No. OA97–110–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI and Southern Indiana Gas and Electric Company.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Southern Indiana Gas and Electric Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. Cinergy Services, Inc.

[Docket No. OA97–111–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Power Coordination Agreement between PSI and Indiana Municipal Power Agency.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Indiana Municipal Power Agency, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. Cinergy Services, Inc.

[Docket No. OA97–112–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI and Hoosier Energy Rural Electric Cooperative, Inc. and Southern Indiana Gas and Electric Company.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Hoosier Energy Rural Electric Cooperative, Inc., Southern Indiana Gas and Electric Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. Cinergy Services, Inc.

[Docket No. OA97–113–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interchange Agreement between PSI and Illinois Municipal Electric Agency.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Illinois Municipal Electric Agency, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. Cinergy Services, Inc.

[Docket No. OA97–114–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 19, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI and Louisville Gas and Electric Company.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Louisville Gas and Electric Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. Black Hills Corporation

[Docket No. OA97–115–000]

Take notice that Black Hills Corporation, which operates its electric utility business under the assumed name of Black Hills Power and Light Company (Black Hills) on December 19, 1996, tendered for filing changes to its Economy Power Sales tariff. The changes are required by Commission Order No. 888 and unbundle Black Hills' power supply and transmission services.

Black Hills has requested that further notice requirement be waived and the tariff be allowed to become effective January 1, 1997.

Copies of the filing were provided to, Tri-State Generation and Transmission Association, Inc., PacifiCorp, Montana Power Company, Public Service Company of Colorado, Basin Electric Power Cooperative, Platte River Power Authority, Illinova Power Marketing, Inc., LG&E Power Marketing, Inc., Enron Power Marketing, Inc., KN Marketing, Inc., Rainbow Energy Marketing Corporation, and the regulatory commission of each of the states of South Dakota, Wyoming, and Montana.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. Central Vermont Public Service Corporation

[Docket No. OA97–116–000]

Take notice that on December 19, 1996, Central Vermont Public Service Corporation tendered for filing an application for limited waiver of Order No. 889.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

22. Allegheny Power Service Corp.

[Docket No. OA97–117–000]

Take notice that on December 19, 1996, Allegheny Power Service Corp. (Allegheny) tendered for filing Allegheny's Standards of Conduct.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

23. Allegheny Power Service Corp. on behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. OA97–118–000]

Take notice that on December 19, 1996, Allegheny Power Service Corporation on behalf of Monongahela Power Company and West Penn Power Company (Allegheny Power), and Pennsylvania Power Company and Ohio Edison Company filed a compliance filing, as required by Order No. 888, to unbundle generation and transmission services for transaction after December 31, 1996, offered under an existing coordination agreement.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

24. Central Power and Light Company West Texas Utilities Company

[Docket No. OA97–119–000]

Take notice that on December 20, 1996, Central Power and Light Company (CPL) and West Texas Utilities Company (WTU) sought limited waiver of the Commission's Order No 889 requirements. CPL/WTU explain that they are members of the Electric Reliability Council of Texas and that the ERCOT OASIS will not be fully operational on January 3, 1997. CPL/WTU propose to adhere to interim procedures that enable eligible customers to obtain transmission service under the CPL/WTU open access transmission service tariff in a manner consistent with Order No. 889.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

25. Illinois Power Company

[Docket No. OA97–120–000]

Take notice that on December 20, 1996, Illinois Power Company (IP) tendered for filing an Attachment to its coordination agreements. IP states that the purpose of the Attachment is to unbundle transmission and ancillary service costs from economy energy coordination agreement sales as required by Order 888.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

26. Orange and Rockland Utilities, Inc.

[Docket No. OA97–121–000]

Take notice that on December 20, 1996, Orange and Rockland Utilities, Inc. tendered for filing its Standards of Conduct for the separation of transmission operation functions and generation marketing functions.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

27. Allegheny Power Service Corp. on behalf of Monongahela Power Co., The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. OA97–122–000]

Take notice that on December 20, 1996, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed a request for an extension of time to meet compliance requirements for unbundling future economy transactions under an existing coordination agreement with the PJM Group. Allegheny Power requests an extension until January 31, 1997.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, and the West Virginia Public Service Commission.

Comment date: January 15, 1997, in accordance with Standard Paragraph E at the end of this notice.

28. Cinergy Services, Inc.

[Docket No. OA97–123–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 20, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interchange Agreement between PSI and Blue Ridge Power Agency.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Blue Ridge Power Agency, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

29. Cinergy Services, Inc.

[Docket No. OA97–124–000]

Take notice that Cinergy Services, Inc. (Cinergy) on December 20, 1996, tendered for filing on behalf of its operating companies, The Cincinnati Gas & Electric Company (CG&E) and PSI Energy, Inc. (PSI), modifications to the Interconnection Agreement between PSI Hoosier Energy Rural Electric Cooperative, Inc. and Southern Indiana Gas and Electric Company.

The modifications are being made to comply with the unbundling requirement for coordination contracts contained in the Commission's Order No. 888 by the December 31, 1996 deadline.

Cinergy has requested an effective date of January 1, 1997.

Copies of the filing were served on Hoosier Rural Electric Cooperative, Inc., Southern Indiana Gas and Electric Company, the Kentucky Public Service Commission, the Public Utilities Commission of Ohio and the Indiana Utility Regulatory Commission.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

30. Central Hudson Gas & Electric Corporation

[Docket No. OA97–125–000]

Take notice that on December 20, 1996, Central Hudson Gas & Electric Corporation (Central Hudson) filed, pursuant to Section 37.4(c) of the Commission's Regulations, Central Hudson's procedures for compliance with the Commission's Standards of Conduct for public utilities as set forth in the Commission's OASIS Rule. *Open Access Same Time Information System and Standards of Conduct,* Order 889, FERC Stats. & Regs. (Regulations Preambles 1991–1996) ¶ 31,036 (1996). Central Hudson has proposed that its procedures take effect on January 3, 1997.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

31. Illinois Power Company

[Docket No. OA97–126–000]

Take notice that on December 20, 1996, Illinois Power Company (IP) filed, pursuant to Section 37.4(c) of the Commission's Regulations, IP's procedures for compliance with the Commission's Standards of Conduct for public utilities as set forth in the Commission's OASIS Rule. *Open Access Same Time Information System and Standards of Conduct,* Order 889, FERC Stats. & Regs. (Regulations Preambles 1991–1996) ¶ 31,036 (1996). IP has proposed that its procedures take effect on January 3, 1997.

Comment date: January 21, 1997, in accordance with Standard Paragraph E at the end of this notice.

32. New England Power Company

[Docket No. OA97–127–000]

Take notice that on December 23, 1996, New England Power Company on behalf of the NEES companies submitted its Standards of Conduct filing pursuant to the requirements of Order No. 889.

Comment date: January 23, 1997, in accordance with Standard Paragraph E at the end of this notice.

33. Madison Gas and Electric Company

[Docket No. OA97–128–000]

Take notice that on December 23, 1996, Madison Gas and Electric Company (MGE) tendered for filing with the Federal Energy Regulatory Commission the following sheets from its Original Volume No. 2 (Power Sales Tariff).

First Revised Sheet No. 1
First Revised Sheet No. 2
First Revised Sheet No. 3
First Revised Sheet No. 4
First Revised Sheet No. 5
First Revised Sheet No. 9
First Revised Sheet No. 12
First Revised Sheet No. 13
First Revised Sheet No. 14
First Revised Sheet No. 16
First Revised Sheet No. 17
First Revised Sheet No. 18

MGE states that a copy of the filing has been provided to the Public Service Commission of Wisconsin and all customers taking service under the Power Sales Tariff.

Comment date: January 23, 1997, in accordance with Standard Paragraph E at the end of this notice.

34. Grays Ferry Cogeneration Partnership

[Docket No. QF94–147–002]

On December 23, 1996, Grays Ferry Cogeneration Partnership of 2600 Christian Street, Philadelphia, Pennsylvania 19146, submitted for filing an application for certification of a facility as a qualifying cogeneration facility pursuant to Section 292.207(b) of the Commission's Regulations. No determination has been made that the submittal constitutes a complete filing.

According to the applicant, the topping-cycle cogeneration facility located in Philadelphia, Pennsylvania, will consist of a combustion turbine generator, a steam turbine generator, a heat recovery steam generator, and an auxiliary steam generator. The primary energy source will be natural gas or, in the alternative, No. 2 fuel oil. The thermal output of the facility will be sold to Trigen-Philadelphia which will be used in its steam distribution system to provide its various customers with steam for heating, cooling, hot water, sterilization, food preparation, humidification and other process applications. The maximum net electric power production capacity of the facility will be 178 MW. Electric power produced by the facility will be sold to PECO Energy Company. Construction of the facility commenced on March 8, 1996. The facility is expected to commence commercial operation by December 8, 1997.

Comment date: January 23, 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.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 97–843 Filed 1–13–97; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5676–2]

Notice of Disclosure of Confidential Business Information Obtained Under the Comprehensive Environmental Response, Compensation and Liability Act to EPA Contractor Dynamac, Osage Iron and Metals Superfund Site, Kansas City, Kansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for comments.

SUMMARY: EPA hereby complies with the requirements of 40 CFR 2.301(h) and 40 CFR 2.310(h) for authorization to disclose to its contractor, Dynamac of Rockville, Maryland, cost recovery support documentation for the Osage Iron and Metals Superfund Site, Kansas City, Kansas. This disclosure includes Confidential Business Information (CBI) which has been submitted to EPA Region 7, Superfund Division. Dynamac's principal office is 2275 Research Boulevard, Suite 500, Rockville, Maryland 20850.

FOR FURTHER INFORMATION CONTACT: Jeffrey G. Weatherford, P.E., Superfund Division, Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101, (913) 551–7695.

SUPPLEMENTARY INFORMATION:

Notice of Required Determinations, Contract Provisions and Opportunity to Comment

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), as amended (commonly known as ''Superfund''), requires the establishment of an administrative record upon which the President shall base the selection of a response action. CERCLA also requires the maintenance of many other records. EPA has entered into ESS Contract No. 68–W4–0039 for management of those records. EPA Region 7 has determined that disclosure of CBI to Dynamac is necessary in order that the contractor may carry out the work requested under the above contract with EPA. The contract complies with all requirements of 40 CFR 2.301(h)(2)(ii) and 40 CFR 2.310(h). EPA Region 7 will require that each Dynamac employee working on cost recovery work sign a written agreement that he or she:

(1) Shall use the information only for the purpose of carrying out the work required by the contract;

(2) Shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA regional office; and

(3) Shall return to EPA all copies of the information and any contracts or extracts therefrom (a) upon completion of the contract, (b) upon request of the EPA, or (c) whenever the information is no longer required by Dynamac for performance of work requested under the contract. These non-disclosure statements shall be maintained on file with the EPA Region 7 Project Officer for Dynamac. Dynamac employees will be provided technical direction from their respective EPA contract management staff.

EPA hereby advises affected parties that they have ten (10) working days to comment pursuant to 40 CFR 2.301(h)(2)(iii) and 40 CFR 2.310(h). Comments should be sent to: Jeffrey G. Weatherford, P.E., Environmental Protection Agency, Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101.

Dated: December 23, 1996.

Dennis Grams,

Regional Administrator.

[FR Doc. 97–875 Filed 1–13–97; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. pap. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

American Freight Liners, Inc., One World Trade Center, Suite #4667, New York, NY 10048, Officers: Denzil C. Fernando, President, Sasanka D. Ariyawansa, Vice President

S.L.M.L. Export Inc. d/b/a Scully & Co. Inc., 12777 Jones Road, Suite 310, Houston, TX 77070–4621, Officers: Sharon Lerner, President, Linda Givens, Vice President

Noral Cargo International, Inc., 4745 NW 72nd Avenue, Miami, FL 33166, Officers: Norma E. Garcia, President, Carlos Garcia, Vice President

SR International Logistics, LLC, 12373 West 60th Place, Arvada, CO 80004, Officer: Russell E. Steele, Manager

Neal Brothers, Inc., 9871 Highway 78, Ladson, SC 29456, Officers: David Kenneth Neal, President, Christopher Brindley Warburton, Vice President

Panamerican All Trading Services, Corp., 5461 N.W. 72nd Avenue, Miami, FL 33166, Officers: Jorge Murillo, President, Adriana P. Orozco, Secretary

Trans World Shipping Co. Import/Export, 300 W. Glenoaks Blvd., Glendale, CA 91202 Vartan Nazerian Edward Melkonian Partnership

Dated: January 9, 1997.

Joseph C. Polking,

Secretary.

[FR Doc. 97–830 Filed 1–13–97; 8:45 am]

BILLING CODE 6730–01–M

[Docket No. 97–01]

Alex Parsinia D/B/A Pacific International Shipping and Cargo Express; Order of Investigation

Alex Parsinia (''Parsinia'') is an individual who appears to be doing business under the names Pacific International Shipping (''PIS'') and Cargo Express (''CE''). It appears that from at least September 17, 1995 to the present, Parsinia has provided ocean transportation services to the public for shipments from the United States to foreign countries. PIS and CE appear to dispatch shipments via ocean common carriers, arrange for the transportation of shipments on behalf of shippers, prepare documentation consisting of bills of lading and export documents. Shippers appear to look to PIS and CE for the delivery of shipments,[1] and PIS and CE appear to hold themselves out to perform transportation to the public and accept responsibility for the transportation of shipments. The shipments consist mostly of personal effects or household goods. Shipments are contracted with ocean common carriers under the names of actual shippers as well as under the names PIS and CE.

Section 19(a) of the Shipping Act of 1984 (''1984 Act''), 46 U.S.C. app. 1718(a), provides that no person may act as an ocean freight forwarder unless that person has obtained a license from the Federal Maritime Commission. Section 3(19) of the 1984 Act, 46 U.S.C. app. 1702(19), defines an ocean freight forwarder as a person in the United States that dispatches shipments from the United States to a foreign country via common carriers, books or otherwise arranges space for such shipments on behalf of shippers, and processes the documentation or performs related activities incident to those shipments. In order to obtain an ocean freight forwarder license, a forwarder must furnish to the Commission a bond to insure the financial responsibility of the forwarder, and the Commission must determine that the forwarder is qualified by experience and character to render forwarding services. According to a review of records maintained by the Commission's Bureau of Tariffs, Certification and Licensing, no ocean freight forwarder license has been issued in the name of Alex Parsinia. Therefore, it would appear that Parsinia, by dispatching shipments, by booking or otherwise arranging space for the shipments, and by processing documentation incident to ocean shipments made on behalf of others from the United States, has acted as an ocean freight forwarder without a license issued by the Commission in violation of section 19(a) of the 1984 Act.

Section 8(a) of the 1984 Act, 46 U.S.C. app. 1707(a), provides that each common carrier must file a tariff with the Commission showing all of its rates, charges, classifications, rules, and practices. Section 3(6) of the 1984 Act, 46 U.S.C. 1702(6), in pertinent part, defines a common carrier as a person holding hold out to the public to provide transportation by water between the United States and a foreign country, that assumes responsibility for performing the transportation, and utilizes a vessel operating on the high seas for providing the transportation. Section 3(17) of the 1984 Act, 46 U.S.C. 1702(17), defines a non-vessel-operating common carrier (''NVOCC'') as a common carrier that does not operate the vessels used in providing the ocean transportation and acts as the shipper in relation with the ocean common carrier. Section 23(a) of the 1984 Act, 46 U.S.C. app. 1721(a), further provides that each NVOCC must furnish to the Commission a bond, proof of insurance or other surety, *inter alia,* to insure the financial responsibility of the carrier to pay any judgment for damages arising from its transportation-related activities. According to the records maintained by the Commission's Bureau of Tariffs, Certification and Licensing, no tariff or bond has been filed with the Commission in the name of Alex Parsinia, PIS or CE. Therefore, it would appear that Parsinia, by providing ocean transportation of cargo to the public for shipments between the United States and foreign countries and by contracting as a shipper for the carriage of the cargo, has acted as a NVOCC without a tariff or bond on file with the Commission, in violation of sections 8(a) and 23(a) of the 1984 Act.

Section 11(c) of the 1984 Act, 46 U.S.C. app. 1710(c), sets forth the Commission's authority to investigate violations of the 1984 Act. In the event violations are found, section 13(a) of the 1984 Act, 46 U.S.C. app. 1712(a), provides that the Commission may assess civil penalties. Section 14(a) of the 1984 Act, 46 U.S.C. app. 1713(a), empowers the Commission to issue orders relating to violations of the 1984 Act.

Now therefore it is ordered, That pursuant to sections 8(a), 11(c), 13(a), 14(a), 19(a) and 23(a) of the 1984 Act, an investigation is hereby instituted to determine:

1. Whether Parsinia violated section 19(a) of the 1984 Act by acting as an ocean freight forwarder without a license issued by the Commission;

2. Whether Parsinia violated sections 8(a) and 23(a) of the 1984 Act by acting as a NVOCC without tariff and bond on file with the Commission;

3. Whether, in the event Parsinia violated the 1984 Act, civil penalties should be assessed against Parsinia and, if so, the amount of such penalties; and

4. Whether, in the event violations are found, an appropriate cease and desist order should be issued.

It is further ordered, That a public hearing be held in this proceeding and that this matter be assigned for public hearing before an Administrative Law Judge (''Presiding Officer'') of the Commission's Office of Administrative Law Judges in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The Hearing shall include oral testimony and cross-examination at the discretion of the Presiding Officer only after consideration has been given by the parties and the Presiding Officer to the use of alternative forms of dispute resolution, and upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

It is further ordered, That Alex Parsinia d/b/a Pacific International Shipping and Cargo Express is designated Respondent in this proceeding;

It is further ordered, That the Commission's Bureau of Enforcement is designated a party to this proceeding;

It is further ordered, That notice of this Order be published in the Federal Register and a copy be served on parties of record;

It is further ordered, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72;

It is further ordered, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on parties of record;

It is further ordered, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, and comply with Subpart H of the Commission's Rules of Practice and Procedure, 46 CFR 502.111–119, and shall be served on parties of record; and

It is further ordered, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61, the initial decision of the Administrative Law Judge shall be issued by January 8, 1998,

[1] The Commission's Office of Informal Inquiries and Complaints has received eleven complaints from shippers in regard to difficulties the shippers have encountered in obtaining the delivery of shipments turned over to Parsinia.

and the final decision of the Commission shall be issued by May 8, 1998.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–829 Filed 1–13–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.25 of Regulation Y (12 CFR 225.25) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. Once the notice has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act, including whether consummation of the proposal can ''reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices'' (12 U.S.C. 1843). Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 29, 1997.

A. Federal Reserve Bank of New York (Christopher J. McCurdy, Senior Vice President) 33 Liberty Street, New York, New York 10045:

1. Canadian Imperial Bank of Commerce, Toronto, Canada; to engage *de novo*, through its wholly owned subsidiary, CIBC Investment Corporation, New York, New York (''Company''), in trading for its own account, for purposes other than hedging, in futures, options, and options on futures contracts based on certain securities indices and money market instruments. Canadian Imperial proposes that Company would conduct these activities throughout the world. *See Swiss Bank Corporation*, 81 Fed. Res. Bull. 185 (1995).

Board of Governors of the Federal Reserve System, January 8, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–828 Filed 1–13–97; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 96N–0512]

Hoechst Marion Roussel, Inc., and Baker Norton Pharmaceuticals, Inc.; Terfenadine; Proposal To Withdraw Approval of Two New Drug Applications and One Abbreviated New Drug Application; Opportunity for a Hearing

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is proposing to withdraw approval of two new drug applications (NDA's) and one abbreviated new drug application (ANDA) for drug products containing terfenadine. NDA 18–949 (Seldane) and NDA 19–664 (Seldane-D) are held by Hoechst Marion Roussel (HMR), Inc., P.O. Box 9627, Kansas City, MO 64134–0627. ANDA 74-475 is held by Baker Norton Pharmaceuticals, Inc., 4400 Biscayne Blvd., Miami, FL 33137. On July 25, 1996, FDA approved HMR's NDA 20–625 for fexofenadine hydrochloride (Allegra). Fexofenadine is the active metabolite of terfenadine that is responsible for the desired beneficial properties of terfenadine. When patients take terfenadine, parent terfenadine is ordinarily present in their blood at very low concentrations, because the terfenadine molecule is metabolized to form fexofenadine. Fexofenadine is responsible for providing patients with essentially all the clinical benefits of taking terfenadine. If terfenadine's metabolism is inhibited, either by another drug or by intrinsic liver disease, the level of parent terfenadine can rise to levels that can cause serious side effects in people as a result of the effect of parent terfenadine on cardiac potassium channels. Inhibition of these channels causes delayed cardiac repolarization (prolonged electrocardiographic QT interval) and increases the risk of a characteristic kind of ventricular tachycardia called torsades de pointes and possibly the risk of other rhythm abnormalities. Fexofenadine hydrochloride, however, has not been shown to affect cardiac potassium channels and has been shown not to cause prolongation of the electrocardiographic QT interval, even at larger-than-recommended doses. Based on all data to date, fexofenadine hydrochloride appears to lack parent terfenadine's risk of serious cardiovascular adverse events. The basis for the proposed withdrawal of the applications is a finding that the availability of fexofenadine hydrochloride provides patients with an alternative that can provide essentially all the benefits of terfenadine, because it is identical in molecular structure to the metabolized (active) form of terfenadine, without the serious and potentially fatal risks associated with terfenadine when terfenadine's metabolism is inhibited either by another drug or by intrinsic liver disease. Because of the availability of fexofenadine hydrochloride, terfenadine is not shown to be safe for use under the conditions of use that formed the basis upon which the applications were approved.

DATES: A hearing request is due on February 13, 1997; data and information in support of the hearing request are due on March 17, 1997.

ADDRESSES: A request for hearing, supporting data, and other comments are to be identified with docket no. 96N–0512 and submitted to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT:

For information on medical/scientific issues: John K. Jenkins, Center for Drug Evaluation and Research (HFD–570), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–

1050.

For general information concerning this notice: David T. Read, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 301–594–2041.

SUPPLEMENTARY INFORMATION:

I. Background

Terfenadine is an antihistamine, indicated for the relief of symptoms associated with seasonal allergic rhinitis such as sneezing, rhinorrhea, pruritus, and lacrimation. Terfenadine was the first antihistamine approved in the United States that was not associated with more somnolence than placebo in clinical trials. The absence of an increased risk of somnolence over placebo is an important safety advantage to many people who use antihistamines. NDA 18–949 for Seldane tablets (terfenadine 60 milligrams (mg)) was approved by FDA on May 8, 1985. NDA 19–664 for Seldane-D tablets (terfenadine 60 mg and the decongestant pseudoephedrine hydrochloride 120 mg) was approved by FDA on August 19, 1991.

Other antihistamines now available in the United States that were not associated with more somnolence than placebo in clinical trials are astemizole (Hismanal) and loratadine (Claritin), approved on December 29, 1988, and April 12, 1993, respectively. Most significant to this proceeding, on July 25, 1996, FDA approved HMR's NDA 20–625 for fexofenadine hydrochloride 60 mg capsules (Allegra). Fexofenadine is the metabolite of terfenadine responsible for its desired antihistaminic efficacy. Fexofenadine hydrochloride was also not associated with more somnolence than placebo in clinical trials.

After the approval of terfenadine in 1985, there began to be reports of certain serious cardiac adverse events associated with terfenadine use in patients taking certain antimicrobials or with significant liver dysfunction. Very little parent terfenadine normally circulates in the plasma because orally administered terfenadine undergoes extensive first pass metabolism by a specific cytochrome P–450 isoenzyme (CYP3A4). This metabolic pathway may be impaired in patients with liver dysfunction (e.g., alcoholic cirrhosis) or who are taking drugs such as ketoconazole, itraconazole, or macrolide antimicrobials (e.g., clarithromycin, erythromycin, or troleandomycin). These drugs are all inhibitors of the cytochrome P–450 isoenzyme.

Interference with the normal metabolism of terfenadine can lead to elevated plasma terfenadine levels. At these elevated levels, terfenadine can delay cardiac repolarization (prolong the electrocardiographic QT interval) because of its effects on cardiac potassium channels. The delayed cardiac repolarization increases the risk of serious ventricular tachyarrhythmias, most characteristically a kind of ventricular tachycardia called torsades de pointes. This arrhythmia can cause dizziness and syncope when it is short-lived, but it may persist and degenerate into unstable ventricular tachycardia or ventricular fibrillation. Ventricular fibrillation is fatal if not promptly reversed. These serious and possibly fatal events can occur at the recommended dose of terfenadine if it is taken along with other medications that interfere with its metabolism or if it is administered to someone with significant hepatic dysfunction.

In an effort to inform the medical and patient communities about the serious and potentially fatal cardiac adverse effects associated with inappropriate use of terfenadine, the labeling for Seldane and Seldane-D have been revised many times. In 1992, terfenadine labeling was revised to include a prominent boxed warning cautioning against its use in certain settings, particularly with the drugs that inhibit its metabolism. In addition, ''Dear Health Care Professional'' letters warning health care practitioners of the serious risk of inappropriate use of terfenadine were issued by the sponsor in 1990, 1992, and 1996.

Although the revised labeling and ''Dear Health Care Professional'' letters have significantly reduced the inappropriate prescribing of terfenadine together with the drugs that block its metabolism, such prescribing and dispensing has not been eliminated and almost certainly cannot be. Three recently published studies indicate that coprescription and codispensing of medications contraindicated with terfenadine continues to occur (Refs. 1, 2, and 3). The Cavuto study also demonstrates that the computerized drug-interaction screening programs used by many pharmacists, who are the last line of defense against prescribing errors, do not completely prevent prescribing and filling of prescriptions for potentially dangerous combinations of terfenadine and contraindicated drugs.

Terfenadine is an antihistamine that is intended to be used when symptoms of seasonal allergic rhinitis occur. Patients often do not consume all of the pills they receive in a prescription of terfenadine for a single episode of seasonal allergic rhinitis, and may keep the remaining pills for later use when needed, as patients often do with over-the-counter antihistamines. Because of the nature of seasonal allergies, a long period of time (e.g., from early fall to spring) can elapse between the time the drug and any associated warning from a health care practitioner or pharmacist is received and the time terfenadine is used. Such intermittent dosing of terfenadine increases the probability that some patients may be taking one of the contraindicated medications, such as one of the frequently prescribed antimicrobials listed above, at the same time the patient self-diagnoses his or her seasonal allergy symptoms and takes the remaining terfenadine from the pill container in the medicine chest.

This problem of concomitant use is further compounded by the growing list of medications known to inhibit the metabolism of terfenadine, many of which are taken for chronic medical conditions and may be prescribed by health care practitioners other than the practitioner who prescribed the terfenadine. Labeling changes and even perfect performance by prescribers and close attention by pharmacists, therefore, cannot completely eliminate the risks of serious cardiac adverse events associated with the inappropriate use of terfenadine.

Very low to undetectable blood levels of parent terfenadine are found in patients taking the recommended dose of terfenadine. For this reason, parent terfenadine appears to have very little, if any, impact on the therapeutic efficacy that is associated with terfenadine use.

The discovery of terfenadine's ability to delay cardiac repolarization and its associations with serious and sometimes fatal cardiac adverse events when used inappropriately led to evaluation of its principal active metabolite as a potentially safer alternative antihistamine. It was discovered that the metabolite that is responsible for the desired therapeutic effect of terfenadine, fexofenadine, does not affect cardiac potassium channels. The agency, therefore, encouraged HMR to initiate the development of a drug product with only the active metabolite fexofenadine as the active antihistamine. Even at doses considerably in excess of those recommended for use, fexofenadine hydrochloride has not been shown to prolong the QT interval. It therefore should not have, and has not been shown to have, the serious cardiovascular adverse events potentially associated with unmetabolized terfenadine. No new adverse reaction, not already associated with terfenadine, would be expected because the many people who have taken terfenadine have been, in fact, exposed primarily to fexofenadine manufactured by their body.

An NDA for fexofenadine hydrochloride was approved by FDA on July 25, 1996. Nearly 5 months of marketing of this product in the United States have not resulted in any reports of serious cardiac arrhythmias.

Prior to the approval of fexofenadine hydrochloride, the agency considered terfenadine to be safe (i.e., its benefits outweighed its risks) despite terfenadine's known serious adverse effects when its metabolism was blocked and despite the availability of alternative antihistamines that, like terfenadine, were not associated with greater somnolence than placebo in clinical trials. This is because the agency recognizes that responses to drugs are not uniform among individuals and, for reasons that are often unclear and difficult to discover, some patients may respond better, with respect to therapeutic effectiveness or tolerance, to one drug than to another. Terfenadine certainly provided a unique therapeutic benefit when it was the only available antihistamine that was not associated with more somnolence than placebo in clinical trials, and it continued to provide a benefit and choice to patients even after the approval of astemizole and loratadine (e.g., some patients may have found that terfenadine provided some advantage over either of the other two products or may have been unable to tolerate the alternative medications for a variety of medical reasons, including drug allergy). So long as terfenadine represented a unique molecule, the agency concluded that terfenadine's risks, which had been greatly reduced by labeling changes and public awareness, were acceptable in light of its benefits. It is only now, when there is an alternative that is identical to the molecule that provides the therapeutic benefits of terfenadine, that terfenadine's benefits do not outweigh its risks. This is because essentially all of its benefits can be obtained with fexofenadine hydrochloride without the cardiovascular risk caused by QT prolongation.

Currently, there is no combination of fexofenadine hydrochloride and pseudoephedrine approved for marketing in the United States. Although the absence of a fexofenadine hydrochloride/pseudoephedrine combination product may be inconvenient for patients currently taking Seldane-D, there are available over-the-counter extended-release pseudoephedrine 120 mg products that could be taken with fexofenadine hydrochloride to provide symptomatic relief comparable to that provided by Seldane-D for the treatment of seasonal allergic rhinitis. The minor inconvenience to patients of having to take separate fexofenadine hydrochloride and extended-release pseudoephedrine doses is more than offset by the cardiac safety advantage of fexofenadine hydrochloride over terfenadine.

Accordingly, the Director of the Center for Drug Evaluation and Research concludes with respect to NDA 18–949 (terfenadine 60 mg) that: (1) Prior to the approval of fexofenadine hydrochloride, terfenadine provided a unique therapeutic alternative for which the risks associated with the use of terfenadine were acceptable; (2) terfenadine provides no therapeutic benefit to any patient population that is not also provided by fexofenadine hydrochloride, because fexofenadine hydrochloride is identical in molecular structure to terfenadine's therapeutically active metabolite; (3) current data demonstrate that fexofenadine hydrochloride lacks the serious cardiovascular risks associated with misuse of terfenadine, and approximately 5 months of marketing experience with fexofenadine hydrochloride in the United States has not resulted in any reports of serious cardiac arrythmias; (4) despite the many interventions undertaken by the agency and by HMR (three ''Dear Health Care Professional'' letters, multiple labeling changes, and extensive education campaigns), residual coprescribing, codispensing, and concomitant use of terfenadine with a growing list of medications that inhibit its metabolism continues and cannot be expected to be completely eliminated; and (5) terfenadine, therefore, is no longer shown to be safe for use under the conditions that formed the basis upon which the application was initially approved. The Director also finds that ANDA 74–475 refers to NDA 18–949 (Seldane, 60 mg terfenadine oral tablets) as the listed drug. The Director further finds that the conclusions set out above for NDA 18–949 apply with respect to NDA 19–664 (terfenadine 60 mg and pseudoephedrine 120 mg), and that the inconvenience to patients of taking separate doses of fexofenadine hydrochloride and extended-release pseudoephedrine is more than offset by the cardiac safety advantage of fexofenadine hydrochloride over terfenadine. The Director is proposing to withdraw approval of NDA 18–949 and NDA 19–664 in accordance with section 505(e)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(e)(2)). The Director is proposing to withdraw approval of ANDA 74–475 in accordance with section 505(j)(5) of the act.

II. Notice of Opportunity for a Hearing

The Director has evaluated the information discussed above and, on the grounds stated, is proposing to withdraw approval of NDA 18–949, NDA 19–664, and ANDA 74–475. Therefore, notice is given to HMR and Baker Norton Pharmaceuticals, Inc. that the Director proposes to issue an order under section 505(e)(2) of the act, withdrawing approval of NDA 18–949 and NDA 19–664, and all amendments and supplements thereto, and under section 505(j)(5) of the act, withdrawing approval of ANDA 74–475, and all amendments and supplements thereto. The Director finds that new evidence of clinical experience, not contained in NDA 18–949 and NDA 19–664 or not available to the Director until after the applications were approved, evaluated together with the evidence available to the Director when the applications were approved, shows that terfenadine is not shown to be safe for use under the conditions which formed the basis upon which the applications were approved. The Director also finds that ANDA 74–475 refers to the drug that is the subject of NDA 18–949.

In accordance with section 505 of the act and part 314 (21 CFR part 314), HMR and Baker Norton Pharmaceuticals, Inc. are hereby given an opportunity for a hearing to show why approval of the NDA's should not be withdrawn.

An applicant who decides to seek a hearing shall file: (1) On or before February 13, 1997, a written notice of appearance and request for hearing, and (2) on or before March 17, 1997, the data, information, and analyses relied on to demonstrate that there is a genuine issue of material fact to justify a hearing, as specified in § 314.200. Any other interested person may also submit comments on this notice. The procedures and requirements governing this notice of opportunity for a hearing, a notice of appearance and request for a hearing, information and analyses to justify a hearing, other comments, and a grant or denial of a hearing are contained in §§ 314.151 and 314.200, and in 21 CFR part 12.

The failure of an applicant to file a timely written notice of appearance and request for hearing, as required by § 314.200, constitutes an election by that person not to use the opportunity for a hearing concerning the action proposed and a waiver of any contentions concerning the legal status of that person's drug products. Any new drug product marketed without an approved new drug application is subject to regulatory action at any time.

III. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Thompson, D., and G. Oster, ''Use of Terfenadine and Contraindicated Drugs,'' *Journal of the American Medical Association*, 275(17):1339–1341, 1996.

2. Cavuto, N. J., R. L. Woosley, and M. Sale, ''Pharmacies and Prevention of Potentially Fatal Drug Interactions'' (letter), *Journal of the American Medical Association*, 275(14):1086–1087, 1996.

3. Carlson, A. M., and L. S. Morris, ''Coprescription of Terfenadine and Erythromycin and Ketoconazole: An Assessment of Potential Harm,'' *Journal of the American Pharmaceutical Association*, NS36(4):263–269, 1996.

A request for a hearing may not rest upon mere allegations or denials, but must present specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for a hearing that there is no genuine and substantial issue of fact that precludes the withdrawal of approval of the applications, or when a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person who requests the hearing, making findings and conclusions, and denying a hearing.

All submissions pursuant to this notice of opportunity for a hearing are to be filed in four copies. Except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, the submissions may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (sec. 505 (21 U.S.C. 355)) and under authority delegated to the Director of the Center for Drug Evaluation and Research (21 CFR 5.82).

Dated: January 7, 1997.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 97–714 Filed 1–10–97; 8:45 am]

BILLING CODE 4160–01–F

National Institutes of Health

Consensus Development Conference on Breast Cancer Screening For Women Ages 40–49

Notice is hereby given of the NIH Consensus Development Conference on ''Breast Cancer Screening For Women Ages 40–49,'' which will be held January 21–23, 1997, in the Natcher Conference Center of the National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892. The conference begins at 8:30 a.m. on January 21, at 8 a.m. on January 22, and at 9 a.m. on January 23.

A number of randomized clinical trials have shown clearly that early detection of breast cancer by mammography, with and without clinical breast examination at regular intervals ranging from 1 year to 33 months, reduces breast cancer mortality in women ages 50–69 by about a third. However, the picture is not as clear for women 40–49 years of age, and worldwide experts continue to examine the data regarding the use of mammography in this age group. Follow-up data from the Swedish, Canadian, Edinburgh (U.K.), and health Insurance Plan of New York clinical trials will be presented at the conference in an attempt to help clarify these issues.

This conference will bring together the investigators who have conducted the randomized clinical trials, epidemiologists, statisticians, radiologists, oncologists, and other experts, as well as representatives of the public, to present and discuss the latest data and data analyses.

After 1½ days of presentations and audience discussion, an independent, no-Federal consensus panel will weigh the scientific evidence and write a draft statement that it will present to the audience on the third day. The consensus statement will address the following key questions:

—Is there a reduction in mortality from breast cancer due to screening women ages 40 to 49 with mammography, with or without physical examination? If so, how large is the benefit? How does it change with age?

—What are the risks associated with screening women ages 40–49 with mammography and with physical examination?

Are there other benefits? If so, what are they? How do they change with age?

—What is known about how the benefits and risks of breast cancer screening differ based on known risk factors for breast cancer?

—What are the directions for future research?

The primary sponsors of this conference are the National Cancer Institute and the NIH Office of Medical Applications Research. The conference is cosponsored by the National Institute on Aging, the NIH Office of Research on Women's Health, and the Centers for Disease Control and Prevention.

Advance information on the conference program and conference registration materials may be obtained from Hope Levy Cott, Technical Resources International, Inc., 3202 Tower Oaks Blvd., Suite 200, Rockville, Maryland 20852, (301) 770–3153, or by sending e-mail to confdept@tech-res.com.

The consensus statement will be submitted for publication in professional journals and other publications. In addition, the statement will be available beginning January 23, 1997, from the NIH Consensus Program Information Center, P.O. Box 2577, Kensington, Maryland 20891, phone 1–888–NIH–CONSENSUS (1–888–644–2667), and from the NIH Consensus Development Program site on the World Wide Web at http://consensus.nih.gov.

Dated: January 7, 1997.

Ruth L. Kirschstein,

Deputy Director, NIH.

[FR Doc. 97–850 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

John E. Fogarty International Center for Advanced Study in the Health Sciences; Notice of Meeting of the Fogarty International Center Advisory Board

Pursuant to Public Law 92–463, as amended, notice is hereby given of the thirty-fifth meeting of the Fogarty International Center (FIC) Advisory Board, February 4, 1997, in the Lawton Chiles International House (Building 16) at the National Institute of Health.

The meeting will be open to the public from 8:30 a.m. to 12:00 p.m.

The agenda will include a report by the Director, FIC; a report on the Recommendations of the External Advisory Panel to Review NIH/FIC International Programs followed by a discussion of the recommendations led by the Director, NIH; a report on the December Meeting of the Advisory Committee to the Director, NIH; a presentation on the recommendations of a review panel on the FIC AIDS International Training and Research Program; and a report on the International Conference on Malaria that took place in Dakar, Senegal, January 6–9.

In accordance with the provisions of section 552b(c)(4) and 552b(c)(6), Title 5, United States Code and section 10(d) of Public Law 92–463, as amended, the meeting will be closed to the public from 1:00 p.m. to adjournment for the review of applications for awards under the Senior International Fellowship Program and the International Research Fellowship Program; and the Fogarty International Research Collaboration Awards and HIC, AIDS and Related Illnesses Collaboration Awards.

Paula Cohen, Committee Management Officer, Fogarty International Center, National Institutes of Health, Building 31, Room B2C08, 31 Center Dr, MSC 2220, Bethesda, Maryland 20892–2220, telephone: 301–496–1491, will provide a summary of the meeting and a roster of the committee members upon request.

Irene Edwards, Executive Secretary, Fogarty International Center Advisory Board, Building 31, Room B2C08, telephone: 301–496–1491, will provide substantive program information.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Cohen at least 2 weeks in advance of the meeting.

(Catalog of Federal Domestic Assistance Program No. 93.989, Senior International Awards Program)

Dated: January 9, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–852 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute; Notice of Closed Meeting

Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the President's Cancer Panel. This meeting will be closed in accordance with the provisions of section 552b(c)(9)(B), Title 5 U.S.C., for discussion and preparation of the Annual Report of the Chair to the President for 1996. These discussions could disclose information, the premature disclosure of which would be likely to significantly frustrate implementation of proposed action the Panel may plan to take.

Cynthia Morgan, Committee Management Specialist, National Cancer Institute, Executive Plaza North, Room 630E, 6130 Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405 (301/496–5708) will provide a copy of the roster of committee members upon request. Other information pertaining to the meeting may be obtained from the contact person indicated below.

Committee Name: President's Cancer Panel.
Date: February 4, 1997.
Place: Hyatt Regency Bethesda, 1 Bethesda Metro Center, Bethesda, MD 20814.
Closed: 9:30 a.m. to 4:00 p.m.
Agenda: Discusson and preparation of the Annual Report of the Chair to the President.
Contact Person: Maureen O. Wilson, Ph.D., Executive Secretary, National Cancer Institute, Building 31, Room 4A48, Bethesda, MD 20892, Telephone: (301) 496–1148.

Dated: January 7, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–851 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Cancer Institute; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Cancer Institute Special Emphasis Panel (SEP) meetings:

Name of SEP: Metabolic Imaging of Cancer and Its Response to Therapy.
Date: January 26–28, 1997.
Time: January 26–7 p.m., January 26–28—8 a.m.
Place: The Madison A Renaissance Hotel, 515 Madison Street, Seattle, Washington 98104.
Contact Person: Ray Bramhall, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 636, 6130 Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405, Telephone: 301/496–3428.
Purpose/Agenda: To review, discuss and evaluate individual grant applications.

This notice is being published less than 15 days prior to the above meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

Name of SEP: Colorectal Cancer Screening: A Cancer Control Opportunity.
Date: February 3–5, 1997.
Time: February 3–7 p.m., February 4–5—8 a.m.
Place: The Double Tree Hotel, 10760 Wilshire Boulevard, Los Angeles, California 90034.
Contact Person: Ray Bramhall, Ph.D., Scientific Review Administrator, National Cancer Institute, NIH, Executive Plaza North, Room 636, 6130 Executive Boulevard, MSC 7405, Bethesda, MD 20892–7405, Telephone: 301/496–3428.
Purpose/Agenda: To review, discuss and evaluate individual grant applications.

The meetings will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control)

Dated: January 8, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–857 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Heart, Lung, and Blood Institute; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Heart, Lung, and Blood Special Emphasis Panel (SEP) meetings:

Name of SEP: Maintenance of a Biological Specimen Repository.
Date: February 4, 1997.
Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.
Contact Person: Diane M. Reid, M.D., Two Rockledge Center, Room 7182, 6701 Rockledge Drive, Bethesda, MD 20892–7924, (301) 435–0277.
Purpose/Agenda: To review and evaluate contract proposals.

This notice is being published less than fifteen days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

Name of SEP: Comprehensive Sickle Cell Center.
Date: May 12–14, 1997.
Time: 8:00 a.m.
Place: Holiday Inn Bethesda, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.
Contact Person: Deborah P. Beebe, Ph.D., Two Rockledge Center, Room 7178, 6701 Rockledge Drive, Bethesda, MD 20892–7924, (301) 435–0270.
Purpose/Agenda: To review and evaluate grant applications.

These meetings will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Programs Nos. 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; and 93.839, Blood Diseases and Resources Research, National Institutes of Health)

Dated: January 9, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–853 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Meeting, National Arthritis and Musculoskeletal and Skin Diseases Advisory Council

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council to provide advice to the National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS) on February 4, 1997, in Conference Room 6, Building 31, National Institutes of Health, Bethesda, Maryland.

The meeting will be open to the public February 4 from 8:30 a.m. to 12:00 p.m. to discuss administrative details relating to Council business and special reports. Attendance by the public will be limited to space available.

The meeting of the Advisory Council will be closed to the public on February 4 from 1:00 p.m. to adjournment in accordance with provision set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications. These deliberations could reveal confidential trade secrets or commercial property, such as patentable material, and personal information concerning individuals associated with the applications, disclosure of which would constitute a clearly unwarranted invasion of personal property.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Dr. Steven Hausman, Executive Secretary, National Arthritis and Musculoskeletal and Skin Diseases Advisory Council, NIAMS, Natcher Building, Room 5AS–13, Bethesda, Maryland 20892 (301) 594–2463.

A summary of the meeting and roster of the members may be obtained from the Extramural Programs Office, NIAMS, Natcher Building, Room 5AS–13, National Institutes of Health, Bethesda, Maryland 20892 (301) 594–2463.

(Catalog of Federal Domestic Assistance Program No. 93.846, Arthritis, Bone and Skin Diseases, National Institutes of Health)

Dated: January 8, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–854 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Institutes of Health (NIH)

National Institute on Aging; Notice of Meeting of the National Advisory Council on Aging

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the National Advisory Council on Aging, National Institute on Aging, Thursday, January 30, and Friday, January 31, 1997, to be held at the National Institutes of Health, Building 31, Conference Room 6, Bethesda, Maryland. This meeting will be open to the public on Thursday, January 30, from 8:30 a.m. to 2:30 p.m. for comments from public interest groups, the Director’s Status Report, a presentation from the NIA Public Information Office, and a report of the NIA Intramural Program.

The meeting will be open again on Friday, January 31, from 8:00 a.m. until adjournment for a report on the future of Peer Review in the Division of Research Grants, a discussion on training, a report on the Geriatrics Program Review, a report on the Working Group on Program, and a report on the Advisory Committee to Director and the Committee of Council Representatives. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. and sec. 10(d) of Public Law 92–463, the meeting of the Council will be closed to the public on Thursday, January 30, from 2:30 p.m. to recess for the review, discussion and evaluation of grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Ms. June McCann, Committee Management Officer for the National Institute on Aging, National Institutes of Health, Gateway Building, 7201 Wisconsin Avenue, Suite 2C218, Bethesda, Maryland 20892 (301/496–9322), will provide a summary of the meeting and a roster of committee members upon request.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. McCann at (301) 496–9322, in advance of the meeting.

This notice is being published less than fifteen days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program No. 93.866, Aging Research, National Institutes of Health)

Dated: January 8, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–855 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Dental Research; Notice of Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Dental Research Special Emphasis Panel (SEP) meetings:

Name of SEP: National Institute of Dental Research Special Emphasis Panel-Review of R13 Grant (97–19).

Dates: January 28, 1997.

Time: 12:15 p.m.

Place: National Institutes of Health, 4500 Center Drive, Natcher Building, Room 4AN–44F, Bethesda, MD 20892, (Teleconference).

Contact person: Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN–44F, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda: To evaluate and review grant applications and/or contract proposals.

This notice is being published less than fifteen days prior to the meetings due to the urgent need to meet timing limitations imposed by the review and funding cycle.

Name of SEP: National Institute of Dental Research Special Emphasis Panel-Review of P01 Grant (97–16).

Dates: February 05, 1997.

Time: 8:30 a.m.

Place: Hyatt Regency Hotel, One Bethesda Metro Center, Bethesda, MD 20814.

Contact person: Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN–44F, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda: To evaluate and review grant applications and/or contract proposals.

Name of SEP: National Institute of Dental Research Special Emphasis Panel-Review of P01 Grants (97–17).

Dates: February 26–28, 1997.

Time: 8:30 a.m.

Place: Hyatt Regency Hotel, Dulles, 2300 Dulles Corner Boulevard, Herndon, Virginia 20171.

Contact Person: Dr. George Hausch, Chief, Grants Review Section, 4500 Center Drive, Natcher Building, Room 4AN–44F, Bethesda, MD 20892, (301) 594–2372.

Purpose/Agenda: to evaluate and review grant applications and/or contract proposals.

The meetings will be closed in accordance with the provisions set forth in Sections 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.121, Oral Diseases and Disorders Research)

Dated: January 8, 1997.

Paula N. Hayes,

Acting Committee Management Officer, NIH.

[FR Doc. 97–856 Filed 1–13–97; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4200–N–03]

Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due: March 17, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Oliver Walker, Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 9116, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Susan Hoyer, Telephone number (202) 708–2700 (this is not a toll-free number) for copies of the proposed forms and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended.

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Application for HUD/FHA Insured Mortgage.

OMB Control Number: 2502–0059.

Description of the need for the information and the proposed use: The Addendum to the Uniform Residential Loan Application and related documents are needed to determine the eligibility of the borrower and proposed request for FHA mortgage insurance.

Agency form numbers: HUD–92900–A, 92544, 92900–WS and 92561.

Members of affected public: Lending Industry and Borrowers.

An estimation of the total numbers of hours needed to prepare the information collection is 215,025, number of respondents is 1,000,000, frequency response is on occasion, and the hours of response is 1 hour.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 27, 1996.

Stephanie A. Smith,

General Deputy Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 97–869 Filed 1–13–97; 8:45 am]

BILLING CODE 4210–27–M

[Docket No. FR–4200–N–02]

Notice of Proposed Information Collection for Public Comment

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below, regarding the competitive components of the Housing Opportunities for Persons with AIDS (HOPWA) program, will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due March 17, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Shelia E. Jones, Department of Housing and Urban Development, 451 7th Street SW., Room 7230, Washington, DC 20410.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35 as amended).

The Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The HOPWA program is authorized by the AIDS Housing Opportunity Act (42 U.S.C. 12901) as amended by the

Housing and Community Development Act of 1992 (Pub. L. 102–550, approved October 28, 1992). The program is governed by the HOPWA Final Rule, 24 CFR Part 574, as amended, and the Consolidated Submissions for Community Planning and Development Programs, Final Rule, 24 CFR Part 91, as amended. This paper work submission extends the current collection of information that is used by the Department in conducting an annual competition to award program funds and in reviewing grant performance reported in annual progress reports. The information collected is essential in order to implement statutory requirements.

The Housing Opportunities for Persons with AIDS (HOPWA) program provides housing assistance and supportive services for low-income persons with HIV/AIDS and their families. Ten percent of the appropriated funds are awarded by competition as grants under two categories of assistance as: (1) Special Projects of National Significance (SPNS) which, due to their innovation nature or their potential for replication, are likely to serve as effective models in addressing the needs of eligible persons; Applications for this category can be submitted by States, local governments and non-profit organizations; and (2) Projects which are part of Long-term Comprehensive Strategies for providing housing and services for eligible persons in non-formula areas. Applications for this category can be submitted by States and local governments to undertake activities in areas that did not qualify for formula allocations during the fiscal year. Funds may be used over a three year operating period. Grantees report to the Department on an annual basis on program accomplishments in annual progress reports.

This Notice also lists the following information:

Title of Proposal: Housing Opportunities for Persons with AIDS (HOPWA) program.

OMB Control Number, if applicable: 2506–0133.

Description of the need for the information and proposed use: The information to be collected is provided in applications for competitively-awarded funds and in annual progress reports for grantees who receive these awards.

Agency form numbers, if applicable: HUD–40110–B and HUD–40110–C.

Members of affected public: States, units of general local government, and non-profit organizations.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Activity	Number of respondents	Frequency of response	Hours of response
Application	150	1	44
Annual Progress Reports	75	1	65

The total annual estimated burden hours for these optional activities are 11,826 hours, including 351 hours that are estimated for miscellaneous activities such as grant signing, amendments, environmental, and relocation activities.

Status of the proposed information collection: Public comment requested by HUD.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

FOR FURTHER INFORMATION CONTACT: Fred Karnas, Jr., Director, Office of HIV/AIDS Housing, Room 7154, U.S. Department of Housing and Urban Development, 451 Seventh Street, N.W., Washington, DC 20410, and telephone number (202) 708–1934 (this is not a toll-free number) and TTY 1–800–877–8339 for copies of the proposed forms and other available documents.

Dated: January 8, 1997.

Andrew Cuomo,

Assistant Secretary for Community Planning and Development.

[FR Doc. 97–870 Filed 1–13–97; 8:45 am]

BILLING CODE 4210–29–M

[Docket No. FR–4200–N–04]

Submission for OMB Review: Comment Request

AGENCY: Office of Administration, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments due date: February 13, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within thirty (30) days from the date of this Notice. Comments should refer to the proposal by name and/or OMB approval number and should be sent to: Joseph F. Lackey, Jr., OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kay F. Weaver, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, Southwest, Washington, DC 20410, telephone (202) 708–0050. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Ms. Weaver.

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. Chapter 35).

The Notice lists the following information: (1) The title of the information collection proposal; (2) the Office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the names and telephone numbers of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 3, 1997.

David S. Cristy,

Acting Director, Information Resources, Management Policy and Management Division.

Notice of Submission of Proposed Information Collection to OMB

Title of Proposal: Housing Owner's Certification and Application for Tenant Assistance Payments, Schedule of Tenant Assistant Payments Due, Schedule of Section 8 Special Claims, and Special Claims Worksheet.

Office: Housing.

OMB Approval Number: 2502–0182.

Description of the Need for the Information and its Proposed Use: These forms are used by owners to request monthly housing assistance payments for eligible families, to limit the number of Section 8 units to those families whose incomes are less than 50 percent of the area median, and to restrict admission of ineligible tenants.

Form Number: HUD–52670, HUD–52670A, and HUD–52671A thru D.

Respondents: Individuals or Households and Business or Other For-Profit.

Frequency of Submission: Monthly.

Reporting Burden:

	Number of respondents	×	Frequency of response	×	Hours per response	=	Burden hours
Information Collection	352,045		1		452		159,124

Total Estimated Burden Hours: 159,124.

Status: Reinstatement, without changes.

Contact: Barbara D. Hunter, HUD, (202) 708–3944, Joseph F. Lackey, Jr., OMB, (202) 395–7316.

[FR Doc. 97–868 Filed 1–13–97; 8:45 am]

BILLING CODE 4210–01–M

DEPARTMENT OF THE INTERIOR

Office of the Assistant Secretary, Water and Science, Central Utah Project Completion Act

AGENCIES: The Department of the Interior (Department) and the Central Utah Water Conservancy District (District).

ACTION: Notice of availability of the Draft Environmental Impact Statement and extension of comment period: DES 96–51.

SUMMARY: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, the Department, and the District have issued a joint Draft Environmental Impact Statement (Draft EIS) on the Upalco Unit Replacement Project (Upalco). The Draft EIS was filed with the Environmental Protection Agency on December 27, 1996. However, the distribution of the Draft EIS to Agencies/persons was not made simultaneously with the filing. Therefore, the date for submittal of written comments is being extended and the dates of the public hearings are being changed. The distribution to Agencies/persons was made on January 8, 1997.

DATES: Written comments on the Draft EIS must be submitted or postmarked no later than March 17, 1997. Comments on the Draft EIS may also be presented verbally or submitted in writing at the public hearings to be held at the following times and locations:

- Tuesday, February 25, 1997, 1:00 p.m., Ute Tribal Auditorium, Ute Tribal Headquarters, Fort Duchesne, Utah
- Tuesday, February 25, 1997, 6:00 p.m., Altamont High School Auditorium, Highway 87 (North Side), Altamont, Utah
- Wednesday, February 26, 1997, 6:00 p.m., Salt Lake, Salt Lake County Commission Chambers, Room N1100, Salt Lake City, Utah.

The public hearings are being held to address the Draft EIS for the proposed Upalco Unit Replacement Project. In order to be included as part of the hearing record, written testimony must be submitted at the time of the hearing. Verbal testimony will be limited to 5 minutes. Those wishing to give testimony at a hearing should submit a registration form, included at the end of the Draft EIS, to the address listed below by February 18, 1997.

ADDRESSES: Comments on the Draft EIS should be addressed to: Terry Holzworth, Project Manager, Central Utah Water Conservancy District, 355 West 1300 South, Orem, Utah 84058.

FOR FURTHER INFORMATION: Additional copies of the Draft EIS, copies of the resources technical reports, or information on matters related to this notice can be obtained on request from: Ms. Nancy Hardman, Central Utah Water Conservancy District, 355 West 1300 South, Orem, Utah 84058, Telephone: (801) 226–7187, Fax: (801) 226–7150.

Copies are also available for inspection at:

Central Utah Water Conservancy District, 355 West 1300 South, Orem, Utah 84058

Department of the Interior, Natural Resource Library, Serials Branch, 18th and C Streets, NW., Washington, DC 20240

Department of the Interior, Central Utah Project Completion Act Office, 302 East 1860 South, Provo, Utah 84606

Bureau of Indian Affairs, Uintah and Ouray Agency, 988 South 7500 East, Fort Duchesne, Utah 84026.

Dated: January 8, 1997.

Ronald Johnston,

CUPCA Program Director, Department of the Interior.

[FR Doc. 97–838 Filed 1–13–97; 8:45 am]

BILLING CODE 4310–RK–P

[MT–960–1150–00]

District Advisory Council Meeting

AGENCY: Bureau of Land Management, Dakotas District Office, Interior.

ACTION: Notice of meeting.

SUMMARY: A meeting of the Dakotas District Resource Advisory Council will be held March 3–4, 1997, at the Northern Hills Ramada Inn, Spearfish, South Dakota. The sessions will convene at 8:00 a.m. on both days. Agenda items include updates on the North Dakota Mineral Exchange, North and South Dakota Land Exchanges, and the District minerals program. The council will also review public comments on the *Standards and Guidelines Draft Environmental Impact Statement.*

The meeting is open to the public and a public comment period is set for 8:00 a.m. on the 4th. The public may make oral statements before the Council or file written statements for the Council to consider. Depending on the number of persons wishing to make an oral statement, a per-person time limit may be established. Summary minutes of the meeting will be available for public inspection and copying during regular business hours.

The 12-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with public land management.

FOR FURTHER INFORMATION CONTACT: Jon Pinner, Administrative Officer, Dakotas District Office, 2933 3rd Avenue West, Dickinson, ND 58601. Telephone (701) 225–9148.

Dated: January 8, 1997.

Douglas J. Burger,

District Manager.

[FR Doc. 97–837 Filed 1–13–97; 8:45 am]

BILLING CODE 4310–DN–P

National Park Service

Notice of Availability of the Final Development Concept Plan/ Abbreviated Final Environmental Impact Statement for the Entrance Area and Road Corridor, Denali National Park and Preserve, Alaska

AGENCIES: National Park Service, Interior.

ACTION: Notice of Availability of the Final Development Concept Plan/ Abbreviated Final Environmental Impact Statement for the entrance area and road corridor, Denali National Park and Preserve, Alaska.

SUMMARY: The National Park Service announces the availability of a Final Development Concept Plan/Abbreviated Final Environmental Impact Statement (DCP/EIS) for the Entrance Area and Road Corridor (Front Country) of Denali National Park and Preserve. The document describes and analyzes the environmental impacts of a proposed action and three other action alternatives for visitor facilities and services. A no action alternative also is evaluated.

DATES: A Record of Decision will be made no sooner than 30 days after the date of this notice.

ADDRESSES: Copies of the statement are available on request from: Superintendent, Denali National Park and Preserve, P.O. Box 9, Denali Park, Alaska 99755.

Public reading copies of the final DCP and abbreviated final EIS will be available for review in the following locations:

Office of Public Affairs, National Park Service, Department of the Interior, 1849 C Street, Room 3424, Washington, DC 20240, telephone: (202) 208–6843.

Alaska System Support Office, National Park Service, 2525 Gambell Street, Room 404, Anchorage, Alaska 99503–2892, telephone: (907) 257–2647.

FOR FURTHER INFORMATION CONTACT: Mike Tranel, Denali National Park and Preserve. Telephone: (907) 683–9552 FAX: (907) 683–9612.

SUPPLEMENTARY INFORMATION: Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (P.L. 91–190, as amended), the National Park Service, has prepared a final DCP and abbreviated final EIS for proposed visitor facilities and services in the front country of Denali National Park and Preserve in Alaska. The final DCP/EIS includes five alternatives for providing for visitor use and resource protection and related facility development in the front country of Denali National Park and Preserve. The front country includes all non-wilderness areas along the Parks Highway, the Riley Creek/ headquarters area, and the park road corridor to the Kantishna airstrip. The five alternatives include a no action alternative and four action alternatives. The proposed action as revised in the final is based on the recommendations of the Denali Task Force, a committee formed at the request of the Secretary of the Interior in 1994, on proposals received during public scoping, on previous plans, on planning team work and impact analysis, and on public comments on the draft plan.

Facilities and services considered in the proposed action and in each alternative include visitor accommodations, campgrounds, camper conveniences, interpretive facilities, transportation, parking, bus tours, bicycle use, rest and picnic areas, concessions, road maintenance, trails, employee housing, administrative and support facilities, airstrips, and utility systems. The alternatives differ in construction costs, extent and location of visitor facilities, and corresponding environmental, social, and economic impacts.

The Proposed Action (Alternative D) would provide visitor facilities and services in the front country to meet a wide range of visitor needs and interests. Front country developments would be limited to actions in which the NPS has traditionally specialized, such as interpretive centers, environmental education opportunities, trails, and campgrounds. The park hotel would be closed, and the NPS would encourage the private sector to develop visitor service facilities (accommodations, food service, and other commercial services) outside the park. The existing Visitor Access Center would be remodeled and expanded to serve as an interpretive and discovery center, and a new visitor services building and parking would be constructed nearby. Camper convenience services would be provided in this same area and the existing store and temporary shower building would be removed. Some buildings in the former hotel area would be adaptively used to provide an environmental education and science facility. New permanent rest areas would be constructed at Savage and Toklat. Additional trails would be constructed primarily in the Nenana River and Savage River areas. New campsites would be developed in the entrance area, the Nenana River corridor, and in the Kantishna area. Road maintenance and repair would be upgraded to address safety concerns and major structural failures along the park road. These actions would be phased in over the 15 to 20-year life of the plan.

Alternative A (No Action—Continue Current Management Direction) represents no change from current management direction. With the exception of development concepts not yet implemented, it continues the present course of action set forth in existing management plans and guidance documents including the Statement for Management (1995) and the General Management Plan/Land Protection Plan/Wilderness Suitability Review (1986). This alternative represents the existing situation in the park, so existing facilities and services would remain. For example, the temporary park hotel would be rehabilitated as funds allow, adaptive use of historic structures and overcrowding of administrative space would continue, campgrounds would not be expanded, and no new trail construction or additional trail maintenance would be done.

Alternative B (Implement Development Concepts from Previous Plans) would fully implement previous planning decisions and development concepts contained in approved plans such as the 1986 General Management Plan and the 1992 Amendment to the 1983 Development Concept Plan/ Environmental Assessment for the park road corridor and 1987 addendum (1992 Riley Creek Amendment). These documents not only propose additional facilities throughout the park to support NPS operations; they also propose increased visitor services and facilities within the park entrance area. Examples of new facilities proposed include a new hotel and camper convenience center to replace existing temporary facilities, a hostel in the entrance area, a new interpretive center with additional administrative space, a 50-site expansion to Riley Creek campground, and upgraded trail maintenance in the entrance area.

Alternative C (Reduce Facilities and Services Inside Park) would reduce the level of development and visitor services inside the park and encourage the private sector to provide necessary new facilities such as overnight accommodations, campgrounds, and camper conveniences outside the park boundary. Major new park facilities such as an interpretive center and an environmental education center would be constructed outside the park as well. The park entrance area would function primarily as a staging area for trips farther into the park rather than as a destination in itself. This alternative allows for minimizing resource impacts and therefore maximizing resource protection inside the park.

Alternative E (Emphasize Visitor Services and Recreational Opportunities Within the Park) would significantly enhance the visitor experience by concentrating new development inside the park and providing a diversity of visitor facilities and services in the front country to meet a wide range of visitor needs and interests. The NPS would take the leading role in providing new visitor services. A new hotel would replace the existing temporary building, and a hostel or similar low-cost accommodations would be constructed at a separate location. A new interpretive center, a camper conveniences center, and an environmental education facility would be constructed just north of Riley Creek Campground. Additional campsites would be developed throughout the front country. New permanent rest areas would be constructed at Toklat and Savage, and trails would be upgraded and expanded at several locations. Road maintenance and repair along the park road would be upgraded to address documented structural problems as well as safety concerns and actual structural failures.

The responsible official for a Record of Decision on the proposed action is the NPS field director in Alaska.

Dated: December 24, 1996.

Paul R. Anderson,

Field Director, Alaska Field Office.

[FR Doc. 97–802 Filed 1–13–97; 8:45 am]

BILLING CODE 4310–70–P

National Park Service, National Capital Region

Mary McLeod Bethune Council House National Historic Site Advisory Commission; Notice of Public Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act that a meeting of the Mary McLeod Bethune Council House National Historic Site Advisory Commission will be held on January 24 and 25, 1997, at the Madison Hotel at 10:00 a.m., the hotel is located at 15th and M Street, N.W., Washington, D.C.

The Commission was authorized on December 11, 1991, by Public Law 102–211, for the purpose of advising the Secretary of the Interior in the development of a General Management Plan for the Mary McLeod Bethune Council House National Historic Site.

The members of the commission are as follow: Dr. Dorothy I. Height; Ms. Barbara Van Blake; Ms. Brenda Girton-Mitchell; Dr. Savanna C. Jones; Dr. Bettye J. Gardner, Bettye Collier-Thomas; Mr. Eugene Morris; Dr. Rosalyn Terborg-Penn; Mrs. Bertha S. Waters; Dr. Frederick Stielow; Dr. Sheila Flemming; Dr. Ramona Edelin; Mrs. Romaine B. Thomas; Ms. Brandi L. Creighton; and Dr. Janette Hoston Harris.

The purpose of this meeting will be to discuss and develop a general management plan for the Mary McLeod Bethune Council House National Historic Site. The meeting will be open to the public. Any person may file with the Commission a written statement concerning the matters to be discussed. Persons who wish further information concerning this meeting or wish to file a written statement or testify at the meeting may contact Ms. Marta C. Kelly, the Federal Liaison Officer for the Commission, at (202) 332–1233. Minutes of these meetings will be available for public inspection 4 weeks after the meeting at the Mary McLeod Bethune Council House National Historic Site, located at 1318 Vermont Avenue, N.W., Washington, D.C. 20005.

Dated: January 17, 1997.

Richard Powers,

Acting Field Director, National Capital Area.

[FR Doc. 97–803 Filed 1–13–97; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF JUSTICE

Office of Attorney Personnel Management, Justice Management Division Agency Information Collection Activities: Proposed Collection: Reinstatement, Without Change of a Previously Approved Collection for Which Approval Has Expired; Comments Requested

ACTION: Application Booklets—Attorney General's Honor Program, Summer Law Intern Program, Law Student Program.

The Department of Justice, Justice Management Division, Office of Attorney Personnel Management, has submitted the following information collection request utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. Additionally, this notice will also serve as the 60 day public notification for comments as required by the Paperwork Reduction Act of 1995. Pursuant to 28 CFR 0.15(b)(2), the Deputy Attorney General of the United States Department of Justice has the responsibility of administering the ''Attorney General's recruitment program for honor law graduates and judicial law clerks.'' This includes the hiring of third-year law students and judicial law clerks for full-time employment following graduation or completion of a clerkship, and primarily second-year law students for summer and/or part-time employment. This program has been in existence for 43 years, and is considered the Federal Government's premier legal recruitment program. The Department of Justice currently hires approximately 130–150 third-year law students/judicial law clerks and 130 second-year law students each year under these programs. The Department of Justice is the largest legal employer in the country. Approximately 5,700 applications are received for these positions annually. The responsibility for running these programs has been delegated by the Deputy Attorney General to the Director, Office of Attorney Personnel Management (OAPM) pursuant to 28 CFR 0.15(c). OAPM together with other Department of Justice representatives who make the ultimate hiring determinations have developed these application booklets to distribute information on the programs and in turn collect the information they consider essential to make an informed hiring decision on legal applicants. The proposed information collection is published to obtain comments from the public and affected agencies. Emergency review and approval of this collection has been requested from OMB by January 20, 1997. If granted, the emergency approval is only valid for 180 days. Comments should be directed to OMB, Office of Information and Regulatory Affairs, Attention: Ms. Victoria Wassmer, 202–395–5871, Department of Justice Desk Officer, Washington, D.C. 20530. The agency requests written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time should be directed to the Office of Attorney Personnel Management, U.S. Department of Justice, Attn: P. Vickers, Room 6150, 950 Pennsylvania Avenue, NW., Washington, DC 20530–0001 (202–514–8902). If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Paula Vickers, 202–514–8902, Office of Attorney Personnel Management, U.S. Department of Justice, Room 6150, 950 Pennsylvania Avenue, NW., Washington, DC, 20530–0001.

Overview of This Information Collection

(1) Type of Information Collection: Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) Title of the Form/Collection: Application Booklets—Attorney General's Honor Program, Summer Law Intern Program, Law Student Program.

(3) Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection: Form Number: None. Office of Attorney Personnel Management, Justice Management Division, U.S. Department of Justice.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals or households. Other: None. This data collection is the only vehicle for the Department of Justice (DOJ) to hire graduating law students. This application form is submitted voluntarily, submitted only once a year by students/judicial law clerks who will be in this applicant pool only once; and the information sought only relates to the hiring criteria established as an internal matter by DOJ personnel.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 5,700 respondents at 1 hour per response.

(6) An estimate of the total public burden (in hours) associated with the collection: 5,700 annual hours.

If additional information is required contact Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW., Washington, DC 20530.

Dated: January 8, 1997.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 97–794 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–26–M

Notice of Lodging of Consent Decree Pursuant to the Comprehensive, Environmental Response, Compensation and Liability Act (''CERCLA'')

In accordance with Departmental policy, 28 C.F.R. § 50.7, and Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), notice is hereby given that a proposed consent decree in *United States* v. *Alpert Iron & Metal Corp. et al.*, Civil Action No. CV–97–AR–0001–S was lodged on January 2, 1997, with the United States District Court for the Northern District of Alabama, Southern Division. This agreement resolves a judicial enforcement action brought by the United States, pursuant to Sections 106(a) and 107 of CERCLA, 42 U.S.C. §§ 9606(a) and 9607, against a group of potentially responsible parties (''Settlors'') who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances at the Interstate Lead Company Superfund Site (''Site'' or ''ILCO Site'') in Leeds, Jefferson County, Alabama. The Consent Decree also provides a covenant not to sue under Section 7003(d) of the Resource Conservation and Recovery Act (''RCRA'') 42 U.S.C. § 6973.

The Site is comprised of a former battery recycling and smelter facility (''the ILCO facility''), and several Satellite Sites where furnace slag was taken. Furnace slag is a byproduct of the Site smelting operations. The Satellite Sites included the adjacent parking lot, the City of Leeds landfill, and properties owned by a gas station, a church, a resident, a restaurant, and a local business.

Under the consent decree, the Settlors have agreed to pay $1,823,644 of the government's past response costs, and all future response costs of the government in excess of $300,000. The Settlors have also agreed to implement the Site remedy as set forth in Records of Decision (''RODs'') dated September 30, 1991, October 13, 1994, September 25, 1995, and August 27, 1996. The selected remedy provides for the excavation of contaminated soils and sediment, treatment by soil solidification/stabilization, and disposal in an appropriate, permitted landfill. Contaminated groundwater at the ILCO facility and the City of Leeds landfill will be pumped and treated. Groundwater monitoring will be conducted at the other Satellite Sites, with annual sediment and biota monitoring along a nearby creek and tributary thereto.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Alpert Iron & Metal Corp. et al.*, DOJ Ref #90–11–2–108D. Commenters may request an opportunity for a public meeting in the affected area, in accordance with Section 7003(d) of RCRA.

The proposed consent decree may be examined at the office of the United States Attorney, 200 Federal Building, 1800 Fifth Avenue North, Birmingham, AL 35203; the Region 4 office of the Environmental Protection Agency, 100 Alabama Street, S.W., Atlanta, Georgia, 30303; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and enclose a check for the reproduction costs. If you want a copy of the Consent Decree without attachments, which attachments include the RODs, Statement of Work, and list of Settlors, then the amount of the check should be $29.25 (117 pages at 25 cents per page). If you want a copy of the Consent Decree with the above stated attachments, then the amount of the check should be $106.75 (427 pages at 25 cents per page). The check should be made payable to the Consent Decree Library.

Bruce S. Gelber,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 97–796 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–15–M

Notice of Lodging of Amendment to Modified Consent Decree Pursuant to the Clean Water Act

In accordance with 28 CFR 50.7, notice is hereby given that on December 31, 1996, a proposed Amendment to the Modified Consent Decree in *United States of America* v. *Lynn Water and Sewer Commission, et al.,* Civil Action No. 76–2184–G, was lodged with the United States District Court for the District of Massachusetts. The United States' complaint sought compliance with the Clean Water Act. The Modified Consent Decree, as amended in 1995, requires the construction of various projects to reduce combined sewer overflows from Lynn Water and Sewer Commission outfalls in accordance with a specified schedule. The Amendment to the Modified Consent Decree extends the deadline for completion of one of those projects—the Eastern Avenue Sewer Separation Project, Phase II—from September 1, 1997 to December 31, 1998.

The Department of Justice will receive comments relating to the proposed Amendment to Modified Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Lynn Water and Sewer Commission, et al.,* D.J. Ref. 90–5–1–1–545B.

The proposed Amendment to Modified Consent Decree may be examined at the office of the United States Attorney, 1003 John M. McCormack P.O. & Courthouse, Boston, Massachusetts 02109 and at the New England Region office of the Environmental Protection Agency, One Congress St., Boston, Massachusetts 02203. The proposed Amendment to Modified Consent Decree may also be examined at the Consent Decree Library, 1120 G. St., N.W., 4th Floor, Washington, D.C. 20005, 202–624-0892. A copy of the proposed Amendment to Modified Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G. St., N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy, please enclose a check in the amount of $1.25 (25 cents per page reproduction cost) payable to the ''Consent Decree Library.''

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 97–798 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–15–M

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that a proposed consent decree in *United States* v. *Janet Schusheim, et al.,* Civil Action No. 97–0019, was lodged on January 2, 1997 with the United States District Court for the Eastern District of New York. Defendant Janet Schusheim was the former owner of the property comprising the SMS Instruments, Inc. Superfund Site (''Site'') in Deer Park, New York at the time wastes containing hazardous substances were disposed of at the Site. Defendant 120 Realty Corp. is the current owner of the Site property.

Under the terms of the proposed decree, defendants will pay the United States $290,000 for certain past response costs incurred by the United States for remedial action work involving air and steam stripping of contaminated soil and groundwater extraction, treatment, and reinjection. The proposed decree includes a covenant not to sue by the United States under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9601 *et seq.*

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposes consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *United States* v. *Janet Schusheim, et al.* D.J. reference #90–11–2–1123A.

The proposed consent decree may be examined at the Office of the United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn; New York, the Region II, Office of the Environmental Protection Agency, 290 Broadway, New York, New York; and at the Consent Decree Library, 1120 G Street, N.W. 4th floor, Washington, D.C. 2005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W. 4th Floor, Washington, D.C. 20005. In requesting a copy please enclose a check in the amount of $7.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 97–797 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–15–M

Notice of Lodging of Consent Decree Pursuant to the Comprehensive Environmental Response Compensation and Liability Act

In accordance with Departmental policy, notice is hereby given that a proposed consent decree in *United States* v. *Western Crude Reserves, Inc. et al*, Civil Action No. 95–52, was lodged on October, 1994 with the United States District Court for Eastern District of Kentucky, Lexington division. Under the consent decree the United States is settling claims against two defendants, Western Crude Reserves, Inc. and Reserve Energy, Ltd., based on claims for civil penalties and injunctive relief relating to alleged violations of the Safe Drinking Water Act (''SDWA'') and the implementing Underground Injection Control (''UIC'') regulations, 40 C.F.R. § 144.28 *et seq.* The United States alleged that Reserve Energy, Ltd. and Western Crude Reserves, Inc. once owned and operated, respectively, 113 underground injection wells in the Irvine, Garrett and South Fork units in the Irvine-Furnace field in Powell and Estill Counties, Kentucky. Reserve Energy, Ltd. is a limited partnership. Western Crude Reserves, Inc. is the corporate general partner of Reserve Energy. In 1993, Reserve Energy transferred the wells to defendant Kish Resources PLC. Under the proposed settlement, Western Crude Reserves, Inc. and Reserve Energy, Ltd. will provide $75,000 in financial assurance for plugging abandoned injection wells, and the field will be transferred to a nonparty, Trinity Group, LLC. (''Trinity''), for the purpose of bringing the wells into regulatory compliance pursuant to a schedule set forth in an Administrative Order on Consent (''AOC'') entered between Trinity and EPA. Under the AOC, Trinity will provide $50,000 in financial assurance and will plug or case and cement the injection wells over the course of three years. Under this settlement, EPA will obtain the injunctive relief it seeks to bring the field into compliance, plus a total of $125,000 in financial assurance, in case Trinity does not fulfill its obligations.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Western Crude Reserves, Inc. et al.*, DOJ Ref. #90–112–859.

The proposed consent decree may be examined at the office of the United States Attorney, 1441 Main Street, Suite 500 Columbia, South Carolina (803) 929–3000; the Region IV Office of the Environmental Protection Agency, 100 Alabama Street, SW, Atlanta, Georgia 30303; and at the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005, (202) 624–0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of $6.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 97–799 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–15–M

Federal Bureau of Investigation

Implementation of Section 104 of the Communications Assistance for Law Enforcement Act

AGENCY: Federal Bureau of Investigation (FBI).

ACTION: Second Notice and request for comments.

SUMMARY: The FBI is providing a second notification of the requirements for actual and maximum capacity of communication interceptions, pen register and trap and trace device-based interceptions that telecommunications carriers may be required to conduct to support law enforcement's electronic surveillance needs, as mandated in section 104 of the Communications Assistance for Law Enforcement Act (CALEA). On October 16, 1995, the FBI published an Initial Notice for comment (60FR53643); and on November 9, 1995, the comment period was extended until January 16, 1996. After reviewing the comments received, the FBI is issuing this Second Notice for comment.

DATES: Written comments must be received on or before February 13, 1997.

ADDRESSES: Comments should be submitted in triplicate to the Telecommunications Industry Liaison Unit (TILU), Federal Bureau of Investigation, P.O. Box 220450, Chantilly, VA 20153–0450.

FOR FURTHER INFORMATION CONTACT: Contact TILU at (800) 551–0336. Please refer to your question as a capacity notice question. Because the appendices referred to in this Notice are voluminous, they are not contained herein but are available in a public reading room located at Federal Bureau of Investigation Headquarters, 935 Pennsylvania Ave. N.W., Washington, D.C. 20535. To review the appendices, interested parties should contact Ms. Eloise Lee at FBI Headquarters, telephone number (202) 324–3476, to schedule an appointment (48 hours in advance).

I. Background

A. Purpose of CALEA

On October 25, 1994, President Clinton signed into law the Communications Assistance for Law Enforcement Act (CALEA) (Public Law 103–414, 47 U.S.C. 1001–1010). Its objective is to make clear a telecommunications carrier's duty to cooperate in the interception of communications for law enforcement purposes. (For purposes of this notice, the word ''interception'' refers to the interception of both call-content and call-identifying information.) CALEA was enacted to preserve law enforcement's ability, pursuant to court order or other lawful authorization, to access call-content and call-identifying (pen registers and trap and trace) information in an ever-changing telecommunications environment.

In 1968 when Congress statutorily authorized court-ordered electronic surveillance, there were no technological limitations on the number of interceptions that could be conducted. However, the onset of new and advanced technologies has begun to erode the ability of the telecommunications industry to support law enforcement's interception needs. To preserve communications interception as a vital investigative tool, the Congress determined that technological solutions must be employed necessitating greater levels of assistance from telecommunications carriers.

The intent of CALEA is to define and clarify the level of technical assistance required from telecommunications carriers. CALEA does not alter or expand law enforcement's fundamental statutory authority to conduct interceptions. It simply seeks to ensure that after law enforcement obtains legal authority, telecommunications carriers will have the necessary technical ability to fulfill their statutory obligation to accommodate requests for assistance.

B. Capacity Notice Mandate

Because many future interceptions will be fulfilled through equipment controlled by telecommunications carriers, CALEA obligates the Attorney General to provide carriers with information they will need (a) to be capable of accommodating the actual number of simultaneous interceptions law enforcement might conduct as of October 25, 1998, and (b) to size and design their networks to accommodate the maximum number of simultaneous interceptions that law enforcement might conduct after October 25, 1998. (Although actual and maximum capacity determinations represent estimates for October 25, 1998, and thereafter, telecommunications carrier compliance with capacity requirements is, by terms of CALEA, required by 3 years after issuance of the Final Notice.) These two information elements are referred to in CALEA as ''actual'' and ''maximum'' capacity requirements. In accordance with section 104 of CALEA, the FBI, which has been delegated CALEA implementation responsibilities from the Attorney General, must provide notice of law enforcement's future actual and maximum capacity requirements. The statute defines these requirements as follows:

For actual capacity: The actual number of communication interceptions, pen registers, and trap and trace devices, representing a portion of the maximum capacity, that the Attorney General estimates that government agencies authorized to conduct electronic surveillance may conduct and use simultaneously by the date that is 4 years after the date of enactment of CALEA.

For maximum capacity: The maximum capacity required to accommodate all of the communication interceptions, pen registers, and trap and trace devices that the Attorney General estimates that government agencies authorized to conduct electronic surveillance may conduct and use simultaneously after the date that is 4 years after the date of enactment of CALEA.

Although CALEA requires the Attorney General to estimate the actual number of communication interceptions, pen registers and trap and trace devices that may be required simultaneously as of October 25, 1998 and thereafter, the estimates are not a reflection of the number of interceptions expected to occur. Indeed, law enforcement has no estimate or expectations about how many interceptions will occur. The number of interceptions that actually occur will be determined by authorized law enforcement investigations at the time.

Under CALEA, telecommunications carriers are required to have an actual capacity available for immediate use 3 years after issuance of a Final Notice. Maximum capacity, on the other hand, is a capacity level that telecommunications carriers must be able to accommodate ''expeditiously'' if law enforcement's needs increase in the future. The time frame for ''expeditious'' expansion to maximum capacity was not specified in CALEA. However, law enforcement typically maintains ongoing liaison with telecommunications carriers serving their areas. Such liaison facilitates the needed technical capability and capacity to be prearranged, thereby ensuring that the interception can begin as soon as the legal authorization is received. Such liaison is critical because electronic surveillance interceptions are by their very nature time sensitive. Law enforcement considers five business days from receipt of a court order by a telecommunications carrier to be a reasonable period of time to allow for incremental expansion up to the maximum capacity on an as-needed basis. This time frame is based on the time typically involved under existing procedures used by law enforcement and telecommunications carriers to make technical arrangements.

The term ''expeditious,'' as used herein, applies to section 104 capacity requirements regarding incremental expansion up to the maximum capacity. It should not be confused with ''expeditious access'' to call-content and call-identifying information as used in section 103 of CALEA, which pertains to the assistance capability requirements.

Law enforcement has interpreted the maximum capacity chiefly as a requirement that telecommunications carriers will follow to size a capacity ceiling. This ceiling is intended to provide telecommunications carriers with a stable framework for cost-effectively designing future capacity into their networks. It also would provide room for accommodating future interception-related ''worst-case scenarios.'' Establishing the maximum capacity will allow telecommunications carriers to assist law enforcement during serious, unpredictable emergencies requiring unusual levels of interception.

Consistent with CALEA, this Second Notice identifies the number of simultaneous interceptions that a telecommunications carrier should be able to accommodate in a given geographic area as of the date that is three years after the date of the Final Notice of Capacity and thereafter. An interception relates to accessing and delivering all communications (call-content) and/or call-identifying information associated with the telecommunications service of the subject specified in a court order or lawful authorization. The telecommunications service targeted for interception includes all of the services and features associated with the subject's wireline/wireless telephone number, or as otherwise specified in the court order or lawful authorization.

For a call content-based interception, a carrier is responsible for accessing and delivering all communications and call-identifying information supported by the subject's telecommunications service, regardless of the advanced services or features to which the subject subscribes (e.g., a redirected call through call forwarding); and notwithstanding that the subject may be engaged in more than one communication (e.g., a subject is engaged in a voice telephone call and simultaneously sends a fax or data transmission; a subject is engaged with several (different) parties in a conference call and simultaneously communicates with a non-conferenced party).

For an interception of call-identifying information, a carrier is responsible for accessing and delivering all call-identifying information related to the communications caused to be generated or received by the subject, regardless of the advanced services or features to which the subject subscribes and notwithstanding that the subject may be engaged in more than one simultaneous communication. The fact that a subject utilizes advanced services and features as part of his/her telecommunications service or is capable of sending or receiving more than one communication simultaneous does not mean that carrier access and delivery of each constitutes a separate interception. Consequently, telecommunications carriers need to ensure that, regardless of their solutions (which may be varied), the solution permits access and delivery of all the communications and call-identifying information for each interception. Because of this circumstance, and because CALEA forbids the government from dictating solutions, law enforcement will be available to consult with carriers as they develop solutions and apply the capacity requirements to their particular solutions.

In some instances a telecommunications carrier may be able to meet the assistance capability requirements without modifying its equipment, facilities, or services. As a practical matter, conventional methods of effectuating interceptions of call-content and call-identifying information, such as loop extender technologies, may meet the requirements of CALEA for some subjects of court-ordered interceptions, depending on the types of services and features, etc., to which the subject subscribes. Telecommunications carriers that presently meet these requirements under the circumstances described above will be in compliance until the equipment, facility, or service is replaced or significantly upgraded or otherwise undergoes major modification. Furthermore, telecommunications carriers that cannot meet the assistance capability requirements may still be considered to be in compliance if the Government does not provide cost recovery for modifications to equipment, facilities, and services installed or deployed on or before January 1, 1995. Such carriers will also be in compliance with CALEA until such time as they significantly upgrade or replace or otherwise undergo major modification to equipment, facilities, or services.

C. Initial Notice of Capacity

On October 16, 1995, law enforcement's proposed future actual and maximum capacity requirements were presented in an Initial Notice published in the Federal Register as mandated by section 104 of CALEA. Comments on the Initial Notice were accepted through January 16, 1996. The Initial Notice and the comments on it are summarized in section V of this notice.

D. Second Notice of Capacity

Since the release of the Initial Notice, law enforcement has consulted with telecommunications industry representatives, privacy advocates, and other interested parties to receive feedback on the method used to express future actual and maximum capacity requirements. This consultative process has helped law enforcement understand the challenges facing the industry and others in appling the capacity requirements. After deliberation, law enforcement concluded that it should issue a Second Notice for comment in order to refine its original approach.

After the instant comment period closes, a complete record will be delineated and a Final Notice will be issued that fulfills the obligations of the Attorney General under section 104(a)(1) of CALEA. Telecommunications carriers will have 180 days after publication of the Final Notice in the Federal Register to submit a Carrier Statement as mandated by section 104(d) to the Government identifying any of its systems or services that do not have the capacity to accommodate law enforcement's requirements (see section IV infra).

CALEA applies to all telecommunications carriers as defined in section 102(8). Notices will eventually be issued covering all telecommunications carriers. However, this Second Notice and its associated Final Notice should be viewed as a first phase applicable to telecommunications carriers offering services that are of most immediate concern to law enforcement—that is, those telecommunications carriers offering local exchange services and certain commercial mobile radio services, specifically cellular service and personal communications service (PCS). (For the purpose of this notice, PCS is considered a service operating in the licensed portion of the 2 GHz band of the electromagnetic spectrum, from 1850 MHZ to 1990 MHZ. Telecommunications carriers offering local exchange services are referred to hereafter in this notice as ''wireline'' carriers, and telecommunications carriers offering cellular and PCS services are referred to as ''wireless'' carriers.

The exclusion from this notice of certain other telecommunications carriers that have services deployed currently or anticipate deploying services in the near term does not exempt them from any obligations under CALEA. Law enforcement will consult with these other telecommunications carriers before subsequent Notices are issued and applicable capacity requirements are established. Law enforcement also looks forward to consulting with these other telecommunications carriers to develop a reasonable method for characterizing capacity requirements.

II. Methodology for Projecting Capacity Requirements

A. Overview

The CALEA mandate set forth in section 104 obligates the Attorney General to estimate future interception capacity requirements and marks the first time that (a) information has been required to be provided to telecommunications carriers in order for them to design future networks with reference to the amount of potential future interception activity that may occur, and (b) the entire law enforcement community has been required to project its collective future potential needs for interception. This new circumstance has generated legitimate concern in the law enforcement community, because telephone technology historically placed no constraints on the number of court-ordered interceptions that could be effected. If not implemented carefully, an under-scoping of capacity requirements under CALEA could have the unintended effect of restricting the technical ability to conduct interceptions authorized in court orders. If future interception needs are understated, law enforcement's investigative abilities will be hampered and, more important, public safety will be jeopardized.

Capacity provisions were included in CALEA to ensure that law enforcement's future interception needs can be met in a way that will not be unduly burdensome for telecommunications carriers. These provisions also present a means for telecommunications carriers to better understand the nature and extent of their existing statutory obligations to accommodate law enforcement's interception needs. (Since law enforcement requirements for all types of interceptions are a function of authorized investigations, the estimated number that may be conducted cannot be zero since that would imply that there is a county or market service area where an interception could not be conducted. See section G ''Establishing Threshold Capacity Requirements'' for further discussion on how minimum capacities are estimated.) To derive capacity requirements that would meet law enforcement's future interception needs without being unduly burdensome, law enforcement used a rigorous methodology. The objective was to ensure that law enforcement's future capacity requirements would (a) be based on historical interception activity, (b) ensure that public safety is not compromised, (c) provide telecommunications carriers with a degree of certainty regarding law enforcement's needs over a reasonable period of time, (d) be based on the geographic areas affected, and (e) not dictate a solution to the industry.

The methodology consisted of these steps:

- Collecting information on historical interception activity.
- Determining geographic areas for identifying capacity requirements.
- Deriving a basis for determining capacity requirements for wireline carriers.
- Deriving a basis for determining capacity requirements for wireless carriers.
- Deriving growth factors for projecting future capacity requirements from historical information.
- Establishing threshold capacity requirements.

B. Collecting Information on Historical Interception Activity

To comply with CALEA's mandate to project future capacity needs, law enforcement believed it was essential to first establish a historical baseline of interception activity from which future interception needs could be projected. This effort entailed a detailed review and analysis of the available information on recent federal, state, and local law enforcement interceptions throughout the United States. Such information had never before been collected in a single repository. Amassing this detailed and extremely sensitive information required an unprecedented and time-consuming effort. It involved identifying sources from which accurate information could be retrieved efficiently. The information required included the numbers of all types of interceptions (communications, pen register, and trap and trace) performed by federal, state, and local law enforcement agencies, in terms of the actual number of telephone lines intercepted at each locality. (For purposes of this notice, the work ''line'' refers to the transmission path from a subscriber's terminal to the network via a wireline or wireless medium.)

The Wiretap Report, published annually by the Administrative Office of the United States Courts, was a valuable source of historical information on criminal Title III (call-content) court orders; however, it did not identify the actual number of interception lines associated with each court order or, more important, the vastly greater number of lines associated with call-identifying interceptions (pen register and trap and trace) that have been performed by all law enforcement agencies. Even though law enforcement used information on the number of court orders reported in the Wiretap Report for forecasting purposes as described subsequently in this section, the report does not contain the necessary line-related information needed to identify the level of past interceptions for establishing a historical baseline of activity.

To obtain line-related information regarding past simultaneous interceptions, records of interception activity were acquired from telecommunications carriers, law enforcement officials, and what was most important, from the federal and state Clerks of Court offices (the official repositories for all interception court orders) through a survey.

The objective of the survey effort was to determine the numbers of all types of interceptions (communications, pen register, and trap and trace) conducted between January 1, 1993, and March 1, 1995, for all geographic areas. Highly sensitive information pertaining to each interception was collected, including interception start/end dates and area code and exchange. The time period of January 1, 1993 to March 1, 1995 was chosen to obtain recent interception information that was reasonably retrievable given the time constraint imposed by CALEA with regard to publishing a Notice of Capacity.

Approximately 1,500 telecommunications carriers, representing nearly all wireline and cellular telephone companies (as of March 1995), were requested to provide information that would identify where and how many interceptions had occurred within their networks during the period surveyed. Records were submitted by approximately 66 percent of the telecommunications carriers surveyed. To ensure receipt of information from a comprehensive representation of the telecommunications industry, law enforcement worked closely with telecommunications carriers serving large markets or unique geographic areas. Such carriers included the Regional Bell Operating Companies (RBOCs), GTE, and the largest providers of cellular service.

Sensitive interception records maintained under seal within the Clerks of Court offices were acquired through two separate efforts. Federal court order information was collected under special court orders directing the unsealing of this information for the limited purpose of issuing capacity notices required under section 104 of CALEA. State and local law enforcement records were collected with the assistance of the offices of the State Attorney Generals and District Attorneys or state wide prosecutors. This effort resulted in the collection of information on all federal law enforcement interception activity for the period surveyed and information on interceptions by state and local law enforcement from most states. (Some states' laws do not authorize the conduct of all types of interceptions, e.g., call-conduct interceptions, and other states do not maintain retrievable records of all historical interception activity.)

C. Determining Geographic Areas for Identifying Capacity Requirements

Section 104(a)(2)(B) of CALEA requires law enforcement to identify, to the maximum extent practicable, the capacity needed at ''specific geographic locations.'' In addressing this mandate, law enforcement decided that using point-specific sites, such as switch locations, city blocks, or neighborhoods, would not be appropriate because it would not properly take into account movement in criminal activity and could lead to the compromise of sensitive investigations. Also, law enforcement believed that any geographic designation used should not be subject to frequent change, should relate to discernible and officially recognized geographic territorial boundaries, and should be commonly understood by the affected parties.

It was also considered essential that the geographic designations be ones that (a) historically have not been affected by regulatory changes in the telecommunications marketplace, (b) would allow flexibility for telecommunications carriers in developing solutions, and (c) would not be affected by changes in the configurations of telecommunications networks.

Law enforcement concluded that, for wireline carriers, county boundaries or their equivalent best met the criteria above and should be used to define the geographic locations for projecting future capacity requirements. (For purposes of this notice, the term ''county'' includes boroughs and parishes, as well as the District of Columbia and a few independent cities in Missouri, Maryland, Nevada, and Virginia that are not part of any county. U.S. territories such as American Samoa, Guam, the Mariana Islands, Puerto Rico, and the U.S. Virgin Islands are treated similarly.) Further, using the geographic designation of a county in this way was deemed appropriate because it is used by both telecommunications carriers and law enforcement. Telecommunications carriers pay county taxes and fees and are affected by county regulations. Likewise, law enforcement's legal territorial jurisdictions frequently are drawn based on county boundaries, and resources for law enforcement are often allocated on a county basis.

For wireless carriers, individual county boundaries were not considered to be a feasible geographic designation for identifying capacity requirements. Instead, law enforcement determined that wireless market service areas—Metropolitan Statistical Areas (MSAs), Rural Service Areas (RSAs), Major Trading Areas (MTAs), and Basic Trading Areas (BTAs)—would be the most appropriate geographic designations. Although wireless market service areas comprise sets of counties, the use of such market service areas best takes into account the greater inherent mobility of wireless subscribers. Furthermore, what is most important is that historical information on wireless interceptions could only be associated with market service areas.

The approach selected—using counties for wireline carriers and market service areas for wireless carriers—was also responsive to comments on the Initial Notice urging that the two types of telecommunications carriers be treated separately; thus, different geographic designations should appropriately apply.

D. Deriving a Basis for Determining Capacity Requirements for Wireline Carriers

Having established the county as the appropriate geographic area for identifying capacity requirements for wireline carriers, law enforcement had to decide on a basis for determining capacity requirements for each county. Section 104(a)(2)(A) of CALEA stated that the capacity requirements could be based on type of equipment, type of service, number of subscribers, type or size of carrier, or nature of service area, but allowed the use of ''any other measure.'' Law enforcement chose to use the historical interception activity associated with telecommunications equipment located within a county as the most logical basis for making determinations about projected capacity requirements in a county.

Each wireline interception reported during the historical period surveyed (January 1, 1993, to March 1, 1995) was associated with a telecommunications switch, based on its area code and exchange (frequently referred to as its ''NPA/NXX code'') as found in the April 1995 version of the Local Exchange Routing Guide (LERG) published by Bellcore. The LERG contains information on the switching systems and exchanges of wireline carriers and is considered to be an authoritative source in the telecommunications industry. Thereafter, telecommunications switches were associated to counties by using the vertical and horizontal coordinates marking the switch's physical location.

CALEA also required that capacity requirements be expressed in terms of ''simultaneous'' interceptions. Law enforcement chose to consider interceptions occurring on the same day, rather than at exactly the same moment, as being simultaneous. This time frame was logical from a law enforcement perspective, because interception court orders are authorized for a certain number of days as opposed to some other unit of time Additionally, the time frame of 1 day was compatible with the historical data that was recorded only by days.

The daily interception activity of each switch in a county was examined, and the single day with the most interceptions during the period surveyed was used to identify the switch's highest number of simultaneous interceptions. Thereafter, the highest number of simultaneous interceptions identified for each switch in the country was totaled to produce a historical baseline for the county. Law enforcement believed that this approach provided a reasonable representation of past interception needs for the geographic area during the period surveyed. This approach also avoided the problems that would be inherent in trying to specify capacity requirements for interceptions on a site-specific or equipment-specific basis because of the fluid nature of interceptions conducted over time and because of changes in equipment and the services that they support. After determining the county's historical baseline, law enforcement sought to establish an appropriate means of utilizing that activity as a basis for projecting future capacity requirements. In the Initial Notice, capacity requirements were expressed as a percentage of the engineered capacity of equipment, facilities, and services. It was thought that in so doing, some flexibility would be beneficial to carriers in addressing the capacity requirements. Comments on the Initial Notice, however, questioned the meaning of engineered capacity and recommended that capacity requirements be expressed as fixed numbers rather than as percentages. In response, law enforcement re-examined this issue and found that using fixed numbers for each county would be a clear way to express capacity requirements without tying them to the constantly changing components of the telecommunications network.

E. Deriving a Basis for Determining Capacity Requirements for Wireless Carriers

Having established the market service area as the appropriate geographic area for identifying future capacity requirements for wireless carriers, law enforcement had to decide on a basis for determining capacity requirements for each market. Each cellular interception reported during the period surveyed (January 1, 1993 to March 1, 1995) was associated with a cellular market service area using the August 1995 version of the Cibernet database, which contains information on roaming and billing arrangements for cellular networks and is considered to be an authoritative source in the telecommunications industry. Thereafter, the single day with the most interceptions during the period surveyed was identified and used to establish the historical baseline for the market service area.

Due to the similarities between cellular and PCS, law enforcement used the historical interception activity of cellular carriers to develop projections of future capacity requirements for PCS carriers. Cellular markets are defined by MSAs and RSAs, and PCS markets are defined by MTAs and BTAs. Historical cellular interception activity was mapped to a PCS market service area. Again, the single day with the most interceptions during the period surveyed was identified and used to ascribe to it a historical baseline for the market service area.

To be responsive to comments on the Initial Notice objecting to the use of percentages of engineered capacity, law enforcement found that using numbers rather than percentages was also an appropriate means by which to express capacity requirements for wireless carriers.

F. Deriving Growth Factors for Projecting Future Capacity Requirements From Historical Information

Section 104 of CALEA requires the Attorney General to project future requirements for actual and maximum capacity. As discussed previously in this notice, law enforcement derived a baseline for these estimates from the historical interception activity in geographic areas defined as counties for wireline carriers and market service areas for wireless carriers during the period surveyed. To project future capacity requirements, growth factors were developed and applied to the historical information.

As noted, comments on the Initial Notice recommended that capacity requirements be stated separately for wireline and wireless carriers. In response, law enforcement created new formulas based on a revised set of growth factors that took account of this distinction.

1. Formulas

As discussed below, four growth factors are used in this Second Notice in formulating future capacity requirements: $A_{wireline}$, $A_{wireless}$, $M_{wireline}$, and $M_{wireless}$. The ''A'' factors were applied to historical interception activity to estimate future actual capacity requirements as of October 1998, the ''M'' factors were used to estimate future maximum capacity requirements.

The formulas are as follows:

Wireline: Future Actual Capacity Requirement in a County Equals The Historical Interception Activity in the County Multiplied by $A_{wireline}$.

Future Maximum Capacity Requirement in a County Equals The Future Actual Capacity Requirement in the County Multiplied by $M_{wireline}$.

Wireless: Future Actual Capacity Requirement in a Market Service Area Equals The Historical Interception Activity in the Market Service Area Multiplied by $A_{wireless}$.

Future Maximum Capacity Requirement in a Market Service Area Equals The Future Actual Capacity Requirement in the Market Service Area Multiplied by $M_{wireless}$.

All the resulting requirements for future actual and maximum capacity were rounded up to the next whole number.

2. Growth Factors

The growth factors used herein were derived solely from analysis related to the historical interception information. Three sources of historical information were deemed to provide relevant information to be considered as growth factors: (a) the number of court orders for call-content interceptions which was obtained from the *Wiretap Reports* published by the Administrative Office of United States Courts for the time period 1980 through 1995; (b) the number of court orders for call-identifying information from pen register and trap and trace devices, which was obtained from reports published by the Department of Justice documenting pen register and trap and trace usage by DOJ agencies for the time period 1987 through 1995; and (c) the historical baseline number of call-content interceptions and interceptions of call-identifying information, which was obtained from the survey of law enforcement and industry for the time period January 1, 1993 through March 1, 1995.

To project the future numerical level of court orders, statistical and analytical methods were applied to the historical interception information. It should be understood that the projections for the number of potential future court orders do not mean that they are the numbers of orders that law enforcement will in fact perform in these years or intends to perform. Rather, they are part of a statistical method used to derive growth factors that would be useful ultimately in calculating future actual and maximum capacity requirements.

A commonly-used analytical tool for projections, known as Best-Fit-Line analysis, was used to track the number of court orders over time and then to project the number into the future. As discussed below, projections were made for call-content court orders for wireline and wireless for the year 1998 and the year 2004. The projections were also made for the vastly greater number of pen register and trap and trace court orders for wireline and wireless for the year 1998 and the year 2004. Composite growth figures for wireline and wireless interceptions were then calculated by weighting the court order projections by the relative number of call-content interceptions and interceptions of call-identifying information during the period survey. The resulting $A_{wireline}$ and $A_{wireless}$ growth factors were based on the 1998 projections. The $M_{wireline}$ and $M_{wireless}$ growth factors were based on the 2004 projections. The year 1998 was selected to comply with the statutory language of CALEA requiring law enforcement to estimate actual capacity requirements by that time. The year 2004 was selected because it provided a 10 year period after the passage of CALEA, a period that was considered reasonable for projecting maximum capacity requirements. It was also considered to be a rational period for constituting a stable capacity ceiling and a design guide.

The value derived for $A_{wireline}$ is 1.259; the value derived for $A_{wireless}$ is 1.707; the value derived for $M_{wireline}$ is 1.303; and the value derived for $M_{wireless}$ is 1.621. These growth factors can also be translated into, and understood in terms of, annual growth rates for capacity requirements. For wireline, if computed annually, growth rates are 5.92 percent for the period from 1994 through 1998, and 4.55 percent for the period from 1998 through 2004. For wireless, if computed annually, growth rates are 14.30 percent and 8.38 percent respectively, for the same time periods. Of relevance in determining the differences in growth rates are the expectations of overall business growth for wireline and wireless telephone services. Market projections for wireline show a steady rate of 3.5 percent annual increase, while wireless annual growth is projected to be 12.0 percent during each of the next 10 years.

(For more information on how the growth factors were derived, refer to Appendix E which is available in the FBI's reading room.)

G. Establishing Threshold Capacity Requirements

In its review of historical interception activity, law enforcement recognized that numerous counties and market service areas had no interception activity during the time period surveyed. Under the methodology described above, these counties and market service areas would have future actual and maximum capacity requirements equal to zero. However, the establishment of future capacity requirements of zero would not provide even a minimal growth flexibility and would largely undermine the intent of CALEA, which is to preserve law enforcement's ability to conduct some level of interceptions. Additionally, it is possible that law enforcement may have conducted interceptions in some of these areas before or after the period surveyed, and it may well have to do so again. History has shown that criminal activity or exigent circumstances can occur anywhere. Therefore, law enforcement must be capable of conducting a number of interceptions in all areas. Consequently, threshold future capacity requirements were developed for counties and market service areas that otherwise would have had a capacity requirement of zero under the above methodology.

For wireline telephone service offered in counties, law enforcement examined the distribution of historical interception activity and found that many counties had no interceptions, and many others had only one interception. To avoid having counties with no future capacity requirement, law enforcement decided to treat counties with zero historical interceptions as if they had one interception. Hence, when the growth factors were applied, it produced a future actual capacity requirement of two simultaneous interceptions and a future maximum capacity requirement of three simultaneous interceptions.

For the wireless market service areas, law enforcement took a similar approach. Here, too, it found that many market service areas had no interceptions during the time period surveyed. Law enforcement chose to treat these market service areas as if they had one interception. Hence, when the growth factors for wireless carriers were applied to these market service areas, the result was a future actual capacity requirement of two simultaneous interceptions and a future maximum capacity requirement of four simultaneous interceptions.

III. Statement of Capacity Requirements

A. Capacity Requirements for Wireline Carriers

Law enforcement is providing notice for the estimated number of communication interceptions, pen register and trap and trace device-based interceptions that may be conducted simultaneously in a given geographic area and has selected counties as the appropriate geographic basis for expressing capacity requirements for telecommunications carriers offering local exchange service (ie., wireline carriers). Appendix A lists all actual and maximum estimates by county. (Appendix A is available in the FBI's reading room for review.) These estimates represent the number of simultaneous call-content interceptions and interceptions of call-identifying information for each county in the United States and its territories. Wireline carriers may ascertain the actual and maximum estimates that will affect them by looking up in Appendix A the county (or counties) for which they offer local exchange service. Capacity requirements based on final estimates will remain in effect for all telecommunications carriers providing wireline service to these areas until such time as the Attorney General publishes a notice of any necessary increase in maximum capacity pursuant to section 104(c) of CALEA.

County capacity requirements represent the estimated number of all types of interceptions that may be conducted simultaneously anywhere within the county. When effective, the county capacity requirements apply to all existing and any future wireline carriers offering local exchange service in each county, regardless of the type of equipment used or the customer base. Law enforcement recognizes that some carriers may seek further clarification on applying the county capacity requirements based on the configurations of their networks and their recommended solutions. Section 103(b) of CALEA forbids law enforcement from requiring any specific design of equipment, facilities, services, features or systems. Because individual carriers configure their networks differently, and may pursue different solutions, the Telecommunications Industry Liaison Unit of the FBI will be available to discuss the application of these capacity requirements to a specific telecommunications carrier's network upon request.

B. Capacity Requirements for Wireless Carriers

Law enforcement is providing notice for the estimated number of communication interceptions, pen register and trap and trace device-based interceptions that may be conducted simultaneously in a given geographic area and has selected market service areas— MSAs, RSAs, MTAs, and BTAs—as the appropriate geographic basis for expressing actual and maximum capacity requirements for telecommunications carriers offering wireless services, specifically those providing cellular and PCS service (i.e., wireless carriers). Appendix B lists all actual and maximum estimates for MSAs and RSAs; Appendix C lists all actual and maximum estimates for MTAs; and Appendix D lists all the actual and maximum estimates BTAs. (Appendices B, C, D are available in the FBI's reading room for review.) These estimates represent the number of simultaneous call-content interceptions and interceptions of call-identifying information for each market service area. Capacity requirements based on final estimates will remain in effect for all wireless carriers providing service to these areas until such time as the Attorney General publishes a notice of any necessary increases in maximum capacity pursuant to section 104(c) of CALEA.

In all cases, the statement of interception capacity for a wireless market service area reflects law enforcement's estimated number of interceptions that may be conducted simultaneously anywhere in the service area. Law enforcement must be capable of conducting interceptions at any time, regardless of the location of a subject's mobile telephone device within the service area. When effective, the market service area capacity requirements apply to all existing and any future telecommunications carrier offering wireless service in each market. Law enforcement recognizes that some carriers may seek further clarification about how to apply the market service area requirements based on the configurations of their networks. Section 103(b) of CALEA forbids law enforcement from requiring any specific design of equipment, facilities, services, features or systems. Because individual carriers configure their networks differently, and may pursue different solutions, the Telecommunications Industry Liaison Unit of the FBI will be available to discuss the application of these capacity requirements to a specific telecommunications carrier's network upon request.

IV. Related Issues

A. Carrier Statement

Section 104(d) of CALEA requires that within 180 days after the publication of a Final Notice pursuant to subsections 104(a) or 104(c), a telecommunications carrier shall submit a statement identifying any of its systems or services that do not have the capacity to accommodate simultaneously the number of call-content interceptions and interceptions of call-identifying information set forth in the notice. The information in the Carrier Statement will be used, in conjunction with law enforcement priorities and other factors, to determine the telecommunications carrier that may be eligible for cost reimbursement according to section 104.

A Telecommunications Carrier Statement Template has been developed with the assistance of the telecommunications industry to facilitate submission of the Carrier Statement. The template is not mandatory, but law enforcement encourages industry to use the template when identifying any of its systems or services that do not have the capacity to accommodate simultaneously the number of call-content interceptions and interceptions of call-identifying information set forth in the Final Notice. A diskette containing the template will be provided by TILU on request by telecommunications carriers.

The information to be solicited will include the following: Common Language Location Identifier (CLLI) code or equivalent identifier, switch model or other system or service type, and the city and state where the system or service is located. Unique information required for wireline systems and services will include the host CLLI code if the system or service is a remote, and the county or counties served by the system or service. Unique information required for wireless systems and services will include the MSA or RSA market service area number(s), or the MTA or BTA market trading area number(s) served by the system or service.

The confidentiality of the data received from the telecommunications carriers will be protected by the appropriate statute, regulation, or nondisclosure agreements.

After reviewing the Carrier Statements, the Attorney General may, subject to the availability of appropriations, agree to reimburse a carrier for costs directly associated with modifications to attain capacity requirements in accordance with the final rules on cost recovery. Decisions to enter into cost reimbursement agreements will be based on law enforcement prioritization factors.

On April 10, 1996, the Carrier Statement Notice was published in the Federal Register for comment under the Paperwork Reduction Act (PRA). A sixty day comment period ensued ending on June 10, 1996. The Carrier Statement Notice is subject to the approval of the Office of Management and Budget (OMB) under the auspices of the PRA. A Second Carrier Statement Notice for comment is currently being prepared for publication in the Federal Register. This comment period will consist of thirty days. At the conclusion of the comment period, OMB will issue a clearance number which will be published in the Final Notice of Capacity.

B. Cost Recovery Rules

CALEA authorizes the appropriation of $500 million for FY 1995 through FY 1998 for reimbursing telecommunications carriers for certain reasonable costs directly associated with achieving CALEA compliance. Section 109(e) directs the Attorney General to establish regulations, after notice and comment, for determining such reasonable costs and establishing the procedures whereby telecommunications carriers may seek reimbursement. In accordance with the section 109(e) mandate, the proposed rule was published in the Federal Register, 61 FR 21396, on May 10, 1996.

As authorized by section 109, and on execution of a cooperative agreement, it was proposed that a telecommunications carrier be reimbursed for the following: (1) All reasonable plant costs directly associated with the modifications performed by the carrier in connection with equipment, facilities, and services installed or deployed on or before January 1, 1995, in order to comply with section 103; (2) additional reasonable plant costs directly associated with making the requirements in section 103 reasonably achievable with respect to equipment, facilities, or services installed or deployed after January 1, 1995; and (3) reasonable plant costs directly associated with modifications of any telecommunications carriers' systems or services, as identified in the Carrier Statement, that do not have the capacity to accommodate simultaneously the number of call-content interceptions and interceptions of call-identifying information set forth in the Final Notice(s).

V. The Initial Notice of Capacity

A. Statement of Capacity Requirements in the Initial Notice

The capacity requirements presented in the Initial Notice were expressed as percentages of engineered capacity and were reported by category of historical interception activity levels, with each geographic area being assigned to one of three categories: I, II, and III.

Category I included the few densely populated areas that historically have had high levels of interception activity. Category II included other densely populated areas and some suburban areas where interception activity had been moderate. Category III covered all other geographic areas. All telecommunications carriers would have been required to meet the minimum requirements established for Category III. In addition, they were to be notified of those geographic areas within the areas they serve that fall in Categories I or II.

The percentages of engineered capacity applied to the equipment, facilities, and services that provide a customer or subscriber with the ability to originate, terminate, or direct communications. The purpose of using percentages was to account for the dynamic nature and diversity of the telecommunications industry.

This approach yielded the following projections of actual and maximum capacity requirements: for Category I, 0.5 percent for actual, 1 percent for maximum; for Category II, 0.25 percent for actual, 0.5 percent for maximum; for Category III, 0.05 percent for actual, 0.25 percent for maximum.

B. Discussion of Comments on the Initial Notice of Capacity

On October 16, 1995, law enforcement's proposed future actual and maximum capacity requirements were presented in an Initial Notice published in the Federal Register as mandated by section 104 of CALEA. Comments on the Initial Notice were accepted through January 16, 1996. Fifty-one parties consisting of individuals, companies, and industry associations submitted comments. The following issues were identified from the comments received in response to the Initial Notice of Capacity.

1. The Use of Percentages in Lieu of Fixed Numbers

In the Initial Notice, capacity requirements were expressed as percentages of engineered capacity. Twenty-one comments were received on the use of percentages in lieu of fixed numbers. Eighteen of the comments indicated that law enforcement should use specific numbers instead of percentages for expressing its actual and maximum capacity needs and the percentages should be translated into specific numbers for each area, or for each switch before a Final Notice is issued. Two of the comments noted that supplying actual capacity figures would not require disclosure of sensitive information to the public. One comment stated that percentages would unnecessarily complicate the implementation and enforcement of CALEA. One comment stated that percentages do not meet the intent of CALEA.

After consideration of the aforementioned comments, law enforcement has concluded that capacity requirements for wireline and wirless carriers will be expressed as fixed numbers rather than as percentages.

2. Engineered Capacity

Twenty comments were received on law enforcement's expression of actual and maximum capacity requirements as a percentage of the ''engineered capacity'' of the equipment, facilities, or services that provide a customer or subscriber with the ability to originate, terminate, or direct communications. Ten of the comments stated that the definition of engineered capacity was too vague and needed to be clarified. Six of the comments stated that engineered capacity applied to land line facilities only and needed to be clarified for wireless carriers. Two of the comments supported the use of ''installed lines'' as the measure of capacity. One comment preferred the use of voice channels as a measurement of engineered capacity for wireless systems. One comment stated that the definition of engineered capacity must be tailored to each industry segment.

In response to the aforementioned comments and from comments on the issue of percentages, law enforcement chose to use fixed numbers as the expression of its capacity needs and thus, the use of terms such as ''engineered capacity'' no longer have any relevance.

3. Geographic Categories

In the Initial Notice, capacity requirements were stated by category of historical interception levels with each geographic area being assigned to one of three categories: I, II, or III. Nineteen comments were received on enforcement's use of geographic categorization to state its capacity requirements. Nine of the comments stated that the notice did not indicate which geographic areas fell into a particular category and that further clarification was needed on the basis for determining categories. One of the comments noted that geographic designations were irrelevant in a wireless environment. Four of the comments remarked that counties did not necessarily correspond to a particular switch service area. One comment stated that geographic areas should be clearly defined and reasonably small. One comment requested clarification on determining capacity when geographic areas overlapped categories. Three comments stated that rural and remote areas should be classified as having Category III (lowest level) requirements.

Law enforcement considered the comments and has concluded that it will no longer use categories for stating capacity requirements. Instead, specific geographic locations to include counties for wireline carriers and market service areas for wireless carriers will be used for stating capacity requirements.

4. The Issuance of Separate Capacity Requirements to the Wireless Industry

Four comments were received on the application of the capacity requirements to the wireless industry. Two of the comments recommended that the wireline and wireless industry segments be treated separately for the purpose of issuing capacity requirements. For example, it was suggested that the geographic divisions proposed in the Initial Notice were based on a wireline central office architecture, which was inappropriate given the network structures for wireless carriers. Furthermore, two of the comments requested clarification as to how wireless carriers were expected to calculate capacity for their systems.

After consideration of the comments, law enforcement has concluded that separate capacity requirements will be established for wireless carriers.

5. Capacity Requirements in Areas With No Interception History

Three comments were received requesting that the notice address areas that lacked interception history. One comment stated that if there was no prior interception history, the capacity number should be zero while another comment suggested that a fourth category should be created for areas with sparse populations. One comment requested that law enforcement clarify whether areas with no interception history should be required to provide capability without specific capacity.

In its review of historical interception activity, law enforcement recognized that numerous geographic areas had not conducted interceptions during the time period surveyed, January 1, 1993 to March 1, 1995. However, law enforcement also recognized that interceptions may have occurred in these geographic areas before or after the time period surveyed and may well occur again in the future. Because history has shown that criminal activity and exigent circumstances can occur anywhere at any time, it is essential that the ability to conduct some level of interception exists in all geographic areas. Therefore, minimum capacity requirements were established for those areas that did not exhibit interception activity during the period surveyed.

6. Application of Capacity Requirements to Other Technologies

Nine comments were received on the application of the capacity requirements to other services, such as mobile satellite, Cellular Digital Packet Data (CDPD), Electronic Messaging, and Special Mobile Radio (SMR) systems. Four of the comments noted that the Initial Notice of Capacity lacked any discussion of data services and advanced services, such as CDPD, and that further clarification was needed on how to calculate capacity requirements for such services. One comment stated that the Initial Notice was too general to measure the potential impact on mobile satellite services. Four of the comments requested clarification as to how the capacity requirements would apply to SMR carriers in the manner specified.

In response to the aforementioned comments, law enforcement is issuing a Notice of Capacity applicable to carriers that offer services of the most immediate concern; those carriers offering local exchange services and certain commercial mobile radio services, specifically cellular and PCS services. Before issuing Notices applicable to carriers other than these, law enforcement will consult with such carriers in order to assess whether the expression of capacity requirements herein has any applicability to the way their services are offered.

7. Interface Recommendations

Seven comments were received on law enforcement's interface recommendations. Two of the comments requested that interface recommendations be defined. Two comments stated that telecommunications carriers needed another opportunity to comment once the interface recommendations were made available because the interface recommendations document was considered to be a prerequisite to compliance. One comment noted that capacity requirements should include delivery channels. One comment stated that the Initial Notice did not define the capability to which the capacity requirements applied.

Law enforcement is mandated by section 104 of CALEA to issue notices of actual and maximum capacity requirements. The Notice pertains solely to the fulfillment of this CALEA statutory mandate. Although law enforcement recognizes the importance of the comments regarding the interface and the capability requirements, such issues are not within the purview of the Capacity Notice.

8. Definition of Expeditious

One comment was received on the definition of expeditious as used in section 104 of CALEA regarding the expeditious expansion to maximum capacity. The comment requested that the term ''expeditiously increase'' be explained. The comment also requested clarification to determine the level of effort expected from telecommunications carriers and what times of day would be required to effectuate interceptions.

In response to the comment to define ''expeditious expansion to maximum capacity,'' law enforcement considers five business days from receipt of a court order by a telecommunications carrier from a duly authorized law enforcement official, to be a reasonable amount of time to allow for incremental expansion up to the maximum capacity. The level of effort (and the time of day) required from telecommunications carriers to effectuate interceptions will be dependent on CALEA solutions and times specified in electronic surveillance court orders.

9. Definition of Simultaneous

One comment was received on the definition of simultaneous interception. The comment stated that the Initial Notice did not adequately define the term ''simultaneous surveillance'' so that switch capacity could be calculated.

As described in the methodology section of the instant notice, law enforcement considers interceptions occurring on the same day to be simultaneous.

10. How Surveillances Were Calculated

Two comments were received requesting clarification on how surveillances were calculated. One comment stated that law enforcement should clarify if multiple wiretap orders on the same target from different law enforcement agencies each accounted for one unit of capacity. One comment asked for clarification as to whether interception of a conference call with many multiple parties could be counted as multiple interceptions.

In calculating surveillance numbers, law enforcement considered every line specified in an electronic surveillance-related court as one unit of capacity. This unit of capacity does not include the services and features (such as a conference call with multiple parties) an investigative subject may activate.

11. Separate Requirements for Communications (Call-Content), Pen Registers, and Trap and Traces and Inclusion of National Security Interceptions

Four comments were received on the issue of releasing separate requirements for communications, pen register, and trap and trace interceptions. Two comments stated that clarification was needed to ensure that all lawful interception requirements were covered and that the requirements were the aggregate of communications, pen register, and trap and trace interceptions. One comment stated that the notice should include all surveillance types, both criminal and national security. One comment supported the notion that capacity requirements should be separated by communications, pen register, and trap and trace interceptions.

Law enforcement chose not to issue capacity requirements by surveillance type due to the unpredictable nature of the types of surveillances that may be needed for a particular investigation. Additionally, law enforcement will not issue capacity requirements for interceptions associated with national security surveillances in an unclassified document.

12. Relationship Between Notices of Capacity and the Carrier Statement

The comment received on the Carrier Statement requested clarification to assess the relationship between the Notice and the Carrier Statement.

In response to the aforementioned comment, Carrier Statement issues have been reviewed in section IV.A of this Second Notice.

13. Historical Baseline of Interception Activity

Eleven comments were received on the historical baseline of interception activity that law enforcement used to calculate its capacity requirements. Six of the comments requested that the underlying data be made available. One comment noted that the capacity requirements must be consistent with historical information provided to law enforcement. Two comments requested that law enforcement compare law enforcement data to carrier data and that the two data sources be reconciled. One of the comments urged that the capacity requirements be established for actual numbers of simultaneous interceptions for the central office and that those numbers be based on data and information supplied by the carriers. Another comment stated that the capacity requirements should be based on historical activity.

As stated in the methodology section of this notice, law enforcement has based the capacity requirements on the historical baseline of interception activity for specific geographic areas, and included reasonable growth factors to establish capacity levels for the future. Historical baselines are provided in the appendices of the Second Notice.

14. Methodology

Eight comments were received questioning the methodology used for determining capacity requirements. Specifically, the comments asked law enforcement to explain its methodology and justify how actual and maximum capacity requirements were determined.

In response to these comments, a methodology section included as part of the Second Notice describes that means by which capacity requirements were determined.

15. Funding and Cost Impact

Fifteen comments were received on the issues of funding and cost impact. Three of the comments requested clarification on the cost impact of complying with CALEA if Congress did not appropriate funding. Two comments requested that law enforcement provide an equitable distribution plan for fund disbursement, while another suggested that law enforcement provide a reasonable assessment of the level of funding that was available for upgrades. Ten of the comments addressed the costs associated with compliance.

Issues pertaining to cost recovery and funding are not the subject or intent of this Notice. Detailed information on funding and cost recovery issues is provided in the proposed cost recovery rules that were published in the Federal Register, 61 FR 21396, on May 10, 1996. A summary of these rules is included in section IV.B of the Second Notice.

16. Impact on Small Carriers

Three comments were received on the effect that CALEA may have on small telephone companies. In particular, the comments indicated that high implementation costs might make compliance difficult to achieve. In addition, the comments stated that unnecessarily high capacity requirements might stifle the advancement of new and emerging telecommunications technologies in rural markets.

Law enforcement recognizes that many small carriers provide service to geographic areas that historically have had minimal or no electronic surveillance activity. The capacity requirements stated in this notice are based on the historical interception activity for a given area. In order for law enforcement to effectively respond to future incidents of unusual and unexpected criminality, minimum capacity requirements have been established for areas with no history of interceptions.

In response to the comment regarding the effect of capacity requirements on new and emerging technologies, law enforcement also recognizes that CALEA prohibits law enforcement from specifying the design of equipment, facilities, features, or systems, or adoption of any equipment, facility, service or feature by a telecommunications carrier.

17. Manufacturers' Concern

Three comments were received expressing manufacturers' concerns with the capacity requirements. One of the comments noted that the Initial Notice might require capacity expansion beyond current manufacturers' capabilities. One comment stated that SMR manufacturers might not have the products required for SMR carriers to comply with the capacity requirements. One comment stated that equipment should be designed only from the perspective of the worst case scenario.

Law enforcement has provided capacity estimates in this Second Notice that can be used by manufacturers in designing and developing CALEA-compliant solutions for wireline and wireless (cellular and PCS) technologies. Other technologies, such as SMR, will be addressed in subsequent Notices of Capacity.

18. Definitions of Installed or Deployed and Significant Upgrade

One comment requested clarification on the terms ''installed'' or ''deployed'', inquiring as to whether equipment ordered before January 1, 1995, but not delivered until after January 1, 1995, would be considered installed or deployed. Another comment stated the term significant upgrade must be clearly defined.

The terms installed or deployed and significant upgrade pertain to the assistance capability requirements and, therefore, are not within the purview of the Notices on Capacity. (It should be noted that the definition of installed or deployed was included in the proposed cost recovery rules published in the Federal Register, 61 FR 21396, on May 10, 1996.)

Louis J. Freeh,

Director, FBI.

[FR Doc. 97–318 Filed 1–13–97; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF LABOR

Employment and Training Administration

[Unemployment Insurance Program Letter (UIPL) No. 9–97]

Unemployment Compensation for Federal Employees (UCFE)—Coverage Ruling for Human Subjects for Research Studies Conducted by U.S. Department of Agriculture, Agricultural Research Service

Pursuant to Employment and Training Order No. 2–92, the Director, Unemployment Insurance Service, has determined that human subjects who participate in nutritional research studies conducted by the U.S. Department of Agriculture, Agricultural Research Service, do not perform ''Federal Service'' within the meaning of 5 U.S.C. 8501(1) for UCFE program purposes. The UCFE Coverage Ruling No. 97–1 is published below.

Dated: January 6, 1997.

Timothy M. Barnicle,

Assistant Secretary of Labor.

Directive: Unemployment Insurance Program Letter No. 09–97.

To: All State Employment Security Agencies.

From: Mary Ann Wyrsch, Director, Unemployment Insurance Service.

Subject: Unemployment Compensation for Federal Employees (UCFE) Program Coverage Ruling No. 97–1, Human Subjects for Research Studies Conducted by the U.S. Department of Agriculture, Agricultural Research Service (ARS).

1. *Purpose.* To provide State Employment Security Agencies (SESAs) with a copy of the above UCFE program coverage ruling.

2. *Background.* For a complete discussion of the background of the UCFE Program Coverage Ruling No. 97–1, please refer to the *Discussion/Analysis* section of the attachment to this directive.

On August 15, 1996, the Administrator of the ARS requested that the Secretary of Labor issue a UCFE program coverage ruling on whether human subjects participating in nutritional research studies conducted by the ARS perform ''Federal Service'' within the meaning of 5 U.S.C. 8501(1) for UCFE program coverage purposes. The attached Coverage Ruling held that these subjects did not perform Federal service.

3. *Action Required.* SESAs should:

a. Provide copies of this directive, plus attachment, to all appropriate staff, including the Unemployment Insurance Tax and Appeals Units.

b. Follow the guidance contained in the attachment when determining the UCFE program eligibility of individuals who participated as human subjects in ARS nutritional research studies.

4. *Inquiries.* Direct inquiries to the appropriate Regional Office.

5. *Attachment.* UCFE Program Coverage Ruling No. 97–1.

UCFE Program Coverage Ruling No. 97–1

Human Subjects for Research Studies Conducted by U.S. Department of Agriculture, Agricultural Research Service

Ruling: Human subjects who participate in nutritional research studies conducted by U.S. Department of Agriculture (USDA), Agricultural Research Service (ARS), do not perform ''Federal Service'' within the meaning of 5 U.S.C. 8501(1).

Statement of Facts: In holding that human subjects participating in ARS nutritional studies do not perform ''Federal service,'' I have considered the following factors:

1. Title XIV of the Food and Agriculture Act of 1977 (Public Law 95–113) provides that USDA is the lead Federal agency for agricultural research in the field of human nutrition and on the nutritive value of foods. Since 1953, the ARS is the USDA agency in charge of conducting nutritional studies.

2. Individuals who participate as ''human subjects'' in these nutritional studies are covered by the Common Rule for the Protection of Human Subjects (45 CFR Part 46, 7 CFR Part 1c, and ARS Directive 605.1).

3. Human subjects do not earn annual leave, sick leave, nor are they covered under any Federal employee retirement system.

4. On August 2, 1990, the Internal Revenue Service (IRS) ruled in a non-precedential decision that human test subjects in medical tests conducted by the Food and Drug Administration are not employees and do not receive ''wages'' for income tax withholding or Federal employment tax purposes. Priv. Ltr. Rul. 91–06–004 (Aug. 2, 1990).

5. On January 24, 1994, in a Federal Employment Tax Determination letter mailed to the Bionetics Corporation, the IRS ruled that an individual's participation as a human test subject in USDA-sponsored research was as an independent contractor and not an employee of the firm conducting the research. This letter was obtained from the ARS on August 16, 1996.

Discussion/Analysis: The purpose of the ARS nutritional research is to carry out the policy of the United States as stated in Section 1421(b) of the Food and Agricultural Act of 1977: ''It is hereby declared to be the policy of the United States that the Department of Agriculture conduct research in the fields of human nutrition and on nutritive value of foods and conduct human nutrition education activities. . . .''

The individuals who agree to be human subjects for this research are treated according to the principles contained in the Common Rule for the Protection of Human Subjects, and in accord with the Nuremburg Code, the Declaration of Helsinki, and the Public Health Service Guidelines. These guiding principles are designed to ensure that human subjects are fully informed of the purpose and planned procedures to be utilized in the research, and that the individual's decision to participate is voluntary without coercion or undue influence. The human subjects receive a $35 per day stipend for as long as they participate in the study. The ARS considers the $35 per day stipend to be too small to influence or coerce an individual's decision to volunteer to be a human subject in its nutritional research studies.

The human subjects participating in these ARS nutritional studies enter into a consent agreement with the ARS nutritional studies enter into a consent agreement with the ARS. The consent agreement stipulates that the human subjects participating in the study must observe the regimen prescribed by the ARS. The human subjects agree to provide blood and other bodily samples for analyses by the research study staff. The human subjects may elect to end their participation in the study at any time prior to its completion, and failure of the human subject to comply with the experimental protocol and/or established rules will result in the human subject being asked by the ARS to leave the study.

Prior to October 1995, the ARS utilized contractors (e.g., the Bionetics Corporation) for assistance in conducting the metabolic research studies including the payment of the human subjects' stipends. In 1995, the California Employment Development Department (CEDD) informed the contractor at the ARS' Western Human Nutrition Research Center (WHNRC) that human subjects participating in nutritional studies at the WHNRC were employees of the contractor. Under California State law, the contractor became liable for State unemployment taxes based on the payment of the $35 per day stipend. In October 1995, the WHNRC assumed the responsibility for the payment of the human subjects' stipends, and the issue arose whether these subjects perform ''Federal Service.'' All stipends provided to human subjects are now paid by the ARS.

The Unemployment Compensation for Federal Employees (UCFE) program provides unemployment compensation coverage for Federal civilian employees. In order to be eligible to receive unemployment compensation under the UCFE program, an individual must perform ''Federal Service'' as defined at 5 U.S.C. 8501(1). The term ''Federal Service,'' in part, is defined to be ''service performed after 1952 in the *employ* of the United States or an instrumentality of the United States which is wholly or partially owned by the United States. * * *''

(Emphasis added.) Therefore, for UCFE program coverage purposes, an individual must be a civilian employee of the United States Federal Government and not an independent contractor.

In reviewing this matter I have examined the relevant statutes, regulations, and consent agreements in addition to the decisions and determinations of the CEED and the IRS in determining whether human subjects participating in nutritional research with the ARS perform service as employees or are independent contractors.

The question of whether an individual is an independent contractor or an employee is one of fact to be determined upon consideration of the facts and the application of the law and regulations in a particular case. Individuals are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the relationship. Guidance for making the determination is found in three substantially similar sections of the IRS Employment Tax Regulations: 26 CFR 31.3121(d)–1; 31.3306(i)–1; and 31.3401(c)–1, which relate to the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and Federal Income Tax withholding respectively, as well as IRS Revenue Ruling 87–41, 1987–1 C.B. 296. Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished but also as to the details and means by which that result is obtained. In this connection, it is not necessary that the firm actually direct or control the manner in which the services are performed; it is sufficient that the right to do so be present.

Other factors characteristic of employment are the right of the employer to discharge and the furnishing of tools or a work place. An individual who is not by statute an employee and is not an employee under the common law rules is an independent contractor. Independent contractors are subject to another's control and direction only with respect to the result to be accomplished and not the means and methods to be used.

Consideration must also be given to such factors as the continuity of the relationship and whether the individual's services are an integral part of the business of the employer as distinguished from an independent trade or business of individual in which the individual assumes the risk of realizing a profit or suffering a loss.

The pertinent facts submitted for any consideration indicate:

1. The ARS nutritional research studies are conducted in accord with the Common Rule for the Protection of Human Subjects (45 CFR Part 46, 7 CFR Part 1c, and ARS Directive 605.1), and in accord with the Nuremburg Code and the Declaration of Helsinki. These require that human subjects' participation in research must be voluntary and uncoerced. Since ARS nutritional research studies follow the above regulations and international agreements, it suggests that the human subjects are volunteers, not employees, who are subject to control and direction. Further,

I agree with the ARS that the stipend paid to the human subjects for each day they participate in the research ($35 per day) is an amount so small that it does not have an undue influence on the decision of the individual to participate in the research.

2. Human subjects who voluntarily participate in the ARS nutritional research studies enter into a consent agreement under which they agree to follow research protocols established by the ARS during the duration of the research study. A continuing relationship between the ARS and the human subjects is not established.

3. The human subjects do not produce a product or provide a service to the ARS during these research studies. Providing samples of blood and normal bodily functions is not an activity pursued as a livelihood by the human subjects.

4. The human subjects control the means and methods used to accomplish the task, i.e., the provision of samples of bodily functions. While the ARS controls the research protocols to be followed, including the schedule of sample collection, the human subjects control their own bodily functions.

5. The ARS provides no tools, supplies, or equipment to the human subjects. The ARS does use instruments during the nutritional research to collect and analyze bodily samples provided by the human subjects, however these instruments are not used by the human subjects.

6. Human subjects are not entitled to sick leave or annual leave and are not covered under any Federal Employee Retirement System.

The reasons stated above indicate that an employment relationship does not exist and support the conclusion stated in the first paragraph of this ruling that, for UCFE program purposes, human subjects who participate in nutritional research studies conducted by the USDA, ARS, do not perform ''Federal Service'' within the meaning of 5 U.S.C. 8501(1).

This coverage ruling is issued pursuant to redelegation of authority from the Assistant Secretary, in Employment and Training Order No. 2–92, dated April 10, 1992, (published at 57 *Fed. Reg.* 13760), which is authorized by Section 6 of Secretary's Order No. 4–75 (40 *Fed. Reg.* 18515) (as amended by Secretary's Order No. 14–75).

Dated: November 26, 1996.

Mary Ann Wyrsch,

Director, Unemployment Insurance Service.

[FR Doc. 97–839 Filed 1–13–97; 8:45 am]

BILLING CODE 4510–30–M

Pension and Welfare Benefits Administration

[Application No. D–10172, et al.]

Proposed Exemptions; The Chicago Corporation

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

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, 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, NW., Washington, DC 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, NW., Washington, DC 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 Chicago Corporation (TCC) Located in Chicago, IL

[Application No. D–10172]

Proposed Exemption

Based on the facts and representations set forth in the application, 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.)[1]

Section I. Covered Transactions

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 the proposed sale, for cash or other consideration, by the Midwest Banc Fund IV Group Trust (the BF IV Group Trust) in which employee benefit plans (the Plans) invest, of certain securities (the Securities) that are held in the BF IV Group Trust Portfolio, to a party in interest with respect to a participating Plan, where the party in interest proposes to acquire or merge with a bank company (the Bank Company) or a financial services company (the Financial Services Company) that issued such securities.

In addition, the restrictions of section 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)(E) of the Code, shall not apply to the payment of a performance fee (the Performance Fee) by Plans investing in the BF IV Group Trust to TCC.

[1] For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

This proposed exemption is subect to the following conditions as set forth below in Section II.

Section II. General Conditions

(a) Prior to a Plan's investment in the BF IV Group Trust, a Plan fiduciary which is independent of TCC and its affiliates (the Independent Fiduciary) approves such investment on behalf of the Plan.

(b) Each Plan investing in the BF IV Group Trust has total assets that are in excess of $50 million.

(c) No Plan invests more than 10 percent of its assets in beneficial interests (the Beneficial Interests) in the BF IV Group Trust and such Beneficial Interests held by the Plan may not exceed 25 percent of the Group Trust.

(d) No Plan may invest more than 25 percent of its assets in investment vehicles (i.e., collective investment funds or separate accounts) managed or sponsored by TCC and/or its affiliates.

(e) Prior to investing in the BF IV Group Trust,

(1) Each Independent Fiduciary receives a Private Placement Memorandum and its supplement containing descriptions of all material facts concerning the purpose, structure and the operation of the BF IV Group Trust.

(2) An Independent Fiduciary who expresses further interest in the BF IV Group Trust receives—

(A) A copy of the Group Trust Agreement outlining the organizational principles, investment objectives and administration of the BF IV Group Trust, the manner in which Beneficial Interests may be redeemed, the duties of the parties retained to administer the BF IV Group Trust and the manner in which BF IV Group Trust assets will be valued;

(B) A copy of the Investment Management Agreement describing the duties and responsibilities of TCC, as investment manager of the BF IV Group Trust, the rate of compensation that it will be paid and conditions under which TCC may be terminated; and

(C) Copies of the proposed exemption and grant notice covering the exemptive relief provided herein.

(3) If accepted as an investor in the Group Trust, the Independent Fiduciary is—

(A) Furnished with the names and addresses of all other participating Plans;

(B) Required to acknowledge, in writing, prior to purchasing a Beneficial Interest in the BF IV Group Trust that such Independent Fiduciary has received copies of such documents; and

(C) Required to acknowledge, in writing, to TCC that such fiduciary is independent of TCC and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the BF IV Group Trust.

(f) Each Plan, including the trustee (the Trustee) of the BF IV Group Trust, receives the following written disclosures from TCC with respect to its ongoing participation in the BF IV Group Trust:

(1) Within 120 days after the end of each fiscal year of the BF IV Group Trust as well as at the time of termination, an annual financial report containing a balance sheet for the BF IV Group Trust as of the end of such fiscal year and a statement of changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual report will also disclose the fees paid or accrued to TCC.

(2) Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the BF IV Group Trust, an unaudited quarterly financial report consisting of at least a balance sheet for the BF IV Group Trust as of the end of such quarter and a profit and loss statement for such quarter. The quarterly report will also specify the fees that are actually paid to or accrued to TCC.

(3) Such other information as may be reasonably requested by the Plans or the Trustee (e.g., certain trading activity and portfolio status reports provided to the Trustee as required by Prohibited Transaction Exemption (PTE) 86–128 (51 FR 41686, November 16, 1986) in order to comply with the reporting requirements of the Act and the Code.

(g) At least annually, TCC holds a meeting of the participating Plans at which time the Independent Fiduciaries of investing Plans are given the opportunity to decide on whether the BF IV Group Trust, the Trustee or TCC should be terminated as well as to discuss any aspect of the BF IV Group Trust and the agreements promulgated thereunder with TCC.

(h) During each year of the BF IV Group Trust's existence, TCC representatives are available to confer by telephone or in person with Independent Fiduciaries on matters concerning such Group Trust.

(i) The terms of all transactions that are entered into on behalf of the BF IV Group Trust by TCC remain at least as favorable to an investing Plan as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets in the BF IV Group Trust that is done in connection with the payment of Performance Fees is based upon independent market quotations or (where the same are unavailable) determinations made by an independent appraiser (the Independent Appraiser).

(j) In the case of the sale by the BF IV Group Trust of Securities to a party in interest with respect to a participating Plan, the party in interest is not TCC, any employer of a participating Plan, or any affiliated thereof, and the BF IV Group Trust receives the same terms as is offered to other shareholders of a Bank Company or a Financial Services Company.

(k) As to each Plan, the total fees paid to TCC and its affiliates constitute no more than ''reasonable compensation'' within the meaning of section 408(b)(2) of the Act.

(l) TCC's Performance Fee is based upon a predetermined percentage of net realized gains minus net unrealized losses. In this regard,

(1) The Performance Fee is not to be paid before December 31, 2001, which represents the completion of the projected acquisition phase (the Acquisition Phase) of the BF IV Group Trust, and not until all participating Plans have received distributions equal to 100 percent of their capital contributions made to the BF IV Group Trust.

(2) Prior to the termination of the BF IV Group Trust, no more than 75 percent of the Performance Fee credited to TCC is withdrawn from such Group Trust.

(3) The Performance Fee account established for TCC is credited with realized gains and losses and charged for net unrealized losses and fee payments.

(4) No portion of the Performance Fee is withdrawn if the Performance Fee Account is in a deficit position.

(5) TCC repays all deficits in its Performance Fee account and it maintains a 25 percent cushion in such account before receiving any further fee payment.

(m) Either TCC or the Trustee, on behalf of Plans participating in the BF IV Group Trust, may terminate the Investment Management Agreement at any time pursuant to the provisions in such agreement.

(n) TCC maintains, for a period of six years, the records necessary to enable the persons described in paragraph (o) of this Section II to determine whether the conditions of this exemption have been met, except that—

(1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of TCC and/or its affiliates, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest other than TCC shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (o) below.

(o)(1) Except as provided in section (o)(2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (n) of this Section II shall be unconditionally available at their customary location during normal business hours by:

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any Independent Fiduciary of a participating Plan or any duly authorized representative of such Independent Fiduciary;

(C) Any contributing employer to any participating Plan or any duly authorized employee representative of such employer; and

(D) Any participant or beneficiary of any participating Plan, or any duly authorized representative of such participant or beneficiary.

(o)(2) None of the persons described above in subparagraphs (B)–(D) of this paragraph shall be authorized to examine the trade secrets of TCC or commercial or financial information which is privileged or confidential.

Section III. Definitions

For purposes of this proposed exemption,

(a) the term ''TCC'' means The Chicago Corporation and any affiliate of TCC as defined in paragraph (b) of Section III.

(b) An ''affiliate'' of TCC includes—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with TCC.

(2) Any officer, director or partner in such person, and

(3) Any corporation or partnership of which such person is an officer, director or a 5 percent partner or owner.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) An ''Independent Fiduciary'' is a Plan fiduciary who is independent of TCC and its affiliates and is either a Plan administrator, trustee, named fiduciary, as the recordholder of Beneficial Interests in the BF IV Group Trust or an investment manager.

Preamble

On September 22, 1993, the Department granted PTE 93–63 (58 FR 49322), a temporary exemption which is effective for a period of eight years from the date of the grant. PTE 93–63 permits a series of transactions relating to the (a) sale by the Bank Fund III Group Trust (the BF III Group Trust) in which Plans invest, of certain Securities which have been issued by Bank Companies and are held in the BF III Group Trust's portfolio, to a party in interest with respect to a Plan, where the party in interest proposes to acquire or merge with the Bank Company that issued such securities. In addition, PTE 93–63 permits the BF III Group Trust to purchase Bank Company Securities from the Midwest Bank Fund I Limited Partnership (MBF I LP) and the Midwest Bank Fund II, Limited Partnership (MBF II LP), two entities organized by TCC. Further, PTE 93–63, allows Plans investing in the BF III Group Trust to pay a Performance Fee to TCC.

The pooled investment fund that is described herein (i.e., the BF IV Group Trust) is virtually identical to the pooled investment fund that is described in PTE 93–63 as well as other funds organized by TCC. The transactions described herein are generally patterned after the exemptive relief described in PTE 93–63. However, no cross-trading transactions under this exemption will be permitted. Also, permanent exemptive relief is being provided.

Summary of Facts and Representations

1. TCC is an investment services firm founded in 1965 in Chicago, Illinois to serve the needs of financial institutions, corporations, governments, individual investors, fiduciaries and securities and commodities dealers. TCC is a registered investment adviser under the Investment Advisers Act of 1940, as amended. It is also registered as a broker-dealer under the Securities Exchange Act of 1934 and is a member in good standing with various national and regional securities exchanges. By virtue of its exchange memberships, TCC is an exchange specialist for many securities as well as an over-the-counter market maker in other securities. As of March 31, 1995, TCC had total assets of $507 million.

TCC has four principal lines of business. First TCC provides institutional investors with investment research and trade execution services for listed and unlisted equity and fixed income securities, options and futures. Second, TCC's investment banking group provides corporations with assistance in capital planning and in facilitating and arranging for corporate mergers and acquisitions as well as underwriting. Third, TCC's asset management group provides investment management services to a broad range of clients, including Plans, through separate accounts. In this regard, TCC currently manages $3.545 billion in client Plan assets in 259 separate accounts. Fourth, TCC provides securities firms, futures commission merchants and professional investors with exchange floor execution and clearing services.

TCC's relevant specialty is provided by its banking group which, in addition to the services described above, provides management, investment and capital formation services to collective investment vehicles which invest in commercial banks and other financial institutions. The banking group possesses detailed knowledge of the banking industry and other financial institutions such as consumer finance companies and stock insurance companies. It researches financial institutions, underwrites the securities of these institutions and acts as consultants or organizers of merger and acquisition projects.

During 1997, it is anticipated that TCC's parent will be acquired by ABN AMRO North America, Inc., a subsidiary of ABN AMRO Bank N.V., a global bank headquartered in the Netherlands. The acquisition will not involve the purchase of the assets of TCC's parent and TCC will retain its separate corporate identity.

2. In 1989, TCC organized the MBF II LP as a limited partnership with the investors acting as the limited partners. The general partners of MBF II LP are partnerships (MidBanc I and MidBanc II), whose general partners are corporate affiliates of TCC and whose limited partners are the members of TCC staff who are responsible for managing the MBF II LP. Less than 25 percent of the funds invested in the MBF II LP have been provided by Plans. According to the applicant, the portfolios of these funds do not constitute ''plan assets'' within the meaning of 29 CFR 2510.3–101 and TCC has not assumed the role of a fiduciary with respect to these investing Plans.[2]

[2] TCC also organized the MBF I LP in 1986. This limited partnership shared the same general partners and types of investments as MBF II LP.

Continued

In 1993, TCC completed the organization of the BF III Group Trust and the Bank Fund III Limited Partnership (the BF III LP)[3] whose objectives were somewhat identical to those formulated for the MBF II LP. Taxable investors acquired an interest in the BF III LP, the general partner of which is MidBanc III, L.P., a limited partnership of which Chicorp Management III, Inc. is the general partner.[4]

3. The MBF II LP and the BF III invest in subregional banks that are located in the United States.[5] In this regard, these entities acquire minority investments in Bank Companies that may be potential candidates for acquisition by other entities or at public offerings. Interests in Bank Companies can be acquired in freely-traded public securities, on either exchanges or in the over-the-counter markets, or in private transactions.

4. The MBF II LP and BF III have pre-defined terms of existence and defined activity periods within those terms. For example, the MBF II LP has an eight year term between organization and liquidation. The first five years represent the acquisition phase (the Acquisition phase). Once those five years elapse, no further acquisitions of Bank Company Securities can be made except under limited circumstances. The last three years of the term of the MFB II LP will be used to liquidate the portfolio.

5. TCC proposes to organize Banc Fund IV (BF IV) as two separate and distinct entities sharing the same investment philosophy and strategy, similar (if not identical) portfolios and operational methods as those formulated for the MBF II LP and the BF III. Taxable investors will acquire an interest in the Banc Fund IV Limited Partnership (the BF IV LP). The general partner of the BF IV LP will be MidBanc IV, L.P., a limited partnership of which Chicorp Management IV, Inc., a wholly owned subsidiary of TCC's parent corporation, is the general partner.

In addition to the BF IV LP, approximately 5–10 Plans will acquire Beneficial Interests in the BF IV Group Trust which will be a tax-exempt entity pursuant to Revenue Ruling 81–100, 1981–1 C.B. 326.[6] The BF IV Group Trust and the BF IV LP will not be organized unless $50 million in capital contribution commitments are subscribed for by investors in both entities. Unless extended, the BF IV Group Trust and the BF IV LP will terminate on December 31, 2003.

Investments by both the BF IV Group Trust and the BF IV LP may be made in the equities and debt instruments of Bank Companies such as commercial banks and other depository institutions. BF IV may also acquire interests in Financial Services Companies such as consumer finance companies and demutualizing insurance companies. All of these entities will be located in the United States.

6. It is anticipated that Citibank will act as the trustee of the BF IV Group Trust. In this capacity, the Trustee will be responsible for retaining TCC or such other investment manager for the BF IV Group Trust. The Trustee will also be responsible for monitoring TCC's compliance with the established investment philosophy of the BF IV Group Trust and for policing TCC's adherence to the provisions of the Investment Management Agreement.

For services rendered, the Trustee is entitled to receive the following annualized fees that will be paid quarterly and in arrears: (a) a base fee of $1,500; (b) a proportionate fee based upon the combined market value of the BF IV Group Trust and the BF IV LP at the beginning of the quarter representing (i) 0.02 percent of the first $100 million and (ii) 0.01 percent of any amount over $100 million; and a transaction fee of $12 per purchase or sale and a disbursement fee of $8 per payment of funds from the BF IV Group Trust. In accordance with the provisions of the Group Trust Agreement, the Trustee may be removed by a vote of Plans holding a majority of the Beneficial Interests in the BF IV Group Trust, provided such Plans give the Trustee 30 days' advance written notice of their intent to terminate the Trustee.

Although TCC may have and may have had business relationships with the Trustee, there will be no control relationship or ownership-based affiliation between TCC and the Trustee. Further, no Plan sponsored by TCC will be permitted to invest in the BF IV Group Trust.[7]

7. Interests in the BF IV Group Trust are referred to as ''Beneficial Interests.''[8] All investors that are beneficiaries of the BF IV Group Trust must evidence the following characteristics in order to acquire Beneficial Interests: (a) Each must commit to making at least $1 million in initial capital contributions; (b) each investor must be a Plan; (c) each Plan mut have at least $50 million in assets; (d) each Plan must agree to incorporate the terms of the Group Trust Agreement into its own trust agreement; (e) no Plan may invest more than 10 percent of its assets in Beneficial Interests in the BF IV Group Trust and such Beneficial Interests held by a Plan may not exceed 25 percent of such Group Trust; and (f) no Plan may subscribe for Beneficial Interests which, when aggregated with all other Plan assets that are subject to investment funds or separate accounts managed by TCC and/or its affiliates, is valued in excess of 25 percent of such Plan's net assets.

8. The Group Trust Agreement provides that each Plan's commitment to contribute will be divided into 20 equal segments. TCC, as investment manager, may call any amount of these installments, upon 14 days' advance written notice, when cash is needed to fund the acquisition of the Securities.[9] However, there are two limitations upon TCC's power to call contributions. First,

Moreover, less than 25 percent of its assets were provided by Plans. On January 1, 1995, MBF I LP reached the end of its term and final liquidations were made.

[3] The BF III Group Trust and the BF III LP are collectively referred to herein as BF III.

[4] The limited partners of the MidBanc III, L.P. are the individuals who are responsible for the management of BF III. Chicorp Management III, Inc. is a wholly owned subsidiary of Chicorp, Inc., which is the holding company of TCC.

[5] In the case of MBF II LP, these banks are located in the Midwestern United States. In the case of BF III and proposed BF IV Group Trust, there are no geographic restrictions.

[6] TCC believes it is appropriate to organize the BF IV Group Trust separate from the BF IV LP in order that the assets of the Group Trust may be regarded as ''plan assets'' and the requirements of the Act may otherwise be complied with in a separate entity.

[7] Although TCC and the Trustee will not be affiliated with, or under the control of or controlling any participating Plan, the applicant represents that it is likely that certain participating Plans may have a pre-existing relationship with TCC in the form of investment in the MBF II LP or the BF III. The applicant believes it is possible that a Plan participating in the BF IV Group Trust may utilize the services of the Trustee with respect to certain of its other assets that are not invested in such Group Trust. In this regard, the applicant is not requesting, nor is the Department providing, exemptive relief with respect therefor.

[8] The Department is not proposing, nor in the applicant requesting herein, exemptive relief for the purchase and sale of Beneficial Interests in the BF IV Group Trust between the Trustee and the investing Plans beyond that provided under section 408(b)(8) of the Act.

[9] If an investing Plan cannot or does not meet a capital call, the Trust Agreement provides that ten days after the investor receives notice of default on a capital call, TCC may (a) permit the investor's continued participation in the BF IV Group Trust with a commensurate reduction in both the investor's proportionate interest in such Group Trust and aggregate size of the Group Trust; (b) declare the investor's entire capital commitment due and pursue collection of the same; or (c) expel, at fair market value, the defaulting investor and offer its interest in the BF IV Group Trust first to the non-defaulting investors and then to non-investors who are qualified to invest in such Group Trust. In making the choice between these alternatives, it is represented that TCC will be guided by then-current investment strategies and the best interest of the non-defaulting investors.

no more than 50 percent of the contribution commitment may be called in any twelve month period. Second, TCC cannot call any contributions after the sixth anniversary date of the inception of the BF IV Group Trust (the period running from the date on which initial capital contributions are made to such sixth anniversary being referred to as ''the Acquisition Period'').

9. The terms of the BF IV Group Trust prescribe the content of the Investment Management Agreement. For example, TCC, at its own expense, will provide the BF IV Group Trust with personnel who are able to perform the administrative functions of the Group Trust. In addition, TCC, at its own expense, will provide the BF IV Group Trust with office space, telephones, copying machines, postage and all other necessary items of office services. Further, TCC will control proxy voting on all portfolio securities.[10]

The Investment Management Agreement permits TCC to provide brokerage services in an agency capacity. To the extent that TCC utilizes its own services in connection with brokerage services provided to the BF IV Group Trust, it will comply fully with state and federal securities laws as well as with PTE 86–128.[11]

The Investment Management Agreement may be terminated by either the Trustee, on behalf of the Plans, or by TCC at any time, subject to the following provisions. If the termination is a ''Justified Termination,'' [12] the Investment Management Agreement can be terminated by the Trustee unilaterally. However, if the termination is a ''Non-Justified Termination,'' it cannot be terminated unilaterally by the Trustee. In such case, the Trustee must first obtain the approval of Plans holding at least two-thirds of the Beneficial Interests in the BF IV Group Trust. Further, as a precondition to a ''Non-Justified Termination,'' the terminating party must provide the other party with 60 days' advance written notice of its intent to terminate.

10. In general, Beneficial Interests in the BF IV Group Trust will not be assignable, and no Plan may assign or otherwise transfer, pledge or otherwise encumber any or all of its interest in the Group Trust except for the purpose of redemption. Redemptions are limited to situations where (a) a replacement Plan is available from either current Plans investing in BF IV or there are new, qualified investors; (b) a Plan submits to TCC and the Trustee, a written opinion of counsel to the effect that the Plan's continued participation in the BF IV Group Trust would violate the Act and that relief from the violation cannot be obtained; (c) the Plan loses its tax-exempt status and that loss threatens the tax-exempt status of the BF IV Group Trust; and (d) the BF IV Group Trust loses its tax-exempt status or fails to obtain the exemptive relief proposed herein for the necessary operation of such Group Trust. This information will be disclosed to investors.

11. The decision to participate in the BF IV Group Trust will be made by a plan fiduciary who is independent of TCC and the Trustee. In each instance, the Plan fiduciary who makes the investment decision will agree not to rely on either the advice of TCC or the Trustee as the primary basis for a Plan's investment and the Independent Fiduciary will be specifically required to do so in every instance.[13] TCC represents that the decision of a Plan to invest in the BF IV Group Trust will be made by an unrelated Plan fiduciary acting on the basis of his or her own investigation into the advisability of investing in the Group Trust.[14]

12. An Independent Fiduciary of each Plan proposing to invest in the BF IV Group Trust will be provided with a copy of the Private Placement Memorandum by TCC. The Private Placement Memorandum will describe all material facts concerning the purpose, structure and operation of the BF IV Group Trust. If the Independent Fiduciary expresses further interest in participating in the BF IV Group Trust, such Independent Fiduciary will be provided with copies of the Group Trust Agreement outlining the organization principles, investment objectives and administration of the BF IV Group Trust, the procedure for the redemption of Beneficial Interests, the duties of the parties retained to administer the BF IV Group Trust and the manner in which Group Trust assets will be valued. The Independent Fiduciary will also be provided with a copy of the Investment Management Agreement which describes the duties and responsibilities of TCC, as investment manager of the BF IV Group Trust, the fees that will be paid to TCC, the conditions under which TCC may be terminated and the functions of the Independent Appraiser which may be retained under certain circumstances. Once the Independent Fiduciary has made a decision to invest in the BF IV Group Trust, TCC will provide such Independent Fiduciary with the names and addresses of all other participating Plans. The Independent Fiduciary will be required to acknowledge, in writing, prior to purchasing a Beneficial Interest in the BF IV Group Trust that such fiduciary has received copies of such documents.

The Independent Fiduciary will also be required to acknowledge, in writing, to TCC that such fiduciary is independent of TCC and its affiliates, capable of making an independent decision regarding the investment of Plan assets, knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the BF IV Group Trust.

13. TCC will prepare, or cause to be prepared on behalf of the BF IV Group Trust, the following reports with respect to the ongoing operations of the Group Trust: (a) Trading Activity and Portfolio Status Reports, for the Trustees, as required by PTE 86–128; (b) annual audited financial statements for the Trustee and the Plans; and (c) quarterly unaudited financial statements for the Trustee and Plan investors. The annual financial statements will contain a balance sheet for the BF IV Group Trust as of the end of the applicable fiscal year and a statement describing changes in the financial position for the fiscal year, as audited and reported upon by independent, certified public accountants. The annual financial report

[10] The Department is not providing exemptive relief herein for any prohibited transactions that may arise as a result of proxy voting on the part of TCC. The Department also notes that the general standards of fiduciary conduct promulgated under the Act would apply to such voting practices.

[11] The Department expresses no opinion on whether the effecting of securities transactions by TCC will comply with the terms and conditions of PTE 86–128.

[12] A Justified Termination will occur if it is caused by: (a) a material breach of the Investment Management Agreement by the party that is not seeking to terminate such Agreement; (b) a material violation of the Act that has already occurred or will occur absent termination of the Investment Management Agreement; or (c) the disassociation of key personnel (i.e., those upon whom the Plans relied in making their investment) from TCC without being replaced by individuals who are approved by a majority of the Plans.

[13] The Department notes that the general standards of fiduciary conduct promulgated under the Act would apply to the participation in the BF IV Group Trust by an Independent Fiduciary. Section 404 of the Act requires that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion. Accordingly, an Independent Fiduciary must act prudently with respect to the decision to invest in the BF IV Group Trust. The Department expects that an Independent Fiduciary, prior to investing in the BF IV Group Trust, to fully understand all aspects of such investment following disclosure by TCC of all relevant information. (For a further discussion of these disclosures, see Representation 12 above.)

[14] The Department is not expressing an opinion on whether TCC or the Trustee would be deemed to be fiduciaries under section 3(21)(A)(ii) of the Act with respect to a Plan's investment in the BF IV Group Trust. The Department is also not proposing relief for the rendering of investment advice in connection with the acquisition of Beneficial Interests in the BF IV Group Trust.

will also specify the fees that are payable or accruable to TCC. TCC will make the annual financial report available to the Trustee and each Plan within 120 days after the end of each fiscal year of the BF IV Group Trust. Within 60 days after the end of each quarter (except in the last quarter) of each fiscal year of the BF IV Group Trust, TCC will prepare and distribute an unaudited quarterly financial report to the Trustee and each Plan investor. The report will consist of at least a balance sheet for the BF IV Group Trust as of the end of fiscal year quarter and a profit and loss statement for such quarter. The quarterly financial report will also disclose the fees that are payable or accruable to TCC.

In addition to the foregoing reports, TCC will prepare and distribute to the BF IV Group Trust and each Plan such other information as may be reasonably requested by the Plans, including such information as a Plan may request in order to comply with the reporting requirements of the Act or Code.

14. A meeting of the participating Plans and TCC will be held at least annually. The meeting will afford Independent Fiduciaries an opportunity to decide on whether the BF IV Group Trust should be terminated, whether the Trustee should be removed or whether the Investment Management Agreement should be terminated, if the situation warrants. However, before any termination can take place, the advance notification requirements for termination discussed above must be complied with. Also at the annual meeting, TCC representatives will be available to discuss any aspect of the BF IV Group Trust and the agreements promulgated thereunder with Independent Fiduciaries. Such meetings will be conducted in either TCC's offices or in the offices of the Independent Fiduciaries.

15. During the Acquisition Phase for the BF IV Group Trust, any net gains realized on portfolio sales will be distributed to Plan investors but the original cost of the Security that is sold will be reinvested.[15] From the seventh year of the Group Trust through its termination, the net proceeds from sales of portfolio Securities will be distributed unless the proceeds are needed to honor pre-seventh year investment commitments or to protect pre-seventh year investments.[16]

16. Under the Investment Management Agreement, two types of fees will be payable to TCC by the BF IV Group Trust. These fees are the Management Fee and the Performance Fee, the components of which are described below. TCC's Management Fee, which is independent of the Performance Fee, is intended to cover the day-to-day operating expenses of the BF IV Group Trust. TCC represents that the Management Fee is covered by the statutory exemptive relief available under section 408(b)(2) of the Act.[17] With respect to the Performance Fee, TCC is requesting administrative exemptive relief from the Department.

(a) The annualized *Management Fee* will be payable to TCC monthly in arrears during each fiscal year the BF IV Group Trust is in existence. The Management Fee will be based upon a percentage of the aggregate capital contributions committed to both the BF IV Group Trust and the BF IV LP (the Management Fee Base). It will be equal to (1) the sum of 5 percent of the first $35 million of the Management Fee Base plus (2) 0.84 percent of the Management Fee Base in excess of $35 million, multiplied by (3) a fraction (the Trust Share), the numerator of which is the amount of capital contributions committed to the BF IV Group Trust and the denominator of which is the aggregate of the capital contributions made to the BF IV Group Trust and the BF IV LP.[18] The Management Fee will not exceed 2 percent of committed capital when all capital is contributed, even if BF IV is capitalized at less than $125 million.

After the end of the Acquisition Phase, the Management Fee will be subject to certain adjustments, particularly as distributions are made to Plan investors.[19] If, as a result of distributions to Plan investors, capital contributions made by Plans are reduced to 50 percent or less of the original aggregate capital contributions to the BF IV Group Trust, the Trust Share of the Management Fee will be reduced to 70 percent of the amount otherwise payable, effective for fiscal years subsequent to the year in which said payment was completed, and upon the payment to the Plans of an amount sufficient to reduce to 25 percent or less of their total capital contributions to the BF IV Group Trust, the Trust Share of the Management Fee will be reduced to 50 percent of the amount otherwise payable, effective for fiscal years subsequent to the year in which said payment was completed.

(b) *The Performance Fee* that will be accruable to TCC for each fiscal year of the Group Trust, will be equal to 20 percent of ((1) the excess, if any of (a) the cumulative total of realized capital gains from the inception of the BF IV Group Trust through the end of such fiscal year over (b) the cumulative total of realized capital losses during the term, less (2) any unrealized losses in the BF IV Group Trust portfolio at the end of such period in excess of unrealized appreciation in the Portfolio) and, the amount of such fee previously accrued. The amount of the annual Performance Fee that is accruable to TCC will be determined after the annual audit of the BF IV Group Trust as described in Representation 13. The calculation of the Performance Fee will be made within 60 days of the BF IV Group Trust's fiscal year end. Specifically, Securities will be valued as of the close of business on the last day of the Group Trust's fiscal year.

The Performance Fee will be further subject to the following terms and conditions:

(1) *Fee Base.* As stated above, the amount credited to TCC as the Performance Fee will be equal to a percentage of realized gains minus realized and net unrealized losses. Such

[15] According to the applicant, cash dividends that are received by the BF IV Group Trust from investments in Securities will be distributed to investors on an annual basis. Stock dividends will be retained by the BF IV Group Trust until the original portfolio investment is sold.

[16] The applicant explains that these exceptions to the general distribution rules are disclosed to investors in the Group Trust Agreement. With respect to the commitment exception, the applicant states that it is meant to cover situations where the BF IV Group Trust enters into an installment-type purchase agreement or some other contingency contract prior to the seventh year of its existence. In this connection, the applicant explains that TCC may have determined that the BF IV Group Trust should own a certain percentage of the Securities of a Bank Company or a Financial Services Company, but the requisite number of shares might not be available at that time. Under these circumstances, the applicant states that the BF IV Group Trust might enter into an agreement to purchase such Securities as they become available, even if the availability does not occur until after the sixth year.

[17] The Department expresses no opinion herein on whether TCC's receipt of the Management Fee will satisfy the terms and conditions of section 408(b)(2) of the Act.

[18] By aggregating capital contributions that are made by the BF IV Group Trust with those made to the BF IV LP and by allocating the dollar amount between both entities in proportion to their respective size, TCC represents that all investors will be charged a lower Management Fee. TCC believes that by computing the Management Fee in this manner more appropriately reflects the unified investment management of the BF IV Group Trust and the BF IV LP. The Department, however, expresses no opinion as to whether this arrangement for computing the Management Fee satisfies the ''reasonable compensation'' requirements of section 408(b)(2) of the Act and the applicable regulations.

[19] All distributions, with the exception of interest income and cash dividends, count as returns of capital.

amount will be credited to TCC annually.

(2) *Limited Deferral/Return of Capital.* The Performance Fee will be paid after December 31, 2001 which is the completion of the Acquisition Phase for the BF IV Group Trust and it cannot be paid until all participating Plans have received distributions equal to 100 percent of their capital contributions made to the BF IV Group Trust.[20]

(3) *Reduced Availability.* Prior to the termination of the Group Trust, only 75 percent of what is credited to TCC as the Performance Fee may be withdrawn from the BF IV Group Trust after the Acquisition Phase.

(4) *Charges.* The Performance Fee account will be charged for realized losses, net unrealized losses and fee payments. Thus, the fee cannot be drawn when the Performance Fee account is in a deficit position.

(5) *Fee Repayment/25 Percent Cushion.* TCC must repay any deficit in the Performance Fee account and it must also maintain a 25 percent cushion in such account.

The following examples illustrate the calculation of TCC's Performance Fee. Although the Performance Fee is paid annually and there are only two years of the BF IV Group Trust's expected term during which this fee can be drawn upon (i.e., 2002 and 2003), for purposes of illustration, four draw years have been assumed.

EXAMPLE #1

Year	Cumulative net position	Performance fee account	Maximum draw	Draw or refund
1	$800	$160	$120	$120
2	200	40	30	(90)
3	1,000	200	150	120
4	700	140	105	(45)

Year 1 Assume that when the Performance Fee first becomes payable in 2002, the BF IV Group Trust's Cumulative Net Position is $800. TCC's Performance Fee is 20% of $200 or $160. TCC may draw 75% of the $160 or $120.[21]

Year 2 The BF IV Group Trust's Cumulative Net Position at the end of the Year 2 is $200. The Performance Fee is 20% of $200 or $40. TCC is entitled to draw $30, but since it has previously drawn $120, it must refund $90.

Year 3 The BF IV Group Trust now has a Cumulative Net Position of $1,000. The Performance Fee is $200 with a permitted draw of $150. Because TCC has previously draw a net amount of $30 at the end of Year 2 (i.e., $120–$90), it may now draw an additional $120.

Year 4 The BF IV Group Trust's Cumulative Net Position falls to $700 and the Performance Fee falls to $140. The 75% draw equals $105, but TCC has previously drawn a total of $150 (i.e., $120–$90+$120). Therefore, TCC must make a refund to the BF IV Group Trust of $45.

EXAMPLE #2

Year	Cumulative net position	Performance fee account	Maximum draw	Draw or refund
1	$2,000	$400	$300	$300
2	1,000	200	150	(150)
3	500	100	75	(75)
4	900	180	135	60

Year 1 Assume that when the Performance Fee first becomes payable in 2002, the Cumulative Net Position for the BF IV Group Trust is $2,000. TCC's Performance Fee is 20% of $2,000 or $400. TCC may draw 75% of the $400 fee or $300. $100 or 25% of the draw amount must be left in the BF IV Group Trust as a cushion.[22]

Year 2 The Cumulative Net Position for the BF IV Group Trust at the end of Year 2 has fallen to $1,000. The Performance Fee is 20% of $1,000 or $200. TCC is entitled to draw $150, but since it has previously drawn $300, it must refund $150.

Year 3 The Cumulative Net Position for the BF IV Group Trust has fallen to $500. The Performance Fee now falls to $100 (i.e., 20% of $500) with a permitted draw of $75 and a cushion of $25. Because TCC has previously drawn $150 ($300–$150), it must make a refund to the BF IV Group Trust of $75.

Year 4 The Cumulative Net Position for the BF IV Group Trust is $900 at the end of Year 4. TCC's Performance Fee is 20% of $900 of $180. The 75% draw on the Performance Fee equals $135. However, since TCC has previously drawn a total of $75 ($300–$150–$75), it may now draw a Performance Fee of $60.

17. In the event of a premature termination of the Investment Management Agreement, special fee arrangements will be effective as follows:

(a) If the termination occurs prior to the third full fiscal year of the Investment Management Agreement's existence (i.e., before January 1, 1999) and it is either a Justified Termination by TCC or a non-Justified Termination by the Trustee, TCC will be entitled to receive a fee equal to the sum of (1) 20 percent of net realized gains to the date the agreement was terminated plus (2) 20 percent of the aggregate of unrealized gains net of unrealized losses

[20] For purposes of calculating the Performance Fee, cash dividends and interest are not included in the computation of the return of capital to Plan investors. As such, cash dividends do not affect the calculation of the amount of the Performance Fee or the time such fee can be first paid, even if the return of capital occurs before December 31, 2001.

[21] The assumption is, for purposes of this example, that all Plans investing in the BF IV Group Trust have received a 100 percent return of their capital contributions.

[22] The assumption is again, for purposes of this example, that all Plans investing in the BF IV Group Trust have received a 100 percent return of their capital contributions.

determined on the date the agreement was terminated. (For purposes of determining net unrealized gains or net unrealized losses, TCC will utilize an independent appraiser to value Securities for which there are no independent market quotations.) Payment of this fee will be deferred until the termination of the BF IV Group Trust. In addition, TCC will not be required to make payments to the BF IV Group Trust in the event a loss to such Group Trust occurs.

(b) If the termination of the Investment Management Agreement occurs after the third full fiscal year of the BF IV Group Trust and is either a Non-Justified Termination by the Trustee or a Justified Termination by TCC, TCC will be entitled to its regular Performance Fee. However, payment will be deferred to the termination of the Group Trust.

(c) If TCC declares a Non-Justified Termination at any time, it has no enforceable right to receive a Performance Fee under the terms of the Investment Management Agreement.

(d) If the Trustee, on behalf of the BF IV Group Trust, declares a Justified Termination at any time, TCC has no enforceable right to receive a Performance Fee under the terms of the Investment Management Agreement. However, if the Justified Termination involves a violation of the Act and such violation has not been caused by TCC's gross misconduct (e.g., the law changes in a manner that would prohibit prospectively an important part of TCC's management of the BF IV Group Trust), TCC will be entitled to the Performance Fee it would have earned through the date of the termination of the Investment Management Agreement. Payment will again be deferred until the termination of the BF IV Group Trust.[23]

18. The BF IV Group Trust will terminate upon the earliest to occur of (a) the complete distribution of its assets, (b) a vote in favor of termination by two-thirds of the Plans holding Beneficial Interests or (c) December 31, 2003. The Group Trust may be extended by a two-thirds affirmative vote of those Plans holding Beneficial Interests therein. (For termination of the Trustee under the Group Trust Agreement and the termination of TCC under the Investment Management Agreement, see Representations 6, 9 and 17 of this proposed exemption.)

Upon termination of the BF IV Group Trust, all portfolio positions will be liquidated, Group Trust expenses (including TCC's Performance Fee) will be paid and distributions will be made. If all assets cannot be converted into cash or if it would be disadvantageous to liquidate every asset, remaining assets may be distributed in-kind. TCC will then receive a fractional portion of its fee in-kind.

TCC has exclusive authority over the sale of portfolio securities so it will make liquidation decisions. The Trustee will pay all expenses of the BF IV Group Trust at the direction of TCC. Although TCC will be responsible for directing the Trustee to make distributions, TCC's discretion will not be unlimited. Rather, as amounts are available for distribution, TCC will be required to make distributions in accordance with the provisions of the Group Trust Agreement.

The following example illustrates the manner in which in-kind distributions will be made by TCC:

Assume that all Plans investing in the BF IV Group Trust have received a 100% return of capital. Assume also that there are only two Plans investing in the BF IV Group Trust. Plan A has a Beneficial Interest worth \$60 and Plan B has a Beneficial Interest worth \$40.

The BF IV Group Trust holds 100 shares of Securities in Bank X which it acquired for \$5 per share. Upon termination of the Group Trust, Bank X Securities is worth \$7 per share.

The total unrealized gain attributable to Bank X Securities is $(\$7-\$5)\times100=\$200$.

TCC's Performance Fee is equal to $\$200\times20\%=\$40$. TCC receives $\$40\div\$7=5.7$ shares of Bank X Securities.

Plan A receives $60\%\times94.3=56.6$ shares of Bank X Securities.

Plan B receives $40\%\times94.3=37.7$ shares of Bank X Securities.

19. Valuations of (and for) the BF IV Group Trust will be needed for redemptions, acquisitions by the BF IV Group Trust, in connection with in-kind distributions and to pay TCC's Performance Fee. The valuations will be made by TCC for Securities for which independent market quotations are readily available. In situations where no independent market quotations are readily available, an Independent Appraiser will be appointed as described below.

(a) *National Exchange—Regular Trades.* Any Security which is listed on a national securities exchange will be valued based on its last sales price on the national securities exchange on which the security is principally traded on the valuation date.[24] If the valuation date is not a date on which the exchange was open for trading, the value will be determined in the same manner as if the valuation date was the last prior date on which the exchange was open for trading.

(b) *National Exchange—No Trades.* If no sale of a Security listed on a national securities exchange occurred on either of the dates described in clause (a) above, the security will be valued based on the last bid price on the exchange on which the security was publicly-traded.[25]

(c) *No Independent Market or No Listing—Use of the Independent Appraiser.* In the event that there is no independent market for a Security or the Security is not listed on a national securities exchange (e.g., a small bank with 5 shareholders), the Independent Appraiser will be required to value such securities. TCC will utilize the Independent Appraiser to value Securities in connection with the in-kind distributions by the BF IV Group Trust, the redemption of Beneficial Interests in the BF IV Group Trust or to determine TCC's Performance Fee.

Although TCC will nominate the Independent Appraiser, Plans will be given the option of either approving or disapproving of the nominee. The Independent Appraiser will not be appointed absent the affirmative written approval of a majority of the Plans investing in the BF IV Group Trust. However, the Plans will have no veto power over TCC's decision that an Independent Appraiser is required.

Each member of the Independent Appraiser (currently, the same advisory committee serving in this capacity for the MBF II LP and the BF III) must be experienced in the valuation of subregional banks as well as in the business of performing valuations. In addition, each member of the Independent Appraiser must not be

[23] If an early termination of the Investment Management Agreement occurs, the applicant states that the Trustee, on behalf of the BF IV Group Trust, and TCC will initially attempt to agree on whether the termination is Justified or Non-Justified. If the parties are unable to agree, judicial proceedings will be instituted as a final means of resolution.

[24] The applicant explains that the phrase "principally traded" means that if a Security is traded on more than one exchange and if the trade prices differ between exchanges, the value will be taken from the exchange on which the largest volume of that security has traded.

[25] The applicant explains that the most recent trade price is not used to value a Security in this instance because it may be too dated to provide an accurate estimate of value. Instead, the applicant considers the bid price to be indicative of the current value at which someone would be willing to acquire a Security on the valuation date. The applicant further notes that the use of the bid price rather than the previous trading or closing price in valuing a Security provides a conservative valuation approach which will result, in most instances, in a lower Performance Fee payable to TCC.

The Department assumes that the bid price described herein represents active bids and is a true indicator of market prices.

controlled by (or control) TCC and must not receive more than 5 percent of their lowest annual income from TCC or the Trustee, either during the term of BF IV or in the three years preceding its creation. Individual members of the Independent Appraiser or the entire committee may be removed by Plans holding 50 percent or more of the Beneficial Interests in the Group Trust. A majority of the Plans and TCC must approve a replacement Independent Appraiser. If the Plans and TCC cannot agree, upon such replacement, the firm of Peat Marwick Main & Co. will be appointed.

The Independent Appraiser will use the principles set forth in Revenue Ruling 59–60 and the Department's proposed ''Adequate Consideration'' regulations (53 FR 17632, May 17, 1988) to determine fair market value. The valuations made by the Independent Appraiser will be binding upon TCC. In addition, the Independent Appraiser will issue reports to TCC, the Trustee and the Plans participating in the BF IV Group Trust which set forth the Independent Appraiser's pricing methodology and rationale for Securities it has been asked to value. Such reports will be issued after each required valuation and they will comply with the aforementioned regulations.

20. With respect to transactions which may arise during the existence of the BF IV Group Trust and which involve parties in interest to participating Plans, TCC requests exemptive relief from the Department from the provisions of section 406(a) of the Act. Specifically, TCC requests exemptive relief where the BF IV Group Trust sells Securities held in its portfolio for cash or other securities to a party in interest with respect to a participating Plan in the context of an acquisition or a merger by the party in interest, provided the party in interest is not an affiliate of TCC. TCC represents that the BF IV Group Trust will receive the same offer that other shareholders of the Bank Company or Financial Services Company will receive. Because the BF IV Group Trust will always be a minority shareholder in such situation, TCC states that the BF IV Group Trust will be in the position of a beneficiary of the acquisition offer and it will not be in the position of an active player in the merger or acquisition transactions.

21. In summary, it is represented that the proposed transactions meet the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The participation of Plans in the BF IV Group Trust will be approved by an Independent Fiduciary.

(b) Each Plan investing in the BF IV Group Trust will have assets that are in excess of $50 million.

(c) No Plan will invest more than 10 percent of its assets in Beneficial Interests in the BF IV Group Trust and such Beneficial Interests held by the Plan will not exceed 25 percent of such Group Trust.

(d) No Plan will invest more than 25 percent of its assets in investment vehicles (i.e., collective investment funds and separate accounts) managed or sponsored by TCC and/or its affiliates.

(e) Prior to making an investment in the BF IV Group Trust, each Independent Fiduciary contemplating investing therein will receive offering materials which disclose all material facts concerning the purpose, structure and operation of the Group Trust and the fees paid to TCC.

(f) Each Plan investing in the BF IV Group Trust will be required to acknowledge, in writing, prior to purchasing Beneficial Interests that such fiduciary has received copies of such documents and to acknowledge, in writing, to TCC that such fiduciary is (1) independent of TCC and its affiliates, (2) capable of making an independent decision regarding the investment of Plan assets and (3) knowledgeable with respect to the Plan in administrative matters and funding matters related thereto, and able to make an informed decision concerning participation in the BF IV Group Trust.

(g) TCC will make quarterly and annual written disclosures to participating Plans with respect to the financial condition of the BF IV Group Trust and the total fees that it will receive for services rendered to the BF IV Group Trust.

(h) TCC will hold annual meetings and conduct periodic discussions with Independent Fiduciaries of Plans participating in the BF IV Group Trust to address any matters pertaining to such Group Trust.

(i) The terms of all transactions that are entered into on behalf of the BF IV Group Trust by TCC shall remain at least as favorable to an investing Plan as those obtainable in arm's length transactions with unrelated parties. In this regard, the valuation of assets of the BF IV Group Trust will be based upon independent market quotations or determinations made by an Independent Appraiser.

(j) Either TCC or the Trustee, on behalf of the Plans participating in the BF IV Group Trust, may terminate the Investment Management Agreement at any time.

(k) As to each Plan, the total fees paid to TCC and its affiliates will constitute no more than reasonable compensation.

(l) TCC's Performance Fee will be based upon a percentage of net realized gains minus net unrealized losses. In this regard,

(1) The Performance Fee will be paid after December 31, 2001, which is the completion of the Acquisition Phase for the BF IV Group Trust, and it cannot be paid until all participating Plans have received distributions equal to 100 percent of their capital contributions to the BF IV Group Trust.

(2) Prior to the termination of the BF IV Group Trust, only 75 percent of what is credited to TCC as the Performance Fee may be withdrawn by such Group Trust.

(3) TCC will repay all deficits in its Performance Fee account.

Notice to Interested Persons

Notice of the proposed exemption will be given to Plans participating in the BF IV Group Trust within 5 days as of the date of publication of the notice of pendency in the Federal Register. Such notice will include a copy of the notice of proposed exemption, as published in the Federal Register, as well as a supplemental statement, as required pursuant to 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment on and/or to request a hearing. Comments and hearings requests with respect to the proposed exemption are due 35 days after the date of publication of the proposed exemption in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Jan D. Broady of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Hughes Non-Bargaining Retirement Plan, Hughes Bargaining Retirement Plan, Hughes Subsidiary Retirement Plan (Collectively, the Plans)

[Applications No. D–10295, D–10296 and D–10297] Located in New York, N.Y.

Proposed Exemption

The Department of Labor (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 32847, August 10, 1990). Effective October 6, 1995, if the exemption is granted, the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the leasing by the Plans of 10,106 square feet of office space (Suite 300) in a commercial office building which is owned by the Plans (the Building) to Sarofim Realty Advisors (SRA), a party in interest with respect to the Plans, for a period ending February 28, 2000 pursuant to the terms of a lease amendment (the Lease) provided the following conditions are satisfied: (1) An independent third party determines that the terms of the Lease represent not less than fair rental value as of the date of the Lease; (2) the terms of the Lease are reviewed and approved by a qualified independent fiduciary of the Plans who determines that the terms of the transaction are at least as favorable as the terms generally available to the Plans in arm's length transactions between unrelated parties and that SRA's improvements to Suite 300 are acceptable; (3) the qualified independent fiduciary concludes that the transaction is in the best interests of the Plans and the Plans' participants and beneficiaries; (4) on behalf of the Plans, the qualified independent fiduciary continues to monitor SRA's performance under the Lease; and (5) within sixty (60) days of the publication in the Federal Register of a notice granting this proposed exemption, SRA will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code that are due by reason of the prohibited Lease transaction during the period beginning March 1, 1995 and ending on the effective date of this exemption.

EFFECTIVE DATE: The effective date of this exemption is October 6, 1995.

Summary of Facts and Representations

1. The Plans involved in the transaction, the Hughes Non-Bargaining Retirement Plan, the Hughes Bargaining Retirement Plan and the Hughes Subsidiary Retirement Plan, are covered by the Hughes Master Retirement Trust (the Trust). The Plans are defined benefit plans. The Plans' sponsor is Hughes Electronic Corporation (Hughes). Prior to March 29, 1995, the Plans' sponsor was Hughes Aircraft Company. As of November 30, 1995, the Plans had a total of 91,006 participants and beneficiaries. As of November 30, 1995, the approximate aggregate fair market value of the total assets of the Plans was $6.376 billion. The Building is a commercial office building known as Preston Sherry Plaza with 147,008 square feet of rentable space and located in Dallas, Texas. As of November 30, 1995, the value of the Building was .34 percent of the fair market value of the total assets of the Plans.

2. SRA states that it is a fiduciary, within the meaning of section 3(21) of the Act, to the Plans and a party in interest under section 3(14)(A) of the Act with respect to the Plans by virtue of its appointment by the Plans as an investment manager for certain of the Plans' real estate investments. SRA is headquartered in Dallas, Texas. As of December 31, 1995, SRA employed 18 full-time employees and had approximately $772 million in aggregate market value of employee benefit plan assets under management. SRA oversees the acquisition, development, leasing, management, financing and sale of select property types in select regions and major cities throughout the country for the Plans and eight other pension plans and endowment funds. SRA provides recommendation to the Plans as to the types of properties to be purchased, the number and location of the properties, the structure of the transactions and the amount of third-party financing, if any, that is appropriate. In addition, SRA is responsible for ensuring that the Plans' properties are managed in accordance with the Plans' investment objectives.

3. From October 1, 1991 to February 28, 1995, SRA leased 6,018 square feet of space on the fourth floor of the Building from the Plans. SRA represents that its lease of the fourth floor space complied with the requirements of Part III of PTE 84–14 which permits a qualified professional asset manager (QPAM) to lease not in excess of the greater of 7500 square feet or 1 percent of the rentable space of the office building in which the investment fund managed by the QPAM has the investment.[26] In order to accommodate another Building tenant and to facilitate a cost effective reconfiguration of space within the Building to the benefit of the Plans, SRA relocated to the third floor of the Building on March 1, 1995. SRA occupied this space pursuant to the terms of the Lease entered into on March 1, 1995.

4. The Lease relates to 10,106 square feet of office space and is for a term of five years ending February 28, 2000, at a base rent of $16,000 per square foot. The annual base rent adjusts at a rate of $.25 per square foot per year to $17.00 per square foot in the year 2000. The Lease also provides for a one-time-only tenant improvement or construction allowance of $18.25 per square foot. The allowance enabled SRA to build additional walls, replace the carpet and repaint the walls of the third floor. Under the terms of the Lease, SRA is responsible for its proportionate share of common area maintenance, insurance and property taxes over the 1994 base year amount. The applicant states that the Lease terms are comparable to the terms of the leases of other similar tenants in the Building, as well as the terms of leases in similar buildings in the area.

5. The applicant states that the Lease between SRA and the Plans is not eligible for relief from the prohibited transaction provisions of the Act pursuant to PTE 84-14 because the Lease is for an amount of space in excess of the greater of 7,500 square feet or one percent of the rentable space in the Building.

6. The applicant represents that on or about March 8, 1995, SRA contacted Price Waterhouse LLP (Price) and requested that Price serve as the independent fiduciary with respect to the Lease. The applicant states that Price agreed to the engagement and SRA asked Price to begin work immediately to determine whether the terms and conditions of the Lease represented an arm's length lease of office space between unrelated parties and to prepare a report summarizing Price's conclusions (Price Report). During the period March 14 to March 31, 1995, Price performed a market review of the Lease. Price reviewed the Lease and the leases of five comparable tenants. Price inspected and evaluated the Building and interviewed the Building's management. Price performed a present value analysis on the comparable leases in order to evaluate the economic terms of the leases. Based on Price's research and analysis, the March 31, 1995 Price Report determined that the Lease was under terms which are not less than fair market value.

7. According to the Amendment, the applicant states that SRA circulated several drafts of an independent fiduciary agreement to Price and to the Plans. On March 30, 1995, the Plans requested that SRA revise the independent fiduciary agreement to substitute ''independent advisor'' for ''independent fiduciary.'' SRA objected to the change and advised the Plans that the agreement should refer to Price as an ''indendent fiduciary.'' On April 4, 1995, the Plans advised SRA that Price could not serve as an independent fiduciary to the Plans because Price was not a registered investment adviser under the Investment Advisers Act of 1940 and the Plans documents required all fiduciaries appointed by the Plans to be registered investment advisers.

[26] SRA represents that it is a QPAM as that term is defined in PTE 84–14.

Subsequently, SRA and the Plans discussed several alternatives with respect to the appointment of an independent fiduciary. On October 6, 1995, the Plans and RREEF America L.L.C. (RREEF) entered into an agreement for RREEF to act on behalf of the Plans as an independent fiduciary to review the Price Report, review and approve the Lease terms and monitor SRA's performance under the Lease (the Agreement). This Agreement was essentially an extension of RREEF's duties as a qualified professional asset manager to the Plans pursuant to the agreement dated March 3, 1992 between the Plans and RREEF America Partners L.P., now known as RREEF (the Investment Management Agreement).

8. The applicant states that RREEF is a qualified independent fiduciary who actively manages commercial real estate in Dallas, Texas. Further, neither RREEF nor its affiliates has any ownership interest in SRA or its affiliates and neither SRA nor its affiliates has any ownership interest in RREEF or its affiliates. The Applicant represents that the Plans will pay RREEF's fee for serving as an independent fiduciary. In view of RREEF's other unrelated business relationships with the Plans, RREEF has agreed to perform these additional services for the Plans for the sum of $1.00 per annum in lieu of any additional fee which otherwise would be due under the Investment Management Agreement.

9. According to the Statement of Independent Fiduciary dated September 12, 1996, RREEF states that it is an investment adviser registered under the Investment Advisers Act of 1940 and oversees the acquisition, development, leasing, management, financing and sale of commercial real estate throughout the country including real estate located in Dallas, Texas. RREEF serves as an investment advisor and fiduciary for approximately 150 employee benefit plans including the Plans. RREEF represents that it understands its ERISA duties and responsibilities in acting as a fiduciary with respect to the Plans. RREEF states that as of December 31, 1995, it had approximately $6 billion in aggregate market value of employee benefit plan assets under management and that, as of December 31, 1995, RREEF and its affiliates received less than 1 percent of their annual income from SRA or its affiliates.

10. The applicant represents that under the Investment Management Agreement, RREEF may be removed with or without cause at any time by the Plans (acting through fiduciaries of the Plans that are unrelated to SRA or RREEF) upon written notice of such termination. Further, RREEF's appointment is subject to annual confirmation by the fiduciaries of the Plans. The applicant states that RREEF may not be removed by SRA and the appointment of RREEF as independent fiduciary shall remain in effect until 60 days after receipt by the Plans of a notice of resignation from RREEF, or 60 days after RREEF receives a notice of removal from the Plans.

11. The applicant states that upon the termination of RREEF's appointment, a successor independent fiduciary (Successor) will be designated by the Plans. The Successor will be subject to annual confirmation by fiduciaries of the Plans. In addition, any Successor must be an individual, group of individuals, or a business entity which has substantial experience and expertise in the commercial real estate field. Neither the Successor nor any affiliate of the Successor may have any ownership interest in SRA or any of its affiliates, nor may SRA or any of its affiliates have any ownership interest in the Successor or its affiliates. Moreover, neither the Successor itself, nor the Successor and its affiliates in the aggregate, may receive more than 1 percent of their total annual gross revenues, determined as of the end of their last fiscal year, from business transactions with SRA or its affiliates. Furthermore, any Successor would be removable with or without cause at any time by the Plans acting through a fiduciary or fiduciaries unrelated to SRA or the Successor. Any Successor would not be removable by SRA for any reason.

12. RREEF states that on the Plan's behalf, RREEF has reviewed and approved the terms of the Lease. RREEF states that is has reviewed: the Lease; SRA's proposed improvements to the property; the Price Report concerning the proposed transaction, including all accompanying data and analyses; physically inspected the property; and compared the Lease with other leases for space in the Building and leases for space at comparable properties. RREEF also interviewed four local brokers active in the Building's submarket to identify comparable market rent terms. Based on RREEF's review and analysis, RREEF concluded that the terms of the Lease are in the best interest of the Plans and the Plans' participants and beneficiaries, the terms of the Lease are at least as favorable as the terms generally available to the Plans in arm's length transactions between unrelated parties, and that SRA's proposed improvements to the office space are acceptable and will not cause the premises to be untenantable.

13. Under the Agreement, RREEF is also obligated to monitor SRA's performance under the Lease. RREEF agreed to review any matter which requires the approval of the landlord under the terms of the Lease and determine on behalf of the Plans whether or not to grant approval and take any other action with regard to the Lease which the landlord would have the authority and/or obligation to take, on behalf of the Plans.

14. The applicant represents that the Lease allows the Plans to accommodate existing tenants, to retain SRA as a stable and reliable tenant, and to realize income that might not otherwise be received. The Plans derive a benefit by virtue of SRA's occupancy of space in the Building and its ability to better evaluate the day-to-day performance of the other tenants, the property manager and the physical upkeep of the asset. If the Lease is not granted an exemption, the applicant represents that the Plans would be subjected to the risks of downtime and additional refit costs for the current SRA space.

15. The applicant represents that within sixty (60) days of the publication in the Federal Register of a notice granting this proposed exemption, SRA will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code that are due by reason of the prohibited Lease transaction during the period beginning the date the Lease was entered into, March 1, 1995, and ending on October 6, 1995, the effective date of this exemption, the date of the appointment of an independent fiduciary with respect to the Lease.

16. In summary, the applicant represents that the proposed exemption meets the criteria of section 408(a) of the Act because: (1) Price, an independent third party, has determined that the terms of the Lease represent not less than fair rental value as of the date of the Lease; (2) the terms of the Lease were reviewed and approved by RREEF, a qualified independent fiduciary who determined that the terms of the transaction were at least as favorable as the terms generally available to the Plans in arm's length transactions between unrelated parties and that SRA's improvement to Suite 300 were acceptable; (3) RREEF, a qualified independent fiduciary, concluded that the Lease is in the best interests of the Plans and the Plans' participants and beneficiaries; (4) RREEF, on behalf of the Plans, continues to monitor SRA's performance under the Lease; and (5) within sixty (60) days of the publication in the Federal Register of a notice granting this proposed exemption, SRA

will file Form 5330 with the Internal Revenue Service and pay the excise taxes applicable under section 4975(a) of the Code that are due by reason of the prohibited Lease transaction during the period beginning March 1, 1995 and ending on the effective date of this exemption.

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons by either mail or hand delivery 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 pendency of the exemption as published in the Federal Register and shall inform interested persons of their right to comment on and/or to request a hearing with respect to the proposed exemption. Comments are due within 60 days of the date of publication of the proposed exemption in the Federal Register.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the proposed replacement exemption to the address above, within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the referenced applications at the address set forth above.

FOR FURTHER INFORMATION CONTACT: Wendy McColough of the Department, telephone (202) 219–8971. (This is not a toll-free number.)

APA, Inc. 401(k) Profit Sharing Plan (the Plan) Located in Pleasant Hill, California

[Application No. D–10375]

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 proposed loan (the Loan) of $30,000 to Mr. Gary Petsuch (Mr. Petsuch), a party in interest with respect to the Plan, from Mr. Petsuch's segregated account (the Account) in the Plan, and (2) the personal guarantee of the Loan by Mr. Petsuch, provided the following conditions are satisfied: (a) The terms of the Loan are at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party; (b) the Loan does not exceed 25% of the assets of the Account; (c) the Loan is secured by a pledge of Mr. Petsuch's interest in an investment account which has been currently valued by an independent party as having a fair market value approximately 280% of the principal amount of the Loan; (d) the account collateralizing the Loan will be maintained at a collateral-to-Loan ratio of not less than 200% throughout the duration of the Loan; (e) Mr. Petsuch has also personally guaranteed the Loan; and (f) Mr. Petsuch is the only Plan participant to be affected by the Loan.

Summary of Facts and Representations

1. Action Personnel Agency, Inc. d.b.a. United Staffing Services (APA), a California Subchapter S Corporation, is the sponsor of the Plan. Mr. Petsuch is the 100% owner of APA and, as such, is a party in interest with respect to the Plan.

2. Mr. Petsuch, as the owner of a Subchapter S Corporation, is unable to participate in the Plan's participant loan program. Mr. Petsuch has a segregated rollover Account in the Plan which had a value of $124,875 as of August 23, 1996. This Account is composed of publicly traded stock.

3. Mr. Petsuch has requested an exemption that would permit him to borrow $30,000 from his Account in the Plan. Since the Loan is to come from his Account, Mr. Petsuch is the only Plan participant who will be affected by this proposed transaction. The Loan amount would represent less than 25% of the value of the Account. The term of the Loan will be for a period of five years at an interest rate of Prime plus two, based on the published Prime Rate in the Western Edition of the Wall Street Journal, which currently would be 10.75%. The interest rate will be adjusted during the term of the Loan whenever there is a change in the Prime Rate of Interest. The new interest rate will be effective immediately and will remain in effect until the next time the Prime Rate changes. The Loan will be repaid in equal monthly installments of principal and interest. Ms. Jeanne Marx, Vice President of The Bank of San Ramon Valley (the Bank) in San Ramon, California, has represented that the Bank would require identical terms to make a five year loan to Mr. Petsuch.

4. In addition to giving his personal guarantee for the Loan, Mr. Petsuch will pledge as security for the Loan his interest in a Charles Schwab & Co., Inc. (Schwab) investment account. The account consists of publicly traded securities, which according to Schwab had a fair market value of $84,855 as of August 26, 1996. Thus, the pledged security has a fair market value approximately 2.8 times greater than the principal amount of the proposed Loan. The applicant represents that the collateral-to-Loan ratio will always remain at least 200%. If the collateral-to-Loan ratio ever falls below this level, Mr. Petsuch represents that he will add additional collateral to the Schwab account.

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Code because: (a) The Loan represents less than 25% of the assets of the Account; (b) the terms of the Loan will be identical to those required by a third party lender, the Bank, if it were to make a similar loan; (c) the Loan will be secured by Mr. Petsuch's personal guarantee and his interest in an investment account which has been currently valued by an independent party as having a fair market value approximately 280% of the principal amount of the Loan; (d) the collateral-to-Loan ration will remain not less than 200% throughout the duration of the Loan; and (e) Mr. Petsuch is the only Plan participant to be affected by the Loan, and he desires that the transaction be consummated.

NOTICE TO INTERESTED PERSONS: Since Mr. Petsuch is the only Plan participant to be affected by the proposed transaction, the Department has determined that there is no need to distribute the notice of proposed exemption to interested persons. Comments and requests for a hearing are due within 30 days from the date of publication of this notice of proposed exemption in the Federal Register.

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 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 that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of January, 1997.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 97–865 Filed 1–13–97; 8:45 am]

BILLING CODE 4510–29–M

[Prohibited Transaction Exemption 97–01; Exemption Application No. D–10143, et al.]

Grant of Individual Exemptions; Univar Corporation UniSaver Tax

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.

Univar Corporation UniSaver Tax Savings Investment Plan (the Plan) Located In Kirkland, Washington

[Prohibited Transaction Exemption 97–01; Exemption Application No. D–10143]

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 section 4975(c)(1) (A) through (E) of the Code, shall not apply to the extension of credit in the form of guarantees and loans of funds (the Loans), not to exceed $1,466,785.38, to the Plan by Univar Corporation (the Employer), the sponsor of the Plan, or it successors, with respect to Guaranteed Investment Contract No. 62127 (the GIC) issued by Confederation Life Insurance Company of Canada (Confederation), and the repayment of the Loans by the Plan to the Employer, or its successors, provided the following conditions are satisfied: (a) All terms and conditions of the transactions are no less favorable to the Plan than those the Plan could receive in arm's length transactions with unrelated parties; (b) No interest payments or other expenses will be incurred by the Plan with respect to the transactions; (c) Repayment of the Loans will be made from proceeds realized from the GIC (the GIC Proceeds) as paid to the Plan by Confederation, its successors, or any other third party, and made only if the repayments do not interfere with the liquidity needs of the Plan for payment of benefits, transfers of investments, hardship withdrawals, or loans as determined by BZW Barclays Global Investors, N.A., the Plan trustee; (d) Repayment of the Loans will be waived by the Employer and its successors to the extent the Loans exceed the GIC Proceeds; and (e) All unpaid principal and interest that was due under the GIC on August 12, 1994, minus any Loans from the Employer and its successors, and/or payments received under the GIC after August 12, 1994, will be completely paid by January 1, 2000, by a Loan to the Plan from the Employer or its successors.

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 57467.

FOR FURTHER INFORMATION CONTACT: Mr. C.E. Beaver of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Wayne Obstetrical Group, P.A. Money Purchase Retirement Plan (the Wayne Plan); Pediatric Professional Associates, P.A. Profit Sharing Plan (the Pediatric Plan); Physicians for Women, P.A. Profit-Sharing Plan and Trust (the Physicians Plan; collectively, the Plans) Located in Wayne, New Jersey

[Prohibited Transaction Exemption 97–02; Exemption Application Nos. D–10262, D–10263, and D–10264]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the loans totalling $530,000 by the Plans to S & D Associates (S & D), provided that the following conditions are satisfied:

(a) The terms and conditions of the loans are at least as favorable to the Plans as those the Plans could obtain in comparable arm's length transactions with unrelated parties;

(b) At all times, the loans are secured by a first mortgage on certain real property (the Property), which is duly recorded under New Jersey State law;

(c) At all times, the fair market value of the Property, as established by a qualified, independent appraiser, equals at least 150% of the total outstanding balances of the loans;

(d) At all times, no more than 25% of the assets of each lending Plan are invested in the loans;

(e) A qualified, independent fiduciary has determined that the loans are in the best interests of the Plans; and

(f) At all times, the independent fiduciary enforces compliance with the terms and conditions of the loans and of the exemption, including foreclosure on the Property in the event of default.

EFFECTIVE DATE: The exemption is effective as of January 1, 1997.

In response to a comment from the applicants, the Department has agreed to modify the Summary of Facts and Representations (the Summary) in the notice of proposed exemption to reflect a modification to the terms of the loans. Accordingly, on page 55323 of such notice, the first subparagraph in Paragraph 4 of the Summary should be corrected to read as follows:

> The loans, as evidenced by promissory notes, will each provide for a term of 15 years and a fixed interest rate of 11 percent per annum for the first 10 years. Thereafter, the interest rate will become adjustable annually, based upon the greater of: (a) 11 percent, or (b) three percent above the five-year Treasury note yield as published in The Wall Street Journal, determined as of the 10th anniversary of the loans and each subsequent anniversary thereof. The promissory notes will require S & D Associates to make monthly payments of principal and interest on the loans, to be fully amortized over the 15-year term. The Plans will pay no fees nor other expenses relating to the loans.

A "Supplemental Statement" describing the modified loan terms was provided to interested persons, along with a copy of the notice of proposed exemption as published in the Federal Register. Due to a delay in providing notice to interested persons, the comment period was extended until December 26, 1996.

In addition, the applicants wished to note that the last sentence in the first subparagraph of Paragraph of 1 of the Summary should be corrected to read as follows:

> The trustees of the Wayne Plan are the four owners, above [i.e., revised to include Steven Domnitz].

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 55322.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

National Baptist Publishing Board Pension Plan (the Plan) Located in Nashville, TN

[Prohibited Transaction Exemption 97–03; Exemption Application No. D–10283]

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) of common stock of Citizens Savings Bank and Trust Company (the Stock) located in Nashville, Tennessee, by the Plan to AmeriStar Investments and Trust, a division of First American National Bank, Trustee of the Plan and party in interest with respect to the Plan; provided that (1) the Sale is a one-time transaction for cash; (2) the Plan experiences no loss nor incurs any expenses from the Sale; and (3) the Plan receives as consideration from the Sale the greater of the following amounts: (a) the fair market value of the Stock as of the date of the Sale plus interest at 6% for the period March 31, 1993 through the date the Stock is sold by the Plan; or (b) the total cost of the investment, $100,000, plus interest at 6% for the period March 31, 1993 through the date the Stock is sold by the Plan.

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 55324.

FOR FURTHER INFORMATION CONTACT: Mr. Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Summit Sheet Metal, Inc. Defined Benefit Pension Plan (the Plan) Located In Anaheim, California

[Prohibited Transaction Exemption 97–04; Exemption Application No. D–10330]

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 section 4975(c)(1) (A) through (E) of the Code, shall not apply to the cash sale (the Sale) by the Plan of certain real property (the Property) to Messrs. Milton J. Chasin, Donald E. Hanson, and Gale N. Searing, parties in interest with respect to the Plan; provided that the following conditions are satisfied: (a) The Sale is a one-time transaction for a lump sum cash payment; (b) the purchase price is the fair market value of the Property as determined on the date of the Sale by a qualified, independent appraiser; and (c) the Plan will incur no commissions or any other expenses from the Sale.

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 25, 1996, at 61 FR 59914.

FOR FURTHER INFORMATION CONTACT: Mr. C.E. Beaver of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

SouthTrust Securities, Inc. (ST) Located in Birmingham, Alabama

[Prohibited Transaction Exemption 97–05; Exemption Application No. D–10376]

Exemption

I. Transactions

A. Effective October 25, 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 25, 1996, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) the plan is not an Excluded Plan;

(ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) a plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) immediately after the acquisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[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 25, 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 25, 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

[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).

[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.

investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under Part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition or holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. ''Certificate'' means:

(1) a certificate—

(a) that represents a beneficial ownership interest in the assets of a trust; and

(b) that entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) a certificate denominated as a debt instrument—

(a) that represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) that is issued by and is an obligation of a trust;

with respect to certificates defined in (1) and (2) above for which ST 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 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.

[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.

C. ''Underwriter'' means:

(1) ST;

(2) any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with ST; or

(3) any member of an underwriting syndicate or selling group of which ST 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 loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. ''Servicer'' means any entity which services loans contained in the trust, including the master servicer and any subservicer.

H. ''Trustee'' means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. ''Insurer'' means the insurer or guarantor of, or provider of other credit support for, a trust. Notwithstanding the foregoing, a person is not an insurer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. ''Obligor'' means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, ''obligor'' shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. ''Excluded Plan'' means any plan with respect to which any member of the Restricted Group is a ''plan sponsor'' within the meaning of section 3(16)(B) of the Act.

L. ''Restricted Group'' with respect to a class of certificates means:

(1) each underwriter;

(2) each insurer;
(3) the sponsor;
(4) the trustee;
(5) each servicer;
(6) any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or
(7) any affiliate of a person described in (1)–(6) above.

M. ''Affiliate'' of another person includes: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;
(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and
(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. ''Control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be ''independent'' of another person only if:
(1) such person is not an affiliate of that other person; and
(2) the other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. ''Sale'' includes the entrance into a forward delivery commitment (as defined in section Q below), provided:
(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's-length transaction with an unrelated party;
(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and
(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. ''Forward delivery commitment'' means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

R. ''Reasonable compensation'' has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. ''Qualified Administrative Fee'' means a fee which meets the following criteria:
(1) the fee is triggered by an act or failure to act by the obligor other than the normal timely payment of amounts owing in respect of the obligations;
(2) the servicer may not charge the fee absent the act or failure to act referred to in (1);
(3) the ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and
(4) the amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. ''Qualified Equipment Note Secured By A Lease'' means an equipment note:
(1) which is secured by equipment which is leased;
(2) which is secured by the obligation of the lessee to pay rent under the equipment lease; and
(3) with respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as would be the case if the equipment note were secured only by the equipment and not the lease.

U. ''Qualified Motor Vehicle Lease'' means a lease of a motor vehicle where:
(1) the trust holds a security interest in the lease;
(2) the trust holds a security interest in the leased motor vehicle; and
(3) the trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as would be the case if the trust consisted of motor vehicle installment loan contracts.

V. ''Pooling and Servicing Agreement'' means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, ''Pooling and Servicing Agreement'' also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

W. ''ST'' means SouthTrust Securities, Inc. and its affiliates.

The Department notes that this exemption is included within the meaning of the term ''Underwriter Exemption'' as it is defined in section V(h) of Prohibited Transaction Exemption 95–60 (60 FR 35925, July 12, 1995), the Class Exemption for Certain Transactions Involving Insurance Company General Accounts at 35932.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 3, 1996 at 61 FR 64164.

FOR FURTHER INFORMATION CONTACT: Gary Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

Skana Enterprises, Inc. Defined Benefit Pension Plan (the Plan) Located in Kodiak, Alaska

[Prohibited Transaction Exemption 97–06; Exemption Application No. D–10342]

Exemption

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 loan (the Loan) of $157,500 by the Plan to Skana Enterprises, Inc. (Skana), the Plan's sponsor and a disqualified person with respect to the Plan, and (2) the personal guarantee of the Loan by Mr. Ralph Bolton (Mr. Bolton), a disqualified person with respect to the Plan, provided the following conditions are satisfied: (a) the terms of the Loan are at least as favorable to the Plan as those obtainable in an arm's-length transaction with an unrelated party; (b) the Loan does not exceed 25% of the assets of the Plan; (c) the Loan is secured by a first deed of trust on real property (the Property) which has been appraised by a qualified independent appraiser to have a fair market value not less than 150% of the amount of the Loan; (d) the fair market value of the Property remains at least equal to 150% of the outstanding balance of the Loan throughout the duration of the Loan; (e) the Plan's independent fiduciary has determined that the Loan is appropriate for, in the best interest of, and protective of the Plan; and (f) the Plan's independent fiduciary will monitor compliance with the terms of the Loan and conditions of the exemption throughout the duration of the transaction, taking any action necessary to safeguard the Plan's interest, including foreclosure on the Property in the event of default.[5]

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 25, 1996 at 61 FR 59915.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department,

[5] Since Mr. Bolton is the sole owner of Skana and the only participant in the Plan, there is no jurisdiction under Title I of the Act pursuant to 29 CFR 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

telephone (202) 219–8881. (This is not a toll-free number.)

Wayne Obstetrical Group, P.A. Money Purchase Retirement Plan (the Wayne Plan); Pediatric Professional Associates, P.A. Profit Sharing Plan (the Pediatric Plan); Physicians for Women, P.A. Profit-Sharing Plan and Trust (the Physicians Plan; collectively, the Plans) Located in Wayne, New Jersey

[Prohibited Transaction Exemption 97–07; Exemption Application Nos. D–10262, D–10263, and D–10264]

Exemption

The restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the loans totalling $530,000 by the Plans to S & D Associates (S & D), provided that the following conditions are satisfied:

(a) The terms and conditions of the loans are at least as favorable to the Plans as those the Plans could obtain in comparable arm's length transactions with unrelated parties;

(b) At all times, the loans are secured by a first mortgage on certain real property (the Property), which is duly recorded under New Jersey State law;

(c) At all times, the fair market value of the Property, as established by a qualified, independent appraiser, equals at least 150% of the total outstanding balances of the loans;

(d) At all times, no more than 25% of the assets of each lending Plan are invested in the loans;

(e) A qualified, independent fiduciary has determined that the loans are in the best interests of the Plans; and

(f) At all times, the independent fiduciary enforces compliance with the terms and conditions of the loans and of the exemption, including foreclosure on the Property in the event of default.

EFFECTIVE DATE: The exemption is effective as of January 1, 1997.

In response to a comment from the applicants, the Department has agreed to modify the Summary of Facts and Representations (the Summary) in the notice of proposed exemption to reflect a modification to the terms of the loans. Accordingly, on page 55323 of such notice, the first subparagraph in Paragraph 4 of the Summary should be corrected to read as follows:

The loans, as evidenced by promissory notes, will each provide for a term of 15 years and a fixed interest rate of 11 percent per annum for the first 10 years. Thereafter, the interest rate will become adjustable annually, based upon the greater of: (a) 11 percent, or (b) three percent above the five-year Treasury note yield as published in The Wall Street Journal, determined as of the 10th anniversary of the loans and each subsequent anniversary thereof. The promissory notes will require S & D Associates to make monthly payments of principal and interest on the loans, to be fully amortized over the 15-year term. The Plans will pay no fees nor other expenses relating to the loans.

A ''Supplemental Statement'' describing the modified loan terms was provided to interested persons, along with a copy of the notice of proposed exemption as published in the Federal Register. Due to a delay in providing notice to interested persons, the comment period was extended until December 26, 1996.

In addition, the applicants wished to note that the last sentence in the first subparagraph of Paragraph of 1 of the Summary should be corrected to read as follows:

The trustees of the Wayne Plan are the four owners, above [i.e., revised to include Steven Domnitz].

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 55322.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng 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 accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 9th day of January, 1997.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 97–864 Filed 1–13–97; 8:45 am]

BILLING CODE 4510–29–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of January 13, 20, 27 and February 3, 1997.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of January 13

Monday, January 13

10:00 a.m.
Briefing on NRC Strategic Assessment (Public Meeting)
Contact: John Craig, 301–415–3812
11:30 a.m.
Affirmation Session (Public Meeting)
a. Direct Final Rulemaking: Privatization Act Conforming Changes and Revision to the NRC Enforcement Policy (NUREG–1600) (Tentative)
(Contact: Andrew Bates, 301–415–1963)

Week of January 20—Tentative

Wednesday, January 22

10:00 a.m.
Briefing on Codes and Standards (Public Meeting)
(Contact: Gil Millman, 301–415–5843)
11:30 a.m.
Affirmation Session (Public Meeting) (if needed)

Week of January 27—Tentative

Monday, January 27

2:30 p.m.
Briefing by DOE on Plutonium Disposition (Public Meeting)
(Contact: Vanice Perin, 301–415–8143)

Wednesday, January 29

10:00 a.m.
Briefing on Operating Reactors and Fuel Facilities (Public Meeting)
(Contact: Victor McCree, 301–415–1711)
11:30 a.m.

Affirmation Session (Public Meeting) (if needed)

Thursday, January 30

10:00 a.m.
Briefing on Millstone by Northeast Utilities and NRC (Public Meeting)
(Contact: Bill Travers, 301–415–8500)

Friday, January 31

10:00 a.m.
Briefing on Integrated Materials Performance Evaluation Program (Public Meeting)
(Contact: Don Cool, 301–415–7197)

Week of February 3—Tentative

Tuesday, February 4

9:30 a.m.
Briefing by Maine Yankee, NRR and Region I (Public Meeting)
(Contact: Daniel Dorman, 301–415–1429)

Wednesday, February 5

NOON
Affirmation Session (Public Meeting) (if needed)

The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (Recording)—(301) 415–1292.

CONTACT PERSON FOR MORE INFORMATION: Bill Hill (301) 415–1661.

THe NRC Commission Meeting Schedule can be found on the Internet at:
http://www.nrc.gov/SECY.smj/schedule.htm

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to it, please contact the Office of the Secretary, Attn: Operations Branch, Washington, D.C. 20555 (301)–415–1661.

In addition, distribution of this meeting notice over the internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to wmh@nrc.gov or dkw@nrc.gov.

Dated: January 10, 1997.

William M. Hill, Jr.,

SECY Tracking Officer, Office of the Secretary.

[FR Doc. 97–1013 Filed 1–10–97; 1:56 pm]

BILLING CODE 7590–01–M

RAILROAD RETIREMENT BOARD

Proposed Collection; Comment Request

SUMMARY: In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

Comments are Invited on

(a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Title and Purpose of Information Collection

Application and Claim for Unemployment Benefits and Employment Service, OMB 3220–0022.

Section 2 of the Railroad Unemployment Insurance Act (RUIA), provides unemployment benefits for qualified railroad employees. These benefits are generally payable for each day of unemployment in excess of four during a registration period (normally a period of 14 days). Section 12 of the RUIA provides that the RRB establish, maintain and operate free employment facilities directed toward the reemployment of railroad employees. The procedures for applying for the unemployment benefits and employment service and for registering and claiming the benefits are prescribed in 20 CFR 325.

RRB Form UI–1, Application for Unemployment Benefits, and Employment Service, is completed by a claimant for unemployment benefits once in a benefit year, at the time of first registration. Completion of Form UI–1 also registers an unemployment claimant for the RRB's employment service. No changes are being proposed to Form UI–1.

The RRB also utilizes Form UI–3, Claim for Unemployment Benefits, for use in claiming unemployment benefits for days of unemployment in a particular registration period, normally a period of 14 days. The RRB proposes to revise Form UI–3 to incorporate changes required by the Railroad Unemployment Insurance Amendments Act of 1996. The changes include the addition of a new item to provide the RRB with information regarding a claimant's gross wages or other pay for days during the 14-day registration period. Effective with the 1996 amendments, an earnings test applies to each 14-day claim period and information about the claimant's gross wages or other pay is needed to determine the claimant's eligibility for benefits. The explanation of the waiting period printed on the claim has also been revised because the 1996 amendments changed the waiting period requirement from 14 days to 7 days.

Completion of Forms UI–1 and UI–3 is required to obtain or retain benefits. The number of responses required to each claimant varies, depending on their period of unemployment. The RRB estimates that approximately 29,000 Form UI–1's are filed annually. Completion time is estimated at 10 minutes. The RRB estimates that approximately 265,000 Form UI–3's are filed annually. Completion time is estimated at 6 minutes.

ADDITIONAL INFORMATION OR COMMENTS: To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751–3363. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611–2092. Written comments should be received within 60 days of this notice.

Chuck Mierzwa,

Clearance Officer.

[FR Doc. 97–795 Filed 1–13–97; 8:45 am]

BILLING CODE 7905–01–M

Sunshine Act Meeting; Notice of Public Meeting

Notice was previously published at FR 1139 on January 8, 1997, that the Railroad Retirement Board would hold a meeting on January 15, 1997, 9:00 a.m., at the Board's meeting room on the 8th floor of its headquarters building, 844 North Rush Street, Chicago, Illinois 60611. This meeting has been rescheduled to January 22, 1997, at 9:00 a.m. The agenda remains the same.

The entire meeting will be open to the public. The person to contact for more information is Beatrice Ezerski, Secretary to the Board, Phone No. 312–751–4920.

Dated: January 9, 1997.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 97–968 Filed 1–10–97; 11:40 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Extension:
Rule 17a–7, SEC File No. 270–238, OMB Control No. 3235–0214
Rule 17e–1, SEC File No. 270–224, OMB Control No. 3235–0217
Rule 19a–1, SEC File No. 270–240, OMB Control No. 3235–0216
Rule 31a–1, SEC File No. 270–173, OMB Control No. 3235–0178

Upon written request, copies available from: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission (Commission) has submitted to the Office of Management and Budget requests for approval of extension on previously approved collections of information:

Rule 17a–7 [17 CFR 270.17a–7] under the Act requires registered investment companies to keep various records in connection with certain purchase or sale transactions between investment companies and certain of their affiliates. The annual burden of meeting this requirement is estimated to be about one hour for each of an estimated 500 recordkeepers that enter into subject transactions each year, for a total annual burden of 500 hours.

Rule 17e–1 [17 CFR 270.17e–1] under the Act governs the remuneration a broker affiliated with an investment company may receive in connection with securities transactions by the investment company. The rule requires an investment company's board of directors to establish, and review, as necessary, procedures reasonably designed to provide that the remuneration to an affiliated broker is a fair amount compared to that received by other brokers in connection with transactions in similar securities during a comparable period of time. Each quarter, the board must determine that all transactions effected pursuant to the rule during the preceding quarter complied with the established procedures. Rule 17e–1(c) also requires the investment company to (i) maintain permanently a written copy of the procedures adopted by the board for complying with the requirements of the rule; and (ii) maintain for a period of six years a written record of each transaction subject to the rule setting forth the amount and source of the commission, fee or other remuneration received; the identity of the broker; the terms of the transaction; and the materials used to determine that the transactions were effected in compliance with the procedures adopted by the board.

The Commission estimates that approximately 1,462 funds rely upon Rule 17e–1 each year. The total average annual burden for Rule 17e–1 per respondent is estimated to be 10 hours, for a total annual burden of 14,620 hours.

Rule 19a–1 [17 CFR 270.19a–1] under the Act sets forth specific requirements for the information which must be included in statements made pursuant to Section 19(a) by registered management investment companies (funds). The rule requires that the statement indicate what portions of the payment are made from net income, net profits and paid-in capital. When any part of the payment is made from net profits, Rule 19a–1 requires that the statement disclose certain other information relating to the appreciation or depreciation of portfolio securities. If an estimated portion is subsequently determined to be significantly inaccurate, a correction must be made on a statement made pursuant to Section 19(a) or in the first report to shareholders following the discovery of the inaccuracy.

It is estimated that approximately 3,000 funds are subject to the rule each year. It is estimated that compliance with the rule's requirements imposes a total annual burden per fund of approximately 30 minutes. The total annual burden for all funds is estimated at 1,500 hours.

Rule 31a–1 [17 CFR 270.31a–1] under the Act requires registered investment companies, and every underwriter, broker, dealer or investment adviser which is a majority-owned subsidiary of a registered investment company, to maintain and keep current accounts, books and other documents which constitute the record forming the basis for financial statements required to be filed pursuant to Section 30 [15 U.S.C. 80a–29] of the Act and of the auditor's certificates relating thereto. The rule lists specific records to be maintained by registered investment companies. The rule also requires certain underwriters, brokers, dealers, depositors and investment advisers to maintain such records as they are required to maintain under federal securities laws.

It is estimated that Rule 31a–1 imposes an average burden of approximately 5,260 hours annually per investment company. It is further estimated that approximately 5,000 investment companies are subject to the rule each year, so that the total annual burden for all investment companies would be 26,300,000 hours. Most of the records required to be maintained by the rule are the type that generally would be maintained as a matter of good business practice and to prepare the investment company's financial statements.

General comments regarding the estimated burden hours should be directed to the Desk Officer for the Securities and Exchange Commission at the address below. Any comments concerning the accuracy of the estimated average burden hours for compliance with Commission rules and forms should be directed to Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549 and Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503.

Dated: December 30, 1996.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–863 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 22444; 811–8302]

Master Investment Trust, Series II; Notice of Application

January 7, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the ''Act'').

APPLICANT: Master Investment Trust, Series II.

RELEVANT ACT SECTION: Order requested under section 8(f) of the Act.

FILING DATE: The application was filed on September 23, 1996 and amended on December 19, 1996.

SUMMARY OF APPLICATION: Applicant requests an order declaring that it has ceased to be an investment company.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 3, 1997, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant, 3435 Stelzer Road, Columbus, Ohio 43219.

FOR FURTHER INFORMATION CONTACT: Kathleen L. Knisely, Staff Attorney, at (202) 942–0517, or Alison E. Baur, 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.

Applicant's Representations

1. Applicant is an open-end diversified management investment company organized as a Delaware business trust. Applicant is comprised of a single series, the National Municipal Bond Fund.

2. On January 21, 1994, applicant filed a Notification of Registration on Form N–8A pursuant to section 8(a) under the Act and a registration statement on Form N–1A pursuant to section 8(b) of the Act. No registration statement was filed under the Securities Act of 1933.

3. On April 23–24, 1996, at the regular Board of Trustees meeting, the Board of Trustees approved, effective upon the withdrawal of the investment of the Feeder Fund from the applicant, the termination of the applicant's investment advisory and other service agreements. The board also authorized the taking of all actions necessary to effect the deregistration of applicant.

4. Prior to July 1, 1996, the National Municipal Bond Fund of Pacific Horizon Funds, Inc. (the ''Feeder Fund'') invested all of its investable assets in applicant's National Municipal Bond Fund. The Feeder Fund was the sole interest holder of applicant's National Municipal Bond Fund. On July 1, 1996, applicant's sole interest holder gave notice that it wanted to redeem its entire holdings, and on the same day complete redemption distributions were paid to the interest holder based on net asset value. Such distributions effectively liquidated applicant.

5. Bank of America National Trust and Savings Association, applicant's investment adviser, has undertaken to pay applicant's expenses in connection with the liquidation.

6. Applicant has no security holders, liabilities or assets. Applicant is not a party to any litigation or administrative proceeding. Applicant is not now engaged, nor does it propose to engage, in any business activities other than those necessary for the winding up of its affairs.

7. Applicant intends to file the necessary documentation with the State of Delaware to effect its dissolution as a Delaware business trust.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–805 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 22443; 812–10452]

United Financial Group, Inc.; Notice of Application

January 7, 1997.

AGENCY: Securities and Exchange Commission (''SEC'').

ACTION: Notice of Application for exemption under the Investment Company Act of 1940 (the ''Act'').

APPLICANT: United Financial Group, Inc. (the ''Company'').

RELEVANT ACT SECTION: Order requested under sections 6(c) and 6(e) of the Act granting an exemption from all provisions of the Act.

SUMMARY OF APPLICATION: Applicant requests an order that would exempt it from all provisions of the Act until December 30, 1997. The requested relief would extend an exemption originally granted until December 30, 1990, and extended by subsequent orders until December 30, 1991, December 30, 1992, December 30, 1993, December 30, 1994, December 30, 1995, and December 30, 1996.

FILING DATE: The application was filed on December 5, 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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 3, 1997, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicant, 5847 San Felipe, Suite 2600, Houston, Texas 77057.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus, Paralegal Specialist, at (202) 942–0584, or Mary Kay Frech, 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.

Applicant's Representations

1. The Company was a savings and loan holding company whose primary asset and source of income was the United Savings Association of Texas (''USAT''). As a result of the recession in Texas beginning in 1986, USAT's financial condition deteriorated, and on December 30, 1988 it was placed into receivership. The assets of USAT were sold to an unaffiliated third party and the Company received no consideration for the loss of its primary subsidiary, thereby generating a substantial tax loss. In light of this tax loss, the Company determined not to liquidate, but instead to acquire an operating business.

2. The Company's efforts to acquire an operating business have been substantially hindered due to claims asserted against it by the Federal Deposit Insurance Corporation (the ''FDIC'') and the Office of Thrift Supervision (the ''OTS''). The FDIC asserted an approximately $534 million claim against the Company in January 1989 for failure to maintain the net worth of USAT (the ''Net Worth Claim'') and an approximately $14 million claim concerning certain tax refunds alleged to have been received by the Company (together with the Net Worth Claim, the ''FDIC Claims''). In addition, the FDIC has asserted the existence of possible other claims (the ''Indemnified Claims'') against the Company and certain former officers and directors of the Company and USAT. The Company may have indemnification obligations to these former officers and directors.[1] The FDIC

[1] Prior to 1996, the Company advanced certain expenses incurred by the former officers and

Continued

has not alleged a dollar amount for any Indemnified Claims. Although the Company disputes the FDIC Claims and the Indemnified Claims, their existence constitutes a large contingent liability against the Company's assets, thus making it difficult for the Company to acquire an operating business.

3. The OTS has asserted certain claims not included within the scope of the FDIC's jurisdiction. The OTS is investigating the possibility of certain regulatory violations (the ''OTS Claims'') by the Company and its current and former officers and directors. The Company has been in negotiations with the OTS since September, 1994 concerning possible settlement of the OTS Claims. These claims constitute a substantial contingent liability against the Company's assets.

4. During 1989 and 1990, the Company was in continuous negotiations with the FDIC in an attempt to reach a resolution of the FDIC Claims and in early 1990 the Company reached a tentative agreement. In December 1990, however, the FDIC rejected the Company's settlement offer and informed the Company that no counter proposal would be offered. In mid-1991, the Company again contacted the FDIC to determine whether a settlement could be reached. Beginning in July 1991, the Company and the FDIC's representatives met to determine if a possible solution could be reached. In December 1991, the FDIC requested, and the Company provided, an agreement to toll the statute of limitations. This tolling agreement was subsequently extended numerous times, and, as described below, the statute of limitations has been tolled until the terms of an Agreement and Release entered into among the Company, the FDIC, and others are effected or the Agreement and Release is terminated.

5. The Company and certain of its officers and directors also entered into tolling agreements with the OTS pursuant to which the OTS would have until the end of the tolling period to allege certain regulatory violations and seek regulatory enforcement. In connection with a Stipulation and Consent entered into among the Company, the OTS, and others, the statute of limitations has been tolled until the terms of the Stipulation are effected or the Consent cancelled. However, in 1996, the OTS brought enforcement action against certain officers and directors of the Company. Such action is still in its preliminary stage.

6. Effective December 1995, the Company entered into a Stipulation and Consent to Issuance of Consent Cease and Desist Order for Affirmative Relief with the OTS and a Settlement Agreement and Release with the FDIC, First Trust of California, National Association, and Nu-West Florida, Inc. (''Nu-West''). Under these agreements, the Company neither admits nor denies liability under claims by the OTS. The FDIC settlement is conditioned upon the Company obtaining a final order of the Delaware Bankruptcy Court, and requires a minimum payment of $9,450,000 to the FDIC, a minimum payment of $1,360,000 to the trustee for the 9% Secured Sinking Debentures (the ''Debenture Trustee''), and a minimum payment of $190,000 to Nu-West be made from the Company's assets. The Company is required to proceed with a plan of reorganization or liquidation in the Delaware Bankruptcy Court, and payments would be made after the Delaware Bankruptcy Court confirms a final plan. Any assets of the Company remaining after the payments and expenditures described above, and pursuant to the confirmed final plan of bankruptcy, must be paid to the FDIC, the Debenture Trustee, and Nu-West in proportion to the minimum settlement payments. The FDIC settlement also provides that the Company may not, except in limited circumstances, utilize the benefits of tax losses carried forward from 1988 and the prior years.

7. On June 30, 1996, the Company held assets of approximately $11.859 million, comprised of approximately $1.840 million in cash and cash equivalents, $9.788 million in short-term investments, $.083 million in other investments, and $.148 million in other assets. The Company's common stock currently is traded sporadically in the over-the-counter market. The Company does not employ any full-time employees. The Company's administrative operations are handled by contract bookkeepers, accountants, and attorneys.

8. Rule 3a–2 under the Act provides a one-year safe harbor to issuers that meet the definition of an investment company but intend to maintain that status only transiently. The Company relied on the safe harbor provided by this rule from December 30, 1988 until December 30, 1989. The expiration of the safe harbor period necessitated the filing of an application for exemption. In 1990, the Company was granted conditional relief from all provisions of the Act until December 30, 1990. The SEC extended this exemptive relief by six subsequent orders, most recently until December 30, 1996.[2]

9. As described in detail in the applications for the Prior Orders, during a portion of the period in which the requested exemption will be effective, it is possible that the Company will be subject to the jurisdiction of the federal bankruptcy courts. In this regard, the Company has formulated a plan of reorganization (the ''Reorganization Plan'') to be implemented under Chapter 11 of the Bankruptcy Code. The Reorganization Plan would settle the outstanding claims against the Company and provide a structure for the possible acquisition of a new operating business or businesses. Because the bankruptcy court is charged with protecting the interests of the Company's creditors and equity interest holders, the Company believes that it is not necessary for it to comply with section 17(a) or 17(d) with respect to transactions approved by the bankruptcy court.

Applicant's Legal Analysis

1. Section 3(a)(3) of the Act defines an investment company as an issuer engaged in the business of investing, reinvesting, owning, holding, or trading in securities, and owning investment securities having a value exceeding 40% of the value of such issuer's total assets (exclusive of government securities and cash items). The Company acknowledges that, based on its current mix of assets, it may be deemed to be an investment company under section 3(a)(3).

2. The Company requests, pursuant to sections 6(c) and 6(e) of the Act, that the SEC issue an order exempting the Company from all provisions of the Act, subject to certain exceptions, until December 30, 1997. The requested order would extend the exemption granted by the Prior Orders.

3. In determining whether to grant exemptive relief for a transient investment company, the SEC considers such factors as: (a) Whether the failure of the company to become primarily engaged in a non-investment business or excepted business or liquidate within one year was due to factors beyond its

directors, subject to a refund obligation if it was determined they were not entitled to such advances. In 1996, at the insistence of the FDIC and OTS, the Company ceased making these advances.

[2] Investment Company Act Release Nos. 17941 (Jan. 9, 1991) (notice) and 17989 (Feb. 7, 1991) (order); Investment Company Act Release Nos. 18430 (Dec. 5, 1991) (notice) and 18466 (Dec. 31, 1991) (order); Investment Company Act Release Nos. 19128 (Nov. 25, 1992) (notice) and 19175 (Dec. 22, 1992) (order); Investment Company Act Release Nos. 19839 (Nov. 5, 1993) (notice) and 19916 (Dec. 1, 1993) (order); Investment Company Act Release Nos. 20545 (Sept. 12, 1994) (notice) and 20608 (Oct. 7, 1994) (order); and Investment Company Act Release Nos. 21416 (Oct. 12, 1995) (notice) and 21480 (Nov. 7, 1995) (order) (the ''Prior Orders'').

control; (b) whether the company's officers and employees during that period tried, in good faith, to effect the company's investment of its assets in a non-investment business or excepted business or to cause the liquidation of the company; and (c) whether the company invested in securities solely to preserve the value of its assets. The Company believes that it meets these criteria.

4. The Company believes that its failure to become primarily engaged in a non-investment business by December 30, 1996 is a result of factors beyond its control. The existence of the FDIC Claims and the OTS Claims has precluded the Company from investing its assets in a non-investment company business. The magnitude of the FDIC Claims and OTS Claims and the potential threat that the FDIC and the OTS would seek to enjoin any utilization of the Company's assets have prevented the Company from investing its assets in a non-investment company business.

5. Pending the settlement of the FDIC Claims and the OTS Claims, the Company has limited its investments to high quality marketable securities, cash or cash equivalents. Thus, the Company believes that it primarily invests in securities solely to preserve the value of its assets.

6. The Company believes that the issuance of an order exempting it from all provisions of the Act, subject to certain exceptions, until December 10, 1997 would be in the public interest and consistent with the protection of investors and the purposes of the Act. The Company believes that it would be unfair to its stockholders to require it to register as an investment company and that such registration is not necessary for the protection of its stockholders.

Applicant's Conditions

The Company agrees that the requested exemption will be subject to the following conditions, each of which will apply to the Company until it acquires an operating business or otherwise falls outside the definition of an investment company:

1. During the period of time the Company is exempted from registration under the Act, it will not purchase or otherwise acquire any securities other than securities with a remaining maturity of 397 days or less and that are rated in one of the two highest rating categories by a nationally recognized statistical rating organization, as that term is defined in rule 2a–7(a)(10) under the Act.

2. The Company will continue to comply with sections 9, 17(e), and 36 of the Act.

3. The Company will continue to comply with sections 17(a) and 17(d), subject to the following exceptions:

(a) If the Company becomes subject to the jurisdiction of the bankruptcy court, the Company need not comply with sections 17(a) or 17(d) with respect to any transaction, including without limitation the Reorganization Plan, that is approved by the bankruptcy court; and

(b) The Company would not be required to comply with sections 17(a) or 17(d) with respect to any transaction or series of transactions that result in its ceasing to fall within the definition of an ''investment company'' provided that (i) no cash payments are made to an ''affiliated person'' (as defined in the Act) of the Company as part of such transaction or series of transactions, and (ii) no debt securities are issued to an affiliated person of the Company as part of such transaction or series of transactions unless such debt securities are expressly subordinated upon liquidation to claims of the holders of the Company's debentures.

4. The Company will continue to comply with sections 17(f) of the Act as provided in rule 17f–2.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–804 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–38124; File No. SR–Amex–96–48]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by American Stock Exchange, Inc. Relating to a Fee Change

January 6, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[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 (''SEC'' or ''Commission'') the proposed fee change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed fee change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex is issuing a one-time credit against the Exchange's monthly Floor Facility Fee for those members who were charged such fee for the months of August through December, 1996 (amounting to $583.35 per member for such period).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the fee change and discussed any comments it received on the proposed fee change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As the Exchange has had a rewarding year from a financial perspective, it has decided to issue a one-time credit against its monthly Floor Facility Fee for those members who were charged such fee for the months of August through December, 1996 (amounting to $583.35 per member for such period).

2. Statutory Basis

The proposed fee change is consistent with Section 6(b) of the Act[2] in general and furthers the objectives of Section 6(b)(4) in particular in that it is intended to assure the equitable allocation of reasonable dues, fees, and other charges among Exchange members, issuers, and other persons using the Exchange's facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The fee change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the fee change.

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[1] 15 U.S.C. § 78s(b)(1).

[2] 15 U.S.C. § 78f(b).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee or other charge imposed by the Exchange and therefore, has become effective pursuant to Section 19(b)(3)(A) of the Act [3] and subparagraph (e) of Rule 19b–4 [4] thereunder. At any time within 60 days of the filing of such proposed fee change, the Commission may summarily abrogate such fee change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written 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 fee change that are filed with the Commission, and all written communications relating to the fee 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 in Washington, DC. 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–96–48 and should be submitted by January 27, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–807 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[3] 15 U.S.C. § 78s(b)(3)(A).

[4] 17 CFR 19b–4(e).

[5] 17 CFR 200.30–3(a)(12).

[Release No. 34–38128; File No. SR–AMEX–96–46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange, Inc. Relating to Amending Rule 170 to Permit Options Specialist Organizations and Their Approved Persons to Engage in Market Making Activities on Other Options Exchanges in the Options in Which They Are Registered on the AMEX

January 6, 1997.

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 November 27, 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 950(n) to permit options specialist organizations and their approved persons to engage in market making activities on other options exchanges in the options in which they are registered on the AMEX.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Exchange Rule 950(n) currently prohibits AMEX options specialists and their ''approved persons'' [1] from effecting transactions in specialty options except insofar as reasonably necessary to satisfy their specialist obligations on the Exchange. Thus, among its several consequences, Rule 950(n) prohibits an AMEX specialist organization and its approved persons from acting as a market maker in a specialty option on the floor of another options market.[2] The other options exchanges have rules that are similar to AMEX Rule 950(n) with respect to persons that perform functions similar, or identical, to those of a specialist.[3] However, it is the Exchange's understanding that not all those markets interpret their rules in the same manner as the AMEX. Thus, the Exchange has observed Registered Options Traders (''ROTs'') on its Floor trading as market makers in options in which affiliates of such ROTs perform a specialist function on another exchange.

The restrictions on the trading activities of options specialists and their approved persons have their origin in the Exchange's and the New York Stock Exchange's equity trading rules. The AMEX extended these restrictions to listed options at the outset of the Exchange's option program in the mid-1970s in order to expeditiously commence trading options using a combination specialist/competitive market maker system. While these restrictions reflect historical regulatory concerns, the federal securities laws do not require that trading by specialists and their approved persons in specialty securities should be limited to that necessary to the specialist function on any one market. In many respects, moreover, the policy reasons behind the trading restrictions on equity specialists are not compelling in the context of options due to the derivative pricing of these securities. In addition, the limitations contained in Rule 950(n) on principal trading by the affiliates of options specialists predate multiple trading of listed options. When you add to these factors the extraordinary level of self-regulatory organization surveillance of specialists and market makers, the Exchange believes that the

[1] An ''approved person'' is a person or entity that controls a member or member organization or that is engaged in a securities or kindred business and is controlled by or under common control with a member or member organization. *See* Article I, Section 3(g) of the Exchange Constitution.

[2] The approved persons of Exchange specialists may obtain relief from the restrictions of Rule 950(n) by establishing an Exchange approved information barrier pursuant to Rule 193. In practice, however, it has generally proven impractical for all but the largest broker-dealers to establish information barriers that would satisfy the requirements of Rule 193.

[3] Chicago Board Option Exchange Rule 8.81(a), Pacific Stock Exchange Rule 6.83(a), Philadelphia Stock Exchange Rule 1020(e).

prophylactic restrictions on trading represented by Rule 950(n) are not essential to ensure compliance with standards of fair dealing.

For the foregoing reasons, the Exchange believes that it is appropriate to permit Exchange specialist organizations and their affiliates to engage in market making in specialty options on the floor of other options exchanges. This measure will eliminate a regulatory disparity between the rules of the Exchange and other markets. To ensure that specialist organizations and their affiliates do not intentionally trade ahead of, or otherwise disadvantage, orders on the AMEX limit order book, the Exchange will require any AMEX member organization that seeks to act as a market maker on the floor of another options exchange in an option in which they are a specialist on the AMEX to implement policies and procedures designed to prevent the misuse of information regarding limit orders on the AMEX limit order book.[4] These policies and procedures will not have to conform to the specific requirements of Rule 193. Instead, the Exchange proposes to adopt the approach used by Congress in enacting Sections 15(f) and 21A of the Act, and by the Commission in adopting Rule 14(e)(3) under the Act, which require firms to adopt information barriers, but do not legislate the design of these internal controls.[5] The Exchange believes that specialist firms and their affiliates should have the ability (subject to Exchange oversight) to structure information barriers that are appropriate to the structure of their firms.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b)(5)[6] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

[4] As proposed, these policies and procedures will not be subject to pre-approval by the Exchange. Telephone conversation between Bill Floyd-Jones, Assistant General Counsel, AMEX, and Heather Seidel, Attorney, Division of Market Regulation, Commission, on January 2, 1997.

[5] *See* Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information, Securities and Exchange Commission Division of Market Regulation, March 1990.

[6] 15 U.S.C. 78f(b)(5)

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities sand Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–AMEX–96–46 and should be submitted by January 27, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

[7] 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–862 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–38125; File No. SR–CHX–96–32]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a Fee Waiver by the Chicago Stock Exchange, Incorporated

January 6, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] notice is hereby given that on December 17, 1996, the Chicago Stock Exchange, Incorporated (''CHX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items, I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to waive certain member charges in its Membership Dues and Fees Schedule. Specifically, the Exchange proposes to waive all membership dues for the month of December. The Exchange also proposes to waive all floor telephone booth and post space charges for the fourth quarter of 1996 (i.e., October, November and December).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. § 78s(b)(1).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to waive membership dues for the month of December, 1996, and waive floor telephone booth and post space charges for the fourth quarter of 1996 because the Exchange has already adequately covered its costs associated with these services for the year.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)(4) of the Act [2] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose a 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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to Section 19(b)(3)(A) of the Act [3] and subparagraph (e) of Rule 19b–4 [4] thereunder. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. Copies of such filing also will be available for inspection and coping at the Exchange. All submissions should refer to File No. SR–CHX–96–32 and should be submitted by January 27, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–808 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[2] 15 U.S.C. § 78f(b)(4).

[3] 15 U.S.C. § 78s(b)(3)(A).

[4] 17 CFR 19b–4(e).

[5] 17 CFR 200.30–3(a)(12).

[Release No. 34–38130; File No. SR–CHX–96–33]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Stock Exchange, Incorporated Relating to the Circuit Breaker Pilot Program

January 6, 1997.

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 18, 1996, the Chicago Stock Exchange, Incorporated (''CHX'' 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 CHX. 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 CHX proposes to amend Article IX, Rule 10A ''Trading Halt Due to Extraordinary Market Volatility'' (''circuit breakers'') [1] to increase the levels at which such circuit breakers are triggered. The Exchange seeks to effect these changes on a one-year pilot basis.

The text of the proposed rule change is available at the Office of the Secretary, the CHX, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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

Article IX, Rule 10A (Trading Halts Due to Extraordinary Market Volatility) is the Exchange's codification of the several recommendations for circuit breakers which were made in the wake of the market break of 1987. The current rule, which is due to expire on October 31, 1997, provides that if the Dow Jones Industrial Average [2] (''DJIA'') falls 250 or more points below its previous trading day's closing value, trading in all stocks on the Exchange shall halt for one-half hour. The Rule further provides for a one hour trading halt if the decline in the DJIA is 400 or more points. Although the Rule was amended in July 1996 to shorten the time periods for marketwide trading halts, the levels of the circuit breakers themselves have not been adjusted since the Rule was first adopted. The Exchange believes that it is appropriate to amend Article IX, Rule 10A to raise the circuit breakers from 250 points to 350 points and from 400 points to 550 points.

Article IX, Rule 10A was approved by the Commission in October 1988 as a one-year pilot[3] and has been extended on a pilot basis since then. At that time, the DJIA was at a level of about 2100 points. A 250 point drop would have represented at 12% decline in the average. A 400 point drop would have

[1] *See* Securities Exchange Act Release Nos. 26218 (October 26, 1988), 53 FR 44137 (November 1, 1988); 27370 (October 23, 1989), 54 FR 43881 (October 27, 1989); 28580 (October 25, 1990), 55 FR 45895 (October 31, 1990); 29868 (October 28, 1991), 56 FR 56535 (November 5, 1991); 33120 (October 29, 1993), 58 FR 59503 (November 9, 1993); 36414 (October 25, 1995), 60 FR 55630 (November 1, 1995); and 37459 (July 19, 1996), 61 FR 39172 (July 26, 1996).

[2] ''Dow Jones Industrial Average'' is a service mark of Dow Jones & Company, Inc.

[3] *See* Securities Exchange Act Release No. 26218 (October 26, 1988), 53 FR 44137 (November 1, 1988).

represented a 19% decline in the average. Article IX, Rule 10A has never been invoked, as the DJIA has not declined by 250 points or more since the rule was adopted. The largest decline occurred on March 8, 1996, when the DJIA fell intra-day 217 points below its previous day's closing value. Today, with the DJIA at about 6500 points, a 250 or 400 point drop would represent a much smaller percentage decline in the average (3.8% and 6.2%, respectively).

The proposed circuit breakers of 350 and 550 points would represent, respectively, a 5.4% and 8.5% decline in the DJIA, which are significant market declines and thus represent appropriate levels at which to halt trading. The proposed trigger values take into account the rise in market values since the Rule was first adopted, while also recognizing the fact that the original trigger values have never been reached. The Exchange believes that the new trigger values in Article IX, Rule 10A should be stated in absolute numbers, rather than in terms of percentages of the DJIA, in order to facilitate understanding by all market participants as to exactly when the circuit breakers will be utilized.

The Exchange seeks to effect these changes on a one-year pilot basis. The adoption of amendments to Article IX, Rule 10A would be contingent upon the adoption of amended rules or procedures substantively identical to this rule 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 an all-market trading halt requirement at appropriate levels 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)(5) of the Act in that it is designed to promote just and equitable principles of trade. The Exchange believes that amending Article IX, Rule 10A on a pilot basis is consistent with these objectives in that the revised trading halt triggers during a period of significant stress can be expected to provide 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

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 CHX. All submissions should refer to File No. SR–CHX–96–33 and should be submitted by January 27, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–809 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–38126; File No. SR–NASD–96–56]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Increase in Minimum Gross Income Assessment

January 6, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on December 24, 1996, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. 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, Inc. (''NASD Regulation'') is proposing a rule change to amend Section 1 to Schedule A of the By-Laws to increase the minimum gross income assessment from $850.00 to $1,200.00. Proposed new language is italicized; proposed deletions are in brackets.

Schedule A to the NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of the Corporation, shall be determined on the following basis.

Section 1—Assessments

Each member shall pay an annual assessment composed of:

(a) An amount equal to the greater of *$1,200.00*[850.00] or the total of:

(i) 0.125% of the annual gross revenue from state and municipal securities transactions,

[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. § 78s(b)(1).

(ii) 0.125% of annual gross revenue from other over-the-counter securities transactions,

(iii) 0.125% of the annual gross revenue from U.S. Government securities transactions, and

(iv) With respect to members whose books, records, and financial operations are examined by the NASD, 0.125% of annual gross revenue from securities transactions executed on an exchange.

Each member is to report annual gross revenue as defined in Section 5 of this Schedule, for the preceding calendar year.

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 NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD 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

Article VI of the By-Laws authorizes the NASD Board of Governors to levy fees, dues and assessments to be paid by members to defray reasonable expenses incurred in the administration of the work of the NASD. Currently, each member of the NASD is required to pay an annual gross income assessment of the greater of (i) $850.00 or (ii) the total of 0.125% of the annual gross revenue from state and municipal securities transactions, 0.125% of annual gross revenue from other over-the-counter securities transactions, 0.125% of the annual gross revenue from U.S. Government securities transactions, and, with respect to members whose books, records, and financial operations are examined by the NASD, 0.125% of annual gross revenue from securities transactions executed on an exchange.

The minimum gross income assessment of $850.00 has not been changed since 1989. Due to inflationary pressures and increased regulatory costs, the NASD is proposing to raise the minimum gross income assessment from $850.00 to $1,200.00. The 1997 expenses of NASD Regulation are expected to grow by $43 million or 24% as the result of various factors, including, among other things, initiatives designed to respond to the findings by the SEC in its recent report concerning the NASD,[2] completion of a regulatory transition plan for the examination program, development of the new Central Registration Depository system, further implementation of the Arbitration Policy Task Force recommendations and continued development of an Order Audit Trail System. The proposed increase in the minimum gross income assessment, along with anticipated revenue growth in other areas, is expected to help defray the significant increase in regulatory costs anticipated to be incurred by NASD Regulation.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[3] which require that the rules of the Association provide for the equitable allocation of reasonable dues, fees, and other charges in that the proposed rule reasonably provides for an increase in the minimum gross income assessment to help defray the significant increase in regulatory costs anticipated to be incurred by NASD Regulation.

(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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A) of the Act [4] and subparagraph (e) of Rule 19b–4 [5] thereunder in that it constitutes a due, fee or other charge imposed by the Association. However, the NASD has determined to implement the rule change on January 1, 1997.

At any time within 60 days of the filing of a rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written 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 available for inspection and copying at the principle office of the NASD. All submissions should refer to File No. SR–NASD–96–56 and should be submitted by January 27, 1997.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–860 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[2] *See,* Report Pursuant To Section 21(a) Of The Securities Exchange Act Of 1934 Regarding the NASD And the Nasdaq Stock Market, U.S. Securities and Exchange Commission (August 8, 1996).

[3] 15 U.S.C. § 78o–3(b)(5).

[4] 15 U.S.C. § 78s(b)(3)(A).

[5] 17 CFR 19b–4(e).

[6] 17 CFR 200.30–3(a)(12).

[Release No. 34–38133; File No. SR–NASD–96–57]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to SEC Transaction Fees

January 7, 1997.

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 January 2, 1997, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II,and III below, which Items have been prepared by the NASD.[1] The NASD has designated this proposal as one constituting a change to a due, fee, or

[1] The Commission notes that the NASD filed a technical amendment to the proposal (Amendment No. 1) on January 3, 1997.

other charge under Section 19(b)(3)(A)(ii) of the Act, which renders the rule effective upon receipt of this filing. 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 proposed rule change amends Schedule A, Section 8 of the By-Laws of the NASD to authorize the NASD to recoup from its members SEC transaction fees assessed against the NASD pursuant to the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 and Section 31 of the Act, as amended by the National Securities Markets Improvement Act of 1996. Below is the text of the proposed rule change. Proposed new language is italicized and proposed deletions are bracketed.

Schedule A

Secton 8 [Fee on Cleared Transactions] *Transaction Fees*

(a) NASD fee on cleared transactions. Each member shall be assessed a transaction charge of $.0625 per 1,000 shares, with a minimum charge per side of $.025 and a maximum charge per side of $.46875 for each over-the-counter transaction with another member of the Association reportable through ACT in which the member acts either as an agent or a principal for the purchase and/or sale of equity securities.

(b) SEC transaction fee. Each member shall be assessed a transaction fee of 1/300 of one percent of the aggregate dollar value of sales of covered securities transacted by or through such member. For purposes of this section, covered securities shall mean:

(i) all securities traded otherwise than on a national securities exchange (other than bonds, debentures, other evidences of indebtedness, and any sale or any class of sales of securities which the Securities and Exchange Commission may exempt from the fee imposed by Section 31 of the Securities Exchange Act of 1934, and securities described in subparagraph (ii)) that are subject to prompt last sale reporting and

(ii) effective October 1, 1997, securities registered on a national securities exchange pursuant to Section 12(b) of the Securities Exchange Act of 1934 (other than bonds, debentures, other evidences of indebtedness, and any sale or any class of sales of securities which the Securities and Exchange commission may exempt from the fee imposed by Section 31 of the Securities Exchange Act of 1934) traded otherwise than on such exchange.

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 NASD included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organizations Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Congress recently enacted the National Securities Markets Improvement Act of 1996 (''Improvement Act'') and the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (''Appropriations Act''), which together require the NASD to pay SEC transaction fees for two classes of securities generally.

Effective January 1, 1997, pursuant to the Appropriations Act, the NASD is required to pay to the Commission a fee equal to 1/300 of one percent of the aggregate amount of sales transacted by or through any NASD member otherwise than on a national securities exchange of securities (other than bonds, debentures, and other evidences of indebtedness) subject to prompt last sale reporting. This applies to securities listed on The Nasdaq Stock Market, as well as many non-Nasdaq securities traded over the counter that also are subject to NASD rules requiring the reporting of transactions within 90 seconds of execution.[2] On September 1, 1997, the fees are required pursuant to Section 31 of the Exchange Act, as amended by the Improvement Act, and Exchange Act Rule 31–1 thereunder.[3]

Effective October 1, 1997, Section 31 of the Exchange Act, as amended by the Improvement Act, will require the NASD to pay to the Commission the existing transaction fee that applies to off-exchange trades of exchange-registered securities (so-called ''third market'' transactions). Currently, broker-dealers pay this fee, which is equal to 1/300 of one percent of the aggregate value of off-exchange transactions in exchange-registered securities, directly to the Commission.

The SEC fees will remain at 1/300 of one percent through fiscal year 2006 pursuant to the Improvement Act. In fiscal year 2007, the fees decline to 1/800 of one percent.

The proposed amendment to Schedule A, Section 8 of the NASD By-Laws authorizes the NASD to recoup from its members the transaction fees that NASD will be required to pay to the Commission pursuant to the new legislation. As such, the proposed amendment will parallel existing practices with respect to the transaction fees that Section 31 currently imposes on national securities exchanges. It is contemplated that NASD members will be free to pass the proposed fee through to those customers whose transactions were subject to the fee, as is generally done with respect to the existing Section 31 fee on national securities exchanges.

The fees will be collected by the NASD through clearing firms that are NASD members, based on trade report information submitted into the Automated Confirmation Transaction system (''ACT'') by these firms and their correspondent firms. Because the fee is assessed on each transaction, all transactions that are submitted into ACT for reporting purposes will be subject to an SEC fee, regardless of whether the transaction is a ''cleared'' transaction. Thus, the fee will be imposed based on reported trades rather than cleared trades. The fee is based on the reported price, exclusive of any markup or markdown.

Payment of the accumulated transaction fees to the NASD is the responsibility of NASD member clearing firms. The NASD will calculate the fees based on each transaction attributed on a monthly basis. Each clearing firm's transactions will be consolidated with all reported trades of its correspondents, and the NASD will debit each clearing firm's account at the National Securities Clearing Corporation or the Stock Clearing Corporation of Philadelphia each month. An NASD-generated invoice will be forwarded to each clearing member as confirmation of the deduction. Self-clearing firms will be billed directly and will be expected to remit payment directly to the NASD.

As noted, the fee applies to all non-debt securities subject to prompt last-sale reporting, *i.e.*, the NASD's ''90 second rule.''[4] Thus, the fee applies to all securities listed on The Nasdaq Stock

[2] *See* NASD Rules 4632, 4642, and 6620. Further, as discussed herein, the fee will apply to certain transactions which currently are not required to be reported within 90 seconds of execution. *See* note 8 and accompanying text, *infra.*

[3] *See* Securities Exchange Act Release No. 38073 (December 23, 1996), 61 FR 68590 (December 30, 1996).

[4] NASD Rules 4632, 4642, and 6620.

Market, with the exception of listed convertible debt. Therefore, the types of Nasdaq securities subject to the fees include: common, preferred, ADRs, foreign, Canadian foreign, warrants, rights, and units.

Because NASD rules also require such prompt last sale reporting for transactions involving all domestic, Canadian, and ADRs that are non-Nasdaq OTC Equity Securities,[5] the transaction fee applies to these securities as well. This includes many securities quoted in the OTC Bulletin Board or in the National Quotation Bureau's ''Pink Sheets.'' Conversely, foreign securities (other than Canadian securities and ADRs) that are non-Nasdaq OTC Equity Securities are not subject to the SEC fee, because NASD rules currently permit members to report transactions in these securities on the day after trade date (T+1).[6]

The fee also applies to transactions in covered securities executed outside normal hours. These transactions are reported into ACT pursuant to NASD Rules 4632(a)(4), 4642(a)(4), 6420(a), and 6620(a)(3).[7]

The NASD also will be collecting the SEC fee for odd-lot transactions and transactions effected pursuant to the exercise of an option on a covered security. The NASD notes that although these types of transactions generally are not reported into ACT, they are nonetheless subject to the SEC fee.[8] With respect to transactions that result from the exercise of a listed option cleared through Options Clearing Corp (''OCC'') where the underlying security is subject to the fee (*e.g.*, because it is a Nasdaq security or is otherwise subject to prompt last sale reporting), the fee will be collected by OCC on behalf of the NASD. With respect to odd-lot transactions and transactions pursuant to the exercise of a conventional or ''OTC'' option where the underlying security is subject to the fee, there currently is no automated means to calculate and assess the fee. Therefore, for these types of transactions only, the NASD will require NASD clearing firms to account and submit payment for such activity by them and their respective correspondents on a monthly basis. Self-clearing firms also will be required to account and submit payment for such activity on a monthly basis.[9]

Each NASD member firm will be responsible for determining whether the securities they trade are subject to prompt last sale reporting requirements, and thus subject to the transaction fee. Nonetheless, the NASD recognizes that member firms may experience difficulty in modifying their systems by January 1, 1997 to distinguish between Canadian and other foreign non-Nasdaq OTC equity securities. To assist members in determining which foreign non-Nasdaq OTC Equity Securities are subject to the transaction fee, the NASD will initially make available a list of non-Nasdaq Canadian securities on which it intends to assess the transaction fee.

The transaction fee applies to all transactions in covered securities by or through any member otherwise than on a national securities exchange, regardless of the capacity in which the member is trading. For transactions between two NASD members, the NASD generally will assess the fee on the member on the sell side. For transactions between an NASD member and a customer, the NASD will assess the fee on the NASD member.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[10] which requires, *inter alia*, that the NASD's rules provide for the equitable allocation of reasonable fees among members. The proposed fees are consistent with the appropriations Act and the Improvement Act, and are similar to the transaction fees that have applied to exchange transactions for many years.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD 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 Other

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the ACt and Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written 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. 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the File No. SR–NASD–96–57 and should be submitted by January 27, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

[FR Doc. 97–861 Filed 1–13–97; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38149; File No. SR–NASD–97–01]

Self-Regulatory Organizations; Notice of Proposed Rule Changes by the National Association of Securities Dealers, Inc. Relating to SelectNet Orders

January 10, 1997.

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 January 8, 1997, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its subsidiary,

[5] NASD Rule 6610.

[6] NASD Rule 6620(a).

[7] *See* letter from Anne H. Wright, Associate General Counsel, NASD, to James T. McHale, Esq., Office of Market Supervision, Division of Market Regulation, Commission, dated January 6, 1997 (''Clarification Letter'').

[8] *See* Securities Exchange Act Release No. 38073 (December 23, 1996), 61 FR 68590 (December 30, 1996), at footnote 27.

[9] *See* Clarification Letter, *supra* note 7.

[10] 15 U.S.C. 78o–3.

[11] 17 CFR 200.30–3(a)(12).

The Nasdaq Stock Market, Inc., filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

Nasdaq requests the Commission to find good cause pursuant to Section 19(b)(2) for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Order Execution Rules become effective January 20, 1997. The rule change proposed in this filing is essential to ensure the successful implementation and operation of Nasdaq's system designed to facilitate the ECN Display Alternative envisioned by the Order Execution Rules. Accordingly, Nasdaq requests the Commission to accelerate the effectiveness of the proposed rule change prior to the 30th day after its publication in the Federal Register.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule

Pursuant to Section 19(b)(1) under the Securities Exchange Act of 1934 (''Act'') and Rule 19b–4 thereunder, the NASD is submitting this rule filing to adopt certain rules regarding The Nasdaq Stock Market's (''Nasdaq'') SelectNet Service to clarify members' obligations regarding the use of the service as it will operate under the Commission's new limit order display rule, Rule 11Ac1–4 (''Display Rule'') and amendments to Rule 11Ac1–1(c)(5) (''ECN Amendment'').[1] (New Text is italicized.)

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Conduct Rules

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3300. TRADING

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3380. *SELECTNET SERVICE*

(a) Cancellation of a SelectNet Order

No member shall cancel or attempt to cancel an order, whether preferenced to a specific market maker or electronic communications network, or broadcast to all available members, until a minimum time period of ten seconds has expired after the order to be canceled was entered. Such ten second time period shall be measured by the Nasdaq processing system processing the SelectNet order.

(b) Prohibition Regarding The Entry of Conditional Orders

No member shall enter an order into SelectNet that is preferenced to an electronic communications network covered by Rule 4623 that has any conditions regarding responses to the order, e.g., preferenced SelectNet orders sent to electronic communications networks shall not be all or none, or subject to minimum execution size above a normal unit of trading, or deemed non-negotiable.

* * * * *

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 NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

On November 18, 1996, the NASD and Nasdaq proposed several changes to their rules and systems to address changes to the Nasdaq Stock Market stemming from the Commission's adoption of the Order Execution Rules.[2] The Display Rule requires the display in a market maker's quote of certain customer limit orders and the ECN Amendment requires a market maker to display in its quote any better priced order the market maker places into an electronic communication network (''ECN''). Alternatively, the ECN Amendment provides an exception to the market maker's display obligation that depends upon the ECN itself displaying its best-priced orders in Nasdaq and allowing brokers and dealers to access such orders (''ECN Display Alternative'').

Among the changes to Nasdaq's rules and systems to accommodate trading in the new environment the Order Execution Rules create, Nasdaq has proposed a mechanism to allow ECNs to take advantage of the ECN Display Alternative by providing a linkage to Nasdaq. A critical portion of Nasdaq's mechanism involves an existing Nasdaq system, SelectNet, which will be the means by which NASD members that are not subscribers to a particular ECN may access the ECN's orders that are being displayed in Nasdaq's quote montage pursuant to the ECN Display Alternative. To access those orders, NASD members will be permitted to enter SelectNet preferenced orders, *i.e.*, orders that are directed to a particular ECN at its displayed price. Under the terms of agreements Nasdaq will enter into with each ECN choosing to utilize this SelectNet linkage (''ECN agreements''), the ECN will be required to respond as soon as possible within seconds to the preferenced order.

In the course of working with ECNs on this access linkage via SelectNet, Nasdaq and the ECNs have discovered that problems occur when members entering orders into SelectNet, whether preferenced orders or broadcast, immediately cancel such orders. In addition, there are problems when members impose conditions, restrictions or limitations on the orders entered. For example, an ECN operating an automated response system develops response difficulties when it receives an all or none preferenced order. Nasdaq proposes, through this proposed rule change, to prohibit members from entering conditional orders into SelectNet when they are preferenced to an ECN. Nasdaq plans to develop system changes that will prevent the entry of such conditional orders as soon as possible.

Additionally, the immediate cancellation of an order entered in SelectNet causes significant problems for the ECN that had received such order and was attempting to accept that order. All ECNs will be required, pursuant to performance standards that will be in the ECN agreements, to operate an automated system for accepting orders via SelectNet. The ECN automated system must be able to accept the SelectNet preferenced order and send a message to Nasdaq and to the ECN's own customer indicating that an execution has occurred. However, because an execution does not occur until the Nasdaq system processor receives the ECN acknowledgement that it has in fact accepted the order, a member's cancellation message may arrive at the Nasdaq processor first. Consequently, by the time the acceptance message arrives at Nasdaq's processor for its acknowledgement, the Nasdaq processor may have already accepted the cancellation. This will result in Nasdaq rejecting the execution acknowledgement from the ECN and hence harm the customer of the ECN

[1] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (''Order Execution Rules Adopting Release'') adopting Rule 11Ac1–4 and amendments to Rule 11Ac1–1 (''Quote Rule'') (collectively ''Order Execution Rules'').

[2] *See* Securities Exchange Act Release No. 38008 (December 2, 1996), 61 FR 64550 (December 5, 1996) notice of NASD filing of proposed rule change, file number 96–43.

who believed an execution had occurred. Nasdaq believes it is appropriate, therefore, to require a member that has entered any order into SelectNet, a preferenced order or broadcast, to wait at least ten seconds before cancelling that same order. In this manner, the ECN or market maker operating a rapidly responding system will not be adversely disadvantaged.

Nasdaq notes that the establishment of a minimum life of an order at ten seconds is its initial response to a significant concern that it has had with the use of SelectNet and the rapid cancellation of orders. The entry of large numbers of preferenced and broadcast orders into SelectNet that are cancelled within a very short time span creates serious market quality concerns. Two particular problems occur: (1) the rapid entry and almost immediate cancellation of SelectNet orders causes a misleading appearance of activity that is virtually impossible to access (i.e. ''flickering'' orders); and (2) because of the system design of SelectNet, the large number of order sent to the SelectNet window on Nasdaq Workstation II (''NWII'') rapidly scroll off the screen before a market maker can see the order and react to it (the ''scroll-off'' problem).

Two issues arise because of the many SelectNet orders that are cancelled almost as soon as they have been entered. First, the market may be misled by an appearance of significant activity in a particular issue, when, in fact, very few orders actually are accessible or carry any real price discovery information. The appearance of massive numbers of buy or sell orders first showing up on the screen could cause market makers and other members to believe that significant news on an issue is causing the order flow, leading market makers to adjust their quotations and order entry firms to incorrectly make order entry decisions based on their observation of the heavy influx of orders. The entry of these particular SelectNet orders is essentially a distracting and potentially harmful ''noise'' that disrupts the efficient price discovery process. Indeed, because these orders are so rapidly cancelled, it appears that many of these orders were not entered with the intention of being executed.

Additionally, assuming that each order is entered with the intention that it is to be executed, the almost immediate cancellation often prevents other market participants from reacting effectively to the display of customer order interest. Nasdaq believes that the flurry of SelectNet orders being entered with almost immediate cancellations is the functional equivalent of the ''flickering quote'' problem.[3]

Nasdaq believes that the immediate cancellation of orders entered into SelectNet poses problems similar to those caused by flickering quotations. Essentially, if orders entered through SelectNet are immediately cancelled they are thus virtually inaccessible and therefore misleading. If orders entered into SelectNet are to have any meaning, particularly when they are broadcast to the entire market, it seems that such orders should have a reasonable minimum period of life that permits other market participants to access them.

In addition to the problems caused by the basic inaccessibility of such orders, the unique design by which SelectNet orders are displayed is adversely effected by the heavy influx of such orders and subsequent cancellations. The NWII displays SelectNet orders on a four-line window at the bottom. Each SelectNet order occupies one line of the four-line window. Thus, when more than four orders are sent to a market maker through SelectNet, the oldest order scrolls off the display to be replaced by the newest order. When many SelectNet orders are sent through the system it causes the SelectNet window to scroll orders up and off the four-line window. Consequently, it is virtually impossible for the market maker to effectively interact with the orders. Even if a market maker were to observe an order that it wanted to interact with, it is likely that, due to the high rate of SelectNet cancellations, the order may be cancelled before the market maker is able to act on it. The scrolling, coupled with the almost immediate cancellation of orders, leads some market participants to regard SelectNet as a less viable trading mechanism.

The large influx of orders and cancellations exacts a heavy toll on the capacity of Nasdaq's host processors and the Enterprise-Wide Network II (''EWN''). All of the components have had to be upgraded significantly in the last year, an upgrade driven in significant part by the amount of traffic caused by the SelectNet Broadcast feature and the requirement to process the messages generated in entry and cancellation of SelectNet orders.

Nasdaq believes that the immediate cancellation of SelectNet orders causes a myriad of problems, any of which warrants the imposition of a minimum period for the life of a priced order entered into SelectNet. At this juncture, to prevent harmful market quality effects, Nasdaq believes that orders entered into SelectNet should be accessible for at least a 10 second minimum period of time before such order should be permitted to be cancelled.

Nasdaq has reviewed other possible time periods for examples of minimum time periods that permit reasonable access. One such example is drawn from the Commission's proposed price improvement rule which included a proposed safe harbor.[4] The proposed safe harbor provided that to obtain price improvement for a customer's market order when the spread in the best bid and offer was greater than the smallest quote increment (e.g., larger than 1/8th), the market maker should change its quote for 30 seconds to a price better than the current bid or offer to see if it could obtain a more favorable execution. Another example of a minimum time period is in the Intermarket Trading System (''ITS'') Plan where the exchanges and the NASD have agreed to minimum time periods for orders sent from one market center to another via ITS. ITS rules specifically provide that orders sent by a specialist or market maker in one market center to a specialist or market maker in another market are ''irrevocable'' for either one or two

[3] The NASD believes that the Commission has expressed concern over the value of 'ephemeral' quotes, noting that while certain non-specialists in the trading crowd may make bids or offers that temporarily change the market's quote for ''an instant in time,'' they do not really become part of the market quote because they are withdrawn immediately if not accepted. Such price information, if broadcast to the world via a consolidated quotation system, is essentially inaccessible, confusing to the market, and ultimately, potentially misleading. *See* Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342, 4345 (February 1, 1978) release adopting the Quote Rule. *See also* Securities Exchange Act Release No. 15771 (April 26, 1979), 44 FR 26067 (May 4, 1979) and Securities Exchange Act Release No. 18482 (February 11, 1982), 47 FR 7399 (February 19, 1982) adopting amendments to the Quote Rule.

The NASD also maintains that, in determining not to adopt its price improvement rule, proposed Rule 11Ac1–5, the Commission stated that the inaccessibility of quotes created pursuant to this proposal weighed against its adoption at this time. *See* Order Execution Rules Adopting Release. Lastly, the NASD notes that in recent news report that SEC Commissioner Wallman had concerns with flickering quotes and caused the Commission to rethink its proposed Rule 11Ac1–5 regarding price improvement and a proposed safe harbor mechanism that would have required members to change their quotes for 30 seconds in an effort to obtain price improvement for market orders when spreads are wider than a minimum increment. *See* Bloomberg, ''SEC Commissioner Voices Concern About Nasdaq Access Rule Plan,'' August 14, 1996.

[4] *See* Securities Exchange Act Release No. 36310 (September 29, 1995), 60 FR 52792 (October 10, 1995) release proposing Order Execution Rules which included a proposed price improvement rule.

minutes, depending on the time period that the sending market establishes.

Nasdaq notes that once the Order Execution Rules become effective, experience may determine that the ten second time period is too brief to effectively address the market quality concerns that present problems to market markers and investors alike that are seeking to trade at published prices that are withdrawn before they can be accessed. Nasdaq will continue to review SelectNet cancellation patterns to determine whether a longer minimum period is necessary. If it determines that market quality is being harmed by cancellations that indicate such orders are ephemeral, not executable or perhaps fictitious or manipulative Nasdaq will propose additional means to eliminate the harm. Accordingly, Nasdaq may revisit its initial determination to establish 10 seconds as the minimum life of a SelectNet order.

The NASD believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act and Rule 11Ac–1. Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. Specifically, by imposing limits on SelectNet orders as proposed herein, Nasdaq believes the proposal will promote fair and orderly markets and the protection of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD believes that the proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the Federal Register or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for doing so or (ii) to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of this publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–986 Filed 1–10–97; 12:29 pm]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38127; File No. SR–PSE–96–48]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Stock Exchange Incorporated Relating to A.M.-Settlement

January 6, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 18, 1996, the Pacific Stock Exchange Incorporated (''PSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The PSE is proposing to amend its rules to codify certain existing procedures relating to a.m.-settled index options. The text of the proposed rule change is available at the Office of the Secretary, PSE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing to adopt new Rule 7.8(e), entitled ''A.M.-Settled Index Options.'' This rule provides that the last day of trading for A.M.-settled index option shall be the business day preceding that last day of trading in the underlying securities prior to expiration. It states that the current index value at the expiration of an A.M.-settled option shall be determined on the last day of trading in the underlying securities prior to expiration. It states that the current index value at the expiration of an A.M.-settled option shall be determined on the last day of trading in the underlying securities prior to expiration. It further provides that the current index value shall be determined by reference to the reported level of such index as derived from first reported sale (opening) prices of the underlying securities on such day. In addition, in any case where the security

[5] 17 CFR 200.30–3(a)(12) (1989).

[1] 15 U.S.C. 78s(b)(1) (1982).

[2] 17 CFR 240.19b–4 (1991).

does not open for trading on that day, the last reported sale price of such security shall be used unless the exercise settlement amount is fixed in accordance with the Rules and By-Laws of The Options Clearing Corporation.

Subsection (1)(B) of the proposed rule states that in any case where an exercise settlement amount is fixed for any series of index options pursuant to the Rules and By-Laws of The Options Clearing Corporation, the amount so fixed shall be the amount required to be paid upon exercise of options of that series notwithstanding any difference between the current index value used by The Options Clearing Corporation in fixing that amount and the index value determined pursuant to Exchange Rules or practices.

The rule change further states that the following A.M.-settled index options are approved for trading on the Exchange: the PSE Technology Index; the Wilshire Small Cap Index; and the Dow Jones & Co. Taiwan Index.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and Section 6(b)(5), in particular, in that it is designed to promote just and equitable principles of trade and to foster cooperation and coordination with persons engaged in regulating, clearing, settling and processing information with respect to transactions in securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will—

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference 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 the PSE. All submissions should refer to File No. SR–PSE–96–48 and should be submitted by January 27, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[3]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–806 Filed 1–13–97; 8:45 am]

BILLING CODE 8010–01–M

[3] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Philadelphia Ventures Liberty Fund, L.P. (License No. 03/73–0208); Notice of Issuance of a Small Business Investment Company License

On July 29, 1994, a ''Track 2'' application was filed by Philadelphia Ventures Liberty Fund, L.P. located at 200 Broad Street, the Bellevue, Philadelphia, Pennsylvania 19102, with the Small Business Administration (SBA) pursuant to Section 107.102 of the then prevailing Regulations governing small business investment companies (13 CFR 107.102 (1994)) for a license to operate as a small business investment company. On June 6, 1996, the application was moved to a ''Track 1'' status upon notification of the applicant's first closing.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after considering the revised application and all other pertinent information, SBA issued License No. 03/73–0208 on December 22, 1996, to Philadelphia Ventures Liberty Fund, L.P. to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Don A. Christensen,

Associate Administrator for Investment.

[FR Doc. 97–817 Filed 1–13–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2912]

California; Declaration of Disaster Loan Area

San Diego County and the contiguous counties of Imperial, Orange, and Riverside in the State of California constitute a disaster area as a result of damages caused by firestorms which occurred October 21 through October 23, 1996. Applications for loans for physical damage as a result of this disaster may be filed until the close of business on March 3, 1997 and for economic injury until the close of business on October 2, 1997 at the address listed below: U.S. Small Business Administration, Disaster Area 4 Office, 1825 Bell Street, Suite 208, Sacramento, CA 95825, or other locally announced locations.

The interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.125
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 291205 and for economic injury the number is 924900.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: January 2, 1997.

Ginger Lew,

Acting Administrator.

[FR Doc. 97–821 Filed 1–13–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2914]

New York; Declaration of Disaster Loan Area (Amendment #1)

In accordance with a notice from the Federal Emergency Management Agency, dated December 31, 1996, the above-numbered Declaration is hereby amended to extend the deadline for filing applications for physical damage as a result of this disaster to January 31, 1997.

All other information remains the same, i.e., the termination date for filing applications for loans for economic injury is August 19, 1997.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: January 2, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–818 Filed 1–13–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2918]

New York; Declaration of Disaster Loan Area, (Amendment #1)

In accordance with a notice from the Federal Emergency Management Agency, dated December 31, 1996, the above-numbered Declaration is hereby amended to include Chemung and Delaware Counties in the State of New York as a disaster area due to damages caused by severe thunderstorms, high winds, rain and flooding which occurred November 8–15, 1996.

In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the previously designated location: Broome, Chenango, Greene, Sullivan, Tioga, and Ulster Counties in New York, and Bradford and Wayne Counties in Pennsylvania.

All other information remains the same, i.e., the termination date for filing applications for physical damage is February 7, 1997, and for loans for economic injury the deadline is September 9, 1997.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: January 2, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–819 Filed 1–13–97; 8:45 am]

BILLING CODE 8025–01–P

[Declaration of Disaster Loan Area #2920]

Pennsylvania; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration on December 23, 1996, I find that Tioga County in the State of Pennsylvania constitutes a disaster area due to damages caused by severe thunderstorms, high winds, rain, and flooding which occurred November 8–15, 1996. Applications for loans for physical damages may be filed until the close of business on February 20, 1997, and for loans for economic injury until the close of business on Sepember 23, 1997 at the address listed below: U.S. Small Business Administration, Disaster Area 1 Office, 360 Rainbow Blvd. South, 3rd Fl., Niagara Falls, NY 14303 or other locally announced locations. In addition, applications for economic injury loans from small businesses located in the following contiguous counties may be filed until the specified date at the above location: Bradford, Lycoming, and Potter Counties in Pennsylvania, and Chemung and Steuben Counties in New York.

Interest rates are:

	Percent
For Physical Damage:	
Homeowners with credit available elsewhere	8.000
Homeowners without credit available elsewhere	4.000
Businesses with credit available elsewhere	8.000
Businesses and non-profit organizations without credit available elsewhere	4.000
Others (including non-profit organizations) with credit available elsewhere	7.250
For Economic Injury:	
Businesses and small agricultural cooperatives without credit available elsewhere	4.000

The number assigned to this disaster for physical damage is 292006. For economic injury the numbers are 932600 for Pennsylvania and 932700 for New York.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008)

Dated: January 2, 1997.

Bernard Kulik,

Associate Administrator for Disaster Assistance.

[FR Doc. 97–820 Filed 1–13–97; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Notice of Proposed Change in Magnetic Media Reporting Specifications, for Submitters Who File Wage Reports Using Magnetic Media or Electronic Filing

SUMMARY: Notice is hereby given that SSA has developed proposed new Magnetic Media Reporting and Electronic Filing Specifications (MMREF–1) for submitters who file wage reports with SSA using Magnetic tape, diskette, cartridge or electronic filing. MMREF–1 will replace existing Technical Information Bulletins (TIB) 4, 5, 6 and 7. The MMREF–1 consists of a single record format to be used to report domestic or territorial reports using magnetic media and electronic filing. A pilot will be conducted for tax year 1998 reporting using selected submitters. Beginning with tax year 1999 and over a several year period, submitters will be required to transition to the MMREF–1 format.

We would like to receive any comments the public may offer on the MMREF–1. An educational seminar on the MMREF–1 is scheduled to be held at the SSA headquarters in Baltimore, Maryland, January 16, 1997, 9 a.m. to 12 p.m. To receive a draft copy of the MMREF–1 and/or to attend the educational seminar contact the addressee below.

DATES: Comments on the MMREF–1 must be received on or before February 28, 1997.

Reservations for the seminar would be appreciated but are not necessary by January 10, 1997.

ADDRESSES: To receive a draft and/or to make a reservation for the seminar, contact Ed Bulson, Social Security Administration, Room 3–B–15 Operations Building, Baltimore, Maryland 21235 or fax at (410) 966–4159.

FOR FURTHER INFORMATION CONTACT: Richard Harron, Chief, Earnings Records and Reporting Branch, Office of Program Benefits Policy, Social Security Administration, 3–F–26 Operations Building, Baltimore, Maryland 21235, telephone (410) 966–3856, fax (410) 966–9214.

Dated: January 8, 1997.

Richard Harron,

Tax Forms Coordinator.

[FR Doc. 97–858 Filed 1–13–97; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF STATE

[Public Notice 2497]

United States—Egypt Science and Technology Joint Board; Public Announcement of a New Science and Technology Program for Competitive Grants to Support International, Collaborative Projects in Science and Technology Between U.S. and Egyptian Cooperators

January 15, 1997.

AGENCY: U.S. Department of State.

ACTION: Notice.

EFFECTIVE DATE: January 15, 1997.

FOR FURTHER INFORMATION CONTACT: Catherine Bourgeois, Program Specialist, Office of Cooperative Science Programs, Bureau of Oceans and International Environmental and Scientific Affairs (OES/SCP), U.S. Department of State, 202–647–4662.

SUPPLEMENTARY INFORMATION:

Authority: This program is established under 22 U.S.C. 2656d and the Agreement for Scientific and Technological Cooperation between the Government of the United States of America and the Government of the Arab Republic of Egypt.

A solicitation for this program will begin January 15, 1997. This program will provide small grants for successfully competitive proposals for collaborative projects and other activities submitted by United States and Egyptian experts. Projects must help the United States and Egypt utilize science and apply technology by providing opportunities to exchange ideas, information, skills, and techniques, and to collaborate on scientific and technological endeavors of mutual interest and benefit. Proposals considered for funding in Fiscal Year 1997 must be received by March 1, 1997 by the Program Administrators. All proposals will be considered; however, special consideration will be given to proposals that address priority areas defined/approved by the Joint Board. These include priorities in the areas of biotechnology, standards and metrology, environmental technologies, and manufacturing technologies. More information on these priorities and copies of the Program Announcement/Application may be obtained upon request.

Anne K. Solomon,

Deputy Assistant Secretary, Science, Technology, and Health, and Chair, United States—Egypt S&T Joint Board.

[FR Doc. 97–751 Filed 1–13–97; 8:45 am]

BILLING CODE 4710–09–M

[Public Notice No. 2500]

United States International Telecommunications Advisory Committee (ITAC), Standardization Sector (ITAC–T), Study Group A and ITAC–T; Meeting Notice

The Department of State announces that the United States International Telecommunications Advisory Committee (ITAC), Telecommunications Standardization Sector (ITAC–T) National Study Group and Study Group A has scheduled the following sessions to develop United States positions and contributions for upcoming ITU–T meetings dealing with standardization activities of the International Telecommunications Union.

The U.S. National group, ITAC–T, will discuss and prepare for the March 3–7, 1997, Telecommunications Standardization Advisory Group (TSAG) meeting, while U.S. Study Group A will discuss and prepare positions and contributions for (1) ITU–T Study Group 3's (Tariff and Accounting Principles including related telecommunications economic and policy) meeting now scheduled for May 22–30, 1997 and (2) the ITU–T Study Group 2 meeting scheduled for Geneva, May 20–30, 1997. A more extensive agenda will be developed and distributed by fax or electronic mail to members prior to the announced meeting including the announcements of two ad hoc group meetings, one for numbering and routing and one for accounting rates and call back applications.

ITAC–T Preparations for TSAG

February 6, 1997 at AT&T, 20th & L Streets, Washington, DC, 9:00 a.m. to 1:00 p.m.

March 20, 1997 at the Department of State, room 1207, 9:00 a.m. to 1:00 p.m.

ITAC–T Study Group A Preparations for ITU SG2 and SG3

March 19, 1997 at the Department of State, room 1207, 9:30 a.m. to 4:00 p.m.

April 30, 1997 at the Department of State, room 1207, 9:30 a.m. to 4:00 p.m.

Ad Hoc Group for Numbering/Routing Issues (SG2)

March 13, 1997 at Bellcore, 2101 L Street, NW, Washington, DC, 9:00 a.m. to 5:00 p.m.

March 14, 1997 at Bellcore, 2101 L Street, NW, Washington, DC, 9:00 a.m. to 12:00 noon

April 8, 1997, at Bellcore, 2101 L Street, NW, Washington, DC, 9:00 a.m. to 5:00 p.m.

April 9, 1997, at Bellcore, 2101 L Street, NW, Washington, DC, 9:00 a.m. to 5:00 p.m.

Members of the General Public may attend the meetings and join in the discussions, subject to the instructions of the chair. Admittance of public members will be limited to the seating available. In this regard, entrance to the Department of State is controlled. Questions regarding the meeting may be addressed to Mr. Earl Barbely at 202–647–0197. If you wish to attend please send a fax to 202–647–7407 not later than 5 days before the scheduled meetings. Please include your name, Social Security number and date of birth. One of the following valid photo ID's will be required for admittance: U.S. driver's license with picture, U.S. passport, U.S. government ID (company ID's are no longer accepted by Diplomatic Security). Enter from the ''C'' Street Main Lobby.

Dated: December 31, 1996.

Earl S. Barbely,

Chairman, U.S. ITAC for Telecommunication Standardization.

[FR Doc. 97–800 Filed 1–13–97; 8:45 am]

BILLING CODE 4710–45–M

[Public Notice No. 2503]

Shipping Coordinating Committee International Maritime Organization (IMO) Legal Committee; Notice of Meeting

The U.S. Shipping Coordinating Committee (SHC) will conduct an open meeting at 10:00 a.m., on Thursday, February 6, 1997, in Room 2415 at U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, D.C. The purpose of this meeting is to report on the ninth session of the International Maritime Organization (IMO)/United Nations Conference on Trade and Development (UNCTAD) jointly sponsored intergovernmental group of experts (JIGE), which met in Geneva from December 2–6, 1996, to consider revisions to the 1952 Arrest Convention. This SHC meeting will also prepare for the 75th session of the IMO Legal Committee, which will be held April

21–25, 1997, in London, regarding financial responsibility or compulsory liability and compensation insurance for seagoing vessels, compensation for pollution from ships' bunkers, a draft convention on wreck removal, and other matters. Finally, this meeting will be another opportunity for interested members of the public to express their views on whether the United States should ratify the Hazardous and Noxious Substances Convention, adopted in London in May, 1996.

Members of the public are invited to attend the SHC meeting, up to the seating capacity of the room. For further information, for copies of conference documents, or to submit views concerning the subjects of discussion, contact either Captain Malcolm J. Williams, Jr., or Lieutenant Bruce P. Dalcher, U.S. Coast Guard (G–LMI), 2100 Second Street, S.W., Washington, D.C. 20593, telephone (202) 267–1527, telefax (202) 267–4496.

Dated: January 6, 1997.

Russell A. La Mantia,

Chairman, Shipping Coordinating Committee.

[FR Doc. 97–801 Filed 1–13–97; 8:45 am]

BILLING CODE 4710–07–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Aviation Rulemaking Advisory Committee Meeting on Airport Certification Issues

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of the Federal Aviation Administration Aviation Rulemaking Advisory Committee to discuss airport certification issues.

DATES: The meeting will be held on January 29, 1997, at 9:00 a.m. Arrange for oral presentations by January 17, 1997.

ADDRESSES: The meeting will be held at FAA Headquarters, Conference Rooms 5B and 5C, 5th Floor, 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Ms. Marisa Mullen, Federal Aviation Administration, Office of Rulemaking (ARM–205), 800 Independence Avenue, SW.., Washington, DC 20591, telephone (202) 267–7653, fax (202) 267–5075.

SUPPLEMENTARY INFORMATION: Pursuant to § 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463; 5 U.S.C. App. II), notice is hereby given of a meeting of the Aviation Rulemaking Advisory Committee to be held on January 29, 1997, at FAA Headquarters, Conference Rooms 5B and 5C, 5th Floor, 800 Independence Avenue, SW, Washington, DC 20591. The agenda will include:

- Committee administration.
- Status report from Friction Measurement and Signing Working Group.
- General discussion of working group report.
- Recommendations and Findings Report from Commuter Airport Certification Working Group. To include presentation of any minority view points.
- General discussion of working group report.
- Make any additions or clarifications to working group report.
- Transit completed report to FAA; completing working group task.
- A discussion of future meeting dates, locations, activities, and plans.

Attendance is open to the interested public, but will be limited to the space available. The public must make arrangements by January 17, 1997, to present oral statements at the meeting. The public may present written statements to the committee at any time by providing 25 copies to the Executive Director, or by bringing the copies to the meeting. In addition, sigh and oral interpretation can be made available at the meeting, as well as an assistive listening device, if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Washington, DC, on January 8, 1997.

Robert E. David,

Assistant Executive Director for Airport Certification Issues, Aviation Rulemaking Advisory Committee.

[FR Doc. 97–844 Filed 1–13–97; 8:45 am]

BILLING CODE 4910–13–M

Surface Transportation Board

[STB Finance Docket No. 33321]

Western Fuels Service Corporation, Acquisition and Operation Exemption, Burlington Northern Railroad Company

Western Fuels Service Corporation (WFSC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150, Subpart D to acquire and operate a rail line owned by Burlington Northern Railroad Company (BN). The line, located in Wyoming, extends from West Caballo Junction (milepost 14.9) to the following mines in the Powder River Basin: (1) Buckskin (milepost 9.5; 25 route miles); (2) Fort Union (milepost 6.0; 21 route miles); (3) Clovis Point (milepost 3.0; 18 route miles); Rawhide (milepost 9.5; 25 route miles); Eagle Butte (milepost 9.5; 25 route miles); and Dry Fork (milepost 7.9; 23 route miles).

WFSC states that it has not reached an agreement with BN to operate over BN's tracks between West Caballo Junction and the Powder River Basin mines, but that it is seeking such rights and authority in its pending complaint in *Western Fuels Service Corporation* v. *Burlington Northern Railroad Company*, STB Docket No. 41987, to obtain access to terminal facilities under 49 U.S.C. 11102.

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.[1] The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33321, 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: Fredrick D. Palmer, Western Fuels Service Corporation, Suite 805, 4301 Wilson Blvd., Arlington, VA 22203–1860; and Peter Glaser, Doherty, Rumble, and Butler, PA, 1401 New York Ave., N.W., Washington, DC 20005.

Decided: January 7, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–859 Filed 1–13–97; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Departmental Offices, Debt Management Advisory Committee; Meeting

Notice is hereby given, pursuant to Section 10 of Public Law 92–463, that a meeting will be held at the Federal Reserve Bank of New York at 3:00 p.m. on January 16, 1997, of the following debt management advisory committee:

Public Securities Association

[1] On December 13, 1996, BN filed a petition to reject the notice of exemption or, in the alternative, for a declaration that the notice is void *ab initio*. WFSC filed a reply on December 31, 1996. The merits of the petition will be decided by the entire Board in a separate decision.

Treasury Borrowing Advisory Committee

The agenda for the Public Securities Association Treasury Borrowing Advisory Committee meeting calls for a discussion by the members of their individual views on the appropriate size of the inflation-indexed security auction on January 29. The Committee is not being asked to make a group recommendation as to the appropriate size of the auction. Detailed minutes will be made available on January 21. The short period of time between the announcement of the date for the first auction and the date of the formal offering announcement of the details of the first auction, and the need for the Treasury to hear the views of Committee members before proceeding with its offering announcement, require that this meeting be held without providing the full fifteen days notice.

Pursuant to the authority placed in Heads of Departments by section 10(d) of Public Law 92–463, and vested in me by Treasury Department Order 101–05, I hereby determine that this meeting is concerned with information exempt from disclosure under section 552b(c)(9)(A) of title 5 of the United States Code, and that the public interest requires that such meeting be closed to the public.

My reasons for this determination are as follows. The Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decision on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community, which committees have been utilized by representatives of the Secretary. When so utilized, such a committee is recognized to be an advisory committee under Public Law 92–463.

The nature and content of the discussion and individual members' recommendations are such that their premature disclosure would likely lead to significant speculation in the securities market. Thus, the meeting falls within the exemption covered by section 552b(c)(9)(A) of title 5 of the United States Code.

The Office of the Under Secretary (Domestic Finance) shall be responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of committee activities and such other matters as may be informative to the public consistent with the policy of section 552b of title 5 of the United States Code.

Dated: January 9, 1997.

John D. Hawke, Jr.,

Under Secretary Domestic Finance.

[FR Doc. 97–867 Filed 1–13–97; 8:45 am]

BILLING CODE 4810–25–M

Office of the Comptroller of the Currency

[Docket No. 97–01]

Preemption Determination

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

ACTION: Notice and request for comment.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing for comment a written request for the OCC's determination of whether certain provisions of legislation entitled ''Financial Institution Insurance Sales Act,'' recently enacted by the State of Rhode Island, are preempted by Federal law. The purpose of this notice and request for comment is to provide interested persons with an opportunity to submit comments prior to the OCC's issuance of a final determination responding to the request.

DATES: Comments should be submitted on or before February 13, 1997.

ADDRESSES: Comments should be sent to the Communications Division, 250 E Street, SW, Third Floor, Washington, DC 20219. Attention Docket No. 97–01. Comments will be available for inspection and photocopying at the same location. Appointments for inspection of comments can be made by calling (202) 874–4700.

FOR FURTHER INFORMATION CONTACT: Suzette H. Greco, Senior Attorney, Securities and Corporate Practices Division, (202) 874–5210.

SUPPLEMENTARY INFORMATION:

Background

The OCC has received a request from a trade association that represents financial institutions and insurance companies (Requester) for a determination that certain provisions of legislation entitled ''Financial Institution Insurance Sales Act,'' R.I. Gen. Laws §27–58–1 *et seq.,* (the Rhode Island law), recently enacted by the State of Rhode Island, are preempted by provisions of the National Bank Act.

Section 114 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (section 114), Pub. L. 103–328 (12 U.S.C. 43), generally requires the OCC to publish in the Federal Register a descriptive notice of certain requests that the OCC receives for preemption determinations. Under section 114, the OCC must publish notice before it issues any opinion letter or interpretive rule concluding that Federal law preempts the application to a national bank of any State law in four designated areas: community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches. Pursuant to section 114, interested persons have at least 30 days to submit written comments.

The Requester has offered reasons why the request should not be subject to section 114. Whether or not section 114 applies to the request, the OCC has determined that it is appropriate to use notice and comment procedures in this case, given the broad interest in the issues presented in the request and the benefit the OCC will derive by receiving comments from all parties with an interest in these issues. The OCC will publish in the Federal Register any final opinion letter or interpretive rule that concludes that Federal law preempts State law.

Specific Request for OCC Preemption Determination

The OCC has been asked to determine whether certain provisions of the Rhode Island law are preempted by section 92 of the National Bank Act (12 U.S.C. 92) and other specific Federal laws noted later in this notice and request for comment.

Section 92 authorizes a national bank ''located and doing business in a place where the population is less than five thousand to act as an agent for any fire, life, or other insurance company,'' to ''solicit and sell insurance,'' to ''collec[t] premiums,'' and to ''receive for services so rendered . . . fees or commissions,'' subject to regulations issued by the Comptroller of the Currency. 12 U.S.C. 92. State laws that apply generally to regulated insurance agents and agencies will apply to national banks provided the law does not effectively prevent national banks from conducting activities authorized under Federal law, and provided that, if the law interferes with those authorized activities, the interference is not significant. *See Barnett Bank of Marion County, N.A.* v. *Nelson,* 116 S.Ct. 1103 (1996).

The Rhode Island law imposes a number of requirements upon financial institutions engaged in the solicitation and sale of insurance that differ from the requirements that apply to other insurance agents and agencies. The Requester contends these special requirements prevent or significantly interfere with the ability of a national bank to exercise its authority under section 92. The special requirements include a provision prohibiting banks from requiring or implying that the purchase of insurance products from a bank is related to receiving another banking product or service, a provision restricting where a bank's licensed agent can solicit the sale of insurance, a provision prohibiting certain bank employees from soliciting and selling insurance, a provision requiring separate applications for loans and insurance, and a provision limiting the ability of a bank to use its customer information to solicit and sell insurance.

Specifically, section 6 of the Rhode Island law provides that:

(a) No financial institution may offer a banking product or service, or fix or vary the conditions of such offer, on a condition or requirement that the customer obtain insurance from the financial institution, or any particular insurance producer.

(b) No person shall require or imply that the purchase of an insurance product from a financial institution by a customer or prospective customer of the institution is required as a condition of, or is any way related to, the lending of money or extension of credit, the establishment or maintenance of a trust account, the establishment or maintenance of a checking or savings account or other deposit account, or the provision of services related to any such activities.

R.I. Gen. Laws §27–58–6. The Requester contends that this provision would prohibit a bank employee from even mentioning to a customer that insurance products are available from the bank. As a result, the Requester believes that the provision discriminates against national banks and significantly interferes with the ability of a national bank to solicit or sell insurance under section 92.

Moreover, the Requester contends that the provision conflicts with the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. 1972, and Federal regulations enacted pursuant to that section. Under the Federal anti-tying laws and regulations, banks are permitted to inform a customer that insurance is required in order to obtain a loan or that loan approval is contingent on the customer obtaining acceptable insurance. In such circumstances, the bank may indicate that insurance is available from the bank. Thus, the Requester contends that under traditional preemption standards the Rhode Island law is preempted by Federal law. The Requester further contends that the Rhode Island law was enacted for the purpose of regulating lenders rather than regulating the business of insurance and thus, is not protected from preemption by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*

In addition, section 12 of the Rhode Island law permits financial institutions to solicit and sell insurance only from an office physically separated from the banking activities of the institution. Specifically, section 12 provides that:

The place of solicitation or sale of insurance by any financial institution shall be from an office physically separated from the banking activities of the institution. Physical separation shall not be defined as a separate building. The commissioner shall have the authority to promulgate rules to implement this section pursuant to § 27–58–4.

R.I. Gen. Laws §27–58–12. The Requester contends this provision will effectively prohibit insurance activities at small bank or branch offices. As a result, the Requester believes that the provision significantly interferes with a national bank's ability to solicit and sell insurance under section 92.

In addition, section 8 of the Rhode Island law prohibits bank employees with lending or deposit taking responsibilities from soliciting and selling insurance. Specifically, section 8 provides that:

Solicitation for the purchase and sale of insurance by a financial institution shall be conducted only by persons whose responsibilities do not include loan transactions or other transactions involving the extension of credit, or the taking of deposits.

R.I. Gen. Laws § 27–58–8. The Requester contends that this provision would prohibit the use of qualified ''platform'' employees to solicit and sell insurance, as is permitted for national banks. Moreover, the Requester believes that the provision could effectively bar insurance activities in small banks or branches where different employees may not be available to offer insurance and banking products and services. For these reasons, the Requester believes the provision discriminates against national banks and prevents or significantly interferes with their authority to solicit and sell insurance under section 92.

Section 11 of the Rhode Island law requires that loan and insurance applications be completed independently and through separate documents. Section 11 provides that:

(a) If insurance is required as a condition of obtaining a loan, the credit and insurance transactions shall be completed independently and through separate documents.

(b) A loan for premiums on required insurance shall not be included in the primary credit without the written consent of the customer.

R.I. Gen. Laws § 27–58–11. The Requester contends that this provision, particularly when coupled with other requirements of the Rhode Island law, including the provision requiring the physical separation of insurance and banking activities and the provision prohibiting certain bank employees from soliciting and selling insurance, will impose an undue burden upon the bank and its customers by necessitating that the customer make multiple visits with different bank employees to multiple locations in order to purchase bank and insurance products.

Section 10 of the Rhode Island law prohibits financial institutions from using or disclosing certain customer information for the purpose of selling or soliciting insurance. Specifically, section 10 provides that:

(1)(b) ''Nonpublic customer information'' means information regarding a person that has been derived from a record of a financial institution, including information concerning the terms and conditions of insurance coverage, insurance expirations, insurance claims, or insurance history of an individual. ''Nonpublic customer information'' does not include customer names, addresses or telephone numbers.

(2) No financial institution shall use any nonpublic customer information for the purpose of selling or soliciting the purchase of insurance or provide the nonpublic customer information to a third party for the purpose of another's sale or solicitation of the purchase of insurance.

R.I. Gen. Laws § 27–58–10. The Requester contends that this provision will cripple a bank's ability to use customer information to meet customer needs. The Requester believes that the limitation on use and disclosure of customer information would even prohibit the marketing of insurance products to bank customers who had requested such information. Moreover, like the other provisions cited by the Requester, the Requester contends that this provision discriminates against financial institutions because a collateral limitation has not been placed on other insurance agents and agencies in Rhode Island.

Request for Comments

The OCC requests comments on whether Federal law preempts the provisions of the Rhode Island law cited above.

Dated: December 16, 1996.

Eugene A. Ludwig,

Comptroller of the Currency.

[FR Doc. 97–674 Filed 1–13–97; 8:45 am]

BILLING CODE 4810–33–P

UNITED STATES INSTITUTE OF PEACE

Announcement of the Spring Unsolicited Grant Program

AGENCY: United States Institute of Peace.

ACTION: Notice.

SUMMARY: The Agency Announces a Change in Deadline for the Spring Unsolicited Grant Competition.

Previous Deadline: April 1
New Deadline: March 1

DATES: Application Material Available Upon Request. Receipt Date for Return of Applications: March 1, 1997. Notification of Awards: June, 1997.

ADDRESSES: For Application Package: United States Institute of Peace, Grant Program, 1550 M Street, NW, Suite 700, Washington, DC 20005–1708, (202) 429–6063 (fax), (202) 457–1719 (TTY), Email: grant__program@usip.org.

FOR FURTHER INFORMATION CONTACT:

The Grant Program, Phone (202)–429–3842.

Dated: January 8, 1997.

Bernice J. Carney,

Director, Office of Administration.

[FR Doc. 97–822 Filed 1–13–97; 8:45 am]

BILLING CODE BAC–3155–01–M

Tuesday
January 14, 1997

Part II

Department of Commerce

International Trade Administration

Antidumping; Silicon Metal From Brazil; Notices

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–806]

Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review and determination not to revoke in part.

SUMMARY: On September 5, 1996, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on silicon metal from Brazil. This review covers the period July 1, 1993, through June 30, 1994, and five manufacturers/exporters of the subject merchandise to the United States. The review indicates the existence of margins for four firms.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and new information submitted at the Department's request, we have changed our results from those presented in our preliminary results, as described below in the comments section of this notice.

EFFECTIVE DATE: January 14, 1997.

FOR FURTHER INFORMATION CONTACT: Fred Baker, Alain Letort, or John Kugelman, AD/CVD Enforcement Group III, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2924, –4243, or –0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 5, 1996, the Department of Commerce published in the Federal Register (61 FR 46776) the preliminary results of its administrative review of the antidumping duty order on silicon metal from Brazil (July 31, 1991, 56 FR 36135). On September 27, October 2, and November 13, 1996 the Department requested additional information from Minasligas, Eletrosilex, and CCM, respectively. We received responses from these firms on October 15, October 16, and November 20, 1996, respectively. The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

Scope of the Review

The merchandise covered by this review is silicon metal from Brazil containing at least 96.00 percent but less than 99.99 percent silicon by weight. Also covered by this review is silicon metal from Brazil containing between 89.00 and 96.00 percent silicon by weight but which contains a higher aluminum content than the silicon metal containing at least 96.00 percent but less than 99.99 percent silicon by weight. Silicon metal is currently provided for under subheadings 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule (HTS) as a chemical product, but is commonly referred to as a metal. Semiconductor grade silicon (silicon metal containing by weight not less than 99.99 percent silicon and provided for in subheading 2804.61.00 of the HTS) is not subject to the order. HTS item numbers are provided for convenience and for U.S. Customs purposes. The written description remains dispositive as to the scope of the product coverage.

The period of review (POR) is July 1, 1993, through June 30, 1994. This review involves five manufacturers/exporters of Brazilian silicon metal: Companhia Brasileira Carbureto de Cálcio (CBCC), Companhia Ferroligas Minas Gerais—Minasligas (Minasligas), Eletrosilex Belo Horizonte (Eletrosilex), Rima Eletrometalurgia S.A. (RIMA), and Camargo Corrêa Metais (CCM).

Consumption Tax

In light of the Federal Circuit's decision in *Federal Mogul* v. *United States,* CAFC No. 94–1097, the Department has changed its treatment of home market consumption taxes. Where merchandise exported to the United States is exempt from the consumption tax, the Department will add to the U.S. price the absolute amount of such taxes charged on the comparison sales in the home market. This is the same methodology that the Department adopted following the decision of the Federal Circuit in *Zenith* v. *United States,* 988 F.2d 1573, 1582 (1993), and which was suggested by the court in footnote 4 of its decision. The Court of International Trade (CIT) overturned this methodology in *Federal Mogul* v. *United States,* 834 F.Supp. 1391 (1993), and the Department acquiesced in the CIT's decision. The Department then followed the CIT's preferred methodology, which was to calculate the tax to be added to U.S. price by multiplying the adjusted U.S. price by the foreign market tax rate; the Department made adjustments to this amount so that the tax adjustment would not alter a ''zero'' pre-tax dumping assessment.

The foreign exporters in the *Federal Mogul* case, however, appealed that decision to the Federal Circuit, which reversed the CIT and held that the statute did not preclude Commerce from using the ''*Zenith* footnote 4'' methodology to calculate tax-neutral dumping assessments (*i.e.*, assessments that are unaffected by the existence or amount of home market consumption taxes). Moreover, the Federal Circuit recognized that certain international agreements of the United States, in particular the General Agreement on Tariffs and Trade (GATT) and the Tokyo Round Antidumping Code, required the calculation of tax-neutral dumping assessments. The Federal Circuit remanded the case to the CIT with instructions to direct Commerce to determine which tax methodology it will employ.

The Department has determined that the ''*Zenith* footnote 4'' methodology should be used. First, as the Department has explained in numerous administrative determinations and court filings over the past decade, and as the Federal Circuit has now recognized, Article VI of the GATT and Article 2 of the Tokyo Round Antidumping Code required that dumping assessments be tax-neutral. This requirement continues under the new Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade. Second, the Uruguay Round Agreements Act (URAA) explicitly amended the antidumping law to remove consumption taxes from the home market price and to eliminate the addition of taxes to U.S. price, so that no consumption tax is included in the price in either market. The Statement of Administrative Action (p. 157) explicitly states that this change was intended to result in tax neutrality.

While the ''*Zenith* footnote 4'' methodology is slightly different from the URAA methodology, in that section 772(d)(1)(C) of the pre-URAA law required that the tax be added to United States price rather than subtracted from home market price, it does result in tax-neutral duty assessments. In sum, the Department has elected to treat consumption taxes in a manner consistent with its longstanding policy of tax-neutrality and with the GATT.

Verification

As provided in section 776(b) of the Tariff Act, we verified information provided by Minasligas, CBCC, RIMA, and CCM by using standard verification procedures, including onsite inspection of the manufacturers' 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.

Use of Best Information Available (BIA)

In our preliminary results of this administrative review, we determined that RIMA was a non-shipper. *See Silicon Metal from Brazil; Preliminary Results of Antidumping Duty Administrative Review, Intent to Revoke in Part, and Intent Not to Revoke in Part*, 61 FR 46776 (September 5, 1996) (preliminary results). Since publication of the preliminary results, we have determined that RIMA did have shipments during the POR. *See* the Department's response to comment 2 below. Therefore, we have included in these final results of review all of RIMA's sales during the POR made to an importer who had at least one importation during the POR. *See* the Department's response to comment 1 below.

Because RIMA failed to produce information requested at verification to substantiate significant portions of its response, in accordance with section 776(c) of the Act, we have determined that the use of BIA is appropriate. For these final results we applied the following two-tier BIA analysis in choosing what to use as BIA:

1. When a company refuses to cooperate with the Department or otherwise significantly impedes these proceedings, it assigns that company first-tier BIA, which is the higher of:

(a) The highest of the rates found for any firm for the same class or kind of merchandise in the same country of origin in the less-than-fair-value investigation (LTFV) or prior administrative review; or

(b) The highest rate found in the present administrative review for any firm for the same class or kind of merchandise from the same country of origin.

2. When a company substantially cooperates with our requests for information including, in some cases, verification, but fails to provide the information requested in a timely manner or in the form required, it assigns to that company second-tier BIA, which is the higher of:

(a) The firm's highest rate (including the ''all others'' rate) of the same class or kind of merchandise from a prior administrative review or, if the firm has never before been investigated or reviewed, the all others rate from the LTFV investigation; or

(b) The highest calculated rate in this review for the class or kind of merchandise for any firm from the same country of origin.

See Allied-Signal Aerospace Co. v. *United States,* 28 F.3d 1188, 1189, 1190 n.2 (CAFC 1994).

RIMA cooperated by responding to the Department's questionnaires. However, we determined at verification that this company could not substantiate significant portions of its responses. Therefore, we have determined to apply second-tier BIA to RIMA's third-review sales. (*See* Use of BIA memorandum to Joseph Spetrini, Deputy Assistant Secretary, Enforcement Group Three.) The second-tier BIA rate we have assigned to RIMA is 91.06 percent. This rate represents the highest rate ever applicable to RIMA for the subject merchandise.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received case and rebuttal briefs from Minasligas, Eletrosilex, CCM, CBCC, and a group of five domestic producers of silicon metal (collectively, the petitioners). Those five domestic producers are American Alloys, Inc., Elkem Metals Co., Globe Metallurgical, Inc., SMI Group, and SKW Metals and Alloys, Inc. We received a request for a hearing from CBCC, Minasligas, Eletrosilex, CCM, and the petitioners. We held a public hearing on November 25, 1996.

Comment 1

Petitioners argue that the Department erred in determining which U.S. sales to review by using the methodology employed in the final results of the second administrative review of this order. In the second review final results, we explained our methodology as follows:

1. Where a respondent sold merchandise, and the importer of that merchandise had at least one entry during the POR, we reviewed all sales to that importer during the POR.

2. Where a respondent sold subject merchandise to an importer who had no entries during the POR, we did not review the sales of subject merchandise to that importer in this administrative review. Instead, we will review those sales in our administrative review of the next period in which there is an entry by that importer.

We also said in the notice that after completion of the review, we would instruct Customs to assess dumping duties against importer-specific entries during the period. *See Silicon Metal from Brazil, Final Results of Antidumping Duty Administrative Review,* 61 FR 46763, 46765 (September 5, 1996) (*Silicon Metal from Brazil; Second Review Final Results*).

Petitioners argue that the methodology described above and used in the preliminary results of this review is inconsistent with the Tariff Act, because section 751(a)(2) of the Tariff Act requires that margins be based on sales associated with entries during the POR. Petitioners also cite to *Torrington Co*. v. *United States,* 818 F. Supp. 1563, 1573 (CIT 1993) (*Torrington*) to demonstrate that the Court of International Trade (CIT) has held that the word ''entry'' as used in the statute refers to the ''formal entry of merchandise into the U.S. Customs territory.'' They argue that this date of formal entry is the date on which the entry summary is filed in proper form. Furthermore, petitioners argue that the Department itself has stated that the use of the term ''entry'' in the antidumping law refers unambiguously to the release of merchandise into the customs territory of the United States. *See Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review,* 56 FR 31692, 31704 (July 11, 1991). Petitioners also argue that the legislative history of section 751 demonstrates that margin calculations in administrative reviews are to be based on sales of merchandise that entered during the POR.

In addition to the above arguments based on their interpretation of the statute and case law, petitioners argue that the questionnaire issued by the Department to the respondents in this review shows that, prior to the 1992–93 administrative review of this order, the Department's established practice was to base reviews on sales of merchandise that entered U.S. Customs territory during the POR, and that it was the Department's expressed intention to conduct this review in the same way. Furthermore, petitioners argue that the failure to calculate dumping margins based on sales associated with entries during the POR would result in improper assessment of duties, because the duties assessed on entries during the POR would have no relation to the margin of dumping on those sales. Thus, by assessing duties on entries at rates unrelated to the margin of dumping on the associated sales, petitioners argue, the Department would violate 19 U.S.C. 1673(2)(B), which requires that ''there shall be imposed upon such merchandise an antidumping duty * * * in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.''

Eletrosilex argues that section 751 of the Tariff Act does not provide the specificity that petitioners assert, and must be read in light of the other provisions of the statute. In a rule-making proceeding several years ago, Eletrosilex alleges that the Department did just that. There the Department said:

Notwithstanding the reference to review and assessment of ''entries'' pursuant to section 751, Congress also provided that the Department should analyze ''sales'' transactions pursuant to sections 772 and 773 of the statute in the course of conducting its administrative review. The statute provides for the review of both ''entries'' and ''sales'' without recognizing that the two terms are not synonymous or providing a mechanism for linking them.

See Advance Notice of Proposed Rulemaking, 56 FR 63696 (December 5, 1991). Eletrosilex argues that in that proceeding the Department concluded that Congress could not have intended that it base all reviews on entries of merchandise rather than sales, and that such a conclusion ''would hinder the achievement of other statutory goals governing review and assessments.'' *Id.,* at 63697.

Furthermore, Eletrosilex argues that, contrary to the petitioners' statements, the Department has consistently adhered to this policy. Petitioners' citations in support of their argument, Eletrosilex argues, are *dicta,* and have no controlling precedent. More importantly, Eletrosilex argues, the Department has recently repudiated exactly the same argument made by the very same petitioners. As support for this statement, Eletrosilex cites the final results of the first and second administrative reviews of this proceeding. *See Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review,* 59 FR 42806, 42813 (August 19, 1994) (*Silicon Metal From Brazil; First Review Final Results*) and *Silicon Metal from Brazil; Second Review Final Results.*

Department's Position

We disagree with petitioners. We most recently addressed this issue in the final results of the second review of this order. There we stated:

We do not agree with petitioners that section 751(a)(2) requires that we review only sales that entered U.S. customs territory during the POR. Section 751(a)(2) mandates that the dumping duties determined be assessed on entries during the POR. It does not limit administrative reviews to sales associated with entries during the POR. Furthermore, to review only sales associated with entries during the POR would require that we tie sales to entries. In many cases we are unable to do this. Moreover, the methodology the Department should use to calculate antidumping duty assessment rates is not explicitly addressed in the statute, but rather has been left to the Department's expertise based on the facts of each review. ''* * * the statute merely requires that PUDD (*i.e.,* potentially uncollected dumping duties) * * * serve as the basis for both assessed duties and cash deposits of estimated duties.'' *See The Torrington Company v. United States,* 44 F.3d 1572, 1578 (CAFC 1995).

See Silicon Metal from Brazil; Second Review Final Results at 46765. Our analysis of this issue and interpretation of the statute remain unchanged from those announced in the final results of the second review. Furthermore, by applying a consistent methodology in each segment of the proceeding we ensure that we review all sales made during the entire proceeding. Changing the methodology could result in our failure to review some sales. Hence, in these final results of review we have employed the methodology we announced in the final results of the second review, and which petitioners cite above.

Comment 2

Petitioners argue that the Department should assign a margin to RIMA based on BIA. In the preliminary results of review the Department determined that RIMA had no shipments during the POR, and therefore assigned RIMA its calculated rate from the final results of the previous review. Petitioners argue that the Department was in error in its determination that RIMA had no shipments during the POR, and that because at verification RIMA was unable to substantiate significant portions of its response, the Department should assign RIMA a margin based on BIA.

Department's Position

On October 21, 1996 the importer of the merchandise in question submitted information regarding its imports. We have carefully reviewed the importer's Customs documentation, and have determined that the Department was in error in its preliminary determination that the sales did not involve an entry during the third administrative review period. Furthermore, RIMA was unable at verification to substantiate significant portions of its response in regard to this entry (*see* the preliminary review results for the fourth review (*Preliminary Results of Antidumping Administrative Review; Intent Not to Revoke in Part*, 61 FR 46779, September 5, 1996), the October 25, 1995 verification report, and the September 13, 1996 ''Use of Facts Available'' memorandum from Fred Baker to Richard Weible). Therefore, we have determined to use BIA for these sales. We have assigned to this sale, as BIA, 91.06 percent (*see Use of Best Information Available (BIA)* above). This rate represents the highest rate ever applicable to RIMA for the subject merchandise.

Comment 3

Petitioners argue that the Department erred in its preliminary results of review by announcing an intent to revoke the order with respect to Minasligas. They argue that Minasligas does not qualify for revocation for two reasons. First, Minasligas has sold at less than fair value (LTFV) in this and every prior segment of this proceeding, and therefore has not met the regulatory requirement of having not sold at less than fair value for at least three years. *See* 19 CFR §353.25(a)(2)(i). The three years in question are the first (91–92), second (92–93), and third (93–94) reviews. For the first and second reviews, the Department calculated a margin of zero percent in its final results of review. For the third review the Department calculated a margin of zero percent for its preliminary results. Petitioners argue, with respect to the first review (which is in litigation before the CIT), that after the Department corrects the errors for which it has already conceded error, Minasligas will have a margin. They argue, with respect to the second review, that after the Department corrects the ministerial errors they allege it made in its final results, Minasligas will again have a margin. They argue, with respect to the third review, that after the Department corrects the calculation and methodological errors which they allege it made, Minasligas will again have a margin.

Second, petitioners argue that the Department cannot correctly determine that Minasligas is not likely to resume selling at less than fair value in the future, and without this determination the Department cannot revoke the order. (*See* 19 CFR 353.25(a)(2)(ii).) Petitioners base this argument on the following factors:

(1) Minasligas had a margin greater than *de minimis* in the preliminary results of the fourth administrative review of this order. *See Silicon Metal from Brazil, Preliminary Results of Review and Intent Not to Revoke in Part,* 61 FR 46779, 46781 (September 5, 1996).

(2) Minasligas has submitted no evidence that it is unlikely to sell at less than fair value in the future.

(3) The Department has not verified any information that Minasligas is unlikely to dump in the future. Citing 19 U.S.C. §1677e(b)(2)(B) and 19 CFR

353.25(c)(2)(ii), petitioners argue that the statute and regulations require that the basis for the ''likelihood'' determination be verified, and that because the Department did not verify any such basis, Minasligas does not qualify for revocation.

Furthermore, petitioners argue that analysis based on the criteria used by the Department in its review of the antidumping duty order on brass sheet and strip from Germany show that Minasligas is likely to resume dumping. (*See Brass Sheet and Strip from Germany, Final Results of Administrative Review,* 61 FR 49727, 49730 (September 23, 1996) (*German Brass*).) These criteria include a dramatic decline in shipments after publication of the antidumping duty order and the low level of shipments by the respondent. Both of these factors, petitioners allege, are present here with respect to Minasligas.

Minasligas argues, first, that in two consecutive administrative reviews prior to the issuance of the preliminary results of the third review, the Department found Minasligas not to have sold at less than fair value, and that, therefore, if, in the final results of this review the Department finds no sales at less than fair value, it will have met the requirement of 19 CFR 353.25(a)(2)(i). Secondly, Minasligas argues that 19 CFR 353.25(a)(2)(ii) requires a finding that dumping is not likely to occur in the future, but, contrary to petitioner's suggestion, does not require Minasligas to provide, or the record to contain, evidence that Minasligas is unlikely to resume dumping in the future. Furthermore, Minasligas argues that there is evidence on the record that Minasligas will not dump in the future. That evidence consists of Minasligas' written agreement to reinstatement of the antidumping duty order if it is found to be selling at less than fair value in the future.

Department's Position

To qualify for revocation in part under 19 CFR 353.25(a)(2)(i), a respondent must have sold the subject merchandise at not less than foreign market value for at least three consecutive years. Our analysis in these final results of review indicates that Minasligas had no margin for this period. Therefore, because Minasligas has met the requirement under 353.25(a)(2)(i), we determine that Minasligas has met the regulatory requirement of having sold the subject merchandise at not less than foreign market value for at least three consecutive years.

However, in order to revoke an order in part the Department must also be satisfied that the firm is not likely to resume dumping in the future. The Department has determined that Minasligas has a dumping margin of greater than *de minimis* in the fourth administrative review (being issued concurrently). Accordingly, the issue of likelihood of dumping in the future is moot because Minasligas has in fact resumed dumping. Therefore, we are not revoking the order in part for Minasligas.

Comment 4

Petitioners argue that the Department erred in its calculation of the COP/CV for Minasligas, Eletrosilex, and CCM by using the monthly amounts of depreciation that they reported. Petitioners argue with respect to Minasligas and Eletrosilex that their calculation of depreciation does not reflect the useful life of the assets, but rather reflects an accelerated life. Petitioners argue that the Department's practice is to reject accelerated depreciation of assets where such accelerated depreciation fails to allocate the cost of the asset on a consistent basis over the life of the asset, which, petitioners allege, is the case here. Furthermore, with respect to Eletrosilex, petitioners argue that evidence on the record indicates that Eletrosilex did not report depreciation in accordance with Brazilian GAAP. With respect to Minasligas and CCM, petitioners argue that their depreciation calculation does not restate the value of the assets to account for hyperinflation. Petitioners argue that when an economy is hyperinflationary, basing depreciation on historical asset values results in severe understatement of actual costs; for this reason the Department's practice is to use depreciation that is based on revalued assets in hyperinflationary economy cases. Finally, petitioners argue that CCM's submitted calculation is inadequate because it does not include depreciation of idle equipment. It is the Department's practice, petitioners argue, to include depreciation for idle equipment when calculating COP and CV. Moreover, petitioners allege that there is contradictory information on the record as to whether CCM had expenses for idle equipment. Petitioners argue that because CCM failed to provide the information that would allow the Department to calculate monthly depreciation based on revalued assets and to include depreciation for idle assets, and because CCM misled the Department about whether it had depreciated its idle equipment, the Department should determine depreciation for CCM based on BIA. In the alternative, the Department should obtain from CCM the information necessary to determine monthly depreciation in accordance with Department practice.

Minasligas argues that petitioners' argument is fallacious. Minasligas points to documentation it submitted on October 15, 1996, showing that (1) Minasligas did not depreciate its assets over the shortened period that petitioners suggest; (2) the depreciation reported in its COP/CV tables for purposes of this proceeding is fully supported by Minasligas' accounting records; (3) the value of the assets subject to depreciation is restated in current currency to account for hyperinflation through the use of special indices known as the BTN/UFIR indices. Furthermore, Minasligas argues that the Department fully verified this information. Moreover, Minasligas argues that the petitioner's argument is based on a misunderstanding of some of the columns in the verification exhibit upon which they base their argument. Finally, Minasligas argues that to recalculate depreciation, using the longer useful lives of Minasligas' assets that petitioners suggest, would be unfair because the Department has already completed two administrative reviews in which it calculated Minasligas' depreciation using the shorter useful lives that are the basis for the depreciation calculation that Minasligas records in its books and reported to the Department. Therefore, Minasligas argues that, if the Department does decide to recalculate its depreciation using longer useful lives for the firm's assets, it should adopt a methodology that takes into account the depreciation expenses that Minasligas reported in the previous administrative reviews.

Eletrosilex argues that the petitioners have presented no basis for rejecting Eletrosilex's longstanding use of aggressive accelerated depreciation. It argues that after having taken depreciation of 10 percent per year through 1991 on its furnaces, as permitted under Brazilian generally accepted accounting principles (GAAP), Eletrosilex necessarily had to interrupt depreciation on an item that had a 20-year useful life. It states it resumed a 5 percent depreciation on its furnaces in January 1995. Furthermore, it argues that it has provided the Department with a clear statement of its depreciation schedule and its application to all depreciable assets. Thus, Eletrosilex concludes that it has demonstrated to the Department a sound and legitimate basis for the depreciation schedules used in the POR, and the Department should use those schedules again in the final results of this review.

CCM argues that petitioners' argument with respect to restatement of asset values is invalid because CCM does not base its depreciation on historical costs. CCM's financial statement, CCM argues, makes clear that the value of CCM's property, plant, and equipment is recorded at the cost of acquisition plus monetary adjustment. CCM states that this is a common accounting mechanism used by Brazilian companies to restate the historical costs of their assets at their current cost during hyperinflation. With regard to its statement (cited by petitioners) that CCM did not revalue its assets, CCM argues that the statement meant only that there was no special asset re-valuation during the POR; CCM did follow the accepted accounting practice of restating the historical cost through the application of monetary correction. Thus, CCM argues, there is no basis for petitioners' statements that CCM's reported depreciation is grossly understated because it is based on historical costs.

With respect to petitioners' argument that CCM did not report depreciation of idle equipment, CCM admits that it did not include idle equipment in its submitted costs, but argues that doing otherwise would have distorted the Department's hyperinflationary cost calculations. The fundamental premise of the Department's replacement cost methodology, CCM argues, is that costs actually incurred by the respondent in the production of subject merchandise must be restated on a replacement basis in order to eliminate the distortive effects of hyperinflation on costs incurred at various times in the POR. In order to calculate an accurate monthly replacement cost, CCM argues, the Department must apply this approach only to the value of inputs actually consumed in the production process. Because of this, it would be incorrect to include the replacement cost of an idled asset, because by definition the asset was not used or consumed in the specific month. Thus, CCM argues that the Department's replacement cost rules work only if applied to those costs actually (and not hypothetically) incurred in production, as petitioners advocate. Therefore, CCM argues, the Department should not include depreciation on idled equipment in CCM's COP/CV.

Department's Position

We agree with petitioners in part. With respect to Minasligas, we disagree with petitioners' argument that Minasligas' depreciation calculation is unacceptable because it is based on accelerated depreciation. The CIT has upheld the Department's calculation of depreciation based on a respondent's financial records where their financial records are consistent with foreign GAAP principles and where those records do not distort actual costs. *See Laclede Steel Co.* v. *United States,* 18 CIT 965, 975 (1994). Here, Minasligas has historically used accelerated depreciation, and these methods are consistent with Brazilian GAAP. Moreover, we note that we have in the past used accelerated depreciation where the respondent has historically used it in its financial statements. *See Foam Extruded PVC and Polystyrene Framing Stock from the United Kingdom; Final Determination of Sales at Less Than Fair Value;* 61 51411, 51418 (October 2, 1996). Furthermore, we agree with Minasligas that to recalculate depreciation using a longer useful life for Minasligas' assets after having used a shorter life in two prior reviews would allocate costs to this review that have already been accounted for in prior reviews, and would therefore be inequitable. Finally, we agree with Minasligas that its use of the BTN/UFIR indices accurately restates the value of its assets. Therefore, in these final results of review, as in the preliminary results of review, we have used Minasligas' reported depreciation in calculating COP.

With respect to Eletrosilex, we agree with petitioners that evidence on the record indicates that Eletrosilex did not report depreciation in accordance with Brazilian GAAP. *See* note 5(b)(iv) of Eletrosilex's 1994 financial statement in Eletrosilex's February 26, 1996 submission. Therefore, for these final results of review, we have used the auditor's estimate of Eletrosilex's depreciation for the COP calculation because it is the most accurate reflection of Eletrosilex's depreciation that is on the record and because it is in accordance with Brazilian GAAP.

With respect to CCM, we agree with CCM that evidence on the record indicates that it makes a monetary adjustment in recording the value of its property, plant, and equipment. Therefore, no additional restatement is necessary.

Concerning idle assets, we agree with the petitioners that the Department includes in fully absorbed factory overhead the depreciation of equipment not in use or temporarily idle, notwithstanding home market accounting standards which may allow companies to refrain from doing so. *See,* for example:*Silicon Metal From Argentina* (58 FR 65336, 65338, December 14, 1993); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom* (58 FR 39729, 39756, July 26, 1993); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan* (58 FR 64720, 64727–28, July 26, 1993); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan* (57 FR 4960, 4973, February 11, 1992); *Shop Towels from Bangladesh* (57 FR 3996, 3999, February 3, 1992); *Mechanical Transfer Presses from Japan* (55 FR 335, January 4, 1990); *Titanium Sponge from Japan* (49 FR 38687, 38689, October 1, 1984). *See also NTN Bearing Corp. of America, et al., plaintiffs,* v. *United States, Slip Op. 93–129* (August 4, 1993) (upholding the Department's inclusion of depreciation expenses for idle equipment).

We disagree with CCM's argument that a hyperinflationary environment necessitates disregarding the Department's long-standing policy. Depreciation is a cost that is incurred without regard to whether the assets being depreciated are used in production during a particular period. Thus, depreciation of idle assets must be included in COP in order for COP to reflect the full costs incurred during the POR regardless of whether an economy experienced hyperinflation during the POR.

Similarly, we disagree with CCM's related argument that depreciation expense for idled assets involves only hypothetical expenses; depreciation expenses reflect not only wear and tear from usage but also aging and obsolescence, which affect idle assets as much as, and sometimes more than, active assets.

Therefore, in these final results of review we have added the depreciation for idle assets to CCM's reported depreciation.

Comment 5

Petitioners argue that the Department should disregard Minasligas' inventory holding gain/loss calculation because Minasligas failed to ''layer'' or value its inventory properly. They argue the Department should require Minasligas to provide the information necessary to perform a proper inventory holding gain/loss calculation in accordance with Department practice.

Minasligas argues that the petitioner's point is moot because the Department used Minasligas' home market selling prices for foreign market value (FMV), not CV. It also argues that the Department verified the accuracy of Minasligas' calculations, and found no discrepancies.

Department's Position

While we verified that the amounts Minasligas used in its calculation were derived from accounting records, Minasligas did not substantiate its method of layering its inventory. As petitioners note in their brief, Minasligas' calculations show only one layer of prior inventory for inputs and finished product even though inventory stemmed from more than one previous month. By failing to include in its calculations the goods placed in inventory during prior months, Minasligas failed to value the inventory properly based on the inflation-adjusted costs in the prior months. See Minasligas' March 17, 1995 submission, exhibit 11. Thus, consistent with our practice when a respondent fails to report inventory properly, we have denied Minasligas an adjustment for inventory holding gains/losses in these final results of review.

Comment 6

Petitioners argue that the Department erred by not including Minasligas' and Eletrosilex's claimed duty drawback in CV. This drawback consists of taxes and import duties that the government of Brazil suspended on Minasligas' and Eletrosilex's purchases of imported electrodes used in the production of silicon metal destined for export. Petitioners argue that because the Department added the duty drawback to U.S. price, and because the taxes represented by the drawback were not elsewhere represented in CV, the Department should add the drawback to CV in order to make an ''apples-to-apples'' comparison of U.S. price to CV. In addition, they argue, with respect to Eletrosilex, that the Department must include the duty paid on purchases of electrodes in COP for purposes of the sales-below-cost analysis.

Minasligas argues that in the preliminary results of review the Department correctly added duty drawback to U.S. price for comparison with a sales-based FMV. However, if the Department uses CV in the final results, and includes indirect taxes in CV, it must still add duty drawback to U.S. price to make an ''apples-to-apples'' comparison.

Eletrosilex argues that the methodology the Department announced in its second review final results with respect to taxes does not achieve the stated aim of tax neutrality. Therefore, it urges the Department to adopt the approach mandated by the Uruguay Round Agreements Act, and eliminate consumption taxes from all calculations. It states that this is the only way truly to achieve tax neutrality. Furthermore, it argues that this approach has the additional virtue of simplifying these proceedings.

Department's Position

We agree with petitioners. The Brazilian duty drawback law applicable to Minasligas and Eletrosilex suspends the payment of ICMS and IPI taxes and import duties that would ordinarily be due upon importation of electrodes if they are consumed in producing silicon metal for export. Therefore, because the ICMS and IPI taxes and import duties are suspended, we cannot conclude that they are already included in the COM or reported tax payments that Minasligas and Eletrosilex have reported. Thus, in order to make a valid comparison between USP and CV, we need to add to CV the full amount of the claimed duty drawback that we added to USP in accordance with section 772(d)(1)(B) of the Tariff Act. We have done so in these final results of review. This methodology is identical with the methodology announced in the final results of the prior review of this case. *See Silicon Metal from Brazil; Second Review Final Results*, at 46770.

Because the import duties are not suspended for electrodes consumed in the home market, we agree with petitioners that Eletrosilex's import duties on carbon electrodes should be added to COP for purposes of the cost test. In these final results of review we have calculated the import duties by multiplying the cost of carbon electrodes that we allocated to the domestic market by the import duty rate of ten percent.

Comment 7

Petitioners argue that the Department erred in its computation of Minasligas' monthly COP by not including the cost of tubes and rods that Minasligas consumed during each month. The Department included these costs only in the months in which Minasligas made purchases of tubes and rods, and not in the months in which Minasligas consumed them. Petitioners argue that in the final results the Department should determine the proper costs for tubes and rods based on the number of units of each input used in the production of silicon metal in each month and the monthly replacement cost for each input.

Minasligas states that it reported its costs for tubes and rods in the month of purchase because this is how they are reported in Minasligas' accounting records. It also states that if the Department wishes to recalculate these costs for each month of consumption, it is willing to cooperate fully with the Department in providing all necessary information.

Department's Position

Because Brazil's economy was hyperinflationary during the POR, in these final results of review, we have calculated each respondent's COM using an ''annual average'' methodology. *See* the Final Results Analysis Memorandum. In this methodology we first calculated an annual weighted-average COM indexed to end-of-year values, and then restated the annual average COM to compute a monthly COM. We used the wholesale price index to restate the annual COM to the specific month of production. Thus, because we calculated monthly costs based on annualized figures, petitioners' point regarding Minasligas' tubes and rods is moot.

Comment 8

Petitioners argue that the Department made numerous errors with respect to Brazilian taxes in performing the cost test. With respect to Minasligas, petitioners allege that the Department erred by comparing COP to home market prices that included a disproportionately high amount of ICMS tax. By so doing, petitioners allege, the Department failed to follow its practice of either including the same absolute amount of value-added taxes (VAT) in both home market price and COP, or of excluding VAT from both COP and home market price. Thus, petitioners argue, the Department did not make a fair and equal comparison in the preliminary results of review. They argue that in the final results of review the Department should exclude ICMS taxes from both the home market prices and the COPs used in the sales-below-cost analysis.

With respect to Eletrosilex, petitioners argue that the Department erred by failing to deduct the ICMS, PIS, and COFINS taxes from Eletrosilex's home market prices before performing the cost test. Petitioners argue that the failure to deduct the ICMS tax was in error because information on the record shows that Eletrosilex's reported cost of manufacture (COM) did not include the ICMS tax. With respect to PIS and COFINS taxes, petitioners argue that the Department correctly included in COP the PIS and COFINS taxes that Eletrosilex paid on its purchases of inputs (and which Eletrosilex included in its reported price of materials), but erred in how it treated the PIS and COFINS taxes Eletrosilex collected on sales of silicon metal. In the preliminary results, the Department, petitioners allege, added to COP a variable Eletrosilex reported that represents its home market direct selling expenses, consisting of inland freight and PIS and COFINS taxes collect on sales. Petitioners argue that rather than adding this selling expense variable to COP to account for collections of PIS and COFINS taxes on home market sales, the Department should instead subtract from the net home market prices the sales-specific amount of PIS and COFINS taxes in its computation of NPRICOP (the price which we compare to COP in the cost test).

With respect to CCM, petitioners argue that the Department erred in the cost test by comparing home market prices that included ICMS taxes with COPs that included a disproportionately larger amount of ICMS taxes. They argue that it is established Department practice when performing the cost test to either include the same absolute amount of VAT in both home market price and COP or to exclude VAT from both.

Minasligas argues that the Department should not include the same amount of VAT in the sales price and COP because different amounts of taxes were collected and paid on the sales price and production costs, respectively.

Eletrosilex argues that the Department should eliminate consumption taxes from all calculations. This approach, it argues, is the only way to achieve true tax neutrality.

CCM argues that the Department correctly accounted for its VAT in the preliminary results of review. In support of its argument, it cites *Silicomanganese from Venezuela,* 57 FR 55436 (November 7, 1994) (*Silicomanganese from Venezuela),* in which the Department agreed with a respondent's argument that ''if the Department includes the value-added taxes paid on inputs in the cost of production, it must also include the VAT received from its customers in the price for purposes of the sales below cost test.''

Department's Position

We agree with petitioners that in performing the cost test our policy is to either include the same absolute amount of VAT in both home market price and COP, or to exclude VAT from both COP and home market price. In *Silicomanganese from Venezuela,* though we agreed with the statement that CCM cites, we also said, ''The amount of VAT included in the home market COP should be the same as the amount that is included in the home market sales prices.'' *See Silicomanganese from Venezuela* at 55441. In performing the cost test for these final results of review, we have calculated both COP and the price we compare to COP exclusive of the ICMS tax. This is the methodology recently used in *Ferrosilicon from Brazil; Final Results of Antidumping Duty Administrative Review,* 61 FR 59407, 59410 (November 22, 1996) (*Ferrosilicon from Brazil; First Review Final Results*). However, unlike *Ferrosilicon from Brazil; First Review Final Results,* we have not deducted IPI tax from COP because IPI tax is not assessed on sales of silicon metal as it is for ferrosilicon.

With respect to PIS and COFINS, we have not deducted these taxes from the home market price to which we compare COP because they are gross revenue taxes, and not taxes imposed directly on the merchandise or components thereof on a transaction-by-transaction basis. *See* the Department's Position in response to comment 28 (below). For Eletrosilex we have eliminated the addition to COP of the selling expense variable it reported in its COP response, and have instead added to COP the sales-specific amount of direct selling expenses, which does not include PIS and COFINS taxes. We have also calculated COP for all respondents so that it represents the full purchase price of all inputs, and is not exclusive of a hypothetical amount of PIS and COFINS taxes.

Comment 9

Petitioners argue that the Department erred in its treatment of inland freight in the COP test for CCM, Minasligas, and Eletrosilex. With respect to CCM, petitioners argue that the Department erred by comparing COPs that did not include freight costs to home market selling prices that did include freight costs. They argue that to make a fair comparison in the final results the Department should exclude freight expenses from the home market prices used in the sales-below-cost analysis.

CCM states that it included freight costs in the direct selling expense field of its COP/CV database. Therefore, CCM argues, the COPs that the Department used in the cost test did in fact include freight costs.

With respect to Minasligas, petitioners argue that the Department erred by comparing COPs inclusive of freight charges to home market prices inclusive of disproportionately high freight charges. This difference in freight occurred, petitioners argue, because Minasligas calculated the per-unit freight cost for home market sales by dividing the freight charges incurred on each home market sale by the quantity of each sale, while it calculated the per-unit freight included in COP by dividing the monthly sum of those same freight charges by the monthly volume of its silicon metal production. This methodology, petitioners allege, resulted in Minasligas including a lower per-unit amount of freight in COP than in the home market prices. By using this methodology, petitioners argue, the Department failed to compare home market prices to COP on an ''apples-to-apples'' basis. Petitioners also allege this methodology violates *Import Administration Policy Bulletin No. 94.6,* which states that the Department determines both COP and the home market prices on an ex-factory basis (*i.e.,* net of movement charges, which, by definition, include freight expenses). They argue, therefore, that in the final results of review the Department should exclude freight expenses from both the COP and the home market prices.

Minasligas argues that the petitioners' proposed method is distortive, and in fact is contrary to *Import Administration Policy Bulletin 94.6.* According to this bulletin, Minasligas argues, COP is calculated net of selling expenses. Because its reported selling expenses included inland freight, Minasligas argues that if the Department removes freight from home market price, it should also remove selling expenses from COP.

With respect to Eletrosilex, petitioners argue that the Department erred by not deducting inland freight from Eletrosilex's home market prices before performing the cost test. In the preliminary results, rather than subtracting inland freight from Eletrosilex's home market prices before performing the cost test, the Department added to the cost build-up a variable that Eletrosilex reported that included inland freight (as well as PIS and COFINS taxes). Petitioners argue that this approach was an error because not all of Eletrosilex's home market sales included freight expenses. Thus, petitioners argue, the Department improperly compared the home market sales prices that include freight to a COP that includes an amount of freight that is artificially lowered by Eletrosilex's improper division of the total freight incurred on a portion of home market sales by the volume of all home market sales. At the same time, petitioners argue, the Department improperly compared a COP that includes freight to home market sales prices for which Eletrosilex reported no freight.

Department Position

Petitioners and Minasligas are correct that *Import Administration Policy Bulletin 94.6* states that the cost test will be performed on an ex-factory basis, and thus net of freight expenses. Therefore, in these final results of review we have deducted inland freight from the price which we compare to COP in the cost test. In order to ensure we make a proper comparison for those respondents (*i.e.*, Minasligas and CCM) who included freight in their reported direct selling expenses for COP, we have not used the direct selling expenses the respondents reported in their cost questionnaire response. Instead, in these final results of review, we have added to COP the sales-specific direct selling expenses included in each home market sales price.

Comment 10

Petitioners argue that the Department erred by calculating Minasligas', CCM's, and CBCC's home market imputed credit expenses based on prices that include VAT. The Department's established practice, petitioners argue, is to exclude VAT collected on home market sales from the prices used in calculating imputed credit expenses. Thus, petitioners argue, in the final results of review the Department should exclude ICMS taxes from the prices used to calculate home market imputed credit.

Minasligas argues, based on the tax policies of the government of Brazil, that ICMS taxes should be included in the imputed credit calculation. It argues that imputed credit expenses represent the opportunity cost of financing accounts receivable, and that this opportunity cost does not apply solely to a portion of the sale, but to the entire revenue that is generated by the sale. During the period that payment from the customers is outstanding, not only must Minasligas finance its production operations, it must also pay any ICMS amounts it owes to the Brazilian government. To the extent that it pays such taxes before it receives them from its customers, they become part of the cost of financing receivables. Therefore, Minasligas argues, ICMS taxes should be included in the imputed credit calculation.

CCM argues that petitioners are incorrect in saying that it is the Department's policy not to include ICMS tax in the computation of imputed credit. It argues that the Department has previously calculated CCM's home market imputed credit expenses based on ICMS tax-inclusive home market prices. In support of this statement, it cites the final determination of the LTFV investigation of this case, in which the Department said:

> The ICMS incident to a home market sale is outstanding until that time that the customer pays for its merchandise. Until the customer pays, CCM cannot use the ICMS collected on that sale to offset ICMS it has paid on purchases of materials used in the production of the subject merchandise. Accordingly, there is an inherent cost in maintaining an outstanding amount of ICMS due to CCM's receivables. Therefore, we have included the ICMS in the home market price when calculating imputed credit expenses.

See Silicon Metal from Brazil; Final Determination of Sales at Less Than Fair Value, 56 FR 26977, 26982 (June 12, 1991). Furthermore, CCM points out that no party appealed this issue to the CIT, reflecting all parties' agreement concerning the legitimacy of this approach.

Department's Position

We agree with petitioners. While CCM is correct that we have calculated imputed credit inclusive of ICMS tax in earlier segments of this proceeding, our more recent practice is to calculate imputed credit exclusive of ICMS tax. We addressed this issue in *Silicomanganese from Venezuela.* There we said:

> The Department's practice is to calculate credit expenses exclusive of VAT. (See the discussion of our VAT methodology in the preliminary determination (59 FR 31204, 31205, June 17, 1994.) Theoretically, there is an opportunity cost associated with any post-service payment. Accordingly, to calculate the VAT adjustment argued by Hevensa would require the Department to calculate the opportunity costs involved with freight charges, rebates, and selling expenses for each reported sale. It would be an impossible task for the Department to attempt to determine the opportunity cost of every such charge and expense.

See Silicomanganese from Venezuela, 59 FR 55436, 55438 (November 7, 1994). Similarly, in this case to calculate the ICMS adjustment argued by CCM would require the Department to calculate the opportunity costs involved with freight charges, selling expenses, and packing for each reported sale. It would be an impossible task for the Department to determine the opportunity cost of every such charge and expense. In these final results of review we have followed our more recent practice. *See* also *Ferrosilicon from Brazil; First Review Final Results* at 59410.

Comment 11

Petitioners argue that the Department made two currency conversion errors in its margin calculation for CBCC and Minasligas. With respect to CBCC, petitioners argue that the Department used the wrong exchange rate for converting CBCC's brokerage, warehousing, and foreign inland freight from Brazilian currency into U.S. dollars. This error occurred, petitioners allege, because the Department incorrectly believed that these expenses were denominated in cruzeiros, rather than in cruzeiros reais.

CBCC argues that there is no evidence on the record that any of the charges it reported are in a currency other than cruzeiros.

With respect to Minasligas, petitioners argue that the Department erred by converting the cruzeiro value of Minasligas' U.S. sales into dollars, rather than using the actual value of the U.S. sales in the currency in which they were originally denominated. They argue that the needless recalculation of U.S. price had the effect of increasing the U.S. price.

Minasligas argues that it reported its U.S. sales in cruzeiros (as recorded in its books), and that the Department correctly converted it into dollars using the average exchange rate of the month of shipment. This methodology, Minasligas argues, is in accordance with the Department's practice of comparing the U.S. price to the CV or FMV in the month of shipment.

Department's Position

We agree with petitioners. With respect to CBCC, we note that in exhibit 6 of CBCC's March 17, 1994 supplemental questionnaire response (SQR) CBCC demonstrated the currency conversion. That demonstration indicates that the expenses were in fact denominated in cruzeiros reais, and not cruzeiros. We have corrected this error in these final results of review. With respect to Minasligas, our practice is to use the actual U.S. price in the currency in which it was originally denominated. We also seek to avoid any unnecessary currency conversions. Therefore, in these final results of review we have used the actual sales prices in the currency in which they were originally denominated.

Comment 12

Petitioners argue the Department erred in the margin calculation for Minasligas and CCM by using the wrong shipment date. With respect to

Minasligas this alleged error occurred where the Department performed the currency conversion for the movement expenses on U.S. sales by using the exchange rate on the date of shipment from the port in Brazil, rather than the exchange rate on the date of shipment from Minasligas' plant. Doing so, petitioners allege, was a violation of the Department's practice in which the date of shipment is the date the merchandise was shipped from the producer's factory. Therefore, petitioners argue, the Department should use the exchange rate of the date of sale in converting U.S. movement expenses, just as it used the date of sale (rather than the reported date of shipment) in the calculation of imputed credit.

Minasligas argues that because the record does not contain the date on which Minasligas paid the movement expenses, the Department was correct in using the exchange rate of the date of shipment from the port because it was the closest date on record to the date in which the expenses were actually incurred.

With respect to CCM, petitioners argue that the Department used the wrong shipment date in its calculation of U.S. imputed credit. The shipment date that CCM reported and that the Department used in its computation, petitioners allege, was the shipment date from the port in Brazil, rather than the shipment date from CCM's plant. Petitioners argue that the Department should use the date of sale as the date of shipment as it did in calculating Minasligas' imputed credit. Furthermore, petitioners argue that for the same reason the Department should base CV on the month of the U.S. sale, rather than on CCM's reported month of shipment.

With respect to petitioners' argument that the Department should have calculated imputed credit using the date of the U.S. sale, CCM argues, first, that the Department should use the credit calculation it submitted in its questionnaire response as the actual credit expense. This calculation, CCM states, reflects the actual interest charged on the export credit line obtained for that shipment, and therefore is the most accurate, transaction-specific measure of CCM's interest expense in connection with its U.S. sale. Second, CCM argues that if the Department decides to use an imputed figure, it need not resort to the date of sale as the date of shipment because the date of shipment from CCM's factory is on the record as verification exhibit 11.

With regard to petitioners' argument that the Department should use the CV in the month of sale to establish fair value, CCM argues that it is the Department's practice in hyperinflationary economy cases to use the bill-of-lading date as the shipment date, and thus the date upon which CV should be based. In support of this assertion it cites *Tubeless Steel Disc Wheels from Brazil; Amended Final Determination of Sales at Less than Fair Value and Amended Antidumping Duty Order,* 53 FR 34566 (September 7, 1988) (*Tubeless Steel Disc Wheels from Brazil*). There the Department stated that it corrected a clerical error whereby ''invoice dates were used rather than bill-of-lading dates to represent the date of shipment for the calculation of antidumping duty margins.'' CCM also argues that if the Department decides to use the invoice date, rather than the bill-of-lading date, as the date of shipment, it need not resort to using the date of sale (as petitioners urge) because, as previously mentioned, the invoice date is on the record in verification exhibit 11.

Department's Position

With respect to the petitioners' argument regarding Minasligas, we agree with Minasligas. Where the record does not contain the actual dates of payment for its export sale movement expenses and where the Department did not specifically solicit this information, it is reasonable to use the date of shipment from the port in the imputed credit calculation because it is the closest date on record to the date on which the expenses were actually incurred. With respect to the petitioners' argument regarding CCM, we agree with CCM that when using CV in hyperinflationary economy cases it is the Department's practice to perform the margin calculation using the CV of the month of shipment from the port, rather than (as petitioners argue) the CV of the month of shipment from the plant. *See Tubeless Steel Disc Wheels from Brazil* at 34567.

We disagree with CCM that we should use its reported ''actual expense'' for U.S. credit. The Department requires that the credit expenses reflect the opportunity cost of the entire period between shipment from the plant and payment by the customer. That is not the case for CCM's reported ''actual expense.'' The actual expense covers only a portion of the imputed credit expense period. Therefore, in these final results of review we have calculated imputed credit using the shipment date from CCM's plant, as given in verification exhibit 11.

Comment 13

Petitioners argue that the Department erred in its computation of Minasligas' COP/CV by using the 1993 G&A expenses that Minasligas reported. They argue that Minasligas' 1993 audited financial statements show that Minasligas' G&A expenses are greater than what it reported to the Department. Therefore, petitioners argue, the Department should require Minasligas to report monthly G&A expenses for 1993 whose sum reconciles to the total 1993 G&A expenses shown on its financial statement.

Minasligas argues that petitioners' argument fails to consider that Minasligas deducted from its G&A some expenses associated with forest maintenance, depletion, and exhaustion that it included in its cost of charcoal as part of direct material expenses. To have not made this deduction, Minasligas argues, would have resulted in these costs being double-counted.

Department's Position

We agree with petitioners that the G&A figures Minasligas reported in its October 15, 1996 submission do not reconcile to its 1993 financial statement. Though Minasligas claims that the difference is due to its exclusion from G&A of some costs that had been included in its cost of charcoal as part of direct material costs, we note that neither Minasligas' G&A chart of accounts nor its cost of charcoal list includes the categories of forest maintenance, depletion, or exhaustion. *See* verification exhibits 23 and 33. Thus, since there is no evidence on the record to substantiate Minasligas' explanation or the G&A figures in its October 15, 1996 submission, for these final results of review we have relied upon the G&A expenses reported in Minasligas' 1993 financial statement.

Furthermore, in these final results of review, unlike the preliminary results of review, we have calculated Minasligas' G&A by multiplying a ratio (consisting of indexed monthly historical G&A divided by indexed monthly historical cost of goods sold) by monthly replacement cost COM. As explained below in response to comment 22, this is our current method of calculating G&A in a hyperinflationary economy. To perform this calculation, we increased the reported G&A costs for each month in 1993 by the percentage difference between the reported annual G&A costs and the financial statement G&A costs.

Comment 14

Petitioners argue that the Department erred in its calculation of interest expense for Eletrosilex, CCM, and CBCC by offsetting interest expenses with interest income. Petitioners argue with respect to all three of these respondents that the interest income for which the Department allowed an offset is not interest income derived from short-term investments of working capital (*i.e.*, from business operations). Petitioners argue that allowing an offset for this income was a violation of the Department's requirements for granting an interest income offset. Those requirements are, petitioners state, that the respondent demonstrate (1) that the interest income stemmed from short-term investments and (2) that short-term interest income was derived from business operations. Petitioners argue with respect to CBCC that some of the interest income for which the Department allowed an offset does not meet these two criteria. Therefore, petitioners argue, in the final results the Department should allow an offset only for those interest income items which CBCC has demonstrated to be from short-term investments.

With respect to Eletrosilex, petitioners focus on one transaction recorded on Eletrosilex's 1994 financial statement for which, they allege, there is no evidence that it was revenue from a short-term investment. They also allege it does not consist of interest income from investments, and therefore does not qualify to be an offset to Eletrosilex's financial expenses. Furthermore, petitioners argue, Eletrosilex did not even make a claim for an offset to its financial expenses, and for this reason alone the Department should not have made one.

With respect to CCM, petitioners also argue that CCM did not submit the financial statement of its direct parent, or a consolidated financial statement for the CCM group of related companies. By not submitting such statements, petitioners argue, CCM thwarted application of the Department's established practice of determining interest expenses on a consolidated basis. Furthermore, petitioners argue that because CCM did not cooperate with the Department by answering the Department's questions regarding its interest income, the Department should base interest expense for CCM on BIA, or, in the alternative, it should obtain the information necessary to calculate interest expenses for CCM properly in accordance with Department practice.

CBCC argues that the Department verified the financial income and expenses of CBCC and its parents Solvay do Brasil and Solvay & Cie at verification, and the Department's report did not indicate that the financial gains were not derived from short-term investments, nor that they were not related to the companies' business operations. Furthermore, because the Department verified CBCC's financial gains, CBCC argues that it is no longer CBCC's burden to prove that the financial gains are short-term or related to its business operations; it is, rather, the petitioners' burden to prove that the Department's methodology was incorrect. Because petitioners are unable to do this, CBCC argues, the Department should reject their argument.

Eletrosilex argues, with regard to petitioners' second argument, that its submitted financial statement (at page 79) shows that the entire transaction occurred between July 28, 1994 and December 27, 1994, and therefore qualifies as short-term under any analysis. Eletrosilex also argues that the financial statement shows that the transaction was a credit cession operation made with several financial institutions. A credit cession operation, Eletrosilex argues, is by its nature a transaction that provides interest income on the investment.

CCM argues, with regard to petitioners' first argument, that in a February 21, 1995, submission (in which it submitted its balance sheet) it demonstrated that all of its interest income was derived from short-term investments. With regard to petitioners' second argument, CCM argues that in the same February 21, 1995, submission, it submitted financial statements for each of CCM's corporate layers. It argues that these financial statements demonstrate that each of its corporate layers had a net interest expense of zero, and that for each corporate layer the interest expenses were offset by interest revenue from short-term investments. As for the company that petitioners call CCM's ''direct parent,'' CCM states that this company is a related entity which does not have audited financial statements, and therefore CCM did not submit one. CCM also says that this entity's net income was captured in the financial statement of another related entity, and that CCM submitted this financial statement.

Department's Position

We agree with petitioners in part. With respect to CBCC, we agree with petitioners that CBCC's reported interest income includes two line items which do not constitute interest income. We are unable to identify these line items in this notice because CBCC has requested that the identity of these line items be treated as business proprietary information subject to release only under administrative protective order (APO). The fact that the verification report does not discuss these items does not imply the Department's agreement with CBCC's characterization of these two line items as interest income. CBCC unduly attempts to shift the burden of proof to the petitioners, disregarding the fact that it is up to a respondent to substantiate and document any adjustment or claim to the Department. As the Department stated in *Gray Portland Cement and Clinker from Japan; Final Results of Antidumping Duty Administrative Review* (60 FR 43761, 43767, August 23, 1995), ''[w]hen a respondent makes a claim for an adjustment, it is the respondent's responsibility to provide a detailed explanation of the adjustment as well as supporting documentation.'' Therefore, because CBCC did not substantiate through an explanation or supporting documentation that the claimed offsets were from short-term investments, we have reduced CBCC's interest income by the total amount of those two line items. *See* Final Results Analysis Memorandum for our calculations.

With respect to Eletrosilex, we agree with petitioners that Eletrosilex is not entitled to an adjustment. The transaction in question consisted of an investment in Brazilian bonds denominated in reais and financed by borrowing on dollar-denominated export notes. Eletrosilex later sold the real-denominated bonds after they had accrued *pro rata* interest for Eletrosilex. Such a transaction would result in interest income and capital gains; only the former would qualify as an offset to interest expenses. However, we have no information on the record to enable us to break out the interest income from the capital gains. Furthermore, we are unable to evaluate any of Eletrosilex's other claimed short-term interest income because, in response to a request that it itemize its offsets, Eletrosilex stated that it is not claiming any offsets. *See* Eletrosilex's March 17, 1995, SQR, at 32. Therefore, in these final results of review, we have denied Eletrosilex an offset to its interest expenses.

We agree with CCM that the evidence on the record supports its contentions that (1) all of CCM's interest income was derived from short-term investments (*see* CCM's audited balance sheet); (2) CCM's interest income outweighed interest expenses (*see* CCM's audited profit/loss statement); and (3) each of CCM's parent companies also experienced short-term interest income in excess of short-term interest expenses (*see* the financial statements for each corporate layer of the group of which CCM is a member). The fact that CCM did not submit consolidated financial statements—which do not exist—cannot be held against CCM since the individual company statements demonstrate that short-term income exceeded short-term interest. For all of these reasons, we have continued to exclude interest expenses from CCM's COP.

Comment 15

Petitioners argue that the Department erred in its computation of Eletrosilex's COP by allocating Eletrosilex's production costs equally between silicon metal and products which petitioners allege are by-products of silicon metal production. They argue that in the final results of review the Department, as it did in the preliminary results of the fourth administrative review of this order, should allocate silicon metal production costs only to commercial-grade silicon metal, and should offset COM with estimated revenue from by-product sales.

Eletrosilex argues that if the Department allocates all production costs only to commercial-grade silicon metal, then it should make an offset to the COP for the revenue generated from the sale of by-products, and should apply the offset to the volume of by-products produced, rather than the volume of by-products sold. Furthermore, Eletrosilex argues that the Department should consider as by-products only ladle sculls, off-grades, and fines, but not slag or silicon metal of ingot bottom. Eletrosilex states that it does not consider slag or silicon metal of ingot bottom production items, and does not include them in its production volume records.

Department's Position

We agree with petitioners that Eletrosilex's production costs should be allocated to only commercial-grade silicon metal, and that an offset should be made to Eletrosilex's costs for the revenue it collects from its sale of by-products. By using this approach we succeed in calculating the actual costs of the merchandise subject to review, without distorting that calculation by allocating some costs to merchandise not subject to review. We have done so in these final results of review.

We do not agree with Eletrosilex that the by-product offset should be calculated based on the volume of by-products produced. Our policy is to allow an offset only for actual revenue. To offset costs with revenue not earned would result in an inaccurate calculation of actual costs, and thus an inaccurate calculation of COP/CV. In these final results of review we have offset production costs with all revenue that Eletrosilex reported from its sale of by-products. Based on Eletrosilex's statement that it does not record slag or silicon metal of ingot bottom as production items in its books, in these final results of review we have counted as by-products only ladle sculls, off-grades, and fines.

Comment 16

Petitioners argue that the Department erred in its calculation of the indirect selling expenses used in Eletrosilex's COP. For the preliminary results of review, the Department divided Eletrosilex's indirect selling expenses by its volume of production. This methodology was incorrect, petitioners argue, for two reasons. First, the selling expense total used in the calculation does not include the selling expenses of Eletrosilex's related affiliates. Second, it is not the Department's practice, petitioners state, to calculate selling expenses based on production volume. Therefore, petitioners argue, in the final results the Department should calculate per-unit indirect selling expenses for COP and CV by dividing Eletrosilex's reported indirect selling expenses by its reported volume of home market and U.S. sales.

Eletrosilex argues that it makes no sense to calculate per-unit indirect selling expenses solely on U.S. and home market sales quantities. It argues that its indirect selling expenses (consisting primarily of salaries and related employee costs) apply to all facets of Eletrosilex's sales functions without regard to the particular market. Citing statements in its questionnaire response, Eletrosilex argues that sales in both the United States and in Brazil are made solely by Eletrosilex personnel, with no assistance from affiliated companies. The Eletrosilex employees involved in all aspects of these sales, Eletrosilex argues, have functions that are relevant to all sales in all markets, and the fact that some affiliated companies may assist in some way with respect to some of the sales in the much larger markets of Europe, Asia, and the Middle East is not relevant to the determination of per-unit indirect selling expenses in the U.S. and home markets.

Department's Position

We agree with petitioners that indirect selling expenses should be calculated based on sales volumes, and not production volumes because, by their nature, indirect *selling* expenses are attributable to *sales*, not production, of merchandise. We do not agree with petitioners that the computation needs to include the indirect selling expenses of all of Eletrosilex's affiliates because COP includes only the indirect selling expenses included in each home market sale. Because the related affiliates did not contribute toward Eletrosilex's home market sales, there is no reason to include their indirect selling expenses in COP. In these final results of review, we have calculated Eletrosilex's monthly indirect selling expenses by dividing its monthly indirect selling expenses allocated to the home market by its monthly home market sales volumes.

Comment 17

Petitioners argue that the Department erred in its computation of Eletrosilex's COP by using the fixed factory overhead costs that Eletrosilex reported on its tape file. Petitioners argue that doing so was improper because evidence on the record suggests that the fixed overhead costs in Eletrosilex's tape file were not replacement cost figures. Specifically, petitioners point out that the fixed factory overhead costs on Eletrosilex's tape file are inconsistent with the replacement cost fixed overhead costs in exhibit 14 of Eletrosilex's March 22, 1995 SQR and with the historical cost fixed overhead costs in exhibit 23 of Eletrosilex's March 22, 1995 SQR. Furthermore, they argue that a worksheet that Eletrosilex submitted (exhibit 17 of its March 22, 1995 SQR) in response to the Department's request does not reconcile to either exhibit 14 or 23 of the SQR, though it does reconcile to the figures on its tape file. Petitioners argue that though exhibit 17 does reconcile to the tape file, it is not truly responsive to the Department's question because the Department had asked Eletrosilex to support the fixed factory overhead costs in its worksheet. In light of these discrepancies, and in the absence of any explanation from Eletrosilex for them, petitioners argue that the Department should use Eletrosilex's reported ''historical'' fixed factory overhead cost figures as Eletrosilex reported them in exhibit 23 of its SQR. These figures are the most disadvantageous to Eletrosilex.

Eletrosilex argues that the figures reported in exhibit 23 of its SQR, which petitioners cite as evidence that the numbers in the tape file are not replacement cost figures, were only preliminary figures on a table which was inadvertently submitted with the SQR. Therefore, they are not the correct historical fixed factory overhead figures. It further argues that data contained in exhibit 17 of its SQR provide the correct historical cost figures for fixed overhead, and that these numbers are identical to those in the tape file.

Department's Position

In its rebuttal brief Eletrosilex explained the discrepancy regarding its reported historical costs, and has indicated that the fixed factory overhead figures it reported on its tape file were historical cost figures. However, in hyperinflationary economies the Department uses replacement cost figures, and not historical cost figures. Therefore we agree with petitioners that the Department should not have used the figures on Eletrosilex's tape file. For this same reason we cannot use the figures Eletrosilex reported in exhibits 17 or 23 of its SQR. In these final results of review we have used the figures that Eletrosilex reported in exhibit 14 of its SQR because these are replacement cost figures.

Comment 18

Petitioners argue that the Department must include in CV all of the taxes that Eletrosilex and CBCC paid on purchases of inputs. They base this argument on the fact that the statute requires that CV include taxes paid on inputs unless the taxes are ''remitted or refunded upon the exportation of the article in the production of which such materials are used.'' *See* 19 U.S.C. §1677b(e)(1)(A). Petitioners argue, with respect to Eletrosilex, that because Eletrosilex did not even claim that home market taxes paid on material inputs were remitted or refunded upon exportation of the merchandise, all of Eletrosilex's taxes must be included in CV.

Eletrosilex argues that the Department should eliminate consumption taxes from all calculations. This approach, it argues, is the only way to achieve true tax neutrality.

CBCC argues the Department erred in its calculation of CV (for those sales for which it used CV, as opposed to BIA, in the preliminary results) by including VAT in the cost build-up. CBCC argues, first, that including VAT in CV violates the tax-neutrality principle that the Department regularly applies in the calculation of margins. If the Department seeks to apply the tax-neutrality policy in its calculation of CV that it applies in its calculation of margins, CBCC argues, VAT should not be included in CV because it has the effect of creating dumping even where none exists. Secondly, CBCC argues that evidence on the record demonstrates that CBCC was able to offset its VAT liability with taxes collected on domestic sales. Thus, CBCC argues, with respect to CBCC in this review, the ICMS tax does not remain a cost of the material input, and should not be included in CV.

Petitioners argue that Eletrosilex's and CBCC's arguments ignore the fact that the statute applicable to this review (19 U.S.C. §1677b(e)(1)(A)(1994)) and the statute as amended by the URAA (19 U.S.C. §1677b(e)(1)) require that CV includes taxes on purchases of inputs unless those taxes are remitted or refunded upon exportation. Section 773(e)(1)(A) of the Tariff Act states that the constructed value of imported merchandise shall be the sum of:

> the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) * * *

Furthermore, petitioners argue that CBCC's claim that it was able to offset its VAT liability with taxes collected on domestic sales is contradicted by other information on the record. Moreover, petitioners point out that the Department directly addressed this issue in the final results of the second administrative review of this order, and agreed that section 773(e)(1)(A) of the Tariff Act required that VAT be included in CV. *Silicon Metal from Brazil; Second Review Final Results,* at 46769. The Department took this same position, petitioners state, in *Ferrosilicon from Brazil,* Final Redetermination of Remand at 9–10, *AIMCOR* v. *United States,* Ct. No. 94–03–00182 (January 16, 1996). Therefore, petitioners conclude, CBCC's claim that ICMS and IPI taxes paid on inputs used to produce exported silicon metal are not a ''cost of materials'' has no basis and has already been rejected by the Department.

Department's Position

We agree with petitioners. In the final results of the second review of this order, the Department stated:

> because section 773(e)(1)(A) of the Tariff Act does not account for offsets of taxes paid due to home market sales, we did not account for the reimbursement to the respondents of ICMS and IPI taxes due to home market sales of silicon metal. The experience with regard to home market sales is irrelevant to the tax burden borne by the silicon metal exported to the U.S.

See Silicon Metal from Brazil; Second Review Final Results, at 46769. Our interpretation of the statute and our analysis of the issue have not changed since publication of the second review final results. Thus, in keeping with our prior determination on this issue, we have included in CV all taxes paid on purchases of material inputs except where an ICMS tax was assessed on the respondent's U.S. sales. For our treatment of the ICMS tax in such a situation, see comment 19 below.

Comment 19

Petitioners argue that the Department must add to Eletrosilex's CV the ICMS tax that Eletrosilex collects from its exports of silicon metal, and that is included in the reported U.S. selling price. They argue that to do otherwise would result in a dumping margin distorted by the use of an artificially high selling price as the basis for U.S. price (USP). Petitioners argue that, in the alternative, the Department should reduce USP by the amount of the ICMS taxes included in the reported USP. This approach, they argue, is pursuant to section 772(d)(2)(A) of the Tariff Act, which requires that USP be reduced by ''any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States.''

Eletrosilex argues that the Department should eliminate consumption taxes from all calculations. This approach, it argues, is the only way to achieve true tax neutrality. Furthermore, Eletrosilex argues that the Department erred in subtracting the ICMS tax from USP. It argues that this subtraction was a violation of a policy the Department stated in the final results of the second administrative review of this order. There the Department stated:

> We disagree with petitioners that the ICMS tax is an export tax or other charge imposed on the exportation of the merchandise to the United States as defined in section 772(d)(2) of the Act. The ICMS tax is imposed upon all sales of this product, regardless of the market to which it is destined. Since the tax is not levied solely upon exported merchandise, it does not constitute an export tax and cannot be subtracted from the USP of the merchandise under section 772(d)(2).

Petitioners argue that Eletrosilex is in error in stating that the Department subtracted the ICMS tax from USP. It states that while the Department said in its analysis memorandum that it made such a subtraction, in fact it did not do so in its margin calculations. Moreover, petitioners state, the argument Eletrosilex has advanced is irrelevant because it applies only to margin calculations based on price-to-price comparisons. After the Department makes the necessary corrections in its calculations for Eletrosilex that the petitioners have identified, Eletrosilex, petitioners allege, will have its margin calculated on the basis of CV.

CCM argues that the Department erred by leaving imbedded in the USP the ICMS tax that its U.S. customers pay, and comparing that USP to a home market price that includes the ICMS tax that its home market customers pay. This was an error, CCM argues, because the ICMS tax rates in the U.S. and home markets are significantly different. Thus, CCM argues, in its methodology the Department did not achieve tax neutrality.

Department's Position

We agree with Eletrosilex that because the ICMS tax assessed on its U.S. sale is not an export tax, it should not be deducted from the U.S. prices. *See Silicon Metal from Brazil; Second Review Final Results* at 46770. However, where the ICMS tax is included in the U.S. price, a proper comparison requires that CV not include both the ICMS tax paid on the purchases of material inputs and the ICMS tax assessed on the U.S. sale. Thus, for the calculation of CV in this situation, we ensured that the amount of the ICMS tax included in CV was the higher of either the ICMS tax on purchases of material inputs or the ICMS tax included in the U.S. price.

We agree with CCM that in the preliminary results of review our methodology failed to achieve tax neutrality. In these final results of review, where we based the margin calculation on a price-to-price comparison (as opposed to a price-to-CV comparison) we have added to the U.S. price the difference between the ICMS tax assessed on the U.S. sale and the ICMS tax assessed on FMV.

Comment 20

Petitioners argue that the Department erred in the calculation of Eletrosilex's U.S. selling prices by calculating the unit prices on the net weight of contained silicon, rather than the gross weight of the silicon metal. They argue that in a CV-based margin calculation the Department should use the gross weight of the silicon metal to calculate the per-unit USP because CV is reported on a gross-weight basis.

Department's Position

We disagree with petitioners. We find no evidence on the record to support petitioners' contention that the weights Eletrosilex reported for its U.S. sales reflect only the weight of the silicon, rather than the weight of the silicon metal. Furthermore, there is no record evidence to support petitioners' assertion that CV was calculated on a gross-weight basis. Therefore, there is no basis to change the per-unit calculations from those in the preliminary results of review.

Comment 21

Petitioners argue that the Department erred in its treatment of packing costs in the cost test for Eletrosilex and CCM. They argue, with respect to Eletrosilex, that the Department erred by including in the calculation of Eletrosilex's COP the packing expense amounts as Eletrosilex reported them on its COP computer file. Petitioners argue that Eletrosilex's computation of packing on its computer file is not appropriate for the cost test because not all of Eletrosilex's home market sales incurred packing costs. They argue that the Department should compare net home market sales prices to a COP that includes the reported amount of packing for each sale.

With respect to CCM, petitioners argue that the Department erred in its cost test by comparing monthly COPs that include per-unit packing costs to home market prices that include much larger per-unit packing costs. They argue that by so doing the Department failed to make an ''apples-to-apples'' comparison. For the final results, they argue, the Department should include the same absolute per-unit packing costs in the home market prices and COPs used in the sales-below-cost analysis.

CCM argues that the Department correctly calculated packing costs for the COP analysis. It argues that differences in per-unit packing costs are to be expected because in hyperinflationary economy cases the Department compares home market prices to costs incurred during the month of payment of the comparison home market sale. Furthermore, it cites *Import Administration Policy Bulletin 94.6* (at 1) which states that in the sales-below-cost test, the Department uses ''COM, actual interest cost, and home market packing * * * based on information in the section D COP/CV questionnaire response.'' Thus, CCM concludes, the Department's policy in a COP analysis is to use the packing costs from the cost section of the questionnaire response.

Department's Position

We agree with petitioners in part. We agree that where home market sales were sold in bulk (*i.e.*, not packed), COP should not include packing because *Import Administration Policy Bulletin 94.6* states (at 1), ''Both the net COP and the net home-market prices should be on the same basis, *e.g.*, packed, ex-factory, net of selling expenses; otherwise, the comparison would be distorted.'' We have done this for Eletrosilex and all other respondents in this review.

We disagree with CCM that we should use the packing costs reported in the section D response. Our present policy is to use the packing costs identified on the home market sales tape, which are transaction-specific. Since the section D packing computation is based on monthly averages, using it would reflect less accurate costs than using transaction-specific packing costs.

Finally, we disagree with petitioners that CCM reported much higher packing costs on its home market sales listing than it reported on its COP worksheet. Comparison of exhibits A (home market sales listing) and B (COP worksheet) of CCM's March 17, 1995 submission reveals that the packing costs are identical.

Comment 22

Petitioners argue the Department erred by using CCM's reported general and administrative (G&A) expenses in its calculation of CCM's COP, because CCM calculated an annual G&A ratio that it applied to its monthly historical COM. Petitioners allege that this methodology is not the Department's practice in hyperinflationary economy cases. They argue that the Department should determine monthly G&A expenses for CCM by multiplying the reported ratio by the monthly replacement COM which CCM reported.

CCM argues the methodology that CCM submitted and that the Department used in the preliminary results is the one that the Department used for CCM in response to the CIT's remand instruction to the Department in the LTFV investigation to ensure that ''its allocation of GS&A expenses does not lead to a systematic overstatement of those expenses due to the restatement of monthly costs as replacement costs.'' *See Camargo Corrêa Metais, S.A.* v. *United States*, Ct. No. 91–09–00641, Slip Op. 93–163 (August 12, 1993) at 15. As a result of these instructions, CCM states, the Department developed and used this method in the preliminary remand results and final remand results which are now awaiting the CIT's approval. *See Preliminary Results on Remand* at 4–5 (Nov. 17, 1993) and *Final Results of Redetermination Pursuant to Court Remand* at 6–7 (Dec. 13, 1993). CCM argues the Department is under obligation to comply with the CIT's remand order until and if it is determined by the Federal Circuit in the LTFV appeal that the CIT's remand instructions, and the Department's resulting methodology for calculating CCM'S G&A, were incorrect. Furthermore, CCM argues that the methodology the petitioners say we should use is one that was developed for other respondents, and not the one the Department developed for CCM.

Department's Position

We agree with petitioners. Contrary to CCM's argument, the Department is not obligated to employ the calculation methodology it used in its remand determination in the LTFV investigation. Since issuing the remand determination the Department has refined its methodology, and now employs a formula in which it multiplies a ratio (consisting of indexed monthly historical G&A divided by indexed monthly historical cost of goods sold) by monthly replacement cost COM. As explained in the final results of the second administrative review of this order, the purpose of indexing is to obtain values at a uniform price level because the simple addition of monthly nominal values during a period of high inflation would yield a meaningless result. *See Silicon Metal from Brazil; Second Review Final Results* at 46773. This is the formula we used in these final results of review.

Comment 23

Petitioners argue that the Department should include in CV the ICMS tax that CCM paid on its purchases of electricity. They allege that CCM did not report this tax in the electricity costs or ICMS tax it previously reported.

CCM argues that it already reported the ICMS tax it paid on electricity, and that these amounts are included in its computer database under the field for taxes.

Department's Position

We agree with CCM. Evidence on the record indicates that CCM did report the ICMS tax it pays on electricity. *See* July 3, 1996 submission by CCM, p. 8. We have included this tax in CV.

Comment 24

Petitioners argue that the Department should not include in CV the amounts that CCM reported on its CV worksheet under the name ''inventory holding.'' They argue that if these amounts are inventory carrying costs, then they should be excluded from CV because it is the Department's established practice to exclude inventory carrying costs from CV when the margin calculations are based on purchase price (PP) sales. Furthermore, they argue that if the amounts that CCM reported in its CV worksheet under the name ''inventory holding'' are actually inventory holding gains/losses (*i.e.*, the difference between replacement costs and the inflation-adjusted cost of inventory), they should be excluded from the calculation because CCM did not calculate them correctly. They base this argument on the fact that CCM's calculation allegedly includes only gains or losses on finished product inventory (and not inventoried inputs) and were calculated without proper layering of the inventory.

CCM argues that it reported inventory carrying costs as requested by the Department in its questionnaire, and that petitioners' argument is irrelevant because in the preliminary results of review the Department based the margin calculation on a price-to-price comparison, and not CV. It also notes that it is appropriate to include inventory carrying costs in the sales-below-cost test where such costs are compared to the home market sales which were made out of inventory. CCM also argues (presumably with respect to inventory holding gains and losses), that it followed the inventory layering method that the Department used in the LTFV investigation and noted in the questionnaire, and that these costs should be included in the monthly COM for CV purposes, should the Department rely on CV for FMV in the final results of review.

Department's Position

Consistent with our practice we did not include inventory carrying costs in our calculation of CV. Also consistent with Department practice, for purposes of the cost test we did not adjust prices for inventory carrying costs because we do not include any imputed costs in the calculation of COP. *See Silicon Metal from Brazil; Second Review Final Results*, at 46775.

Concerning the adjustment CCM reported on its CV worksheet under the name ''inventory holding,'' we have not made this adjustment because CCM failed to substantiate its entitlement to this adjustment. The record of this review contains no narrative description of or request for the adjustment, nor any worksheet demonstrating its calculations. In light of these deficiencies we have denied this adjustment.

Comment 25

Petitioners argue that the Department erred in its calculation of CBCC's interest expense ratio for 1992 by treating as interest income a value that was actually interest expense.

CBCC argues that petitioners' point is moot because the Department did not use the 1992 ratio in the margin calculation.

Department's Position

We agree with CBCC that this point is moot because we did not use the 1992 ratio in the margin calculation.

Comment 26

Petitioners argue that the Department used an incorrect methodology in calculating profit for CBCC. The Department calculated profit by subtracting a COP that includes interest expenses (which by definition include the cost of financing receivables) from home market prices from which the Department subtracted home market imputed credit expenses. By comparing a COP that includes the cost of financing receivables to home market prices from which the (imputed) cost of financing receivables had been subtracted, the Department, petitioners allege, made an improper comparison. Thus they argue that the Department should remove the subtraction of home market imputed credit from the calculation of the price to which the Department compares COP in the cost test.

Department's Position

We agree with petitioners. For purposes of calculating profit, we have continued to include interest expenses in the calculation of COP, but did not deduct imputed credit expenses from home market prices.

Comment 27

Petitioners argue that the Department erred in its margin calculation for CBCC by failing to deduct from U.S. price an unspecified charge that CBCC reported as ''other expenses.'' Petitioners argue that these ''other expenses'' should be deducted from U.S. price in accordance with section 772(d)(2)(A) of the Tariff Act.

CBCC argues that if the Department decides to deduct the ''other expenses'' (which, it states, are movement expenses) from U.S. price, it should note that CBCC mislabeled the currency as U.S. dollars. In fact, CBCC states, it reported them in cruzeiros, and they must be converted into U.S. dollars for the margin calculation.

Department's Position

We agree that we failed to deduct ''other expenses'' in the calculation of U.S. price used in the preliminary results. We have converted them into dollars because the amount of these expenses relative to other reported expenses indicates that they were incurred in cruzeiros. *See* CBCC's March 17, 1994 submission, exhibit 3.

Comment 28

Minasligas comments that the Department correctly applied its tax-neutral policy in the preliminary results of this review. Minasligas summarizes that application as follows:

(1) Home market prices included PIS and COFINS taxes;

(2) In calculating U.S. price, the Department subtracted the ICMS tax that Minasligas' customers pay on their purchases of silicon metal;

(3) The Department then added to the U.S. price the equivalent amount of ICMS, IPI, PIS, and COFINS taxes due on Minasligas' home market sales.

This methodology, Minasligas states, is consistent with the Department's guiding principle of tax neutrality, and should be affirmed in the final results of this review.

Eletrosilex argues that the Department erred in failing to add to USP the PIS, COFINS, and consumption taxes charged on its home market comparison sales. It argues, with respect to the PIS and COFINS taxes, that this failure was a violation of the Department's policy of calculating tax-neutral dumping assessments. It argues, with respect to the consumption taxes, that this failure was a violation of the change in the treatment of consumption taxes that the Department announced in the final results of the second review of this case. There the Department stated:

> Where merchandise exported to the United States is exempt from the consumption tax, the Department will add to the U.S. price the absolute amount of such taxes charged on the comparison sales in the home market.

Eletrosilex argues that the Department's failure to add to USP the absolute amount of consumption taxes charged on its home market sales was a violation of the Department's announced policy because there is evidence on the record that the relevant consumption tax, the ICMS tax, is exempt from payment upon exportation.

CCM also argues that the Department erred by not adding to USP the PIS and COFINS taxes that its home market customers pay on their purchases of silicon metal. It argues that these taxes are imposed only on home market sales, and not on export sales. Thus, by failing to add them to USP, CCM argues, the Department failed to achieve tax neutrality. Moreover, CCM argues, in numerous antidumping investigations and reviews involving imports from Brazil, the Department has made an adjustment to USP for the PIS and COFINS taxes.

Petitioners argue that the Department was correct in not adding the equivalent amount of PIS and COFINS taxes to USP. They base this argument on 772(d)(1)(C) of the Tariff Act which states that USP may be adjusted only for taxes imposed directly upon the ''merchandise or components thereof.'' They argue that the Department has concluded that taxes on gross revenue exclusive of export revenue were not taxes imposed directly upon the merchandise or components thereof, and thus did not qualify for an adjustment to USP. *See Silicon Metal from Argentina*, 56 FR 37891, 37893 (August 9, 1991) (*Silicon Metal from Argentina*). Petitioners argue that Brazil's PIS and COFINS taxes are taxes on gross revenue exclusive of export revenue, and that therefore the Department should not add them to USP.

Department's Position

We disagree with Eletrosilex that there is evidence on the record that the ICMS tax is not assessed upon exportation. In fact, there is evidence to the contrary. *See* Eletrosilex's March 22, 1995, submission, pp. 21–22. To achieve tax neutrality in these final results of review, where we calculated the margin on U.S. and Brazilian price-to-price comparisons, we added to Eletrosilex's USP the difference between the absolute amounts of ICMS tax assessed on its U.S. sales and its FMV. *See* comment 19 (above).

We agree with petitioners that information on the record demonstrates that the PIS and COFINS taxes are taxes on gross revenue exclusive of export revenue. Thus, in accordance with our determination in *Silicon Metal from Argentina*, we determine that these taxes are not imposed ''directly upon the merchandise or components thereof.'' Therefore, in these final results of review we have not added PIS and COFINS taxes to USP.

Comment 29

Eletrosilex argues that the Department erred in its calculation of home market imputed credit by dividing an allegedly annual interest rate by 30, rather than by 365.

Petitioners argue that the interest rate the Department used in its calculation was a monthly rate, and that the Department was therefore correct in using 30 in the denominator.

Department's Position

We agree with petitioners that the rate is a monthly rate. This rate is the average of the monthly rates that appear in Exhibit VI–3 of Minasligas' November 10, 1994, submission. Those rates are the monthly rates of the state bank of Minas Gerais.

Comment 30

CCM argues that in order for its cash deposit rate for future entries to reflect the appropriate dumping margin, the Department should issue the third review final results prior to, or concurrently with, issuance of the fourth review final results. If the Department issues the fourth review final results prior to the third review final results, CCM argues, CCM will continue to face the 93.2 percent cash deposit rate established in the LTFV investigation. In the alternative, if the Department does issue the third review final results after the fourth review, CCM argues that the Department should make clear in its cash deposit instructions that CCM's third review cash deposit rate should apply to all future entries because CCM was a non-shipper in the fourth review.

Department's Position

CCM's point is moot because the Department is issuing the results of both reviews concurrently.

Comment 31

CBCC argues that the Department erred in using total BIA for its U.S. sales verified at the third review verification. (The Department assigned a margin to these sales based on total BIA after it determined that CBCC was unable to substantiate significant portions of its response with respect to these sales.) CBCC argues that the Department was not justified in using BIA for these sales because:

1. Throughout the proceeding CBCC cooperated fully with the Department;
2. At the verification the verifiers collected the information needed to correct the mistakes uncovered at the verification;
3. Even if the Department did not have the resources to recalculate CBCC's data, the Department could have requested CBCC to perform the recalculations.

CBCC also notes that there was ample time to perform any necessary recalculations during the 14 months between the verification and issuance of the Department's BIA memorandum.

Furthermore, CBCC argues that, if the Department believes it does not have all necessary information totally to correct the mistakes found at verification, it should calculate CBCC's dumping margin using partial BIA for those discrete areas where it does not have the necessary information. CBCC argues that this use of partial BIA would be warranted in this case because there were no mistakes uncovered at verification regarding U.S. sales; most of the mistakes, CBCC argues, were connected with home market sales. CBCC argues that as an alternative, the Department should base FMV on CV, for which, CBCC alleges, the Department has all necessary information.

Petitioners argue the Department properly determined the margin for the sales at issue based on total BIA. They argue that the number and magnitude of the deficiencies in CBCC's reported data, the law, and the Department's practice require the Department to assign a margin to the sales at issue based on total BIA. With respect to CBCC's argument that it could have rectified the problems found at the verification if the Department had requested that it do so, petitioners argue that this suggestion ignores the responsibility of respondents to provide accurate and complete information in antidumping proceedings prior to verification. Moreover, petitioners argue, this suggestion is tantamount to asking the Department to condone the submission of false and incomplete information in response to the Department's questionnaire until, at verification, the Department positively determines the submitted information to be false. Doing so would allow respondents to abuse and manipulate the administrative review process.

With regard to CBCC's argument that the Department use partial BIA, petitioners argue that the deficiencies the Department found at verification are so fundamental and numerous that they require the use of total BIA. Moreover, with regard to CBCC's argument that the Department should use CV as the FMV, petitioners argue that using CV would be contrary to the purpose of using BIA. The purpose of using BIA is to induce the respondent to provide accurate and complete information. To achieve this purpose, petitioners argue, a margin based on BIA must be adverse, *i.e.*, it must be higher than the margin that would have been calculated had the respondent provided accurate and complete information. Here, because of the deficiencies in the submitted information, the Department cannot even begin to determine whether a price-based margin calculation would result in a higher margin than the CV-based margin calculation that CBCC suggests.

Department's Position

We agree with the petitioners. As we stated in our September 13, 1996 memorandum on this subject:

> It is the obligation of the respondents to provide an accurate and complete response prior to verification so that the Department may have opportunity to analyze fully the information and other parties are able to review and comment on it. Verification is intended to establish the accuracy and completeness of a response rather than to supplement and reconstruct the information to fit the requirements of the Department.

Nor is it the Department's practice or policy to reconstruct a response with the large number of errors which we found in CBCC's response. *See Final Determination of Sales at Less Than Fair Value: Certain Granite Products from Italy* (53 FR 27187, 27190, July 19, 1988). *See also Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany* (54 FR 18992, 19037, May 3, 1989). Among the problems we encountered were:

- CBCC underreported all per-unit COP and CV values by using unrefined weights, rather than refined weights;
- CBCC underreported its direct materials costs by failing to report late fees it had to pay;
- CBCC was unable to substantiate some of its parent company's interest rates;
- CBCC's method of calculating depreciation understated depreciation for all months;
- CBCC could not substantiate its reported home market sales value;
- CBCC's reported consignment sales listing reported adjustments to sales prices, rather than actual sale prices;
- CBCC underreported ICMS taxes for all its consignment sales.

Because of these and other problems more fully discussed in the September 13, 1996 memorandum, we deem CBCC's submissions to be unusable. Accordingly, in these final results of review we have applied total BIA to CBCC's third review sales.

Comment 32

CBCC argues that the Department erred in its application of its two-tier BIA methodology. This methodology, CBCC argues, states explicitly that the Department has discretion to use two alternative types of BIA when a respondent is deemed to be cooperative. The Department can (1) use the firm's highest rate from a prior administrative review or, if the firm has never been investigated or reviewed, the all others rate from the LTFV investigation; or (2) the highest calculated rate in this review.

CBCC argues that in this case the Department erred because it used CBCC's rate from the LTFV investigation. Under the two-tier BIA methodology, the Department should have used CBCC's rate from a prior review because CBCC has been included in two completed reviews since the LTFV investigation.

Petitioners argue that CBCC's erroneous argument is based on the Department's inadvertent misstatement of its second-tier BIA policy in the preliminary results of this review. It argues that the Department has expressed its two-tier BIA methodology on many occasions, and on one of those recent occasions it expressed it as follows:

> When a company substantially cooperates with our request for information, but fails to provide all the information requested in a timely manner or in the form requested, we use as BIA the higher of (1) the highest rate (including the ''all others'' rate) ever applicable to the firm for the same class or kind of merchandise from the same country from the LTFV investigation or a prior administrative review; or (2) the highest calculated rate in the review of any firm for the same class or kind of merchandise from the same country.

See Silicon Metal from Argentina; Final Results of Antidumping Duty Administrative Review and Termination In Part, 60 FR 64416, 64417 (December 15, 1995) (*Silicon Metal from Argentina II*). Petitioners argue that the Department properly applied this methodology when as BIA it assigned to CBCC its rate from the LTFV investigation.

Department's Position

We agree with the petitioners. As cooperative BIA, we use the higher of either (1) the highest rate ever applicable to the firm in the investigation or in any previous review, or (2) the highest calculated margin for any respondent in the same review. *See Silicon Metal from Argentina II* and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews* (61 FR 65527, December 13, 1996). Accordingly, for these final results, where necessary, we have applied to CBCC 87.79 percent, which is the highest rate ever applicable to CBCC. This use of BIA applies to only those sales where we determined that the use of BIA is appropriate. *See* September 10, 1996 preliminary results analysis memorandum from Fred Baker to the file and September 13, 1996 ''Use of Best Information Available'' memorandum from Fred Baker to Richard Weible.

Comment 33

Parties allege the following clerical errors:

- Petitioners argue that the Department erred by failing to make a circumstance-of-sale adjustment to Minasligas' FMV for bank charges related to loans taken out to finance its U.S. sales.

- Petitioners argue that the Department erred by using an incorrect amount of foreign inland insurance on CCM's U.S. sale.
- CCM argues that the Department erred by failing to deduct post-sale inland freight expenses from its home market price.

Department's Position

We agree, and have corrected these errors in these final results of review. We have also corrected one additional error we noted in our review of the preliminary results. There, for U.S. sales, we used Minasligas' dates of sale as the date of shipment from its plant because we believed the dates of shipment not to be on the record. However, we have determined that the invoice dates are on the record in verification exhibit 12. Therefore, in these final results of review we have used the invoice dates as the dates of shipment.

Final Results of Review

As a result of our analysis of the comments received, we determine that the following margins exist for the period July 1, 1993, through June 30, 1994:

Producer/manufacturer/exporter	Weighted-average margin (percent)
CBCC	64.39
CCM	5.97
Eletrosilex	39.72
Minasligas	0
RIMA	91.06

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of these final results of review for all shipments of silicon metal from Brazil entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Tariff Act, and will remain in effect until publication of the final results of the next administrative review: (1) the cash deposit rates for the reviewed companies will be those rates listed above; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or in the LTFV investigation conducted by the Department, the cash deposit rate will be 91.06 percent, the "all others" rate established in the LTFV investigation.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to APO of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. §1675(a)(1)) and 19 CFR §353.22.

Dated: January 3, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–816 Filed 1–13–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–806]

Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review and determination not to revoke in part.

SUMMARY: On September 5, 1996, the Department of Commerce (the Department) published the preliminary results of its administrative review of the antidumping duty order on silicon metal from Brazil. This review covers the period July 1, 1994, through June 30, 1995, and five manufacturers/exporters of the subject merchandise to the United States. The review indicates the existence of margins for four firms.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received and new information submitted at the Department's request, we have changed our results from those presented in our preliminary results as described below in the comments section of this notice.

EFFECTIVE DATE: January 14, 1997.

FOR FURTHER INFORMATION CONTACT: Fred Baker, Alain Letort, or John Kugelman, AD/CVD Enforcement Group III, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–2924, –4243, or –0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 5, 1996, the Department of Commerce (the Department) published in the Federal Register (61 FR 46779) the preliminary results of its administrative review of the antidumping duty order on silicon metal from Brazil (July 31, 1991, 56 FR 36135). We solicited additional information from Minasligas on October 1, 1996, from Eletrosilex on October 2, 1996, from CBCC on October 10, 1996, and from RIMA on November 14, 1996. We received responses on October 15, October 16, October 24, and November 20, 1996, respectively. The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Act are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA).

Scope of the Review

The merchandise covered by this review is silicon metal from Brazil containing at least 96.00 percent but less than 99.99 percent silicon by weight. Also covered by this review is silicon metal from Brazil containing between 89.00 and 96.00 percent silicon by weight but which contains a higher aluminum content than the silicon metal containing at least 96.00 percent but less than 99.99 percent silicon by weight. Silicon metal is currently provided for under subheadings 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule (HTS) as a chemical product, but is commonly referred to as a metal. Semiconductor grade silicon (silicon metal containing by weight not less than 99.99 percent silicon and provided for in subheading 2804.61.00 of the HTS) is not subject to the order. HTS item numbers are provided for convenience and for U.S. Customs purposes. The written description remains dispositive as to the scope of the product coverage.

The period of review (POR) is July 1, 1994, through June 30, 1995. This review involves five manufacturers/exporters of Brazilian silicon metal: Companhia Brasileira Carbureto de Cálcio (CBCC), Companhia Ferroligas Minas Gerais—Minasligas (Minasligas), Eletrosilex Belo Horizonte (Eletrosilex), Rima Eletrometalurgia S.A. (RIMA), and Camargo Corrêa Metais (CCM).

Verification

As provided in section 782(i) of the Act, we verified information provided by CBCC and RIMA by using standard verification procedures, including onsite inspection of the manufacturers' facilities, the examination of relevant sales and financial records, and original documentation containing relevant information. Our verification results are outlined in the public versions of the verification reports.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received case and rebuttal briefs from Minasligas, Eletrosilex, CCM, CBCC, RIMA, and a group of five domestic producers of silicon metal (collectively, the petitioners). Those five domestic producers are American Alloys, Inc., Elkem Metals Co., Globe Metallurgical, Inc., SMI Group, and SKW Metals and Alloys, Inc. We received a request for a hearing from CBCC, Minasligas, Eletrosilex, RIMA, and the petitioners. We conducted a public hearing on November 25, 1996.

Comment 1

Petitioners argue that the Department erred by using the methodology used in the final results of the second administrative review of this order in determining which U.S. sales to review. In the second review final results, we explained our methodology as follows:

1. Where a respondent sold merchandise, and the importer of that merchandise had at least one entry during the POR, we reviewed all sales to that importer during the POR.

2. Where a respondent sold subject merchandise to an importer who had no entries during the POR, we did not review the sales of subject merchandise to that importer in this administrative review. Instead, we will review those sales in our administrative review of the next period in which there is an entry by that importer.

We also said in the preliminary results notice that after completion of the review we would issue liquidation instructions to Customs which would instruct them to assess dumping duties against importer-specific entries during the period. *See Silicon Metal From Brazil, Final Results of Antidumping Duty Administrative Review,* 61 FR 46763, 46765 (September 5, 1996) (Silicon Metal From Brazil; Second Review Final Results.)

Petitioners argue that the methodology described above and used in the preliminary results of this review is inconsistent with the Act because section 751(a)(2) of the Act requires that margins be based on sales associated with entries during the POR. Petitioners also cite to *Torrington Co.* v. *United States,* 818 F. Supp. 1563, 1573 (CIT 1993) (*Torrington*) to demonstrate that the CIT has held that the word ''entry'' as used in the statute refers to the ''formal entry of merchandise into the U.S. Customs territory.'' Furthermore, petitioners argue that the Department itself has stated that the use of the term ''entry'' in the antidumping law refers unambiguously to the release of merchandise into the customs territory of the United States. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review,* 56 FR 31692, 31704 (July 11, 1991). Petitioners also argue that the legislative history of section 751 demonstrates that margin calculations in administrative reviews are to be based on sales of merchandise that entered during the POR.

In addition to the above arguments based on their interpretation of the statute and case law, petitioners argue that prior to issuance of the final results of the second review of this order, the Department's practice was to review only those sales that entered U.S. customs territory during the POR. In support of this statement, they cite the questionnaire that the Department issued to the respondents in the 1993–94 review. It states that ''purchase price sales that have a sales date during the period of review, but which entered after the period of review, will be covered in subsequent administrative reviews.'' In further support, they cite to the questionnaire issued to the respondents in this administrative review which requests that each respondent report only U.S. sales of merchandise that entered for consumption during the POR with the exception of constructed export price sales made after importation and export price sales of merchandise for which the entry date is not known.

Furthermore, petitioners argue that the failure to calculate dumping margins based on sales associated with entries during the POR would result in improper assessment of duties because the duties assessed on entries during the POR would have no relation to the margin of dumping on those sales. Thus, by assessing duties on entries at rates unrelated to the margin of dumping on the associated sales, petitioners argue, the Department would violate 19 U.S.C. § 1673(2)(B), which requires that ''there shall be imposed upon such merchandise an antidumping duty . . . in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.''

Eletrosilex argues that the Department rejected petitioners' argument with respect to section 751 of the Act as long ago as 1991 in a rule-making proceeding. There it asserted that section 751 does not require consideration solely of entries made in the POR, and that the statute as a whole requires a balanced consideration of ''entries'' and ''sales'' in the review process. *See Advance Notice of Proposed Rulemaking* (56 FR 63696, 63697, December 5, 1991). Furthermore, in the final results of both the first and second administrative review of this proceeding the Department specifically rejected petitioners' arguments that the statute requires consideration only of entries made during the POR. *See Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review,* 59 FR 42806, 42813 (August 19, 1994) (*Silicon Metal From Brazil; First Review Final Results*) and *Silicon Metal From Brazil; Second Review Final Results.* Eletrosilex concludes that the Department has acted within its discretion in reviewing Eletrosilex's sale made during this POR in this segment of the proceeding.

Department's Position

We disagree with petitioners. The Department most recently addressed this issue in the final results of the second review of this order. There we stated:

> We do not agree with petitioners that section 751(a)(2) requires that we review only sales that entered U.S. customs territory during the POR. Section 751(a)(2) mandates that the dumping duties determined be assessed on entries during the POR. It does not limit administrative reviews to sales associated with entries during the POR. Furthermore, to review only sales associated with entries during the POR would require that we tie sales to entries. In many cases we are unable to do this. Moreover, the methodology the Department should use to calculate antidumping duty assessment rates is not explicitly addressed in the statute, but rather has been left to the Department's expertise based on the facts of each review. ''* * * the statute merely requires that PUDD (*i.e.*, potentially uncollected dumping duties) . . . serve as the basis for both assessed duties and cash deposits of estimated duties.'' *See The Torrington Company* v. *United States*, 44 F.3d 1572, 1578 (CAFC 1995).

Our analysis of this issue and interpretation of the statute remain unchanged from those announced in the final results of the second review. Furthermore, by applying a consistent methodology in each segment of the proceeding we ensure that we review all sales made during the entire proceeding. Changing the methodology could result in our failure to review some sales. Hence, in these final results of review we have employed the methodology we announced in the final results of the second review.

Comment 2

Petitioners argue that evidence on the record indicates that Minasligas' and Eletrosilex's costs and prices have been severely distorted by hyperinflation that occurred prior to the start of the period covered by this review, and that, therefore, the Department should adopt a methodology that eliminates the effects of those distortions. These distortions occurred, petitioners argue, because the inventories that these companies had on July 1, 1994 (the first day of this POR) were purchased prior to July 1, 1994, during the period when Brazil experienced hyperinflation.

Minasligas argues that there is no evidence that its costs or prices were affected by hyperinflation that occurred prior to the POR. It makes the following points:

- During the three months prior to July 1994 (the first month in recent history during which there was no hyperinflation in Brazil and also the first month covered by this administrative review) the effects of hyperinflation had already been greatly attenuated in the negotiations of material prices in Brazil because of the use of the URV (unit of real value) as a unit of exchange. (Minasligas stated that the URV was a unit reference value pegged to the U.S. dollar which the Brazilian government introduced into the Brazilian economy in March 1994.)
- Minasligas' accounts were subject to a one-time restatement into URVs at the end of June 1994.
- Petitioners have pointed to no support in the record for their claim that Minasligas had significant inventories of material inputs for silicon metal production in the first half of 1994.
- Petitioners have pointed to no support in the record for their claim that the value of such inventories was affected by hyperinflation during the first half of 1994.
- Petitioners have pointed to no support in the record for their claim that these inventories were carried over into the POR.
- The end-of-year inventories that Minasligas records in its financial statements include materials used in the production of merchandise which is not subject to this proceeding.
- The petitioners' request that the Department adopt a methodology that eliminates the effects of alleged distortions is limited to only two respondents. One would think, Minasligas argues, that if a country is hyperinflationary during a certain period, it would equally affect all companies doing business in that country.

Eletrosilex argues that the introduction of the URV in March 1994 resulted in a substantial reduction in inflation during the period March through June 1994, and that it was during the latter two months of this period that it bought all of the stock it had in inventory on July 1, 1994. Moreover, it argues that on July 1, 1994 (the date of the introduction of the real plan) it converted all of its inventory from cruzeiros reais to reais based upon the URV value at that date. This conversion, Eletrosilex argues, refutes the petitioners' allegation of any impact on the value of its inventory on July 1, 1994. Finally, Eletrosilex argues that the U.S. sale upon which the Department based its margin calculation for Eletrosilex in this review was sold long after Eletrosilex used up its entire stock in inventory on July 1, 1994. Therefore, Eletrosilex concludes, there is no possible effect on Eletrosilex's costs from any high inflation that may have existed at some time before the POR.

Department's Position

We agree with petitioners. Evidence on the record shows that Eletrosilex's and Minasligas' cost of materials for the first several months of the POR reflect significant fluctuations. ''See'' petitioners' July 17, 1996 and July 18, 1996 submissions. These fluctuations occurred because these respondents consumed inventory which they had purchased during a period of hyperinflation. Moreover, these respondents reported their POR costs based on their normal books and records which reflect historic costs. Therefore, we requested, and Minasligas and Eletrosilex provided, information regarding the purchase dates, quantities, and amounts recorded in their July 1, 1994 beginning inventory. Because the reported costs of materials included the cost of the beginning inventory based on historic costs, these amounts were understated by the rates of inflation that occurred from the date of purchase until June 30, 1994. Therefore, we revalued the beginning inventory of July 1, 1994 by applying the UFIR index to the value of the inventory from the date of purchase until July 1, 1994.

Comment 3

Petitioners argue that for two reasons Minasligas does not qualify for revocation. (In the preliminary results of this review we stated that we did not intend to revoke the order on Minasligas at the completion of this administrative review because we intended to revoke the order on Minasligas upon completion of the third administrative review.) First, petitioners allege Minasligas has dumped in this and every prior segment of this proceeding, and therefore has not met the regulatory requirement of having not sold at less than fair value for at least three years. *See* 19 CFR § 353.25(a)(2)(i). The three years in question are the first (91–92), second (92–93), and third (93–94) reviews. For the first and second reviews, the Department calculated a margin of zero percent in its final results of review. For the third review the Department calculated a margin of zero percent for its preliminary results. With respect to the first review (which is in litigation before the CIT), petitioners argue that after the Department corrects the errors for which it has already conceded error, Minasligas will have a margin. They argue, with respect to the second review, that after the Department corrects the ministerial errors they allege it made in its final results, Minasligas will again have a margin. They argue, with respect to the third review, that after the Department corrects the calculation and methodological errors which they allege it made, Minasligas will again have a margin.

Second, petitioners argue that the Department cannot correctly determine that Minasligas is not likely to resume dumping in the future, and without this determination the Department cannot revoke the order. ''See'' 19 CFR § 353.25(a)(2)(ii). Petitioners base this argument on the following factors:

(1) Minasligas had a margin of greater than *de minimis* in the preliminary results of this administrative review. *See Silicon Metal from Brazil, Preliminary Results of Review and Intent Not to Revoke in Part*, 61 FR 46779, 46781 (September 5, 1996) (preliminary results).

(2) Minasligas has submitted no evidence that it is unlikely that it will dump in the future.

(3) The Department has not verified any information that Minasligas is unlikely to dump in the future. Citing 19 U.S.C. § 1677e(b)(2)(B) and 19 CFR § 353.25(c)(2)(ii), petitioners argue that the statute and regulations require that the basis for the ''likelihood'' determination be verified, and that because the Department did not verify any such basis, Minasligas does not qualify for revocation.

Furthermore, petitioners argue that analysis based on the criteria that the Department used in *Brass Sheet and Strip from Germany* show that Minasligas is likely to resume dumping. *See Brass Sheet and Strip from Germany, Final Results of Administrative Review*, 61 FR 49727, 49730 (September 23, 1996) (*Brass Sheet and Strip from Germany*). These criteria include a dramatic decline in shipments after publication of the antidumping duty order and the low level of shipments by the respondent. Both of these factors, petitioners allege, are present here with respect to Minasligas.

Minasligas argues, first, that in two consecutive administrative reviews prior to the issuance of the preliminary results the Department found Minasligas not to have dumped, and that, therefore, if the Department issues a final determination of no dumping in the final results of the third review, it will have met the requirement of 19 CFR 353.25(a)(2)(i). Secondly, Minasligas argues that 19 CFR 353.25(a)(2)(ii) requires a finding of no likelihood of dumping in the future, but does not, contrary to petitioners' suggestion, require Minasligas to provide, or the record to contain, evidence that Minasligas is not likely to resume dumping in the future. Furthermore, Minasligas argues that there is evidence on the record that Minasligas will not dump in the future. That evidence consists of Minasligas' written agreement to reinstatement of the antidumping duty order if it is found to be selling at less than fair value in the future.

Department's Position

To qualify for revocation in part under 19 CFR 353.25(a)(2)(i), a respondent must have sold the subject merchandise at not less than foreign market value for at least three consecutive years. Our final results of review of the first three reviews of this order indicate that Minasligas had no margins. However, in order to revoke an order in part the Department must also be satisfied that the firm is not likely to resume dumping in the future. In this administrative review the Department has found that Minasligas had a dumping margin of greater than *de minimis.* Accordingly, the issue of likelihood of dumping in the future is moot because Minasligas has in fact resumed dumping. Therefore, we are not revoking the order in part for Minasligas.

Comment 4

Petitioners argue that the Department erred in its calculation of Minasligas' cost of production and constructed value (COP/CV) by using the depreciation values that Minasligas reported. Petitioners find two flaws in this calculation. First, Minasligas' calculation of depreciation, petitioners allege, does not reflect the useful life of the assets, but rather reflects an extremely accelerated useful life. Petitioners argue that the Department's practice is to reject accelerated depreciation of an asset where such accelerated depreciation fails to allocate the cost of the asset on a consistent basis over the life of the asset, which, petitioners allege, is the case here. Second, Minasligas' depreciation calculation, petitioners allege, does not restate the value of the assets to account for hyperinflation. The Department's practice, petitioners argue, requires such restatement.

Therefore, because they find Minasligas' calculation deficient, petitioners submitted a recalculation of depreciation for some assets based on what they believe to be the actual useful life of those assets, and argue that the Department should use this recalculation in its final results of review. The Department, petitioners argue, should also solicit information from Minasligas to determine the proper depreciation for all assets related to the production of silicon metal that were not included in its recalculation.

Minasligas argues that petitioners' argument is flawed. Minasligas points to documentation submitted on October 15, 1996, at the Department's request, which demonstrates (1) that Minasligas did not depreciate its assets over the shortened period that petitioners suggest (though it is not the lengthened useful life that petitioners argue should be used), (2) that the depreciation reported in its COP/CV tables for purposes of this proceeding is fully supported by Minasligas' accounting records; (3) that the value of the assets subject to depreciation are restated in current currency to account for hyperinflation through the use of special indices known as the BTN/UFIR indices. Furthermore, Minasligas argues that the Department fully verified this information. Moreover, Minasligas argues that the petitioners' argument is based on a misunderstanding of some of the columns in the verification exhibit upon which they base their argument. Finally, Minasligas argues that to recalculate depreciation, using the longer useful lives that petitioners suggest, would be unfair because the Department has already completed two administrative reviews in which Minasligas calculated depreciation using the shorter useful lives. Minasligas contends that their useful lives are the basis for the depreciation calculation that Minasligas records in its books and which it reported to the Department. Therefore, Minasligas argues that, in the alternative, if the Department does decide to recalculate its depreciation using a longer depreciation period, it should adopt a methodology that takes into account the depreciation expenses that the firm reported in the previous administrative reviews.

Department's Position

We agree with Minasligas, except that we did not verify the firm for this period. The CIT has upheld the Department's calculation of depreciation based on a respondent's financial records where their financial records are consistent with foreign GAAP principles and where those records do not distort actual costs. *See Laclede Steel Co.* v. *United States*, 18 CIT 965, 975 (1994). Here, Minasligas has historically used accelerated depreciation, consistent with Brazilian GAAP. Moreover, we note that we have in the past used accelerated depreciation where the respondent has historically used it in its financial statements. *See Foam Extruded PVC and Polystyrene Framing Stock from the*

United Kingdom; Final Determination of Sales at Less Than Fair Value; 61 51411, 51418 (October 2, 1996). Furthermore, we agree with Minasligas that to recalculate depreciation using a longer useful life for Minasligas' assets after having used a shorter life in prior reviews would allocate costs to this review that have already been accounted for in prior reviews, and would therefore be inequitable. Finally, we agree with Minasligas that its use of the BTN/UFIR indices accurately restates the value of its assets. Therefore, in these final results of review, as in the preliminary results of review, we have used Minasligas' reported depreciation in calculating COP and CV.

Comment 5

Petitioners argue that the Department erred in its calculation of interest expense for Minasligas, Eletrosilex, CBCC, and RIMA by allowing an offset to interest expenses for claimed interest income. Petitioners base their argument on two factors: (1) that these companies did not substantiate that the reported interest income was from short-term investments, and (2) many of the categories these companies listed in their enumeration of short-term interest income are, on their face, not interest income derived from short-term investments of working capital.

As for the latter argument, petitioners point out that RIMA's claimed income consists of revenue from late payment charges paid by home market customers and discounts that suppliers grant on payment of an invoice. These categories are not, petitioners assert, interest income derived from short-term investments. As for Eletrosilex, petitioners focus on one transaction recorded on Eletrosilex's 1994 financial statement which, they allege, consists of capital gains, rather than interest income derived from short-term investments of working capital. For CBCC petitioners allege that there is evidence on the record (verification exhibit 29) that some of the interest income claimed by CBCC's Brazilian parent company, Solvay do Brasil (whose interest expenses, petitioners argue in comment 25 below, should be consolidated with those of CBCC), are not derived from short-term investments. Petitioners also argue that CBCC's itemization of its interest income (verification exhibit 17) indicates that much of CBCC's interest income is also not derived from short-term investments. Therefore, petitioners argue, in the final results the Department should make no offset to interest expenses for any of CBCC's or Solvay do Brasil's claimed interest offset.

Minasligas argues that it had no long-term financial investments, and that all of its interest income was related to production operations. Moreover, it states, it fully replied to all of the Department's inquiries about its interest expenses and income. Thus, it argues, there is no basis to reject Minasligas' claim for an offset to its interest expense.

RIMA argues that, if the Department uses its financial statement to calculate its interest expenses, it should also use its financial statement to calculate its interest revenue. Furthermore, the firm stands by the claim in its supplemental questionnaire response (SQR) of April 30, 1996 (at 33–34) that its financial income is short-term.

Eletrosilex argues that its financial statement shows that the sole transaction on which petitioners focus occurred between July 28, 1994 and December 27, 1994, and, therefore, qualifies as short-term under any analysis. The transaction involved an investment by Eletrosilex in reais-denominated bonds, purchased from funds obtained by borrowing on dollar-denominated export notes, and later selling the bonds after accrual of *pro rata* interest. The transaction, Eletrosilex argues, was simply a short-term investment which produced interest income from the investment. The investment return was heightened by the substantial over-valuation of the real at the time and the use of dollar-denominated export notes to finance the purchase of the bonds. This transaction, Eletrosilex argues, clearly qualifies as financial revenue permissible under long-settled Department precedent.

CBCC argues that the Department fully verified the interest income of CBCC and Solvay do Brasil, and found it to be short-term. *See* July 22, 1996 verification report, pp. 27–28. It also argues that the petitioners' argument with respect to the interest revenue of CBCC and Solvay do Brasil is irrelevant in light of the Department's practice to use consolidated financial statements. Because of this practice, CBCC argues, the relevant financial statement is that of its ultimate parent, Solvay and Cie, and not that of either CBCC or Solvay do Brasil.

Additionally, petitioners argue that the Department erred by reducing Eletrosilex's cost of manufacture (COM), rather than its interest expenses, by its reported interest revenue.

Department's Position

We agree with petitioners that almost all of Minasligas' reported ''interest income'' consists of items that are totally unrelated to interest income. The financial statements for Minasligas and its parent, Delp Engenharia Mecânica S.A. (Delp), demonstrate that over 95 percent of both companies' reported ''interest income'' consists of ''monetary variation,'' ''monetary correction,'' and ''income from short-terms applications.'' The Department's verification report for Minasligas in the immediately preceding review clarifies that ''financial applications'' (which would include ''income from short-term applications'') refers to compensation for inflation. At no point has Minasligas demonstrated for the record that the amounts reported for these categories of income constitute interest income derived from short-term investments of working capital. Nor has Minasligas demonstrated that the claimed interest income was derived from short-term investments of working capital merely by stating in its rebuttal brief that its net interest income exceeded its net interest expense.

Similarly, the financial statements submitted by Minasligas show that the category ''interest received'' included, *inter alia,* (1) charges paid by customers for Delp's granting of delayed payment terms, which are really sales revenue; (2) discounts obtained from suppliers; (3) dividends received; and (4) exchange gains or losses. *See* Minasligas' April 30, 1996 SQR at 37 and exhibit 19. These items clearly do not represent interest income from short-term investments.

For the above reasons, we have reduced Minasligas' interest income by the total amount of the items incorrectly included therein by Minasligas (*see* Final Analysis Memorandum from Fred Baker to the File).

With respect to RIMA, we agree with petitioners that the interest income categories RIMA reported (*i.e.*, revenue from late payment charges paid by home market customers and discounts that suppliers grant on payment of an invoice) by definition do not constitute interest income from short-term investments. *See* RIMA's April 30, 1996 supplemental questionnaire response (SQR) at 35. Therefore, in these final results of review we have not allowed an offset to RIMA's financial expenses for the claimed interest income.

With respect to Eletrosilex, we agree with petitioners that Eletrosilex is not entitled to an adjustment. The transaction in question consisted of an investment in Brazilian bonds denominated in reais and financed by borrowing on dollar-denominated export notes. Eletrosilex later sold the real-denominated bonds after they had accrued pro rata interest for Eletrosilex.

Such a transaction would result in interest income and capital gains; only the former would qualify as an offset to interest expenses. Therefore, in these final results of review, we have not made an adjustment to Eletrosilex's interest expenses for this transaction. Moreover, in these final results of review, unlike the preliminary results of review, we have calculated Eletrosilex's financial expenses by multiplying its annual COM by the ratio between the financial expenses and cost of sales reported in its 1994 financial statement.

With respect to CBCC, we agree with CBCC in part. As explained in our response to comment 25 below, we agree with CBCC that its financial expenses should be calculated based on the consolidated financial statement of Solvay & Cie, and not that of Solvay do Brasil. However, we do not agree that we should make an adjustment for short-term income because, though we did examine CBCC's financial income at verification and found that CBCC did have some short-term financial revenues, not only did CBCC not make an offset claim in this review for any short-term financial income until submitting its rebuttal brief, but CBCC did not provide for the record any supporting documentation. *See* CBCC's April 30, 1996 SQR at 28 and exhibit 16. Therefore, in these final results of review, as in the preliminary results of review, we have not offset CBCC's financial expenses for any short-term interest income.

Comment 6

Petitioners argue that the Department erred in calculating Minasligas' COP by using Minasligas' submitted computation of direct labor and variable overhead. This computation, petitioners argue, was flawed because Minasligas allocated these costs based on the number of furnaces used to produce ferrosilicon and silicon metal. Furthermore, petitioners argue, Minasligas used this same method to calculate its general and administrative (G&A) expenses in the first administrative review of this order, and the Department rejected it there because G&A expenses are period expenses that relate to the operation of the company as a whole, and are not related to a particular product or process. *See Silicon Metal from Brazil; First Review Final Results*, at 42811. Petitioners argue that using this same method to allocate direct labor and variable overhead is equally wrong. Because these costs relate to production, petitioners argue, the Department should allocate these costs based on the actual production volume for each product.

Minasligas argues that it allocated its direct labor and overhead equally to each direct cost center pursuant to its normal accounting practices. Because the same furnaces are dedicated to the production of the same product, Minasligas allocated these costs on the basis of the furnace ratio. This methodology does not cause distortions, Minasligas argues, because the same number of personnel operates each furnace regardless of the product produced, and the factory overhead expenses are equally shared by all the furnaces.

Department's Position

We agree with petitioner. Direct labor and variable overhead are a function of production, and not the number of furnaces dedicated to the production of each product. Therefore, for these final results of review we have recalculated Minasligas' direct labor and variable overhead. In this recalculation we have allocated direct labor and variable overhead based on the production volume of silicon metal relative to total production.

Comment 7

Petitioners argue that the Department must add to Minasligas' and Eletrosilex's CV the ICMS tax that they collect from their exports of silicon metal because it is included in the reported U.S. selling prices. They argue that to do otherwise would result in a dumping margin distorted by the use of an artificially high selling price as the basis for U.S. price (USP). Petitioners argue that, in the alternative, the Department should reduce USP by the amount of the ICMS taxes included in the reported USP pursuant to section 772(d)(2)(A) (sic) of the Act, which requires that USP be reduced by ''any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States.''

Minasligas argues that the alternatives the petitioners suggest will not result in a tax-neutral comparison. It argues that if the CV already includes ICMS taxes paid to suppliers, then adding to the CV the ICMS tax which is included in the U.S. price will overstate taxes in CV and distort the dumping results. Similarly, Minasligas states, if the CV includes the value-added taxes (VAT) (*i.e.*, ICMS and IPI taxes) paid to suppliers, then deducting ICMS taxes from the U.S. price will result in an apples-to-oranges comparison.

Eletrosilex argues that to be consistent with the URAA, the Department should remove consumption taxes from all consideration in U.S. and home market price determinations.

Department's Position

We disagree with petitioners' contention that the ICMS assessed on the U.S. sale should be deducted from the U.S. price. We addressed this issue with respect to Eletrosilex in the final results of the second administrative review of this order. There we stated that because the ICMS tax assessed on the U.S. sale is not an export tax, it should not be deducted from the U.S. price. *See Silicon Metal from Brazil; Second Review Final Results*, at 46770. However, where the ICMS tax is included in the U.S. price, CV should not include both the ICMS tax paid on the purchases of material inputs and the ICMS tax assessed on the U.S. sale, as this would double-count taxes. Thus, for the calculation of CV in this situation, we ensured that the amount of ICMS tax included in CV was the higher of either the ICMS tax on purchases of material inputs or the ICMS tax included in the U.S. price.

Comment 8

Petitioners argue that the Department erred in its treatment of taxes in the cost test in two ways. First, they argue that the Department erred by not including PIS and COFINS taxes in Minasligas' COM for COP. The preliminary results analysis memorandum, petitioners state, indicates that the Department intended to include PIS and COFINS in COM, but its COP calculation worksheet indicates that, in fact, it did not do so. Second, petitioners argue that the Department erred in its computation of Eletrosilex's and CBCC's COP by not including in the COM the IPI taxes that these companies pay on their purchases of inputs. Petitioners argue that because Eletrosilex and CBCC pay IPI taxes on their inputs, but IPI taxes are not assessed on sales of silicon metal, the Department should include all IPI taxes in the COM.

Eletrosilex argues that to be consistent with the URAA, the Department should remove consumption taxes from all consideration in U.S. and home market price determinations. Furthermore, Eletrosilex argues that IPI taxes are subject to refund from the Brazilian government.

CBCC argues that it can offset the IPI taxes it pays on the purchase of material inputs with the IPI tax it collects on the sale of the finished product from domestic customers. Because CBCC is able to offset the IPI taxes paid on material inputs by the IPI taxes it collects from the sale of ferrosilicon to domestic customers, CBCC argues, IPI taxes are not a cost of producing silicon metal for CBCC. CBCC also states that in this review the only material input for which CBCC paid IPI taxes is electrode paste, and it included these IPI taxes in the reported cost of this product, even though they do not appear in a separate line item on the COP worksheet that CBCC submitted to the Department.

RIMA argues that the Department should make no further addition to its COP for PIS and COFINS taxes because these taxes are already included in its reported direct materials costs.

Department's Position

As explained more fully in our response to comment 26 (below), we have determined that PIS and COFINS taxes are gross revenue taxes, and therefore are not taxes that a buyer pays directly when purchasing materials. For this reason, in order for COP to reflect the complete cost of materials, the costs the Department uses in its calculation of COP must not be net of any hypothetical tax amounts that are presumably imbedded within the purchase price of the materials. Here, Minasligas reported its material costs net of a value that it calculated, at the Department's request, that represented the PIS and COFINS embedded within its cost of materials. Thus, in order for the COP to reflect the full purchase price of the materials, we must add to its reported material costs the hypothetical values that Minasligas reported as PIS and COFINS taxes on its material inputs. We have done so in these final results of review. Moreover, because we have determined that the PIS and COFINS taxes are gross revenue taxes, and are not imposed on a transaction-by-transaction basis, we have not deducted any reported PIS and COFINS taxes from the price to which we compare COP in the cost test.

We agree with petitioners that the IPI tax (a Brazilian Federal value-added tax) should be included in COM because it is not a tax which the respondents can recover from sales of silicon metal. Therefore, in these final results of review we have included the IPI tax in the COM for Eletrosilex and CBCC. However, we have not made a separate addition for this tax to RIMA's COM because evidence on the record indicates that RIMA already included the IPI tax in the reported COM. We have made a separate addition to CBCC's COM for the IPI tax because evidence on the record of this review indicates that CBCC included only a portion of the IPI taxes in its material costs.

Comment 9

Petitioners argue that, with respect to Minasligas, Eletrosilex, CBCC, and RIMA, in accordance with 19 U.S.C. § 1677b(e)(1)(A) of the Act, the Department must include in CV all taxes on purchases of inputs.

Minasligas argues that the Department should calculate a CV that excludes VAT taxes paid to the suppliers of the material inputs. The basis for this argument is that when Minasligas collects ICMS taxes from U.S. customers, it can offset such ICMS taxes against the tax it pays to its suppliers. Accordingly, the ICMS taxes paid on the material inputs are, in Minasligas' view, ''refunded or remitted'' upon exportation of the merchandise to the United States. *See* 777(3)(1)(A) of the Act. Furthermore, Minasligas argues, in order to make a fair comparison, the U.S. price should also not include ICMS taxes. In the alternative, Minasligas argues that if the CV does not include ICMS taxes paid on the material inputs, the same absolute amount of ICMS taxes as that included in the U.S. price could be added to the CV in order to achieve a tax-neutral result.

RIMA argues that the ICMS and IPI taxes should not be included in the cost of materials because, under the Brazilian VAT system, taxes paid on materials can be recovered from taxes collected on the sales of the merchandise produced from such materials. The CIT, RIMA argues, has disagreed with petitioners' interpretation of 19 U.S.C. § 1677b(e)(1)(A), the predecessor provision to 19 U.S.C. § 1677b(e)(3), and held that the statute does not provide ''refund or remission'' as the only instance in which taxes upon inputs will not constitute cost of materials. The CIT noted that ''in a tax scheme such as Brazil's a respondent may be able to show that a value-added tax on inputs did not in fact constitute a ''cost of materials'' for the exported product.'' *See AIMCOR* v. *United States*, Ct. No. 94–03–00182, Slip Op. 95–130 (July 20, 1995) (*AIMCOR*) at 21.

Department's Position

We agree with petitioners. In the final results of the second review of this order, the Department stated:

> because section 773(e)(1)(A) of the Tariff Act does not account for offsets of taxes paid due to home market sales, we did not account for the reimbursement to the respondents of ICMS and IPI taxes due to home market sales of silicon metal. The experience with regard to home market sales is irrelevant to the tax burden borne by the silicon metal exported to the U.S.

See Silicon Metal from Brazil; Second Review Final Results, at 46769. Our analysis of the issue and interpretation of the statute have not changed since publication of the second review final results. Thus, in keeping with our prior determination on this issue, we have included in CV all taxes paid on purchases of material inputs, except in those instances where the ICMS tax included in the export price exceeded the amount of the taxes on the material inputs. In those situations, we included in CV the higher of the two amounts. *See* our position on comment 7.

Comment 10

Petitioners argue that the Department erred by not including Minasligas' claimed duty drawback in CV. This drawback consists of taxes and import duties that the government of Brazil suspended on Minasligas' purchases of imported electrodes used in the production of silicon metal destined for export. Petitioners argue that because the Department added the duty drawback to U.S. price, and because the taxes represented by the drawback were not elsewhere represented in CV, the Department should add the drawback to CV in order to make a fair comparison of U.S. price to CV.

Minasligas argues that in the preliminary results the Department correctly added duty drawback to U.S. price for comparison with a sales-based normal value (NV). However, if the Department uses CV in the final results, and includes indirect taxes in CV, it must still add duty drawback to U.S. price to make a fair comparison.

Department's Position

We agree with petitioners. The Brazilian duty drawback law applicable to Minasligas suspends the payment of ICMS and IPI taxes that would ordinarily be due upon importation of electrodes. Therefore, because the ICMS and IPI taxes are suspended, we cannot conclude that they are already included in the COM or reported tax payments that Minasligas reported. Thus, we need to add to CV the full amount of the duty drawback that we added to USP in accordance with section 772(c)(1)(B) of the Act. We have done so in these final results of review. This methodology is identical to the methodology announced in the final results of the prior review of this case. *See Silicon Metal from Brazil; Second Review Final Results,* at 46770.

Comment 11

Petitioners argue that the Department erred by calculating RIMA's, CBCC's, and Minasligas' home market imputed credit based on prices that include VAT. The Department's practice, petitioners argue, is to exclude VAT collected on home market sales from the prices used in calculating imputed credit expenses. Thus, petitioners argue, in the final results of review the Department should exclude ICMS taxes from the prices used to calculate home market imputed credit.

Minasligas and RIMA argue, based on the tax policies of the government of Brazil, that ICMS taxes should be included in the imputed credit calculation. They argue that imputed credit expenses represent the opportunity cost of financing accounts receivable, and that this opportunity cost does not apply solely to a portion of the sale, but to the entire revenue that is generated by the sale. During the period in which the customer's payment is outstanding, not only must Minasligas and RIMA finance their production operations, they must also pay any ICMS amounts they owe to the Brazilian government. The payment of any such amounts before they received payment from their customers becomes part of the cost of financing receivables. Therefore, Minasligas and RIMA argue, ICMS taxes should be included in the imputed credit calculation.

Department's Position

We agree with petitioners. We addressed this issue in *Silicomanganese from Venezuela*. There we responded to the argument now set forth by Minasligas and RIMA. We said:

> The Department's practice is to calculate credit expenses exclusive of VAT. (See the discussion of our VAT methodology in the preliminary determination (59 FR 31204, 31205, June 17, 1994.) Theoretically, there is an opportunity cost associated with any post-service payment. Accordingly, to calculate the VAT adjustment argued by Hevensa would require the Department to calculate the opportunity costs involved with freight charges, rebates, and selling expenses for each reported sale. It would be an impossible task for the Department to attempt to determine the opportunity cost of every such charge and expense.

See Silicomanganese from Venezuela, 59 FR 55436, 55438 (November 7, 1994) (*Silicomanganese from Venezuela*). In these final results of review we have followed our practice outlined in *Silicomanganese from Venezuela. See* also *Ferrosilicon from Brazil; Final Results of Antidumping Duty Administrative Review*, 61 FR 59407, 59410 (November 22, 1996) (*Ferrosilicon from Brazil; First Review Final Results*).

Comment 12

Petitioners argue that the Department erred in its margin calculation for Minasligas by converting the cruzeiro value of its U.S. sales into dollars, rather than using the actual U.S. value of the U.S. sales since they were originally denominated in U.S. dollars. They argue that the needless recalculation of U.S. price had the effect of increasing the U.S. price.

Minasligas argues that it reported its U.S. sales in cruzeiros (as recorded in its books), and that the Department correctly converted them into dollars using the average exchange rate of the month of shipment. This methodology, Minasligas argues, is in accordance with the Department's practice of comparing the U.S. price to the CV or NV in the month of shipment.

Department's Position

We agree with petitioners. Our practice is to use the actual U.S. price in the currency in which it was originally denominated on the date of sale, and to avoid any unnecessary currency conversions. Evidence on the record indicates that Minasligas' U.S. sales were originally denominated in U.S. dollars. *See* Minasligas' April 30, 1996 SQR, pp. 16–17. Therefore, in these final results of review we have used the actual dollar value of the U.S. sale in the margin calculation.

Comment 13

Petitioners argue that the Department erred by calculating negative imputed U.S. credit expenses for Minasligas and CBCC. This occurred, petitioners state, because the Department used as the payment date the date that these companies received payment from their banks under the terms of their advance exchange contracts (ACC). Under the terms of an ACC, a Brazilian bank pays Minasligas and CBCC the value of their U.S. sales, and the U.S. customer pays the bank. This arrangement sometimes results in Minasligas and CBCC receiving payment for their sales prior to shipment, and thus incurring negative credit expenses. However, petitioners argue that though the CIT has allowed negative U.S. credit expenses under some circumstances, those circumstances are not present here. Specifically, in *AIMCOR* (at 14–15) the CIT permitted such an adjustment for credit revenue partly because the ACCs were tied to specific sales. Evidence on the record of this review, petitioners suggest, demonstrates that Minasligas' and CBCC's ACCs were not tied to specific sales.

With respect to Minasligas, petitioners point out that Minasligas entered into multiple ACCs for each sale, and that review of the record shows that there is no correspondence between the dates of the ACC contracts and Minasligas' reported dates of sale for the sales covered in this review. Furthermore, petitioners argue, review of the two ACC contracts (which pertained to the same sale) on the record of this review reveals that the contracts do not contain an invoice number, customer name, or country of exportation, and are not specific to the merchandise subject to review. Moreover, petitioners argue, the dollar amount of the ACCs does not tie to any specific U.S. sale reviewed in this proceeding. From this evidence petitioners conclude that the ACCs were not specific to U.S. sales, and that, therefore, the Department should use in its imputed credit calculation the date of payment by the U.S. customer.

With respect to CBCC, petitioners point out that CBCC financed its U.S. sales using ACCs that covered sales during an extended period. In addition, they allege that evidence on the record of *Ferrosilicon from Brazil* demonstrates that CBCC's ACCs are not tied to specific sales. *See Ferrosilicon from Brazil, Final Determination of Sales at Less than Fair Value*, 54 FR 732 (Jan. 6, 1994) (*Ferrosilicon from Brazil; Final Determination*).

Minasligas argues that petitioners' argument is unfounded. First, Minasligas argues, in *Ferrosilicon from Brazil; Final Determination* it had entered into multiple contracts for individual sales too, and there was also no correspondence between the dates of sale and the contract dates, but still the CIT upheld in *AIMCOR* the Department's calculation of negative U.S. credit expenses. *See Ferrosilicon from Brazil, Final Determination*, and also *AIMCOR*. Second, Minasligas argues that the petitioners are factually incorrect in saying that the dollar value of the ACC does not tie to any specific sale. It states that the sum of the two ACC amounts in local currency equals the amount in reais that Minasligas reported in its U.S. sales listing. Third, the respondent argues that the fact that one of the two ACCs indicates that the exported product was not silicon metal was a mistake by the bank, and that Minasligas was not aware of this mistake at the time it provided this information to the Department. Problems of this nature, Minasligas argues, are verification problems, and the Department opted not to verify Minasligas in this review. Nevertheless, Minasligas states, it is prepared to provide the Department additional information that clearly shows that this ACC relates to the sale of silicon metal.

CBCC argues that its ACCs are tied to specific sales. The Department, CBCC argues, verified the ACC documentation and tied each ACC to a particular export transaction. *See* July 22, 1996 verification report, pp. 14–15. Additionally, CBCC argues that the date on which the ACC is contracted is irrelevant to the Department's analysis as long as the ACC contract is tied to a particular export transaction.

Department's Position

We agree with CBCC and Minasligas. We have carefully reviewed the record of this review, and are persuaded that CBCC's and Minasligas' ACCs are directly tied to their U.S. sales. With respect to CBCC, we find that the Department's verifiers were able to tie each ACC to a specific U.S. sale. *See* July 22, 1996 verification report, pp. 14–15. With respect to Minasligas, we note that Minasligas is correct that, contrary to petitioners' argument, the value of the ACC which Minasligas put on the record does in fact equal the value of the U.S. sale; therefore, we find that the ACC is tied to the U.S. sale. Furthermore, in prior verifications (where negative U.S. imputed credit was not an issue) the Department was able to tie Minasligas' ACCs to individual U.S. sales. *See* July 22, 1996 verification report, p. 9. Therefore, in the U.S. imputed credit calculation in these final results of review we have used as the payment date the date on which the bank credits the accounts of Minasligas and CBCC with funds under the terms of their ACCs.

Comment 14

Petitioners argue that the Department erred by failing to deduct from RIMA's USP the ICMS tax that RIMA paid on its foreign inland freight for U.S. sales.

RIMA argues that the freight amount that it reported for each export sale includes ICMS taxes.

Department's Position

We agree with petitioners. Evidence on the record indicates that RIMA reported the ICMS tax on foreign inland freight separately from the freight costs. *See* October 3, 1996 verification report, at 6. In these final results of review we have deducted from USP the ICMS tax due on freight.

Comment 15

Petitioners argue that the Department erred in the calculation of Minasligas' and RIMA's COP by granting an offset to production costs for the sale of by-products. With respect to Minasligas, they argue that the documentation Minasligas submitted to demonstrate that it had sold the slag during the POR did not substantiate its claim.

Minasligas argues that its documentation demonstrates that it concluded the sale in June 1995, and thus during the period covered by this proceeding. It argues that only if the Department decides to rely on the date of shipment rather than the date of sale should the adjustment apply to the fifth review.

With respect to RIMA, petitioners argue that RIMA failed to provide a requested worksheet demonstrating its computation of the claimed offset. Furthermore, petitioners claim that the volume of the offset that RIMA claimed is inconsistent with other information on the record.

RIMA argues that it did not calculate or claim a by-product offset for its COP/CV.

Department's Position

We agree with petitioners. With respect to Minasligas, we agree that the documentation Minasligas submitted does not demonstrate that the date of sale for its claimed offset was during the POR. *See* Minasligas' October 15, 1996 submission, exhibit 5. Therefore, in these final results of review we have not allowed an offset to Minasligas' production costs for its sale of slag. With respect to RIMA, we find that the record indicates that RIMA did offset its production costs with revenue earned from the sales of by-products, and that RIMA did not substantiate its claim for that offset. *See* RIMA's April 30, 1996 SQR, at 33. Therefore, in these final results of review we have not allowed an offset to RIMA's production costs for its sales of by-products.

Comment 16

Petitioners argue that the Department erred in its calculation of the by-product offset that it applied to Eletrosilex's COM. It argues that the ICMS tax should be deducted from the selling price in the calculation of revenue earned from the sale of the by-product.

Department's Position

We agree with petitioners. The ICMS tax represents a reduction in Eletrosilex's revenue earned from the sale, and should be deducted from the selling price in calculating total revenue. We have done so in these final results of review.

Comment 17

Petitioners argue that the Department erred in its calculation of Eletrosilex's COP by using Eletrosilex's calculation of indirect selling expenses. That calculation was flawed, petitioners argue, because in it Eletrosilex divided its indirect selling expenses by its volume of production. This methodology was incorrect, petitioners argue, for two reasons. First, the selling expense total used in the calculation does not include the selling expenses of Eletrosilex's related affiliates. Thus, petitioners argue, Eletrosilex allocated to all of its silicon metal production volume only part of the indirect selling expenses that it and its related companies incurred for selling the silicon metal. Second, it is not the Department's practice, petitioners state, to calculate selling expenses based on production volume. Eletrosilex bore the burden, petitioners argue, of reporting properly calculated per-unit indirect selling expenses, and failed to do so. Therefore, petitioners conclude, in the final results the Department should use the facts available, and should calculate Eletrosilex's per-unit indirect selling expenses for COP and CV by dividing Eletrosilex's reported indirect selling expenses by its reported volume of home market and U.S. sales.

Eletrosilex argues that it makes no sense to calculate per-unit indirect selling expenses based solely on U.S. and home market sales volumes. It argues that the indirect selling expenses that Eletrosilex incurs (consisting primarily of salaries and related employee costs) are applicable to all sales, not just to the local and U.S. markets. These employees, Eletrosilex states, perform functions relevant to all sales, and it would be unfair and illogical to apply the expenses of these employees solely to home market and U.S. sales. Citing statements in its questionnaire response as support, it argues that sales both in the United States and in Brazil are made solely by Eletrosilex personnel, with no assistance from affiliated companies. Furthermore, Eletrosilex argues, while affiliated companies assist Eletrosilex in some third-country markets, Eletrosilex personnel are deeply involved in all aspects of these sales. That there is some external assistance on these sales in third-country markets, Eletrosilex argues, is not relevant to the determination of per-unit indirect selling expenses in the home market.

Department's Position

We agree with petitioners that indirect selling expenses should be calculated based on sales volumes, and not production volumes. This is our policy because by their nature indirect selling expenses are attributable to sales of merchandise, and not to production of merchandise. We do not agree with petitioners that the computation needs to include the indirect selling expenses of all of Eletrosilex's affiliates because COP includes only the indirect selling expenses attributable to home market sales. Because the related affiliates were not associated with Eletrosilex's home market sales, there is no reason to include their indirect selling expenses in COP. In these final results of review, we have calculated Eletrosilex's indirect selling expenses by dividing its home market indirect selling expenses by its home market sales volumes.

Comment 18

Petitioners argue that the Department erred in the calculation of Eletrosilex's and RIMA's U.S. selling prices by calculating the unit price based on the net weight of contained silicon rather than the gross weight of the silicon metal. They argue that in a CV-based margin calculation the Department should use the gross weight of the silicon metal to calculate the per-unit USP because CV is reported on a gross-weight basis. Use of the contained-weight quantities would, they allege, distort the comparison of export price (EP) and NV. Similarly, petitioners argue that the Department erred in its sales-below-cost analysis for RIMA by calculating its home market selling prices on the basis of the contained weight of silicon, rather than the gross weight of the silicon metal. They argue that to make a fair comparison, the Department should convert the per-unit home market selling prices to a gross-weight basis before comparing them to COP.

RIMA argues, with respect to petitioners' argument concerning the comparison of USP and NV, that petitioners' argument is tantamount to a request that the Department determine a USP for its sales on a different basis than that at which the merchandise was sold to the U.S. market. Doing so, RIMA argues, would be contrary to the plain language of the statute, which requires that the Department base EP on ''the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise. . .'' (*See* 19 U.S.C. § 1677a(a).) The petitioners' approach, RIMA argues, would result in using a unit price different from that reflected on the invoice, and, therefore, would be contrary to the statute.

Department's Position

We disagree with petitioners. We find no evidence on the record to support petitioners' contention that the weights Eletrosilex and RIMA reported for their U.S. and home market sales reflect only the weight of the silicon, rather than the weight of the silicon metal. Furthermore, there is no record evidence to support petitioners' assertion that CV was calculated on a gross-weight basis. Therefore, there is no reason to change the per-unit calculations from those in the preliminary results of review.

Comment 19

Petitioners argue that Eletrosilex failed to provide a reconciliation of its COM to its inventory cost records. Eletrosilex attempted to provide a reconciliation in its questionnaire response (Q/R), but in an SQR acknowledged that the previously submitted reconciliation contained an error. Therefore, in the SQR Eletrosilex submitted a revised reconciliation. This second reconciliation contained beginning and ending inventory values that were different from those contained in the Q/R. Thus, in a second supplemental questionnaire, the Department requested that Eletrosilex explain why it reported two different inventory balances based on the same inventory records. Eletrosilex answered that ''because inventory unit costs are calculated by the weighted average methodology rather than purely by quantities, the inventory balance necessarily changes when there is a change in values.'' This statement, petitioners argue, shows that Eletrosilex did not reconcile its reported COM to its inventory records maintained in the normal course of business, but instead simply compared its reported monthly COMs to inventory values that it created from its monthly COMs prepared for this review. Thus, petitioners argue, Eletrosilex failed to provide a critical reconciliation needed to validate its reported COM.

Department's Position

We disagree with petitioners. In its SQR, Eletrosilex provided information which substantiated that the reported per-unit costs could be reconciled to the financial statement costs. Eletrosilex provided the financial statement average inventory values for each month of the POR, as well as financial statements. We reviewed and analyzed the cost information, the monthly inventory information, and the financial statements which Eletrosilex submitted. Since Eletrosilex produces only subject merchandise, we multiplied the submitted costs by the production quantities and compared the total costs to the financial statement total costs. We determined that the reported per-unit COP and CV data were consistent with the per-unit costs used in the financial statements.

Comment 20

Petitioners argue the Department erred in its computation of CBCC's COP by using the depreciation expenses that CBCC reported. They find three errors in CBCC's reported depreciation. First, CBCC calculated its reported depreciation by aggregating its depreciation for all assets and allocating the aggregate amount to the three products it produces based on the relative production quantities of these products. Petitioners state that the Department's normal practice (which, petitioners allege, was CBCC's normal methodology prior to the 93–94 administrative review) requires that depreciation of assets used to produce subject merchandise be directly attributed to the cost of the subject merchandise. Petitioners object to CBCC's new allocation because it is not, they allege, how CBCC has historically recorded depreciation in its books or reported to the Department in earlier reviews of this order. Petitioners argue that the Department's practice is clear that a respondent may not depart from its normal, historical cost allocation methods during an antidumping proceeding unless the respondent establishes that its normal method is distortive. *See Canned Pineapple Fruit from Thailand, Final Determination of Sales at Less than Fair Value,* 60 FR 29553, 29559 (June 5, 1995). Here, petitioners argue, CBCC has not even claimed that its prior method was distortive.

The effect of CBCC's new calculation methodology, petitioners argue, is to shift CBCC's depreciation away from silicon metal and toward other products. To accept such a calculation, petitioners argue, would violate the Statement of Administrative Action (SAA) which states that ''if Commerce determines that costs ... have been shifted away from production of the subject merchandise, or the foreign like product, it will adjust costs appropriately, to ensure they are not artificially reduced.'' *See SAA,* 1994 U.S.C.A.A.N. at 4172.

For the above reasons, petitioners argue that the Department should:

• Include in COM the depreciation for assets used to make silicon metal, consistent with CBCC's historical depreciation method;

• Allocate depreciation for equipment common to production of multiple products based on the percentage of

CBCC's total furnace capacity dedicated to production of each product;

• Allocate depreciation for equipment common to production of multiple products for a particular plant only among the products made at that facility;

• Calculate the proper amount of straight-line depreciation for the furnaces that produce silicon metal based on the monthly acquisition values for those furnaces.

The second alleged error petitioners find in CBCC's calculation of depreciation is that it did not include depreciation for all idle equipment.

The third alleged error petitioners find in CBCC's calculation of depreciation is that CBCC used accelerated depreciation for some assets. Petitioners state that the Department consistently rejects accelerated depreciation, which by definition is not based on the average useful life of the fixed assets. Therefore, petitioners argue, the Department should recalculate CBCC's depreciation eliminating any prior accelerated depreciation. It should also, petitioners argue, restate the value of the assets to account for hyperinflation.

CBCC argues, with respect to the first alleged error, that though its methodology represents a change from the first and second reviews of this order, it is the same methodology it used in the third (93–94) review. Moreover, CBCC argues, it used this depreciation allocation method also with respect to production equipment common to all production in *Ferrosilicon from Brazil; Final Determination*, and the Department accepted it. Therefore, CBCC states, its current methodology has been historically used, and the Department has accepted it in one prior instance. Furthermore, CBCC argues, the methodology is proper because CBCC can produce any of its products in each furnace, with only minor modifications. Therefore, allocating depreciation to each product based on relative production capacity is not improper.

CBCC argues, with respect to the second alleged error, that it was pursuant to Brazilian law that it did not report depreciation of idle assets. Under Brazilian law, it states, the depreciation of idle assets is illegal. Under such circumstances, it argues, depreciation is suspended and resumes only when the assets are operational again.

CBCC argues, with respect to the third alleged error, that the Department verified at the fourth review verification that there was no accelerated depreciation of furnaces. Furthermore, had accelerated depreciation occurred in any prior review, CBCC argues, the Department verifiers would have noted it. Therefore, CBCC concludes, there is no evidence on the record to support petitioners' theories. With regard to petitioners' argument that the Department should restate the value of the assets to account for hyperinflation, CBCC argues that it calculated depreciation on asset values that were re-actualized to take account of inflation.

Department's Position

We agree with petitioners in part. We have determined that CBCC's new method of calculating depreciation distorts the cost of depreciation incurred to produce silicon metal because it shifts depreciation costs incurred in the production of silicon metal away from that product and toward other products. For this reason, accepting this method would be contrary to the guidance set forth in the SAA. Since publication of the preliminary results of this review, we have requested and obtained information from CBCC that enables us to identify the depreciation expense associated with assets used to produce silicon metal and to include that expense as part of the COP/CV for silicon metal.

Concerning depreciation expenses for idle assets, we agree with petitioners that it is our clearly stated practice and policy to include these in COP/CV. Accordingly, for these final results, we have included this category of expense in the calculation of depreciation.

Petitioners' allegation that CBCC improperly used accelerated depreciation expenses is moot for these final results because, as stated above, we have performed a recalculation of depreciation. In this recalculation we have not accelerated the useful lives of the assets. For the furnaces we have used a useful life of ten years, which is the useful life we used in prior reviews of this order. By using the same useful life in successive reviews, we avoid accounting for the same costs more than once. *See* our position on comment 4 above.

Comment 21

Petitioners argue that the Department erred in its calculation of CBCC's COP by using CBCC's reported direct labor costs. They argue that the figures CBCC reported reflect a methodology which distorts costs. As a result of this methodology, petitioners argue, CBCC reported disproportionate direct labor costs for products with comparable direct labor requirements. CBCC also, petitioners argue, allocated direct labor costs to furnaces that were not even operating, and thus required no direct labor. Therefore, petitioners argue that the Department should recalculate direct labor correctly, or use facts available for CBCC's direct labor.

CBCC argues that its direct labor costs for this review were taken directly from its books and accounting records, which the Department verified. CBCC believes that its allocation and accounting methodology are justified based on how its labor is in fact employed and how it records the cost of labor in its books. CBCC explains that it assigns a set number of workers to each furnace, no matter what the output of the furnace may be. When a furnace is inoperative or idle, the workers and employees continue to be paid and are generally not reassigned to other furnaces because the cost of laying off employees for temporary periods of time would be prohibitive. Furthermore, all furnaces operate 24 hours a day, and therefore it would be impracticable and unnecessary to add employees in addition to those already assigned to other furnaces. As a result, CBCC allocated these labor costs to the product which the idle furnace produced before becoming non-operational. Under these circumstances, CBCC argues, the evidence on the record, which the Department verified, shows that the workers assigned to idle furnaces continued to be paid, and that CBCC continued to account for this labor in its accounting records based on the volume of silicon metal produced by each furnace while it was active.

Department's Position

We agree with petitioners that CBCC's reported labor costs distort the actual labor costs incurred to produce silicon metal because the company allocates a disproportionate share of labor costs to products that have comparable labor requirements and because it allocates labor costs associated with idle furnaces to specific products that are not in production at the time the labor costs were incurred. Although CBCC used this method in its normal accounting system, we cannot use it in our antidumping analysis. The SAA indicates that costs will be calculated based on records kept by a firm if they are kept in accordance with GAAP and if they reasonably reflect the costs associated with the production and sale of the merchandise.

This is not the case with respect to CBCC's accounting for the labor costs associated with idle furnaces. Under CBCC's accounting, the company charges these costs to the last product produced in the furnace. We believe that it is more appropriate to allocate these costs to all products produced by CBCC since, during the idle time, the labor costs incurred are not directly related to any specific product.

Comment 22

Petitioners argue that the Department erred in its calculation of CBCC's COP by using the forest exhaustion costs that CBCC reported. CBCC's reported forest exhaustion costs were deficient, petitioners argue, because in them CBCC revalued the formation and pre-harvest maintenance costs of each forest project only up to the date that harvesting began for that project. Petitioners argue that in *Ferrosilicon from Brazil; Final Determination* the Department found that CBCC had used the same methodology, and determined that because of it CBCC ''had substantially understated its cost of producing charcoal by inaccurately recording the costs associated with their wood forests.'' (*See Ferrosilicon from Brazil; Final Determination,* at 738.) Petitioners argue that in this review the Department should require CBCC to recalculate its self-produced charcoal costs using forest exhaustion based on forest formation and pre-harvest maintenance costs that have been revalued to account for inflation during the harvest period. In the alternative, petitioners argue, the Department should determine CBCC's charcoal costs based on the facts available.

CBCC argues that it explained its reporting of exhaustion to Department officials at the verification, and that the verifiers fully verified this question. It notes too that the exhaustion costs are re-stated in UFIR to account for hyperinflation, and that they include all taxes and expenses attributable to exhaustion.

Department's Position

We agree with petitioners that because CBCC did not revalue the cost of its forests after harvesting began, the charcoal costs it submitted are inadequate. Therefore, in these final results of review we have valued CBCC's self-produced charcoal at the price paid to outside suppliers. Under these circumstances we resorted to this same cost methodology in the first and second administrative reviews of this order. *See Silicon Metal from Brazil; First Review Final Results* at 42809 and page 1 of the attachment to the March 14, 1995 analysis memorandum from Fred Baker to the file (public version).

Comment 23

Petitioners argue that the Department erred by allocating CBCC's indirect selling expenses according to the relative sales volume of each of CBCC's three products. Petitioners argue that this is not a proper allocation because silicon metal has a significantly higher value than CBCC's other two products. Furthermore, petitioners argue that the Department should use adverse facts available for CBCC's indirect selling expenses because at the verification the Department requested information on CBCC's sales values for each of its products in order to allocate indirect selling expenses to silicon metal based on sales values rather than sales volumes, but CBCC refused to provide that information. The verification report states that the basis for the refusal was that the Department had not requested the information prior to the verification. Petitioners argue that this reason is inadequate because CBCC did not state that the information was unavailable.

CBCC states that at the verification the Department officials suggested that CBCC recalculate the indirect selling expenses on the spot using a different methodology than that it requested in the supplemental questionnaire. CBCC states that at the verification it did not have the time or resources to provide an entirely new set of indirect selling expenses. It also notes that the Department's officials did not suggest providing this information to the Department at a later date. Accordingly, CBCC argues, the Department should not penalize CBCC for the Department's failure to request information other than the information requested in its questionnaires. *See Toyota Motor Sales U.S.A.* v. *United States,* Slip Op. 96–95, June 14, 1996; *Micron Technology, Inc.* v. *United States,* Slip Op. 95–107, June 12, 1995.

Department's Position

We disagree with petitioners. Petitioners have given us no reason to believe that an allocation based on sales volume is unreasonable or distortive in this case. That silicon metal may have a higher sales value than other products CBCC produces is an insufficient basis to conclude, absent any supporting information on the record of this review regarding the specific nature of the indirect selling expenses incurred by CBCC, that an allocation based on sales value would produce more accurate results than an allocation based on sales volume. Therefore, in these final results of review, as in the preliminary results of review, we have allocated CBCC's indirect selling expenses to silicon metal based on relative sales volume.

Comment 24

Petitioners argue the Department erred in its calculation of CBCC's G&A expenses by not allocating to CBCC a portion of the G&A expenses of CBCC's direct Brazilian parent, Solvay do Brasil, but instead it allocated to CBCC a portion of the G&A expenses of only its Belgian parent, Solvay & Cie. Petitioners argue that in the less-than-fair-value (LTFV) investigation of this case CBCC acknowledged that Solvay do Brasil performed some services on CBCC's behalf, and that in this review CBCC has not stated that Solvay do Brasil did not do the same. Therefore, petitioners argue, the Department should calculate the portion of Solvay do Brasil's G&A expenses that is attributable to CBCC, and include those expenses in CBCC's COP and CV.

CBCC argues that the consolidated financial statements of Solvay & Cie include the financial results of Solvay do Brasil as well as CBCC and some two dozen other affiliated companies in the Solvay Group. Thus, by calculating G&A expenses on the basis of the consolidated statements of the Solvay Group, CBCC argues, not only did the Department allocate G&A expenses incurred by Solvay do Brasil on behalf of CBCC, but also those of a number of companies throughout the world that did not perform any administrative services whatsoever for CBCC.

Department's Position

We agree with the respondent that the allocation of its overall parent company's G&A expenses was correct and that to also add the G&A expenses of Solvay do Brazil would double-count the G&A expenses of Solvay do Brazil, which are included in the consolidated financial statements. Accordingly, for these final results we have continued to apply the consolidated G&A expenses reported by CBCC.

Comment 25

Petitioners argue that the Department erred in its calculation of CBCC's interest expense by calculating it on the basis of the interest expense of CBCC's ultimate Belgian parent, Solvay & Cie. They argue that the Department should instead calculate it on the basis of the combined interest expense of CBCC and its Brazilian parent, Solvay do Brasil. In support of their argument, they point out that there is evidence on the record that there are loans between Solvay do Brasil and CBCC, whereas there is no evidence on the record that there are any intercompany transactions or borrowing between CBCC and Solvay & Cie. Furthermore, they argue that the

Brazilian firms normally would borrow in Brazilian credit markets or from Brazilian banks. Moreover, in the final results of the first administrative review of this order, and in *Ferrosilicon from Brazil; Final Determination,* the Department used the financial statements of Solvay do Brasil to calculate CBCC's interest expenses.

CBCC argues that the Department's well-established practice is to calculate financial expenses based on the consolidated statements at the parent company level. *See Ferrosilicon from Brazil; Final Determination* at 736. In prior segments of this proceeding the Department consolidated the financial expenses of CBCC and Solvay do Brasil because CBCC had not submitted the consolidated financial statements of its Belgian parent, Solvay & Cie. In this review CBCC provided such consolidated financial statements. They show, CBCC states, that the financial results of both CBCC and Solvay do Brasil are consolidated with those of the Solvay Group. Therefore, CBCC argues, it is proper for the Department to use these consolidated financial statements pursuant to its ''well-established practice of deriving net financial costs based on the borrowing experience of the consolidated group of companies.'' *See New Minivans from Japan,* 57 FR 21937, 21946 (May 26, 1992).

Department's Position

We agree with CBCC. Both parties urge the Department to use interest expenses reflecting the consolidated financial results of the parent and its subsidiaries. However, the petitioners would have us refer only to the financial results of CBCC and its immediate Brazilian parent, while CBCC would have us use the global corporate interest expense. The petitioners' recommendation is internally inconsistent because, while they state that Department policy is to use fully consolidated results, they urge us to rely on only partially consolidated results (those of CBCC and Solvay do Brasil).

Our policy is to base interest expenses and income on consolidated financial statements. We explained our basis for this position in *Silicon Metal from Brazil; First Review Final Results* as follows:

> Since the cost of capital is fungible, we believe that calculating interest expense based on consolidated statements is the most appropriate methodology. (*see, e.g., Final Determination of Sales at Less Than Fair Value, Small Business Telephones from Korea,* 54 FR 53141, 53149 (December 27, 1989), *Final Results of Antidumping Duty Administrative Review, Brass Sheet and Strip from Canada,* 55 FR 31414, 31418–13418–13419 (August 2, 1990), and *Final Determination of Sales at Less Than Fair Value, Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, et al.,* 54 FR 18992, 19074 (May 3, 1989)).

See Silicon Metal from Brazil; First Review Final Results at 42807. Also see *Ferrosilicon from Brazil; First Review Final Results* at 59412.

While we did use the consolidated financial statement of CBCC and Solvay do Brasil in prior reviews of this order and in *Ferrosilicon from Brazil; Final Determination,* in those segments of the proceeding we did not have the consolidated statement of Solvay & Cie on the record. Accordingly, for these final results of review, we have used the consolidated financial statement of Solvay & Cie for the interest expense.

Comment 26

Petitioners argue that the Department erred in its calculation of CBCC's and RIMA's USP by adding to it the weighted-average amount of ICMS, PIS, and COFINS taxes reported for home market sales. They argue that this addition was improper because under the recent amendments to the antidumping law, the Department is to make no addition to USP for home market taxes. Rather, they argue, when based on home market prices, the Department should reduce NV by:

> [t]he amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product. . . .

See 19 U.S.C. § 1677b(a)(6)(B)(iii). Furthermore, petitioners argue that under this provision, the Department may not reduce NV by the amount of PIS and COFINS taxes reported for home market sales because they are gross revenue taxes. Thus, they are not ''imposed directly upon the foreign like product,'' as required under the statute in order to deduct them from NV.

CBCC argues that the recent amendments to the U.S. antidumping laws require the Department to use tax-neutral methodologies for its dumping calculations. Accordingly, CBCC argues, it is proper for the Department to add to USP the weighted-average amount of ICMS, PIS, and COFINS taxes imposed on domestic sales because, by adding the same amount of taxes to the USP as that collected on the home market sales, the Department makes ''apples-to-apples'' comparisons.

CBCC also argues that, even though the PIS and COFINS taxes are gross revenue taxes, this does not mean ''they are not imposed directly upon the foreign like product,'' as petitioners allege. Whether or not they are shown as a separate line item on the invoice is immaterial, CBCC argues, as long as they are embedded or included in the price of the sale. Furthermore, CBCC argues, the CIT has upheld the Department's practice of making an adjustment for taxes embedded in sales prices. *See Daewoo Electronics Co., Ltd. v. International Union of Electronic, Electrical, Technical, Salaried and Mach. Workers, AFL–CIO,* 6 F.3d. 1511, 1516–17 (Fed. Cir. 1993). Moreover, CBCC argues that the PIS and COFINS taxes meet the two requirements of 19 U.S.C. § 1677b(a)(6)(B)(iii) (quoted above). First, PIS and COFINS taxes are imposed on gross home market sales revenue of silicon metal, but are not ''collected'' on export sales. Second, although PIS and COFINS taxes are not shown as a separate line item on the invoice, they are ''included'' in that price because they are embedded in such price.

RIMA argues that the Department should be guided by the principle of tax neutrality that it re-stated in the final results of *Silicon Metal from Brazil; Second Review Final Results.* Accordingly, RIMA argues, the Department should add to the USP the absolute amount of ICMS taxes as well as the absolute amounts of PIS/COFINS taxes collected on home market sales, pursuant to 19 U.S.C. § 1677a(c)(2)(B), 19 U.S.C. § 1677b(a)(6)(B)(iii), and 19 U.S.C. § 1677b(a)(6)(C)(iii). To add ICMS and PIS/COFINS taxes to NV without a corresponding adjustment to the USP, RIMA argues, would create dumping margins due solely to indirect taxes where none would otherwise exist.

Minasligas argues that the Department erred by failing to deduct from NV the PIS, COFINS, and ICMS taxes due on Minasligas' home market sales. Minasligas argues that this failure was a violation of 19 U.S.C. 1677b(6)(B)(iii), cited above. Minasligas argues, with respect to the PIS and COFINS taxes, that because these taxes are not collected on export sales, they must be deducted from NV prior to the comparison to USP. As for the ICMS tax, Minasligas argues that under the statute the Department must deduct from NV the amount by which the home market ICMS tax due exceeds the amount of ICMS tax due on U.S. sales. This deduction is necessary, Minasligas argues, to account for the difference in ICMS tax which has been rebated or not collected upon exportation, as directed in 16 U.S.C. 1677b(6)(B)(iii).

Minasligas also argues that, in the alternative, if the Department does not deduct the PIS, COFINS, and the correct amount of ICMS taxes from NV, then, in the alternative, it must add the absolute amount of these taxes to USP in order to achieve tax neutrality. As another alternative, Minasligas argues that the Department should make a circumstance-of-sale (COS) adjustment for the tax differential by deducting from the NV the absolute amount of the tax difference between USP and NV.

Petitioners argue that the Department was correct in adding the PIS and COFINS taxes to Minasligas' home market sales prices because it had reported its home market prices net of these taxes, and thus understated the gross unit prices. Therefore, petitioners argue, the Department must add the PIS and COFINS taxes to Minasligas' home market prices in order to determine the actual prices that Minasligas charged, which are the proper starting point for the calculation of NV. Furthermore, petitioners argue, under section 773(a)(6)(B)(iii) of the Act, NV may be reduced only by taxes imposed directly upon the ''foreign like product or components thereof.'' Petitioners argue that because the PIS and COFINS taxes are calculated based on gross receipts (excluding receipts from export sales), they are not imposed ''directly upon the foreign like product,'' and therefore may not be deducted from NV.

Moreover, petitioners argue that in similar situations in the past the Department has not made an adjustment for gross revenue taxes. In support of this argument they first note that the language of 19 U.S.C. 1677b(6)(B)(iii) is virtually identical to the language of 772(d)(1)(C), which was, they state, the parallel provision in effect prior to the enactment of the URAA, and which provided for an upward adjustment to USP. They then note that in *Silicon Metal from Argentina* the Department determined that two Argentine taxes (which petitioners allege are almost identical to Brazil's PIS and COFINS taxes) did not qualify for an adjustment to USP because they were gross revenue taxes. *See Silicon Metal from Argentina, Final Determination of Sales at Less Than Fair Value,* 56 FR 37891, 37893 (August 9, 1991).

Petitioners also argue that the PIS and COFINS taxes do not qualify for a COS adjustment pursuant to 19 U.S.C. § 773(a)(6)(C)(iii) for the same reason that they do not qualify for an adjustment to NV pursuant to 19 U.S.C. § 773(a)(6)(B)(iii) of the Act. The Department's regulations specify that the Department will limit allowances for differences in the circumstances of sales ''to those circumstances which bear a direct relationship to the sales compared.'' *See* 19 CFR § 353.56(a)(1). Petitioners argue that because PIS and COFINS taxes are not imposed on silicon metal transactions, but instead are assessed on gross receipts from operations, they are not directly related to specific sales and therefore do not qualify for a COS adjustment.

Department's Position

We agree with petitioners that recent changes to the antidumping law make no allowance for additions to USP for home market taxes. Thus, to achieve tax neutrality in these final results of review, we have deducted relevant taxes from NV, and have not added them to USP. This approach in is accordance with 19 U.S.C. § 1677b(a)(6)(B)(iii). However, we agree with Minasligas that in order to achieve tax neutrality with respect to the ICMS tax we should deduct from NV only the amount of the difference between ICMS tax due on home market sales and ICMS tax due on U.S. sales. We have done so in these final results of review.

We also agree with petitioners that information on the record demonstrates that the PIS and COFINS taxes are taxes on gross revenue exclusive of export revenue. Thus, in accordance with our determination in *Silicon Metal from Argentina,* we determine that these taxes are not imposed ''directly upon the merchandise or components thereof.'' Thus, we have no statutory basis to deduct them from NV. We also agree with petitioners that because the PIS and COFINS taxes are gross revenue taxes, they do not bear a direct relationship to the sales, and therefore do not qualify for a COS adjustment. Therefore, in these final results of review we have not made an adjustment for PIS and COFINS taxes in the margin calculation.

Comment 27

Petitioners argue with respect to all respondents that the Department should include profit in CV, and that the foreign like product that should be excluded from the profit calculation as outside the ordinary course of trade includes sales disregarded as below cost, sales of off-quality merchandise, and sales to related parties at prices that are not at arm's length.

Department's Position

We agree that the calculation of CV should include profit. Where we used CV in the margin calculation in these final results of review and the respondent had above-cost sales, we have calculated profit based on above-cost home market sales of commercial-grade silicon metal sold at arm's length prices. Where a respondent had no above-cost sales, but its financial statement indicates that it had profits, we based the profit calculation on the respondent's financial statement. Where a respondent had no above-cost sales and its financial statement indicated the company experienced losses rather than profits during the calendar year, we have calculated profit based on the weighted-average profit ratios of other respondents who reported profits on their financial statements.

Comment 28

Petitioners argue that the Department erred in its calculation of RIMA's COP by using incorrect figures for depreciation. The figures the Department used were depreciation expenses that RIMA submitted to the Department at verification. (Subsequent to publication of the preliminary results the Department solicited additional information from RIMA regarding its depreciation. Petitioners submitted separate comments regarding that information, as described below.) Petitioners argue regarding RIMA's original depreciation figures that the reported depreciation is massively understated. As support for this assertion, they cite the independent auditor's report accompanying RIMA's 1994 and 1995 financial statements. These reports give the independent auditor's opinion as to what RIMA's depreciation and amortization would be if RIMA recognized them on their financial statements. Comparing the independent auditor's estimate of depreciation with those submitted by RIMA for this review, petitioners argued, shows that the numbers given by the independent auditors are much higher than those given by RIMA in this review.

Furthermore, petitioners argued that RIMA's depreciation calculation is flawed in numerous ways. Among them:

1. Its calculation of the purported company-wide depreciation for all its products included only depreciation for machinery and equipment at its Varzea da Palma (VZP) plant, and thus excluded the depreciation for the machinery and equipment at the other plants;

2. It is based on an accelerated depreciation rate. Petitioners argue that it is the Department's practice to reject accelerated depreciation of assets where such accelerated depreciation fails to allocate the cost of the asset on a consistent basis over the life of the asset.

3. RIMA's 1995 audited financial statements reported fixed asset values for buildings, vehicles, furniture, and implements, while RIMA's depreciation

worksheets prepared for this review do not reflect depreciation for these assets.

4. RIMA's depreciation worksheets do not appear to contain line items for amortization of its deferred expenses, which were incurred to set up, expand, and modernize RIMA's production facilities and to develop new plants.

Moreover, petitioners argue that RIMA improperly changed its depreciation calculation method since the preceding review. The 93–94 verification report says:

> Since each piece of equipment was dedicated to the production of certain products, RIMA reported the depreciation expense from the cost center for silicon metal. RIMA allocated the remaining overhead expenses [including depreciation] based on the relative number of hours worked on silicon metal production versus total hours worked on all products.

See Verification Report, October 25, 1995, p. 19 (public version). In the 94–95 review, petitioners allege, RIMA departed from this methodology by calculating company-wide depreciation and allocating it to products based on the relative cost of sales of the products. Department practice requires that respondents show that their historically-used method is distortive before they can use a new method. RIMA, petitioners allege, made no such showing.

Finally, petitioners argue that RIMA performed an improper allocation of its depreciation which resulted in depreciation for some equipment used exclusively for silicon metal being allocated to other products. Moreover, they argues that where allocation of depreciation is appropriate, RIMA's allocation, which was based on cost of sales, is improper because cost of sales does not reflect the extent to which assets were used to produce individual products during a period. This is because cost of sales excludes the cost of inventory production and includes the cost of products sold out of inventory.

For the above reasons, petitioners argue that the Department should obtain the necessary information to calculate RIMA's depreciation properly, or, in the alternative, it should calculate RIMA's depreciation based on the facts available.

In response to petitioners' comments regarding its original calculation of depreciation, RIMA argues that petitioners base their comments on incorrect assumptions or on a fundamental misunderstanding of RIMA's depreciation calculations. RIMA argues that while it is true that the independent auditor's estimate of depreciation is different from RIMA's, the difference is accounted for by the fact that the independent auditor's estimate is a cumulative figure representing depreciation that has occurred since RIMA stopped recording depreciation on its financial statement (which has been at least five years), whereas the depreciation RIMA reported to the Department is the depreciation only for the POR. RIMA also state that petitioners were mistaken regarding the number of RIMA's plants that produce silicon metal, and thus are mistaken in their own estimate of what RIMA's allocated silicon metal depreciation should be.

Furthermore, RIMA states that petitioners have made several other errors in their analysis. First, RIMA argues that because petitioners have misread the verification exhibit showing the calculation of depreciation, they are in error in stating that the reported depreciation takes account only of the VZP plant's equipment. In fact, RIMA states, it included eight items in its depreciation worksheet, including deferred expenses and categories of equipment other than equipment at the VZP plant. Second, RIMA states that the depreciation of the assets takes into account the effect of hyperinflation because the acquisition values of such assets are stated in UFIR, which are then converted into local currency for the months concerned. Third, petitioners were incorrect, RIMA argues, in saying that its depreciation methodology is a change from prior reviews. In fact, RIMA argues, it is the same calculation methodology used in *Silicon Metal from Brazil; Second Review Final Results*, which the Department accepted.

Finally, RIMA argues that the Department verifiers noted nothing unusual or incorrect in RIMA's depreciation calculations. Therefore, RIMA concludes, the Department should rely on these findings.

On November 14, 1996 the Department solicited additional information from RIMA. We requested that RIMA submit depreciation expenses that tied to the auditor's statements, and which should consist of the sum of the depreciation expenses for assets only associated with the production of silicon metal and an allocated portion of the depreciation expenses for other, common assets. In its response, in addition to providing information, RIMA reiterated that the auditor's stated depreciation amounts should not be used as a basis for the analysis because the auditors did not consider whether RIMA's assets had been fully depreciated when they calculated the estimated depreciation expenses for the years reported in the financial statement. RIMA argued that this methodology overstates depreciation significantly because during the normal course of business, every year, assets become fully depreciated and, therefore, cannot be used as a basis for determining depreciation expenses.

In commenting on RIMA's response to the Department's November 14, 1996 supplemental questionnaire, petitioners stated that RIMA's new response was deficient. Petitioners state that RIMA did not respond to the Department's request for information on the replacement cost for silicon metal assets or for depreciation expenses for silicon metal assets. Because RIMA allegedly failed to respond to the Department's request for information, petitioners argue that the Department should use facts available for RIMA's depreciation.

Department's Position

We agree with petitioners that both RIMA's initial depreciation calculation and the depreciation calculation submitted in response to the Department's November 14, 1996 supplemental questionnaire were deficient. As petitioners point out, RIMA's original calculation did not include all assets, and therefore is understated. Furthermore, RIMA's response to the Department's November 14, 1996 submission did not respond to all the Department's requests for information. Rather than providing requested information, RIMA calculated depreciation in a way not in conformity with the Department's instructions. Without the requested information the Department cannot properly determine RIMA's depreciation expenses during the POR.

Where a respondent has not responded to a request for information, the Department may resort to facts available. As facts available the Department has chosen to use one-half of the audited total RIMA depreciation expenses for each fiscal year as RIMA's total POR depreciation expenses, and to allocate to silicon metal production a share of that total based on the highest monthly percentage of cost of goods sold accounted for by silicon metal, as appearing in verification exhibit OH1. We allocated one-twelfth of this total, in turn, to each month of the POR.

Comment 29

Petitioners argue that the Department erred in its calculation of RIMA's COP by using RIMA's reported cost for its self-produced charcoal. RIMA reported the price of charcoal from unrelated suppliers, and said it was reflective of the fair market value for charcoal.

Petitioners argue that this claim would be relevant if RIMA had acquired charcoal from related suppliers, but this is not the case; RIMA produced the charcoal itself. Thus, petitioners argue, prior to the final results the Department must obtain RIMA's full cost of producing charcoal (including all operating and materials costs and depreciation and amortization) or use facts available.

In addition, petitioners argue that at the verification in this review RIMA revealed for the first time that one of its plants produced quartz, a major input for the production of silicon metal. Petitioners argue that for the same reasons as given above with respect to charcoal, the Department must either obtain RIMA's full cost of producing quartz or use facts available.

RIMA argues the related entities from which it purchases charcoal are not departments or subdivisions of RIMA Industrial S/A, and that, therefore, the charcoal it purchases from them is not ''internally produced.'' Moreover, it argues that its use of the prices from third-party suppliers was justified in light of statutory provisions. Because the prices from its related suppliers were, it admits, not at arms-length, they could not be used in the cost calculation because 19 U.S.C. § 1677b(f)(2) says that prices between related companies can be considered in determining the cost of materials in CV only when such prices ''fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.'' Furthermore, because the Department could not use the prices from its related companies, RIMA argues that it was justified in using the prices of third-party suppliers as a surrogate for the prices from its related entities, because the statute provides that when ''a transaction is disregarded * * * and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons that were not related.'' *See* 16 U.S.C. § 1677b(f)(2). Under this provision of the statute, RIMA argues, there is no basis for the petitioners' suggestion that the Department require RIMA to calculate the fabrication costs of charcoal for its related suppliers. Moreover, RIMA argues, the Department has used this methodology in other cases, such as in *Ferrosilicon from Brazil; Final Determination* at 738.

With respect to petitioners' argument that RIMA purchased quartz from related suppliers, RIMA argues that petitioners' argument is unfounded. It states that there is no evidence in the record that RIMA purchased quartz from any related suppliers.

Department's Position

At the Department's request, RIMA submitted information relating to the COP of charcoal incurred by RIMA's affiliates during each month of the POR. However, we noted that RIMA did not report reforestation, depreciation, depletion, and exhaustion costs. Therefore, because we cannot rely on RIMA's reported costs for self-produced charcoal, we have used the prices RIMA paid for charcoal to unrelated suppliers to value RIMA's charcoal costs.

With respect to quartz, we agree with respondent that there is no information on the record indicating that RIMA purchased quartz from affiliated suppliers during this POR. Therefore, we have has not adjusted RIMA's reported direct material costs for any supposedly self-produced quartz.

Comment 30

Petitioners argue that the Department erred in its calculation of RIMA's COP by using RIMA's reported G&A expenses. They argue that the Department should reject RIMA's reported G&A expenses because RIMA did not calculate them using the Department's standard methodology for calculating G&A expenses, which is to multiply the COM by the ratio between the G&A expenses and the cost of sales reported in the respondent's audited financial statements. Moreover, petitioners allege that the method RIMA used was flawed for two reasons. First, it was based on monthly G&A expenses. The Department expressly rejected use of monthly G&A expenses in the 1991–92 review in this proceeding. *See Silicon Metal from Brazil; First Review Final Results.* Second, RIMA's calculation used 1994 data to derive monthly G&A expenses for 1995.

In addition, petitioners argue that in its computation of G&A expenses used in the CV calculation RIMA made one additional mistake. That mistake was to include an offset for ''other operational income'' in the monthly G&A calculations. Petitioners argue that this ''other operational income'' consisted of an alleged inventory holding gain due to hyperinflation. The Department should deny this offset, petitioners argue, because its practice is to allow an offset to G&A only for income related to the production of the subject merchandise. The ''other operational income'' here, petitioners argue, is an accounting adjustment that does not constitute income. Moreover, petitioners argue that some of this income is unrelated to silicon metal, but is instead related to RIMA's other products. Therefore, petitioners conclude, the Department should deny this adjustment.

RIMA argues that it reported its G&A costs based on its accounting records kept in the normal course of business. Thus, RIMA argues, the Department should use those reported costs pursuant to 19 U.S.C. § 1677b(f)(1)(A), which states that ''costs shall be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country * * * and reasonably reflect the costs associated with the production and sale of the merchandise.'' Furthermore, RIMA argues, RIMA allocated its G&A costs to silicon metal based on the ratio of the cost of goods sold, which is the normal allocation method the Department uses. *See e.g., Ferrosilicon from Brazil; Final Determination* at 734.

Furthermore, RIMA argues that the Department properly adjusted the G&A costs used in CV to account for a one-time reevaluation of the company's inventory. In support of this argument, RIMA points to the verification report, which says, ''due to hyperinflation in Brazil in 1994, Rima reassessed the value of the company's inventory, resulting in a 15,000,000,000 reais increase in inventory value * * * Rima provided the inventory re-evaluation report indicating the methodology and amount associated with the re-evaluation, as well as an independent auditor's report approving the inventory re-evaluation.'' *See* October 3, 1996 verification report, at 15.

Department's Position

We agree with petitioners that our standard methodology in calculating G&A expenses is to multiply the COM by the ratio between the G&A expenses and the cost of sales reported in the respondent's audited financial statements. *See Silicon Metal from Brazil; First Review Final Results,* at 42809. We have used this method in our final results of this review.

Furthermore, the Department has determined that the adjustment made by RIMA to its inventory balance should not be allowed as a reduction to the company's G&A expense. RIMA chose to restate the historical value of its inventory balances by recognizing a one-time increase to reflect the current value of these assets. The accounting entries for this restatement included a credit to the net equity of the company that was recognized through RIMA's income statement. Here, the record does not indicate that this credit, or offset, can be characterized as income that reduces RIMA's production cost for silicon metal. Consequently, we have made an adjustment to G&A expense to exclude this offset.

Comment 31

Petitioners argue that the Department erred in its computation of RIMA's COP by using the financial expenses as RIMA reported them. Petitioners argue that RIMA's method of calculating its financial expenses was flawed because RIMA did not perform its computation using the Department's standard formula. That formula is, according to petitioners, to multiply COM by the ratio between the financial expenses and cost of sales reported in the respondent's audited financial expenses. Instead, RIMA calculated financial expenses for silicon metal for the months of the POR during 1994 based on its company-wide financial expenses in each month multiplied by the percentage of its cost of sales in that month accounted for by sales of silicon metal. Additionally, RIMA derived monthly financial expenses for the months of the POR in 1995 using its 1994 data.

RIMA argues that the Department should accept RIMA's calculation of financial expenses because it reported these costs as they are recorded in its accounting records in the normal course of business. Thus, accepting them is in accordance with 19 U.S.C. § 1677b(f)(1)(A), which states that:

> [c]osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer.

Department's Position

In order to ensure uniformity in our treatment of different companies and consistency in our calculation methodology from one review to the next, we have found it necessary to adopt standard formulas for the calculation of certain expenses. We agree with petitioners that our method of calculating financial expenses is to multiply COM by the ratio between the financial expenses and cost of sales reported in the respondent's audited financial expenses. We have used this methodology in these final results of review for all companies. This methodology is not inconsistent with RIMA's accounting records because it is based on information contained in RIMA's financial statement.

Comment 32

Petitioners argue that the Department erred in its calculation of RIMA's and Minasligas' U.S. credit expenses by using the shipment date that these companies reported in their sales listings. With respect to RIMA, petitioners argue that using RIMA's reported shipment date results in an understatement of U.S. credit expenses because RIMA reported as the shipment date the date on which it shipped the last lot of each sale from its plant to the Brazilian port, rather than the date on which it shipped the first lot of each sale from its plant to the Brazilian port. Therefore, petitioners argue, the Department should determine the credit expenses for each sale based on the simple average of the number of days between the date of payment and the date of shipment from the plant to the port for each partial shipment from the plant.

With respect to Minasligas, petitioners argue that the shipment date Minasligas reported was the bill of lading date, and not the date of shipment from Minasligas' plant. In a similar situation in the preliminary results of the third review of this order, the Department used the date of sale as the date of shipment; petitioners argue that the Department should do the same here.

RIMA argues that the Department properly used the reported shipment dates because it ships its U.S. sales from its plant to the Brazilian port in lots, and a lot is not completed until all shipments from the plant have been made. Therefore, RIMA argues, it is proper for the Department to consider the date of the last shipment from the plant as the date on which the lot was shipped from the plant.

Department's Position

We agree with petitioners in part. With respect to RIMA, we agree that where a U.S. sale is shipped from the plant to the port in lots, a computation of credit based on the average credit period would better reflect the credit expenses borne by the respondent than would a computation based on the shipment date of either the first or last lot. In these final results of review we have calculated credit using an average credit period based on information RIMA provided in exhibit 13 of its April 30, 1996 SQR.

We disagree with petitioners with respect to Minasligas. While Minasligas did report the bill of lading date as the shipment date for its U.S. sales, it also reported the invoice date for each sale. This invoice date is the date of shipment from the plant. *See* Minasligas' October 25, 1995 questionnaire response, exhibit C–1. Thus, there is no need to use the date of sale as the date of shipment as petitioners suggest. In these final results of review we have calculated credit using the invoice date as the start of the credit period for those sales for which the date of invoice was prior to the date of receipt of payment.

Comment 33

Eletrosilex argues that the Department erred in failing to add to USP the PIS, COFINS, and consumption taxes charged on its home market comparison sales. It argues, with respect to the PIS and COFINS taxes, that this failure was a violation of the Department's policy of calculating tax-neutral dumping assessments. It argues, with respect to the consumption taxes, that this failure was a violation of the change in the treatment of consumption taxes that the Department announced in the final results of the second review of this case. There the Department stated:

> Where merchandise exported to the United States is exempt from the consumption tax, the Department will add to the U.S. price the absolute amount of such taxes charged on the comparison sales in the home market.

See Silicon Metal from Brazil; Second Review Final Results, at 46764. Eletrosilex argues that because the ICMS tax was not included in the USP calculations, the Department's failure to add to USP the absolute amount of consumption taxes charged on its home market sales was a violation of the Department's announced policy of adding to the USP ''the absolute amount of such taxes charged on the comparison sales in the home market.''

Petitioners argue that, with respect to the PIS and COFINS taxes, that the antidumping law, as amended by the URAA, does not provide for an upward adjustment to EP for home market taxes imposed directly upon ''the merchandise or components thereof'' which have not been rebated or collected on the exported merchandise. Instead, under the new law, NV may be reduced by those taxes. Furthermore, petitioners argue that for the reasons given above under comment 26, the PIS and COFINS taxes do not qualify for a reduction to NV.

Petitioners argue, with respect to the ICMS tax (*i.e.,* consumption tax), that evidence on the record indicates that, contrary to Eletrosilex's statement, Eletrosilex's reported U.S. prices did in fact include the ICMS tax due on its U.S. sales. Furthermore, petitioners argue, Eletrosilex's argument is relevant only when the Department bases its margin calculations on price-to-price comparisons, and after the Department makes the necessary corrections in its calculations for Eletrosilex that the petitioners have identified in their case brief, the Department will base its margin calculations for Eletrosilex on CV.

Department's Position

We agree with petitioners that evidence on the record indicates that ICMS taxes are assessed on Eletrosilex's U.S. sales. In these final results of review, in order to calculate the dumping margin on a tax-neutral basis for price-to-price comparisons, we have deducted from NV the amount of ICMS tax on the home market sale that exceeds the amount of ICMS tax collected on the U.S. sale in accordance with § 773(a)(6)(B)(iii). For our position with respect to the PIS and COFINS taxes, see comment 26 (above). For our treatment of the ICMS tax due on U.S. sales when NV is based on CV, see the Department's position in response to comment 7.

Comment 34

Eletrosilex argues that the Department erred in its calculation of home market imputed credit by dividing an allegedly annual interest rate by 30, rather than by 365.

Petitioners argue that the interest rate the Department used in its calculation was a monthly rate, and that the Department was therefore correct in using 30 in the denominator.

Department's Position

We agree with petitioners. For the credit calculation we used the monthly rates from the state bank of Minas Gerais, which Minasligas reported in exhibit B–2 of its October 25, 1995 questionnaire response. This exhibit states that these rates are monthly rates. Therefore, because these are monthly rates, 30 is the appropriate denominator.

Comment 35

Eletrosilex argues the Department erred in its calculation of the foreign unit price in dollars (FUPDOL) by converting three values into U.S. dollars using the exchange rate of the date of sale, rather than the date of shipment.

Petitioners argue that the Department used the correct exchange rates because the statute says that the Department "shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise * * *" *See* 773A(a) of the Act.

Department's Position

We agree with petitioners. Because the date we use in making currency conversions is governed by the statute, in these final results we have used the exchange rate of the date of the U.S. sale in making currency conversions.

Comment 36

Eletrosilex argues the Department erred in its computation of COP by doubling the amount of its reported depreciation. (Eletrosilex reported depreciation for only the six months of the POR in 1995, and no depreciation for the six months of the POR in 1994.) It argues that its recording of no depreciation for 1994 was fully consistent with Brazil's generally accepted accounting principles (GAAP). Its earlier application of accelerated depreciation, Eletrosilex argues, required it to interrupt the application of depreciation for the first part of the POR. It is an error, it argues, for the Department to charge depreciation beyond that legitimately accounted for under the law.

Petitioners argue that the Department was correct in including an amount for 1994 depreciation in Eletrosilex's COP. They argue that the auditor's report which accompanied Eletrosilex's 1994 financial statement shows that Eletrosilex is incorrect in stating that its recording of no depreciation for 1994 was in accordance with Brazilian GAAP. That auditor's report says that "the company did not recognize * * * amounts corresponding to the depreciation of the fixed assets, as required by the accounting principles foreseen in the CORPORATE'S LEGISLATION and by the main accounting principles." *See* Eletrosilex's October 20, 1995 questionnaire response, at exhibit 8. Furthermore, petitioners argue, under established Department practice, it is distortive to use a lower depreciation rate (including a zero depreciation rate) in a review period to compensate for prior accelerated depreciation. *See Ferrosilicon from Brazil; Final Determination* at 738.

Department's Position

We agree with petitioner that evidence from Eletrosilex's financial statement indicates that Eletrosilex's accounting of depreciation was not in accord with Brazilian GAAP. For these final results of review, we have used the depreciation expenses as estimated by Eletrosilex's independent auditor, which were in accordance with Brazilian GAAP. *See* Eletrosilex's October 16, 1996 submission at exhibit 7.

Comment 37

Eletrosilex argues that the Department erred in its computation of its COP by incorrectly calculating the by-product revenue offset that it applied to Eletrosilex's COM. The firm argues that the Department was in error in calculating the offset based on the volume of the by-products sold, rather than the volume produced. Because much of the by-product production is not sold, it is only proper, Eletrosilex argues, that an allocation in terms of cost of production should be made to the product produced, rather than that portion of the product produced that is sold. In addition, Eletrosilex argues the Department should consider as by-products only ladle sculls, off-grades, and fines, and not slag or silicon metal of ingot bottom. Eletrosilex states that it does not consider slag or silicon metal of ingot bottom to be a production item, and does not include it in its production volume records.

Petitioners argue that the Department's practice does not support calculating an offset to COM based on the volume of by-products produced, but only on the volume sold.

Department's Position

We do not agree with Eletrosilex that the by-product offset should be applied to the volume of by-products produced. Our policy is to allow an offset only for actual revenue. In these final results of review we have offset production costs with all revenue that Eletrosilex reported from its sale of by-products. We have counted as by-products only ladle sculls, off-grades, and fines. See also comment 15 of the third review final results of review this order, being issued concurrently.

Comment 38

Eletrosilex argues that the Department should make an adjustment to its USP for duty drawback. It explains that in its questionnaire response it inadvertently failed to request an adjustment for duty drawback, but that it is entitled to one. Therefore, Eletrosilex argues that the Department should use the information it submitted in its case brief to calculate the adjustment. It argues that the duty drawback adjustment is essential to the Department's responsibility to make duty assessments based on full and accurate data.

Petitioners argue that Eletrosilex did not inadvertently fail to request an adjustment for duty drawback. In its questionnaire response, Eletrosilex specifically stated that ''it is not seeking a duty drawback for the period of review.'' *See* Eletrosilex's October 20, 1995, questionnaire response, p. 55. Moreover, petitioners argue that the Department should not consider Eletrosilex's request or the information about this newly-claimed adjustment that Eletrosilex submitted in its case brief because it is untimely under the Department's regulations. *See* 19 CFR 353.31(a)(1)(ii).

Department's Position

We agree with petitioners. It is a respondent's responsibility to make a timely claim for any requested adjustment. Under 19 CFR 353.31(a)(3) the Department may not consider unsolicited information submitted after the applicable time limit. That time limit in this review is 180 days after the date of publication of the initiation notice. *See* 19 CFR 353.31(a)(1)(ii). Because Eletrosilex submitted its duty drawback claim after that deadline, the information was untimely, and we did not make an adjustment for it in these final results of review.

Comment 39

CCM argues that in order for its cash deposit rate for future entries to reflect the appropriate dumping margin, the Department should issue the third review final results prior to, or concurrently with, issuance of the fourth review final results. If the Department issues the fourth review final results prior to the third review final results, CCM argues, CCM will continue to face the 93.2 percent cash deposit rate established in the LTFV investigation. In the alternative, if the Department does issue the third review final results after the fourth review, CCM argues that the Department should make clear in it cash deposit instructions that CCM's third review cash deposit rate should apply to all future entries because CCM was a no-shipper in the fourth review.

Department's Position

CCM's concern is resolved because the Department is issuing the results of both reviews concurrently.

Comment 40

CBCC argues that the Department erred in its computation of home market imputed credit by using an interest rate other than that which CBCC submitted. CBCC states that in its submission it calculated its imputed credit using a published short-term borrowing rate from a commercial lender because it had no short-term borrowings during the POR. Doing so, CBCC states, was in accordance with the Department's instructions as given in the supplemental questionnaire. Thus, CBCC argues, the Department should not have applied a different rate in its calculation of imputed credit.

Petitioners argue that the Department is under no obligation to use the interest rate data that CBCC provided, and that CBCC provided no basis for the Department to use CBCC's data instead of those used for the preliminary results of this review. Accordingly, petitioners argue, the Department should not use CBCC's data for the final results.

Department's Position

We agree with petitioners. In these final results of review, as in the preliminary results of review, we have calculated credit using the borrowing rates offered by the state bank of Minas Gerais. These rates are publicly available, and we have used them without exception for all respondents who reported no short-term borrowings of their own during the POR.

Comment 41

CBCC argues that the Department erred in its calculation of the variable NPRICOP (*i.e.*, the price we compare to COP in the cost test) by double-deducting part of the ICMS tax. It argues the Department made this mistake by deducting a variable representing the ICMS tax on the sale and also a variable, INLFTC2H, that represents the inland freight and the ICMS tax on the inland freight. CBCC argues that the former variable includes all ICMS tax on the sale, including that included in the variable INLFTC2H. Therefore, CBCC argues, the Department should not deduct INLFTC2H, but INLFTC1H, a variable that represents the inland freight net of the ICMS tax.

Petitioners argue that CBCC's argument is wrong because the ICMS tax that CBCC's customers pay on their purchases of silicon metal is not the same ICMS tax that CBCC paid for inland freight services. Because the two different ICMS tax amounts both reduce CBCC's net proceeds from home market sales, petitioners argue that the Department properly deducted both from CBCC's home market sales prices in the sales-below-cost analysis.

Department's Position

We agree with petitioners. Our review of the values CBCC reported under the variable representing the ICMS tax indicates that it reflects only the ICMS tax on the home market sale. Thus, the ICMS tax due on the inland freight must be deducted separately.

Comment 42

CBCC argues that the Department erred in its calculation of its COP by reducing its reported quantity of silicon metal production by the quantity of a by-product, ferrosilicon 95, without having made a corresponding offset to its COP for revenue gained from its sales of ferrosilicon 95. CBCC argues that this failure to grant an offset was a violation of the Department's practice regarding by-products.

Petitioners argue that the Department should limit any reduction in COP for revenue obtained from CBCC's sales of ferrosilicon 95 to net revenue (*i.e.*, revenue net of all selling expenses associated with the sales) from sales during the POR.

Department's Position

The Department first learned of these sales at the verification in June 1996. None of our exhibits contain information regarding the value of these sales or the selling expenses associated with them. Because CBCC did not claim this offset until it submitted its case brief, and because it is a respondent's responsibility to substantiate its claims for offsets, which CBCC has not done, in these final results of review we have not made an offset.

Comment 43

CBCC argues the Department erred in its margin computation by failing to convert the variable for bank charges from aggregate figures to per-unit figures.

Petitioners argue that the Department did in fact convert the bank charges into per-unit figures in its calculations.

Department's Position

We agree with petitioners. *See* the July 22, 1996 verification report at 15, and the SAS program at 824–847.

Comment 44

RIMA argues that the Department erred by including in its margin calculation a sale that entered U.S. customs territory during the previous POR. It argues that the date on which the Department relied in making its determination of this sale's date of entry was not the actual date of entry, and that therefore the Department should request additional information from the U.S. Customs Service regarding the entry date of this sale.

Petitioners argue that the correct date of entry into U.S. customs territory is the date the entry summary was filed in proper form. However, they argue that the date on which the Department relied regarding the particular sale which RIMA references was not in fact the date the entry summary was filed. They are in agreement with RIMA, however, that the sale at issue entered U.S. customs territory during the prior POR.

Department's Position

On October 21, 1996, the importer of the shipment in question submitted information on its imports. We have carefully reviewed the importer's submitted Customs documentation, and have determined that the Department was in error in its preliminary determination that the sale in question involved an entry during the POR. We have excluded this transaction from our analysis for the fourth administrative review, and have included it in our analysis of the third administrative review. However, we disagree with petitioners that the date of entry is necessarily the date on which the entry summary is filed in proper form. 19 CFR 141.68 allows for the possibility that formal entry may in some circumstances be dates other than the date the entry summary is filed.

Comment 45

Parties allege the following clerical errors:

• CBCC and petitioner argue the Department erred in its margin computation by failing to convert the variable for interest revenue from aggregate figures to per-unit figures.

• CBCC argues that the Department incorrectly calculated the credit period as the shipment date minus the payment date, rather than the payment date minus the shipment date.

• Petitioners argue that the Department erred by failing to deduct ''port charges'' from Eletrosilex's USP.

• Petitioners argue that the Department erred in its calculation of Minasligas' USP by adding inland freight charges to USP, rather than subtracting them.

• Petitioners argue that the Department neglected to take into account an expense that Minasligas reported under the variable name ''PORT CLER. EXP. DIRSELU.''

Department's Position

We agree, and have corrected these errors in these final results of review. Additionally, in these final results of review, unlike the preliminary results of review, we have made an adjustment to NV for Eletrosilex's U.S. post-sale warehousing expenses. We also changed the credit period used in the calculation of Minasligas' home market credit so that it is the payment date minus the shipment date, rather than the shipment date minus the payment date.

Comment 46

CBCC argues that the Department erred in its calculation of U.S. imputed credit by dividing an annual interest rate by 30, rather than by 365.

Department's Position

We disagree. The interest rate we used in the calculation of CBCC's U.S. imputed credit expenses was the average of the monthly rates for each of the twelve months of the POR, and not an annual rate. Therefore, 30 is the correct denominator. *See* September 4, 1996 CBCC preliminary results analysis memorandum, p. 4.

Final Results of Review

As a result of our analysis of the comments received, we determine that the following margins exist for the period July 1, 1994, through June 30, 1995:

Producer/manufacturer/exporter	Weighted-average margin (percent)
CBCC	0.29
CCM	[1] 5.97
Eletrosilex	17.22
Minasligas	57.54
RIMA	76.96

[1] No shipments during the POR; margin taken from the last completed segment in which there were shipments.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and NV may vary from the percentages stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of these final results of review for all shipments of silicon metal from Brazil entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act, and will remain in effect until publication of the final results of the next administrative review: (1) the cash deposit rates for the reviewed companies will be those rates listed above except for CBCC which had a *de minimis* margin, and whose cash deposit rate is therefore zero; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or in the LTFV investigation conducted by the Department, the cash deposit rate will be 91.06 percent, the ''all others'' rate established in the LTFV investigation.

This notice serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. § 1675(a)(1)) and 19 CFR 353.22.

Dated: January 3, 1997.

Robert S. LaRussa

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–755 Filed 1–13–97; 8:45 am]

BILLING CODE 3510–DS–P

federal register

Tuesday
January 14, 1997

Part III

Environmental Protection Agency

40 CFR Part 268

Land Disposal Restrictions Phase III—Emergency Extension of the K088 Capacity Variance; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 268

[EPA # 530–Z–96–PH3F–FFFFF; FRL–5676–4]

Land Disposal Restrictions Phase III—Emergency Extension of the K088 Capacity Variance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Land Disposal Restrictions (LDR) program of the Resource Conservation and Recovery Act (RCRA), EPA is extending the current national capacity variance for spent potliners from primary aluminum production (Hazardous Waste Number K088) for six (6) months. Thus, K088 wastes do not have to be treated to meet LDR treatment standards until July 8, 1997, six months from the current treatment standard effective date of January 8, 1997. EPA is extending the national capacity variance due to unanticipated performance problems by the treatment technology which provides most of the available treatment capacity for these wastes. As a result, the Agency does not believe that sufficient treatment capacity which minimizes short and long-term threats to human health and the environment posed by land disposal of the potliners is presently available. The length of the extension of the national capacity variance is based on EPA's best current estimate of the time it will take to modify, evaluate, and correct the current deficiencies in treatment performance.

EFFECTIVE DATE: January 8, 1997.

ADDRESSES: Supporting materials are available for viewing in the RCRA Information Center (RIC), located at Crystal Gateway One, 1235 Jefferson Davis Highway, First Floor, Arlington, VA. The Docket Identification Number is F–96–PH3F–FFFFF. The RCRA Docket is open from 9 a.m. to 4 p.m. Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials by calling (703) 603–9230. The public may copy a maximum of 100 pages from any regulatory document at mo cost. Additional copies cost $0.15 per page.

FOR FURTHER INFORMATION CONTACT: For general information, contact the RCRA Hotline at (800) 424–9346 (toll-free) or TDD (800) 553–7672 (hearing impaired). In the Washington, DC, metropolitan area, call (703) 412–9810 or TDD (703) 412–3323. For specific information, contact the Waste Treatment Branch (5302W), Office of Solid Waste (OSW), U.S. Environmental Protection Agency, 401 M Street S.W., Washington, D.C. 20460; phone (703) 308–8434. For information on the capacity analyses, call Pan Lee or Bill Kline at (703) 308–8440. For information on the regulatory impact analyses, contact Paul Borst at (703) 308–0481. For other questions, call John Austin at (703) 308–0436 or Mary Cunningham at (703) 308–8453.

SUPPLEMENTARY INFORMATION: Today's final rule as well as the K088 Fact Sheet and the Index to the Record of materials in the docket are available on the Internet. Follow these instructions to access the information electronically:

Gopher: gopher.epa.gov
WWW: http:///www.epa.gov
Dial-up: 919 558–0335

This report can be accessed off the main EPA Gopher menu, in the directory EPA Offices and Regions/ Office of Solid Waste and Emergency Response (OSWER)/Office of Solid Waste (RCRA)

FTP: ftp.epa.gov
Login: anonymous
Password: your Internet address

Files are located in /pub/gopher/ OSWRCRA.

SUPPLEMENTARY INFORMATION

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I. Background

A. The Existing Treatment Standard and National Capacity

Variance for Spent Potliners

On April 8, 1996, EPA promulgated a prohibition on land disposing spent potliners from primary aluminum production (Hazardous Waste K088) unless the waste satisfied the treatment standards for K088 established by EPA as part of the same rulemaking. (61 FR 15566, April 8, 1996.) Spent potliners are a highly toxic hazardous waste, whose hazardous constituents include cyanide (present in concentrations between 0.1 and 1 percent, which are quite high for such a toxic constituent), toxic metals, and polycyclic aromatic hydrocarbons (PAHs). See the Final BDAT Background Document for Spent Potliners from Primary Aluminum Reduction—K088, February 29, 1995. These wastes also contain high concentrations of fluoride. See generally *id.* at 15584–585. Previous improper management of spent potliners has resulted in widespread groundwater contamination with cyanide and fluoride, and was an important factor in EPA's decision to list these materials as hazardous wastes. See 53 FR 35412, September 13, 1988. The treatment standards for K088 wastes require substantial reductions in the total concentration of organic hazardous constituents and cyanide, and substantial reductions in the leachability of toxic metals and fluoride. See 61 FR 15626, April 8, 1996. The reduction in leachability is measured by application of the Toxicity Characteristic Leaching Procedure (TCLP), SW–846 Method 1311. Id.

These treatment standards are based upon performance of combustion technology plus stabilization treatment of combustion residues. Id. at 15584. The treatment standard for fluoride is based upon the performance demonstrated by the treatment process developed by Reynolds Metals Company during studies conducted as part of their application for delisting [1] treated K088 from hazardous waste regulation. See 61 FR 15585, April 8, 1996. Although treatment standards were based upon these technologies, any treatment technology (other than impermissible dilution) may be used to achieve these established numerical standards. Data in the administrative record indicate that these treatment standards are achievable by a number of different technologies, including combustion followed by stabilization of the residue. See the Final BDAT Background Document for Spent Potliners from Primary Aluminum

[1] EPA granted a final exclusion from the lists of hazardous wastes contained in 40 CFR 261.32 —i.e., a delisting— for certain solid wastes derived from the treatment of K088 at Reynolds Metals Company, Gum Springs, Arkansas (56 FR 67197, December 30, 1991). The delisting is based on treating the same parameters covered by the LDR treatment standard, and compliance is also measured by TCLP analyses for toxic metals, PAHs, cyanide, and fluoride. The status of this delisting is discussed further in section V.A. of this Notice.

Reduction—K088, February 29, 1995, available in the docket.

Notwithstanding that a number of different treatment technologies can achieve the treatment standard, in fact, virtually all existing treatment capacity is provided by a single operation, the Reynolds treatment facility located in Gum Springs, Arkansas. See 61 FR 15589, April 8, 1996; Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–4 to 4–11). The Reynolds process entails the crushing and sizing of spent potliner materials, the addition of roughly equal portions of limestone and a particular type of brown sand as flux, and the feeding of the combined mixture to a rotary kiln for thermal destruction of cyanide and PAHs. The process also is intended to reduce the mobility of soluble fluoride through the formation of insoluble calcium fluoride. Spent potliners (SPL) are generated in large volumes ranging from 100,000 to 125,000 tons annually.[2] Of the approximate 140,000 tons of treatment capacity EPA estimated was available, 120,000 tons are provided by Reynolds.[3] Because of this potential bottleneck, EPA was concerned enough about the possibility for administrative delays in obtaining access to Reynolds' process that the Agency delayed the prohibition effective date by granting a nine-month national capacity extension, pursuant to RCRA section 3004(h)(2), to assure that logistical difficulties were resolved before the prohibition on land disposal became effective. 61 FR 15589, April 8, 1996; Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–4 to 4–11).[4] The prohibition (and applicable treatment standards) consequently is scheduled to take effect on January 8, 1997.

II. Subsequent Events

Reynolds presently uses its process to treat its own spent potliner K088 wastes and those from other sources, and disposes most of the residue in a dedicated landfill (i.e. a monofill receiving only these treatment residues) located at the treatment site. The company is also using these residues as fill material in unlined pits at a Hurricane Creek, Arkansas mining site, and as a test all-weather road surface at the mining site. (Trip Report, EPA, October 30, 1996). The treatment process appears to be destroying PAHs as predicted, and to be reducing total cyanide concentrations from initial concentrations ranging from 975 mg/kg to 6350 mg/kg to residual levels of 50 mg/kg to 150 mg/kg.[5] For over two years, however, notwithstanding that the wastes as tested by the TCLP would have complied with the land disposal restriction treatment standards for the non-wastewater forms of K088, *actual* sampling data shows potentially high concentrations of hazardous constituents in the leachate from the dedicated monofill. As measured in September 1996, total cyanide concentrations in the leachate are 46.5 mg/L (the treatment standards for K088 wastewaters specify a concentration of 1.2 mg/L); arsenic concentrations are at 6.55 mg/L (treatment standard 1.2 mg/L); and fluoride concentrations are at 2228 mg/L (treatment standard 35 mg/L). (Gum Springs Leachate Analytical Results, Reynolds Metals Company, September 26, 1996).[6] Analysis of surface water run-off from treated SPL used as test roadbeds at the Hurricane Creek Mine found total cyanide concentrations in the leachate of 2.0 mg/L (the treatment standards for K088 wastewaters specify a concentration of 1.2 mg/L); arsenic concentrations are at 1.24 mg/L (treatment standard 1.2 mg/L); and fluoride concentrations are at 229 mg/L (treatment standard 35 mg/L). (Arkansas Department of Pollution Control & Ecology, November 12, 1996). The Gum Springs monofill leachate also has a pH of 12.75 to 13.5, exceeding levels identifying a waste as hazardous due to the characteristic of corrosivity.[7]

The Reynolds process thus appears to be performing significantly less well than anticipated. Indeed, it does not appear to be reducing mobility of hazardous constituents significantly more than occurs in disposal of *untreated* spent potliners. Landfill leachate data obtained from two hazardous waste landfill cells receiving approximately 40 percent untreated SPL shows cyanide concentrations of 11 and 14 mg/L, arsenic concentrations of 0.56 and 0.11 mg/L, and fluoride concentrations of 2.3 and 0.001 mg/L respectively. (Staff Communication; November 20, 1996, fax of analytical data reports for landfill cells L12 and L13, Chemical Waste Management of the Northwest, Inc., Arlington, Oregon). Toxic constituents in the untreated Oregon Landfill data are significantly lower than observed in the leachate from the treated waste in the Gum Springs landfill. The Agency notes that some dilution and neutralization probably occurs from leachate produced by other wastes in the Oregon landfill, so that a direct comparison of the two different leachate results is only partially appropriate. However, the Agency believes the comparison is still relevant in that K088 is presently being disposed in the Oregon landfill, and this same K088 stream would be diverted to the Reynolds facility if the Agency did not take action today. The data available indicate that a more concentrated and toxic leachate would result from the Reynolds facility.

The Agency believes that the increased mobility of cyanide, fluoride, and arsenic are due to the highly alkaline conditions that exist at Reynolds' Gum Springs monofill. In the case of cyanide, for example, alkali-metallic cyanide complexes are soluble,[9] and even insoluble iron cyanides can be solubilized under highly alkaline conditions.[10] While the total cyanide concentration in the treated waste has been greatly reduced by Reynolds' treatment process, cyanide remaining in the residue would be environmentally mobile and in fact does appear in high concentrations in the alkaline leachate from the Gum Springs landfill. As a result, almost all remaining cyanide is detected in the Gum Springs leachate, where at a more neutral pH, only soluble free cyanide

[2] Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–5 to 4–8). Because SPL are not generated continuously, and because the rate of generation fluctuates according to the amount of aluminum produced, it is not possible to estimate this figure with more accuracy. Theoretically, an average of approximately 110,000 tons annually may be used for purpose of assessing available treatment capacity. There are generation data submitted after LDR Phase III was published and please see the docket files: 4/10/96 letter attached to July 9, 1996 petition from aluminum smelters and Reynolds' 11/25/96 submission in the Attachment of November 25, 1996 notes.

[3] Background Document for Capacity Analysis for Land Disposal Restrictions, Phase III (February 1996, Volume I, pages 4–9 to 4–10).

[4] Reynolds challenged EPA's decision in the D.C. Circuit and attempted to obtain expedited review of its petition, but the D.C. Circuit denied Reynolds' motion.

[5] See Table 2, 56 FR 33004, July 18, 1991 and attachments to December 9, 1996 letter from Pat Grover to Mike Shapiro.

[6] EPA was not aware of these data until recently, and, in particular was not aware of these data during the rulemaking which established the K088 treatment standard. EPA notes further that the leachate from the landfill is being intercepted and collected by Reynolds, and so is not contaminating the environment at the treatment site. However, EPA also notes that there is no interception of leachate or runoff at the Hurricane Creek Mine Site.

[7] As it happens, this elevated pH could provide a clue to why the treatment process is operating less well than predicted, and could be rectifiable.

[9] Standard Methods for the Examination of Water and Wastewater, 16th Edition, APHA, AWWA, & WPCF, 1985, page 327.

[10] Id., page 330.

would be measured. In the case of the Oregon landfill, the leachate is of more neutral pH (i.e., pH 6.5 to pH 7.5) and only a small fraction of the constituents of concern are soluble even though the total concentration of toxics in the potliner being disposed is much higher. The Agency does not have information detailing the sources or properties of other hazardous wastes being co-disposed at the Oregon site, but again notes that their presence did not result in a more toxic leachate. EPA surmises that the co-disposed wastes provided some neutralization of the alkaline spent potliner. The extreme alkaline pH conditions that exist in the Gum Springs monofill were not anticipated by the Agency, and are not analogous to the test conditions (i.e. the TCLP) used to verify treatability and compliance with the delisting provisions.

III. EPA's Decision with Respect to Extending the National Capacity Variance

The root requirement of the land disposal restriction program is that treatment of hazardous wastes is to ''substantially diminish the toxicity of the waste or substantially reduce the likelihood of migration of hazardous constituents from the waste so that short-term and long-term threats to human health and the environment are minimized.'' RCRA section 3004(m)(1). To date, in the absence of a reliable means of quantifying when threats are minimized, EPA has implemented this requirement by requiring treatment to reflect the performance of Best Demonstrated Available Treatment technologies, in order to assure substantial reductions of a waste's toxicity and mobility before land disposal. See, e.g., 56 FR 6641 (Feb. 26, 1990).

There are certainly legitimate questions as to the degree of risk reduction through treatment needed to satisfy this minimize threat standard, and EPA has stated repeatedly that the statute does not require elimination of all threats or optimized treatment of each hazardous constituent in order to satisfy the requirement. See, e.g., *id.* at n. 1; 56 FR 12355, March 25, 1991. However, under the circumstances present here, EPA finds that the effectiveness of the Reynolds process, as operated, to minimize short-term or long-term threats sufficiently to satisfy the core statutory requirement must be seriously questioned. For instance, the levels of cyanide and arsenic (and also the less-toxic fluoride) in the leachate from the treated potliners is not significantly superior to that found when untreated potliners are landfilled, as explained above.

The statute further provides in section 3004(h)(2) that EPA shall establish the effective date of a land disposal prohibition on the earliest date on which ''adequate alternative treatment, recovery or disposal capacity *which protects human health and the environment* will be available''. (Emphasis added.) See also sections 3004 (d)(1), (e)(1) and (g)(5), which require that land disposal of hazardous wastes ultimately be protective if land disposal is not to be prohibited. See 60 FR at 14473 (March 2, 1995); 56 FR at 41168 (Aug. 19, 1991); *Natural Resources Defense Council* v. *EPA*, 907 F.2d 1146, 1171–72 (D.C. Cir. 1990) (dissenting opinion). EPA cannot but take notice of two facts relevant here to whether Reynolds'' process, as operated, provides treatment capacity which is protective of human health and the environment. First, because EPA has delisted the residues (see n.1 above and section V.A. below), Reynolds now disposes much of the treatment residue in a subtitle D unit. Although this unit appears to have adequate leachate collection and monitoring to prevent any immediate harm at the site, the monofill still lacks the safeguards subtitle C landfills have—such as double liners, financial responsibility, and more extensive monitoring and leachate collection. Second, Reynolds is placing some of the treatment residues as fill material in an unmonitored, unsupervised setting and no regulatory Agency has directly evaluated the potential for harm this type of disposal could be posing. While this use or disposal practice is presently legal under federal law, since the material is delisted, the Agency cannot say with any certainty (see RCRA sections (d)(1), (e)(1) and (g)(5)) that this practice protects human health and the environment. RCRA section 3004 (h)(2).[11]

EPA believes that treatment normally is adequate to be considered to be both minimizing threats to human health and the environment and to be protective of human health and the environment where there is substantial destruction of environmentally available toxics and/or substantial reduction of the mobility of toxic residuals. See 125 Cong. Rec. at S 9178 (statement of Sen. Chaffee introducing the provision which became RCRA section 3004(m) indicating that the land disposal restriction treatment standards are not to be technology forcing.) In almost all cases, simply meeting the treatment standards for the waste achieves this result. But where treatment is not operating so as to reduce environmental availability of key hazardous constituents appreciably more than disposal of untreated spent potliners, and where total and leachable arsenic may actually be increased by the treatment process, the Agency must question the adequacy of the treatment. Further, where disposal in subtitle C units may be safer than disposal of the residues in subtitle D landfills or in uncontrolled units, the Agency must seriously question the environmental consequences of expanded treatment operations at Gum Spring should the national capacity variance not be extended. The corrosivity and mobility of toxic constituents in the Gum Springs leachate, and the concentration of hazardous constituents in the leachate and runoff from the fill area, compels the Agency to find that the treatment process, as it is presently performing and as it includes disposal in non-subtitle C units, is not satisfying the requirement that threats posed by land disposal of the wastes be minimized and that the available treatment capacity be protective of human health and the environment.

In making this finding, EPA stresses that it is specific to this set of facts. The Agency does not mean to revisit the question of whether LDR standards should be technology-based or risk-based.[12] Nor should this action be read as automatically invoking risk-based levels to supplant technology-based treatment standards, or to vitiate a treatment standard whenever treatment performance turns out in practice to be less than predicted by analytic protocols such as the TCLP. Nor is land disposal

[11] As described in the text above, leachate and runoff levels of hazardous constituents from the fill area are presently significantly lower than from the landfill, although the levels are still of potential environmental concern (particularly given the unsecured disposal setting) and are higher than the K088 wastewater treatment standards. The lower levels undoubtedly result from the buffering effect of the acid mining material at the site. However, this buffering may not be permanent. In addition, it is important to evaluate total concentrations of hazardous constituents in the fill material because of the different types of exposure pathways (for example, air-borne particulate) that can result when wastes are placed in this type of uncontrolled setting. See generally 60 FR at 11732 (March 2, 1995) (proposal to prohibit use of hazardous waste as fill material). Reevaluation of this use will be one of the first matters EPA focuses on as it reexamines the decision to delist the K088 treatment residue. See section V.A. in the text.

[12] As EPA has stated many times, the Agency's ultimate preference is to develop risk-based levels that reflect levels at which threats to human health and the environment are minimized, with the reasonable degree of certainty noted by the statute (RCRA section 3004(d)(1)). See, e.g. 56 Fed. Reg. at 6641; See also 60 FR 66344, December 21, 1995, the so-called ''HWIR'' proposal. The risk-based levels would then cap technology-based standards.

typically to be taken into account in establishing an LDR treatment standard. *American Petroleum Inst.* v. *EPA*, 906 F. 2d 729, 734–37 (D.C. Cir. 1990). In fact, technology-based standards remain the best presently-available means of reducing threats posed by land disposal of hazardous wastes. Our finding here is a narrow response to particular facts: there has been on-going, consistent failure (in certain key aspects) of a treatment technology, and the failure is of a magnitude that, under the circumstances, disposal of untreated wastes in Subtitle C landfills is preferable to treatment of the wastes by this process followed by land disposal in non-subtitle C disposal units. Under these unusual circumstances, threats have not been adequately minimized and ultimate protectiveness has not yet been achieved.

A consequence of this finding is that the capacity for treatment that is protective is inadequate for spent potliners at this time. Since the Reynolds process provides virtually all available capacity, and EPA is finding that the process as it is presently performing does not protect human health and the environment (see RCRA section 3004 (h) (2)), the remaining treatment capacity is far below that needed to accommodate the volume of potliners being generated. Therefore, an extension of the existing national capacity variance is required.

IV. For How Long Should the National Capacity Variance Be Extended?

EPA continues to believe that Reynolds' process is inherently sound, and should be able to treat potliners in a manner that minimizes the threats their land disposal can pose. The process has been demonstrated to effectively destroy significant portions of the cyanide and PAHs present, and the stabilization technology has generally been effective in reducing soluble fluorides.[13] In fact, the high degree of leaching presently occurring may be due to the high pH of each of the materials being combined in the treatment process (i.e., spent potliner, limestone, and brown sand). Spent potliner alone has been found to raise the pH of deionized water to 11.2 to 12.0.[14] Brown sand is an alkaline mud produced from the extraction of alumina from bauxite ore with sodium hydroxide, and contains significant concentrations of highly caustic sodium hydroxide residuals. The high alkalinity of brown sand together with SPL and limestone provides no neutralization of the inherent alkalinity; in confirmation, the pH of deionized water leach solutions of the Reynolds' treatment residue has been found to range from 11.9 to 12.2.[15] This is a problem that may be rectified soon by using a different type of sand and keeping the pH of the treated solids within a particular range.

EPA is also aware of Reynolds' substantial investment of capital and expertise into developing this treatment process. The company also has complied with all applicable regulations in developing, implementing, and operating its process, seeking and obtaining RCRA permits for its process, and obtaining a delisting for the treatment residue. The company has also been complying with the terms of the delisting, which only require evaluation of newly-generated treatment residues for leachable cyanide, fluoride, PAHs, and TCLP metals. The Agency does not intend to take precipitous action that irrevocably undermines use of this still-promising treatment technology, or that discourages needed development of and investment in other treatment technologies (for potliners or for other hazardous wastes).

It is EPA's present judgment that the immediate problems with Reynolds' process could be resolved relatively quickly, possibly (as noted above) by substitution of different sand and other means of pH control. Brown sand functions only as a flux in the process to avoid the formation of lava like blockages in the kiln. Other high silica materials should perform equivalently as a flux, but should not contain or result in a highly alkaline treatment residue that promotes the mobility of hazardous constituents of concern. Process modifications and test trials of a sand substitute by Reynolds are planned or are underway. The Agency projects that six months may be required to complete these tests and data evaluation, and is, therefore extending the period of the national capacity variance until July 8, 1997. In the event that replacing the brown sand does not lower the pH, or that the lower pH does not eliminate the problems of the generation of a corrosive leachate high in hazardous constituents, EPA will evaluate other technical options to provide for treatment of K088 that adequately minimizes threats posed by land disposal and proves ultimately to be protective. The Agency may extend the capacity variance for up to an additional nine (9) months, should process modifications be determined to have not resulted in adequate treatment. The Agency will make available to the public for comment any data or additional information it receives in response to this capacity extension.

V. Other Issues

A. Delisting

As noted above, EPA has delisted the residues from Reynolds' treatment process, relying in significant part on use of the TCLP as a predictor of actual environmental performance. (56 FR 67197, December 30, 1991.) These predictions have proven incorrect, at least in the short-term. EPA also did not anticipate, or directly evaluate the use of the treatment residue as fill or road construction material when it granted the delisting.

Authority to evaluate delistings is presently delegated to EPA Regional offices and to authorized States. EPA's Region 6 is presently evaluating the terms of the existing delisting and plans regulatory action regarding the delisting during the spring of 1997.

EPA notes that a determination that the Reynolds process (or any other treatment process) is treating sufficiently to be considered to minimize threats to human health and the environment does not necessarily mean that the residues from the treatment process would have to remain delisted. See, e.g. the text of RCRA section 3004(m)(2) which speaks directly of treatment residues which have been treated to minimize threats then being disposed in subtitle C disposal units. Thus, should EPA find that the Reynolds process is performing sufficiently well to satisfy land disposal restriction requirements, i.e. that the potliners have been treated sufficiently to allow their land disposal, the finding would not necessarily require retention of the current delisting. Conversely, and for the same reasons, a potential finding that the treatment residues should be relisted as hazardous wastes would not preclude a finding that the treatment is nevertheless sufficient to satisfy the requirement that substantial reductions in toxicity and mobility sufficient to minimize threats occur so that land disposal of the treatment residue is permissible.

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[13] EPA notes, however, that it may have to ultimately revise the treatment standard for fluoride, which is based on the performance of Reynolds' process. EPA will be seeking more information to more fully characterize the performance of the treatment process for fluoride during the extended national capacity variance period.

[14] Attachments to December 9, 1996 letter from Pat Grover of Reynolds Metal Company to Michael Shapiro, Director, Office of Solid Waste. Results cited are from the analysis of 100 grams of solid material leached with 2–Liters of deionized water (a 1:20 ratio).

[15] Id.

B. Competing Treatment Technologies as BDAT

As discussed above, treatment technologies other than Reynolds' exist which could satisfy the existing treatment standards. Other technologies are being developed, and some of these recover resources from the potliner (as well as destroying hazardous constituents). See ''Final BDAT Background Document for Spent Potliners from Primary Aluminum Reduction—K088'', dated February 1995.

EPA is presently being urged to designate these recovery technologies as exclusive BDAT. See Supplemental Submission in Support of Amendment of Land Disposal Restrictions Phase III—Spent Potliners. Although EPA is still studying these submissions, the Agency notes that it does not regard its proper role as picking winners and losers among different treatment technologies, so long as the treatment technologies are achieving substantial reductions in toxicity and mobility of hazardous constituents sufficient to find that threats are being adequately minimized. (See, for example, 57 FR 37198 (August 18, 1992), where EPA chose to base treatment standards on performance of a technology which substantially reduces concentrations of hazardous constituents but does not perform as well as certain other available treatment technologies). Further, the Agency has established the Universal Treatment Standards (268.40) and has indicated a preference to use numerical limits whenever possible, to allow any legitimate treatment process to meet the standards.

EPA notes, in addition, that the Reynolds process is presently the only treatment process offering any appreciable treatment capacity for K088. Reynolds also took the initiative and developed and marketed this technology in advance of the land disposal prohibition for spent potliners. Given these facts, plus the technology's ability to achieve substantial reductions in the waste's toxicity through destruction of hazardous constituents, EPA does not initially believe it should disallow the process as a valid treatment technology (assuming the present operational problems are resolved). EPA notes moreover that as a legal matter, the LDR treatment standards are *not* intended to be technology-forcing (see 125 Cong. Rec. S 9178 (July 25, 1984) (statement of Sen. Chaffee)), but *are* intended to force utilization of existing treatment capacity where that capacity can significantly reduce wastes' toxicity and mobility. S. Rep. No. 284, 98th Cong. 1st sess. at 19. Thus, as a matter of both policy and law, the Agency is disposed to retaining treatment standards for spent potliners that are achievable by a number of treatment technologies, and to try and hasten the use of currently existing technologies provided their performance and operation adequately minimize threats posed by land disposal of the potliners. [16]

Thus, the Agency's initial inclination is not to amend the current treatment standard for spent potliners to establish any particular technology as BDAT.

VI. Disposal of Potliners During National Capacity Variance Period

Section 3004(h)(4) states that during periods of national capacity variances (and case-by-case extensions), hazardous wastes subject to those extensions that are disposed in landfills (and surface impoundments) may only be so disposed if the landfill (or impoundment) is in compliance with the minimum technology requirements of section 3004(o). EPA has interpreted this language as requiring the individual unit receiving the waste to be in compliance with those so-called minimum technology standards, an interpretation sustained in *Mobil Oil* v. *EPA*, 871 F.2d 149 (D.C. Cir. 1989). In addition, EPA has indicated that this requirement only applies to wastes that are still hazardous when disposed. 55 Fed. Reg. at 22659–60 (June 1, 1990).

Putting this together, this means that during the extended period of the national capacity extension, generators other than Reynolds will dispose of K088 wastes in landfill units that satisfy the minimum technology requirements of section 3004(o). Reynolds' treatment residue is not subject to these requirements because it has been delisted, and so is not a hazardous waste. Should there be action reclassifying that treatment residue as a hazardous waste and should the national capacity extension still be in effect, then such residues would also be required to be disposed in landfill units satisfying minimum technology requirements (assuming that landfill disposal is utilized).

VII. Regulatory Requirements

A. Regulatory Impact Analysis Pursuant to Executive Order 12866

Executive Order No. 12866 requires agencies to determine whether a regulatory action is ''significant.'' The Order defines a ''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 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; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.''

The Agency and OMB consider today's final rule to be nonsignificant as defined by the Executive Order and therefore not subject to the requirement that a regulatory impact analysis has to be prepared. Today's rule delays for six months the imposition of treatment standards for spent aluminum potliners that were estimated previously by EPA to cost between $11.9 million and $47.3 million (61 FR 15566 and 15591, April 8, 1996). Thus, today's rule results in net savings over this period of time and prevents any potential hardship that would otherwise result from the lack of available thermal treatment capacity for spent aluminum potliner.

B. Unfunded Mandates Reform Act

Under Section 202 of the Unfunded Mandates Reform Act of 1995, signed into law on March 22, 1995, EPA must prepare a statement to accompany any rule where the estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, will be $100 million or more in any one year. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objective of the rule and is consistent with the statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly impacted by the rule.

EPA has presented an analysis of the costs of implementing the prior LDR Phase III rule (61 FR 15566, April 8, 1996) and has determined that this rule does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate. As stated above, the private sector is not expected to incur costs exceeding $100

[16] The Senate Report also states that ''[i]t is not intended, that a generating industry, for example, could be allowed to continue to have its wastes disposed of in an otherwise prohibited manner solely by binding itself to using a facility which has not been constructed.'' S. Rep. No. 284, 98th Cong. 2d sess. at 19.

million per year due to the delayed implementation of the land disposal restrictions for K088 wastes. EPA has fulfilled the requirement for analysis under the Unfunded Mandates Reform Act.

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, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

VIII. Immediate Effective Date

EPA has determined to make today's action effective immediately. The Agency believes that there is good cause to do so, within the meaning of 5 U.S.C. section 553(b)(B). The current regulatory prohibition is scheduled to take effect on January 8, 1997. Should the Agency fail to act before that time, EPA believes that actions will occur which are both contrary to the objectives of the Land Disposal Restriction statutory provisions, and also environmentally worse than disposal of untreated hazardous waste in subtitle C units. Specifically, if the prohibition takes effect, virtually the entire national volume of potliners will be sent for treatment and disposal to the Reynolds facility. This is because, as set out in this Notice, the Reynolds process is presently operating poorly and because the treatment residues from that process are disposed in units other than subtitle C units. The result is treatment that does not minimize threats and disposal which could be less protective than disposal of untreated wastes in subtitle C units.

Good cause to forego notice-and-comment procedures exists where use of those procedures is contrary to the public interest. 5 U.S.C. section 553(b)(B). EPA believes it would be contrary to the public interest to force treatment of many thousands of tons of hazardous waste which could result in net environmental detriment, as set out in the preceding paragraph. For essentially the same reasons, EPA finds that use of notice-and-comment procedures would be impractical (again within the meaning of 5 U.S.C. section 553(b)(B)).

Finally, EPA notes that it has endeavored to provide actual notice and opportunity for comment on this action. EPA has held a number of meetings with both Reynolds and affected primary aluminum generators (noted in the record for this action), solicited and accepted written submissions from these entities (again part of the administrative record), and made each sides' submissions available to the other for response. The Agency has also had contacts (albeit more limited) with representatives of the hazardous waste treatment industry and the environmental community. Notice and opportunity for comment of course satisfies all procedural requirements of the Administrative Procedure Act (as to parties receiving such notice). 5 U.S.C. section 553(b).

For all of these reasons, EPA finds that this rule may be made effective immediately. In addition, because there is good cause to forego notice-and-comment procedures, the rule may take effect upon promulgation without prior submission of the rule to the Congress. 5 U.S.C. section 808. EPA will thereafter submit the rule to Congress, as required by 5 U.S.C. section 801(a).

List of Subjects in 40 CFR Part 268

Environmental protection, Hazardous waste, Reporting and recordkeeping requirements.

Dated: January 8, 1997.

Carol M. Browner,

Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 268—LAND DISPOSAL RESTRICTIONS

1. The authority citation for part 268 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6924.

2. Section 268.39 is amended by revising paragraph (c) to read as follows:

§ 268.39 Waste specific prohibitions—spent aluminum potliners; reactive; and carbamate wastes.

* * * * *

(c) On July 8, 1997, the wastes specified in 40 CFR 261.32 as EPA Hazardous Waste number K088 are prohibited from land disposal. In addition, soil and debris contaminated with these wastes are prohibited from land disposal on July 8, 1997.

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[FR Doc. 97–878 Filed 1–10–97; 9:32 am]
BILLING CODE 6560–50–P

federal register

Tuesday
January 14, 1997

Part IV

Department of Housing and Urban Development

24 CFR Part 100

Implementation of the Housing for Older Persons Act of 1995; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–4094–P–01]

RIN 2529–AA80

Implementation of the Housing for Older Persons Act of 1995

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement the Housing for Older Persons Act of 1995 (HOPA). HOPA amended the requirements for qualification under the ''housing for older persons'' exemption established by the Fair Housing Act. In addition, HOPA established a good faith defense against civil money damages for persons who reasonably relied in good faith on the application of the ''housing for older persons'' exemption even when, in fact, the housing provider did not qualify for the exemption. This rule proposes to update HUD's regulations to reflect the changes made by HOPA.

DATES: Comments on this proposed rule and the information collection requirements must be received on or before March 17, 1997.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500. Communications should refer to the above docket number and title and to the specific sections in the regulation. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying during regular business hours at the above address. For additional information concerning the information collection requirements contained in this rule, please see the ''Findings and Certifications'' section of this preamble. A copy of any comment regarding the information collection requirements must be sent to: Joseph F. Lackey, Jr., HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Sara K. Pratt, Director, Office of Investigations, Office of Fair Housing and Equal Opportunity, Room 5204, U.S. Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410–0500, telephone (202) 708–0836. (This is not a toll-free number.) Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8399.

SUPPLEMENTARY INFORMATION:

I. Background

A. The Housing for Older Persons Act of 1995

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601–3619) (the Act) exempts ''housing for older persons'' from the prohibitions against discrimination because of familial status. Section 807(b)(2)(C) of the Act exempts housing intended and operated for occupancy by persons 55 years of age or older that satisfies certain criteria. HUD has implemented the ''housing for older persons'' exemption at 24 CFR part 100, subpart E.

The Housing for Older Persons Act of 1995 (Pub. L. 104–76, approved December 28, 1995) (HOPA) replaced the original parameters of the 55-or-older exemption. Section 2 of HOPA redefined 55-or-older housing as housing:

> (C) intended and operated for occupancy by persons 55 years of age or older, and—
> (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
> (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
> (iii) the housing facility or community complies with rules issued by the Secretary [of HUD] for verification of occupancy, which shall——
> (I) provide for verification by reliable surveys and affidavits; and
> (II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

The most substantial change made by HOPA was the elimination of the ''significant facilities and services'' requirement. Section 807(b)(2)(C) of the Act originally required that 55-or-older housing provide ''significant facilities and services specifically designed to meet the physical or social needs of older persons.'' HOPA also adds the new requirement that the housing facility or community comply with any HUD regulations on verification and occupancy.

In other respects, however, the new requirements are equivalent to the former provisions. HOPA requires that a housing facility or community seeking to claim the 55-or-older exemption show three factors. Similar to original section 807(b)(2)(C) of the Act, HOPA requires: (1) that the housing be intended and operated for persons 55 years of age or older; (2) that at least 80 percent of the occupied units be occupied by at least one person who is 55 years of age or older; and (3) the housing facility or community publish and adhere to policies and procedures that demonstrate its intent to qualify for the 55-or-older exemption. The housing facility or community must also comply with rules issued by HUD for the verification of occupancy.

In addition, section 3 of HOPA added a new section 807(b)(5) to the Act. This new section established a good faith defense against civil money damages for persons who reasonably relied in good faith on the application of the 55-or-older exemption, even when, in fact, the housing facility or community did not qualify for the exemption. New section 807(b)(5) provides:

> (5)(A) A person shall not be held personally liable for monetary damages for a violation of this title if such person reasonably relied, in good faith, on the application of the exemption under this subsection relating to housing for older persons.
> (B) For purposes of this paragraph, a person may only show good faith reliance on the application of the exemption by showing that—
> (i) such person has no actual knowledge that the facility or community is not, or will not be, eligible for such exemption; and
> (ii) the facility or community has stated formally, in writing, that the facility or community complies with the requirements for such exemption.

B. This Proposed Rule

On April 1, 1996 (61 FR 14378), HUD published a final rule streamlining its regulations implementing the Act.[1] The April 1, 1996 final rule, which was part of HUD's efforts to implement the President's regulatory reform initiative, removed the obsolete provisions describing the ''significant facilities and services'' requirement. The rule also made several other streamlining changes to HUD's regulations at subpart E of 24 CFR part 100. However, because the April 1, 1996 rule was published for effect without prior public comment, HUD postponed making the more substantial changes necessary to complete its implementation of HOPA. This rule proposes to make these regulatory amendments.

[1] A subsequent technical correction was published on April 25, 1996 (61 FR 18248).

This rule proposes to revise § 100.304, which presents an overview of the 55-or-older exemption, to more closely track the HOPA requirements. The rule also proposes to create a new § 100.305, which would update the 80 percent occupancy requirements. A new § 100.306 would describe how a facility or community may establish its intent to operate as 55-or-older housing. New § 100.307 would set forth the necessary procedures for verification of the 80 percent occupancy requirements. Finally, a new § 100.308 would implement the good faith defense against civil money damages.

Section 2 of HOPA requires that any implementing HUD regulations ''include examples of the types of policies and procedures relevant to a determination of compliance with'' the statute's intent requirement. Accordingly, paragraph (a) of proposed § 100.306 would list several factors which HUD considers relevant in determining whether the housing facility or community intends to operate as housing for older persons. However, 24 CFR 100.306(b) would state that the use of phrases such as ''adult living'', ''adult community'', ''40 and over community'', or similar statements in any written advertisement or prospectus do not create a presumption that the housing community satisfies HOPA's intent requirement. The use of such phrases does not show that the facility or community truly intends to operate as housing for older persons and are inconsistent with that intent. HUD, in order to make a valid assessment of intent, will consider the other measures taken by the facility or community to demonstrate the intent required by HOPA. Moreover, the housing facility or community may not evict families with children in order to achieve occupancy of at least 80 percent of the occupied units by at least one person 55 years of age or older.

HUD also proposes to provide guidance to assist housing facilities and communities in applying the requirements of this proposed rule. These examples are contained in an appendix to this proposed rule. The appendix would not be codified in title 24 of the CFR. HUD may update or revise the appendix as necessary.

II. Findings and Certifications

Public Reporting Burden

(a) The information collection requirements contained in §§ 100.306 and 100.307 of this proposed rule have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). *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.*

(b) In accordance with 5 CFR 1320.5(a)(1)(iv), the Department is setting forth the following concerning the proposed collection of information:

(1) *Title of the information collection proposal*: Proposed Rule—Implementation of the Housing for Older Persons Act of 1995.

(2) *Summary of the collection of information*: (i) Section 100.306 of this proposed rule would require that a housing facility or community seeking to qualify as 55-or-older housing publish and adhere to policies demonstrating that intent.

(ii) Section 100.307 of this proposed rule would establish two information collection requirements. First, § 100.307 would require that an occupant of 55-or-older housing provide reliable documentation regarding the occupancy of its unit, including the identification of whether at least one occupant of the unit is 55 years of age or older. Occupants would be further required to regularly update this information. Secondly, § 100.307 would require a housing facility or community to maintain records of these occupancy surveys. The housing facility or community would be required to produce the records upon: (1) the filing of a discrimination complaint; and (2) the request of any person.

(3) *Description of the need for the information and its proposed use*: To appropriately determine whether a housing facility or community qualifies for the housing for older persons exemption, certain information is required. HUD must determine whether the housing facility or community: (1) has published and adhered to policies demonstrating its intent to operate as 55-or-older housing; and (2) can demonstrate, through reliable surveys and affidavits, that at least 80 percent of its occupied units are occupied by at least one person 55 years of age or older.

(4) *Description of the likely respondents, including the estimated number of likely respondents, and proposed frequency of response to the collection of information*: Respondents will be: (1) occupants of 55-or-older housing; and (2) providers of 55-or-older housing, such as manufactured home parks, home owners associations, and property managers. (Please see paragraph (5) below for the number of likely respondents and the proposed frequency of the response to the collection of information.)

(5) *Estimate of the total reporting and recordkeeping burden that will result from the collection of information:*

Type of collection	Proposed section of 24 CFR affected	Number of respondents	Frequency of response	Est. avg. response time (hrs.)	Annual burden hrs.
Publication of policies demonstrating intent to operate as 55-or-older housing.	24 CFR 100.306	1,000	1	2 hrs.	2,000
Data on the age of occupants in 55-or-older housing.	24 CFR 100.307	10,000	1	.1 hrs.	1,000
Recordkeeping	24 CFR 100.307	1,000	One time every other year.	5 hrs.	2,500,
Total Burden					5,500

(c) In accordance with 5 CFR 1320.8(d)(1), the Department is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

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

(4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

(d) OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not effect the deadline for the public to comment on the proposed rule. Comments on the paperwork collection requirements contained in this rule must be submitted to those persons indicated in the **ADDRESSES** section of this preamble.

Unfunded Mandates Reform Act

The Secretary has reviewed this proposed rule before publication and by approving it certifies, in accordance with the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), that this proposed rule does not impose a Federal mandate that will 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.

Environmental Impact

In accordance with 24 CFR 50.19(c)(3) of the Department's regulations, published in a final rule on September 27, 1996 (61 FR 50914), the policy set forth in this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act of 1969.

Executive Order 12612, Federalism

The General Counsel, as the Designated Official, under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this proposed rule would 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. This rule proposes to implement the requirements of HOPA by revising the parameters for ''55-or-older'' housing found at 24 CFR part 100, subpart E. It effects no changes in the current relationships among the Federal government, the States and their political subdivisions in connection with HUD programs.

Executive Order 12606, The Family.

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this proposed rule would not have a potential significant impact on family formation, maintenance, and general well-being and, thus, is not subject to review under the Order. This proposed rule would update HUD's regulations governing ''housing for older persons'' to reflect the changes made by HOPA. No significant change in existing HUD policies or programs would result from promulgation of this proposed rule, as those policies and programs relate to family concerns.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this proposed rule, and in so doing certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This rule proposes to update HUD's regulations implementing the ''housing for older persons'' exemption to the Fair Housing Act. Specifically, the rule would implement the statutory amendments made by HOPA. These revisions would provide housing facilities and communities with a better understanding of what housing qualifies for the ''55-or-older'' exemption to the Fair Housing Act's prohibitions against discrimination on the basis of familial status. The proposed rule would not have any meaningful impact on small entities.

List of Subjects in 24 CFR Part 100

Aged, Fair housing, Individuals with disabilities, Mortgages, Reporting and recordkeeping requirements.

Accordingly, 24 CFR part 100 is proposed to be amended as follows:

PART 100—DISCRIMINATORY CONDUCT UNDER THE FAIR HOUSING ACT

1. The authority citation for 24 CFR part 100 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 3600–3619.

2. Subpart E is amended by revising § 100.304; and by adding § § 100.305, 100.306, 100.307, and 100.308, to read as follows:

Subpart E—Housing for Older Persons

§ 100.304 55 or over housing.

(a) The provisions regarding familial status in this part shall not apply to housing intended and operated for persons 55 years of age or older. Housing qualifies for this exemption if:

(1) The alleged violation occurred before December 28, 1995 and the housing community or facility complied with the HUD regulations in effect at the time of the alleged violation; or

(2) The alleged violation occurred on or after December 28, 1995 and the housing community or facility complies with:

(i) Sections 807(b)(2)(C) and 807(b)(5)(A) and (B) of the Fair Housing Act; and

(ii) 24 CFR 100.305, 100.306, and 100.307.

(b) For purposes of this subpart, *housing facility or community* means any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion or portions of a single building shall not constitute a housing facility or community. Examples of a housing facility or community include, but are not limited to:

(1) A condominium association;

(2) A cooperative;

(3) A property governed by a homeowners' or resident association;

(4) A municipally zoned area;

(5) A leased property under common private ownership; and

(6) A mobile home park.

(c) For purposes of this subpart, *older person* means a person 55 years of age or older.

§ 100.305 80 percent occupancy.

(a) In order for a housing facility or community to qualify as 55-or-older housing, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older.

(b) For purposes of this subpart, *occupied unit* means:

(1) A dwelling unit that is actually occupied by one or more persons on the date that the exemption for 55-or-older housing is claimed; or

(2) A temporarily vacant unit, if the primary occupant has resided in the unit during the past year and intends to return on a periodic basis.

(c) For purposes of this subpart, *occupied by at least one person 55 years of age or older* means that on the date the exemption for 55-or-older housing is claimed:

(1) At least one occupant of the dwelling unit is 55 years of age or older; or

(2) If the dwelling unit is temporarily vacant, at least one of the occupants immediately prior to the date on which the unit was vacated was 55 years of age or older.

(d) Newly constructed housing for first occupancy after March 12, 1989 need not comply with the requirements of this section until at least 25 percent of the units are occupied. For purposes of this section, newly constructed housing includes facilities or communities that have been unoccupied for at least 90 days prior to re-occupancy due to renovation or rehabilitation.

(e) Housing satisfies the requirements of this section even though:

(1) On September 13, 1988, under 80 percent of the occupied units in the housing facility or community were occupied by at least one person 55 years of age or older, provided that at least 80 percent of the units occupied by new occupants after September 13, 1988 are occupied by at least one person 55 years of age or older.

(2) There are unoccupied units, provided that at least 80 percent of the occupied units are occupied by at least one person 55 years of age or older.

(3) There are units occupied by employees of the housing facility or community (and family members residing in the same unit) who are under 55 years of age, provided the employees perform substantial duties related to the management or maintenance of the facility or community.

(4) There are units occupied by persons who are necessary to provide a reasonable accommodation to disabled residents as required by § 100.204.

(5) There are insufficient units occupied by at least one person 55 years of age or older, but the housing facility or community, at the time the exemption is asserted:

(i) Reserves all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and

(ii) Meets the requirements of §§ 100.304, 100.305, 100.306, and 100.307.

(f) Where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.

(g) Each housing facility or community may determine the age restriction for units that are not occupied by at least one person 55 years of age or older.

§ 100.306 Intent to operate as 55 or over housing.

(a) In order for a housing facility or community to qualify as 55-or-older housing, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. The following factors, among others, are considered relevant in determining whether the housing facility or community has complied with this requirement:

(1) The manner in which the housing facility or community is described to prospective residents;

(2) Any advertising designed to attract prospective residents;

(3) Lease provisions;

(4) Written rules, regulations, covenants, deed or other restrictions;

(5) The maintenance and consistent application of relevant procedures;

(6) Actual practices of the housing facility or community; and

(7) Public posting in common areas of statements describing the facility or community as housing for persons 55 years of age or older.

(b) The use of phrases such as ''adult living'', ''adult community'', ''40 and over community'', or similar statements in any written advertisement or prospectus do not create a presumption that the housing facility or community intends to operate as housing for persons 55 years of age or older.

(c) If there are substantial legal impediments to removing language from deed or other restrictions that may be inconsistent with the intent to provide 55-or-older housing, HUD shall consider documented evidence of a good faith attempt to remove such language in determining whether the housing facility or community complies with the requirements of this section.

(d) The fact that a unit is occupied by a family with a child under eighteen years of age, and not by a person 55 years of age or older, shall not be considered in determining whether the housing facility or community intends to operate as 55-or-older housing.

§ 100.307 Verification of occupancy.

(a) In order for a housing facility or community to qualify as 55-or-older housing, it must be able to produce, in response to a complaint filed under this title, verification of compliance with § 100.305 through reliable surveys and affidavits.

(b) A facility or community shall, within 180 days of the effective date of a rule finalizing the policies and procedures described in this proposed rule, develop procedures for routinely determining the occupancy of each unit, including the identification of whether at least one occupant of each unit is 55 years of age or older. Such procedures may be part of a normal leasing or purchasing arrangement.

(c) The procedures described in paragraph (b) of this section must provide for regular updates, through surveys or other means, of the initial information supplied by the occupants of the housing facility or community. Such updates must take place at least once every two years. A survey may include information regarding whether any units are occupied by persons described in paragraphs (e)(1), (e)(3), and (e)(4) of § 100.305.

(d) The following documents are considered reliable documentation of the age of the occupants of the housing facility or community:

(1) Driver's license;

(2) Birth certificates;

(3) Passports;

(4) Immigration card;

(5) Military identification;

(6) Any other state, local, national, or international official documents containing a birth date of comparable reliability; or

(7) A certification in a lease, application, affidavit, or other document signed by an adult member of the household asserting that at least one person in the unit is 55 years of age or older.

(e) The housing facility or community must establish and maintain appropriate policies to require that occupants comply with the age verification procedures required by this section.

(f) If the occupants of a particular dwelling unit refuse to comply with the age verification procedures, the housing facility or community may, if it has sufficient evidence, consider the unit to be occupied by at least one person 55 years of age or older. Such evidence may include:

(1) Government records or documents, such as a census;

(2) Prior forms or applications; or

(3) A statement from an individual who has personal knowledge of the age of the occupants. The individual's statement must set forth the basis for such knowledge.

(g) Surveys and verification procedures which comply with the requirements of this section shall be admissible in administrative and judicial proceedings for the purpose of verifying occupancy.

(h) Occupancy surveys shall be available for inspection upon reasonable notice and request by any person.

§ 100.308 Good faith defense against civil money damages.

(a) A person shall not be held personally liable for monetary damages for discriminating on the basis of familial status, if the person acted with the good faith belief that the housing facility or community qualified as 55-or-older housing.

(b)(1) A person claiming the good faith defense must have actual knowledge that the housing facility or community has, through an authorized representative, asserted in writing that it qualifies as 55-or-older housing. The person claiming the good faith defense must demonstrate this actual knowledge through reliable evidence.

(2) For purposes of this section, an *authorized representative* of a housing facility or community means the individual, committee, management company, owner, or other entity having the responsibility for adherence to the requirements established by this subpart.

(c) A person shall not be entitled to the good faith defense if the person has actual knowledge that the housing facility or community does not, or will not, qualify as 55-or-older housing. Such a person will be ineligible for the good faith defense regardless of whether the person received the written assurance described in paragraph (b) of this section.

Dated: October 11, 1996.

Elizabeth K. Julian,

Assistant Secretary for Fair Housing and Equal Opportunity.

Note: This Appendix will not be codified in Title 24 of the CFR.

Appendix—Examples of Applications of HUD's Regulations Governing the 55-or-older Exemption to the Fair Housing Act

Sections

1. Purpose
2. 80 percent occupancy.
3. Intent to operate as 55-or-older housing.
4. Verification of occupancy.
5. Future revisions to this appendix.

1. Purpose.

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601–3619) (the Act) exempts ''housing for older persons'' from the prohibitions against discrimination because of familial status. Section 807(b)(2)(C) of the Act exempts housing intended and operated for occupancy by persons 55 years of age or older that satisfies certain criteria. HUD has implemented the ''housing for older persons'' exemption at 24 CFR part 100, subpart E. Specifically, § § 100.304, 100.305, 100.306, and 100.307 set forth the requirements for housing seeking to qualify for the 55-or-older exemption. The purpose of this appendix is to provide guidance to housing facilities or communities in applying these HUD requirements.

2. 80 Percent Occupancy

Section 100.305 provides that in order for a housing facility or community to qualify as 55-or-older housing, at least 80 percent of its occupied units must be occupied by at least one person 55 years of age or older. This occupancy requirement must be met at the time of any alleged violation of the Act. Paragraph (f) of § 100.305 states that where application of the 80 percent rule results in a fraction of a unit, that unit shall be considered to be included in the units that must be occupied by at least one person 55 years of age or older.

Example: A community or facility contains 63 occupied units. Eighty percent of 63 units equals 50.4. Under § 100.305(d), 51 units would require occupancy by at least one person 55 years of age or older.

Section 100.305 also sets forth the other requirements a housing facility or community must follow in calculating occupancy. The following examples illustrate these requirements:

Example 1

Buena Vista is a condominium association of 120 units. On September 13, 1988, twenty (20) of the occupied units are not occupied by at least one person 55 years of age or older.

On April 1, 1996, Buena Vista declares itself to be 55-or-older housing. On that date:

(1) The twenty (20) persons described above are still residing at Buena Vista;

(2) Ten (10) units of the total 120 units are unoccupied;

(3) One (1) of the units is occupied by the association's maintenance supervisor; and

(4) Two (2) units are occupied by live-in health aides who provide reasonable accommodations to residents with disabilities.

How many of the occupied units must be occupied by at least one person 55 years of age or older in order for Buena Vista to qualify as 55-or-older housing?

Under § 100.305(e), Buena Vista would calculate its compliance with the 80 percent occupancy requirement by subtracting the following units from the total 120 units:

(1) The 20 units not occupied by at least one person 55 years of age or older on September 13, 1988 (See § 100.305(e)(1));

(2) The ten (10) unoccupied units (See § 100.305(e)(2));

(3) The one (1) unit occupied by the maintenance person (See § 100.305(e)(3)); and

(4) The two (2) units occupied by the health aides (See § 100.305(e)(4)).

Subtracting these 33 units from the total of 120 units leaves 87 units. At least 80 percent of these 87 units must be occupied by at least one person 55 years of age or older. Eighty percent of 87 equals 69.6. Due to § 100.305(d), 70 units must be occupied by at least one person 55 years of age or older.

Example 2

Topaz House is a cooperative of 100 units. On January 20, 1996, Topaz House announces its intent to be 55-or-older housing and publishes policies and procedures sufficient to satisfy § 100.306. On that date, of the 100 total units:

(1) Sixty (60) of the occupied units are occupied by at least one person 55 years of age or older;

(2) Thirty (30) of the occupied units do not have occupants 55 years of age or older; and

(3) Ten (10) units are unoccupied.

Since 60 out of the 90 occupied units are occupied by at least one person 55 years of age or older, the Topaz House only has 67 percent of its occupied units occupied by at least one person 55 years of age or older. Under § 100.305(e)(5), Topaz House may still qualify for the 55-or-older exemption if it:

(1) Reserves all unoccupied units for occupancy by at least one person 55 years of age or older until at least 80 percent of the units are occupied by at least one person who is 55 years of age or older; and

(2) Meets the requirements of §§ 100.304, 100.305, 100.306, and 100.307.

There is no requirement that Topaz House take any action concerning the residents under 55 years of age who are occupying units on the date the building declares its intent to be 55-or-older housing.

Example 3

Snowbird City is a mobile home community in Texas with 100 units. Snowbird City complies with all other requirements of 55-or-older housing, but is uncertain of its compliance with the 80 percent occupancy rule.

Fifty out of the 100 units are occupied year round. Of these fifty units, 12 units are not occupied by at least one person 55 years of age or older. Of the remaining 50 units, 5 are unoccupied and offered for sale, and the remaining 45 are occupied by at least one person 55 years of age or older each winter on a routine and reoccurring basis.

If a complaint of familial status discrimination is filed in December, the community meets the 80 percent occupancy requirement because 83 out of the 95 occupied units (87 percent), are occupied by at least one person 55 years of age or older. If the complaint is filed in July, Snowbird City still meets the requirement. Under § 100.305(b), a temporarily vacant unit is considered occupied by a person 55 years of age or older if:

(1) The primary occupant has resided in the unit during the past year; and

(2) The occupant intends to return on a periodic basis.

Example 4

The King Philip Senior Community is a newly renovated building originally built in 1952. It has been vacant for over one year while extensive renovations were completed. The building contains 200 units. The King Philip Senior Community is intended to be operated as a 55-or-older community.

Under § 100.305(d), newly constructed housing need not comply with the 80 percent occupancy requirement until 25 percent of the total units are occupied. For purposes of § 100.305(d), newly constructed housing includes housing that has been unoccupied for at least 90 days due to renovation or rehabilitation. Accordingly, the King Philip Senior Community need not comply with the 80 percent occupancy requirement until 50 out of its 200 units (25 percent) are occupied. Subsequent to occupancy of the 50th unit, however, the building will have to satisfy the 80 percent occupancy rule in order to qualify as 55-or-older housing.

3. Intent To Operate as 55-or-Older Housing

Section 100.306 provides that in order for a housing facility or community to qualify as 55-or-older housing, it must publish and adhere to policies and procedures that demonstrate its intent to operate as housing for persons 55 years of age or older. Section 100.306 also details the factors HUD will utilize to determine whether a housing facility or community has met this intent requirement. The following are examples of housing facilities and communities which satisfy the intent requirement described in § 100.306:

Example 1

A mobile home park which takes the following actions satisfies the intent requirement:

(1) Posts a sign indicating that the park is 55-or-older housing;

(2) Includes lease provisions stating that the park intends to operate as 55-or-older housing; and

(3) Has provided local realtors with copies of the lease provisions.

Example 2

An area zoned by a unit of local government as ''senior housing'' satisfies the intent requirement if:

(1) Zoning maps containing the ''senior housing'' designation are available to the public;

(2) Literature distributed by the area describes it as ''senior housing'';

(3) The ''senior housing'' designation is recorded in accordance with local property recording statutes; and

(4) Zoning requirements include the 55-or-older requirement or a similar provision.

Example 3

A condominium association satisfies the intent requirement if it has:

(1) Adopted, through its rules and regulations, restrictions on the occupancy of units consistent with HUD's regulations governing 55-or-older housing at 24 CFR part 100, subpart E;

(2) Has distributed copies of the rules to all occupants; and

(3) Has notified local realtors of the restrictions.

The following is an example of a housing facility which has failed to satisfy the intent requirement described in § 100.306:

Example 4

A homeowners association has failed to meet the intent requirement if it has Covenants, Conditions and Restrictions which refer to an ''adult community,'' has posted a sign stating ''A 40 and over community'' and has restricted visiting children to a maximum of two weeks, but contains no similar restriction for visiting adults.

4. Verification of Occupancy

Section 100.307 provides that in order for a housing facility or community to qualify as 55-or-older housing, it must be able to produce, in response to a complaint alleging a violation of the Act, verification of compliance with § 100.305 through reliable surveys and affidavits. Paragraph (d)(7) of § 100.307 includes self-certifications in a list of documents considered reliable documentation of the age of occupants. The self-certification may be included in a lease or other document, and must be signed by an adult member of the household asserting that at least one person in the unit is 55 years of age or older. The following examples provide acceptable self-certification provisions:

Example 1

All new leases, new purchase agreements, or new applications contain a provision directly above the signatory line for lessees, asserting that at least one occupant of the dwelling will be 55 years of age or older. In addition, the community surveys all current residents for their occupancy status in compliance with the 55-or-older requirements.

Example 2. Sample certification

I, (name), am over the age of 18 and a member of the household that resides at (housing facility or community), (unit number or designation). I hereby certify that I have personal knowledge of the ages of the occupants of this household and that at least one occupant is 55 years of age or older.

Paragraph (e) of § 100.307 requires that the housing facility or community establish appropriate policies to require that all occupants comply with the age verification procedures. The following examples illustrate acceptable policies:

Example 1

A condominium association establishes a rule that the board of directors must approve all new occupants. One criteria for approval is that new occupants of each unit inform the condominium association whether at least one person occupying the unit is 55 years of age or older.

Example 2

A homeowners association amends its Covenants, Conditions and Restrictions, and records them at the appropriate government recording office. The amendments require applicants to state whether at least one occupant is 55 years of age or older.

Example 3

The owner of a mobile home park where the residents own the coach but rent the land requires a statement of whether at least one occupant is 55 years of age or older before any sublease or new rental.

5. Future Revisions to This Appendix

HUD may update or revise this appendix as necessary.

[FR Doc. 97–840 Filed 1–13–97; 8:45 am]
BILLING CODE 4210–28–P

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Vol. 62, No. 9

Tuesday, January 14, 1997

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