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

Rules and Regulations

Federal Register
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Friday, February 28, 1997

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 999

[Docket No. FV96–999–3C]

Peanuts Marketed in the United States; Changes in Handling and Disposition Requirements

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Correction to final rule.

SUMMARY: This document contains a correction to the final regulations published Thursday, January 9, 1997, (FR Doc. 97–283) (62 FR 1249). The rule eliminated several requirements covering the disposition of inedible peanuts and relaxed for 1996 and subsequent crop peanuts several sections regulating the handling and disposition of domestic and foreign-produced peanuts marketed in the United States.

EFFECTIVE DATE: January 14, 1997.

FOR FURTHER INFORMATION CONTACT: Tom Tichenor, Marketing Specialist, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone: (202) 720–6862, fax (202) 720–5968. Small businesses may request information on compliance with this regulation by contacting: Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, Room 2525–S, Washington, DC 20090–6456; telephone (202) 720–2491; fax (202) 720–5698.

SUPPLEMENTARY INFORMATION:

Background

The final rule that is subject to this correction changed several requirements covering disposition of inedible peanuts. In the import regulation (7 CFR Part 999.600), the definition of Negative aflatoxin content on page 1270, incorrectly includes a reference to 25 or less parts per billion (ppb) aflatoxin content for inedible quality peanuts. The final rule removed the 25 ppb level from various other provisions of the domestic and import regulations but inadvertently left that designation in the import regulation's definition of the term negative to aflatoxin. That term only is applied to those peanut lots determined to contain 15 or less ppb aflatoxin content. This correction brings the definition of the term Negative to aflatoxin in the import regulation into conformity with the same term used in the two domestic peanut regulations, as required by law.

Correction of Publication

Accordingly, final regulations published January 9, 1997, FR Doc. 97–283, § 999.600, paragraph (a)(10), on page 1270, first column is corrected to read as follows:

§ 999.600 [Corrected]

(a) * * *

(10) *Negative aflatoxin content* means 15 parts per billion (ppb) or less for peanuts which have been certified as meeting edible quality grade requirements.

* * * * *

Dated: February 21, 1997.

Sharon Bomer Lauritsen,

Acting Director, Fruit and Vegetable Division.

[FR Doc. 97–4969 Filed 2–27–97; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF JUSTICE

8 CFR Parts 3, 103, 212, 235, 236, 242, 287, 292, 292a

[EOIR No. 113F; A.G. Order No. 2070–97]

RIN 1125–AA14

Executive Office for Immigration Review; List of Free Legal Services Providers

AGENCY: Executive Office for Immigration Review, Justice.

ACTION: Final rule.

SUMMARY: This final rule transfers the responsibility for maintaining the list of organizations providing free legal services in immigration proceedings from the Immigration and Naturalization Service (INS) to the Executive Office for Immigration Review (EOIR), Office of the Chief Immigration Judge, and amends the regulations by permitting attorneys who provide free legal services to indigent aliens to apply to be included on the list. The rule also amends the regulations by transferring appellate jurisdiction from the Associate Commissioner for Examinations, INS, to the Board of Immigration Appeals for appeals from decisions on applications to be included on the list of free legal services providers and from decisions on removals from such a list. Finally, this rule will further implementation of section 604(d)(4) of the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 by requiring that the list of free legal services providers maintained by the Chief Immigration Judge include a list of persons who have indicated their availability to represent aliens in asylum proceedings on a *pro bono* basis.

EFFECTIVE DATE: March 31, 1997.

FOR FURTHER INFORMATION CONTACT: Margaret M. Philbin, General Counsel, Executive Office for Immigration Review, Suite 2400, 5107 Leesburg Pike, Falls Church, Virginia 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION: On August 5, 1996, the Executive Office for Immigration Review published a proposed rule in the Federal Register (61 FR 40552) amending 8 CFR parts 3 and 292a by transferring the responsibility for maintaining the list of entities that will provide free legal services in immigration proceedings from INS to EOIR, Office of the Chief Immigration Judge. This list of organizations and attorneys, qualified pursuant to this rule, who can represent aliens in immigration proceedings before the Board of Immigration Appeals and the Immigration Courts is given to aliens who are parties in immigration proceedings in an Immigration Court. This rule amends the present regulation by permitting attorneys who provide free legal services to indigent aliens to apply to be included on the list of free legal services providers.

In response to the above rulemaking, EOIR received two comments. One commenter noted that there may be areas where Immigration Courts are

located but where no organizations or attorneys are available to represent aliens on a *pro bono* basis. The commenter suggested that the Immigration Courts should also maintain lists of private attorneys who regularly practice before each of the Courts. Such lists could be distributed to aliens in need of counsel, and any licensed attorney would be able to place his or her name on the lists.

However, EOIR has promulgated this rule in order to enhance the opportunities for *indigent* aliens to find *free* legal counsel by providing them with a list of organizations and attorneys who are willing to represent them on a *pro bono* basis. Moreover, the statutory basis to formulate and maintain such lists requires that the lists be maintained for this purpose. *See* 8 U.S.C. 1252(b)(2). Therefore, this suggestion will not be adopted.

The same commenter also inquired as to whether an attorney must accept a certain number of *pro bono* cases in order to be included on the list of free legal services providers, and whether an attorney would be prohibited from accepting any cases, or a certain percentage of cases, for a fee. EOIR does not believe it is necessary or advisable to require an attorney to accept a specific number or percentage of cases on a *pro bono* basis in order to be included on the list of free legal services providers. Nor will an attorney included on the list be precluded from accepting cases for a fee. An attorney included on the list may continue serving a wide range of paying clients as long as he or she agrees to represent indigent aliens on a *pro bono* basis. However, if it comes to EOIR's attention that an attorney who is included on the list is not, in fact, accepting cases on behalf of indigent aliens on a *pro bono* basis, the regulation provides that the Chief Immigration Judge, or his or her designee, may remove the attorney's name from the list after giving the attorney notice and an opportunity to answer. Moreover, this issue is subject to further review if necessary to eliminate any abuses.

The other commenter expressed concern that the proposed rule provided that only an organization that has on its staff, or retains at no expense to the alien, an attorney who is available to render free legal services, or a bar association that provides a referral service of attorneys who render *pro bono* assistance, may apply to be included on the list of free legal services providers, while organizations other than bar associations that provide referral services for indigent aliens could not apply to be included on the list. The commenter therefore suggested that the rule be amended to include additional organizations that provide referral services for indigent aliens.

While the purpose of this regulation is to enhance the opportunities for indigent aliens to find free legal counsel by expanding the list of organizations and attorneys who are willing to represent them on a *pro bono* basis, EOIR also recognizes the need to ensure that only organizations with bona fide referral services be included on the list. Therefore, the rule has been amended to allow organizations that operate referral services to apply to be on the list and to allow the Chief Immigration Judge to exercise his or her discretion in ruling on such applications.

Finally, this rule furthers implementation of section 604(d)(4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, by having the list of free legal services providers maintained by the Chief Immigration Judge include a list of persons who have indicated their availability to represent aliens in asylum proceedings on a *pro bono* basis.

Although the rule requires that an organization or attorney file an application requesting to be placed on the list of free legal services providers, there is no specific application form being used for this request at the present time. Further, any organization that is on the current list of free legal services providers will not need to apply at this time to be included on the new list. All organizations on the current list will be contacted by the Office of the Chief Immigration Judge, or his or her designee, to determine if they intend to remain on the list and to verify identifying information, such as address and telephone number. Any organizations that cannot be reached will not be included on the new list.

In accordance with 5 U.S.C. 605(b), the Attorney General certifies that this rule does not have a significant adverse economic impact on a substantial number of small entities. The Attorney General has determined that this rule is not a significant regulatory action under Executive Order No. 12866, and accordingly this rule has not been reviewed by the Office of Management and Budget. This rule has no Federalism implications warranting the preparation of a Federalism Assessment in accordance with section 6 of Executive Order No. 12612. The rule merits the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order No. 12988.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Lawyers, Organizations and functions (Government agencies), Reporting and recordkeeping requirements.

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 236

Administrative practice and procedure, Aliens, Immigration.

8 CFR Part 242

Administrative practice and procedure, Aliens.

8 CFR Part 287

Immigration, Law enforcement officers.

8 CFR Part 292

Administrative practice and procedure, Immigration, Lawyers, Reporting and recordkeeping requirements.

8 CFR Part 292a

Aliens, Legal services.

Accordingly and under the authority of 8 U.S.C. 1103, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 8 U.S.C. 1103, 1252 note, 1252b, 1362; 28 U.S.C. 509, 510, 1746; Sec. 2, Reorg. Plan No. 2 of 1950, 3 CFR 1949–1953 Comp., p. 1002.

2. Section 3.1 is amended by adding a new paragraph (b)(11) to read as follows:

§ 3.1 General authorities.

* * * * *

(b) * * *

(11) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals therefrom pursuant to § 3.65.

* * * * *

Subpart D [Added and Reserved]

3. Subpart D is added and reserved.

4. A new Subpart E is added to read as follows:

Subpart E—List of Free Legal Services Providers

Subpart E—List of Free Legal Services Providers

§ 3.61 List.

(a) The Chief Immigration Judge shall maintain a current list of organizations and attorneys qualified under this subpart which provide free legal services. This list, which shall be updated not less than quarterly, shall be provided to aliens in immigration proceedings. The Chief Immigration Judge may designate an employee or employees to carry out his or her responsibilities under this subpart. Organizations and attorneys may be included on the list of free legal services providers if they qualify under one of the following categories:

(1) Organizations recognized under § 292.2 of this chapter that meet the qualifications set forth in § 3.62(a) and whose representatives, if any, are authorized to practice before the Board and Immigration Courts;

(2) Organizations not recognized under § 292.2 of this chapter that meet the qualifications set forth in § 3.62(b);

(3) Bar associations that meet the qualifications set forth in § 3.62(c); and

(4) Attorneys, as defined in § 1.1(f) of this chapter, who meet the qualifications set forth in § 3.62(d).

(b) The listing of an organization qualified under this subpart is not equivalent to recognition under § 292.2 of this chapter.

§ 3.62 Qualifications.

(a) *Organizations recognized under § 292.2.* An organization that is recognized under § 292.2 of this chapter that seeks to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge must have on its staff:

(1) An attorney, as defined in § 1.1(f) of this chapter; or

(2) At least one accredited representative, as defined in § 292.1(a)(4) of this chapter, who is authorized to practice before the Board and Immigration Courts.

(b) *Organizations not recognized under § 292.2.* An organization that is not recognized under § 292.2 of this chapter that seeks to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge must declare that:

(1) It is established in the United States;

(2) It provides free legal services to indigent aliens; and

(3) It has on its staff, or retains at no expense to the alien, an attorney, as defined in § 1.1(f) of this chapter, who is available to render such free legal services by representation in immigration proceedings.

(c) *Bar associations.* A bar association that provides a referral service of attorneys who render *pro bono* assistance to aliens in immigration proceedings may apply to have its name appear on the list of free legal services providers maintained by the Chief Immigration Judge. Any other organization that provides such a referral service may also apply to have its name appear on the list of free legal services providers, and may, in the sole discretion of the Chief Immigration Judge, be included on the list.

(d) *Attorneys.* An attorney, as defined in § 1.1(f) of this chapter, who seeks to have his or her name appear on the list of free legal services providers maintained by the Chief Immigration Judge must declare in his or her application that he or she provides free legal services to indigent aliens and that he or she is willing to represent indigent aliens in immigration proceedings *pro bono.* An attorney under this section may not receive any direct or indirect remuneration from indigent aliens for representation in immigration proceedings, although the attorney may be regularly compensated by the firm or organization with which he or she is associated.

§ 3.63 Applications.

(a) *Generally.* In order to qualify to appear on the list of free legal services providers maintained by the Chief Immigration Judge under this subpart, an organization or attorney must file an application requesting to be placed on the list. This application must be filed with the Office of the Chief Immigration Judge, along with proof of service on the Court Administrator of the Immigration Court having jurisdiction over each locality where the organization or attorney provides free legal services. Each submission must be identified by the notation ''Application for Free Legal Services Providers List'' on the envelope, and must also indicate if the organization or attorney is willing to represent indigent aliens in asylum proceedings.

(b) *Organizations recognized under § 292.2.* An organization that is recognized under § 292.2 of this chapter must submit a declaration signed by an authorized officer of the organization which states that the organization complies with all of the qualifications set forth in § 3.62(a).

(c) *Organizations not recognized under § 292.2.* An organization that is not recognized under § 292.2 of this chapter must submit a declaration signed by an authorized officer of the organization which states that the organization complies with all of the qualifications set forth in § 3.62(b).

(d) *Attorneys.* An attorney must:

(1) Submit a declaration that states that:

(i) He or she provides free legal services to indigent aliens;

(ii) He or she is willing to represent indigent aliens in immigration proceedings *pro bono;* and

(iii) He or she is not under any order of any court suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law; and

(2) Include the attorney's bar number, if any, from each bar of the highest court of the state, possession, territory, or commonwealth in which he or she is admitted to practice law.

(e) *Changes in addresses or status.* Organizations and attorneys referred to in this subpart are under a continuing obligation to notify the Chief Immigration Judge, in writing, within ten business days, of any change of address, telephone number, or qualifying or professional status. Failure to notify the Chief Immigration Judge of any such change may result in the name of the organization or attorney being removed from the list.

§ 3.64 Approval and denial of applications.

The Court Administrator of the Immigration Court having jurisdiction over each locality where an organization or attorney provides free legal services shall forward a recommendation for approval or denial of each application submitted by the organization or attorney, and the reasons therefor, to the Chief Immigration Judge. The Chief Immigration Judge shall have the authority to approve or deny an application submitted by an organization or an attorney pursuant to § 3.63. If an application is denied, the

organization or attorney shall be notified of the decision in writing, at the organization's or attorney's last known address, and shall be given a written explanation of the grounds for such denial. A denial must be based on the failure of the organization or attorney to meet the qualifications and/or to comply with the procedures set forth in this subpart. The organization or attorney shall be advised of its, his or her right to appeal this decision to the Board of Immigration Appeals in accordance with § 3.1(b) and § 103.3(a)(1)(ii) of this chapter.

§ 3.65 Removal of an organization or attorney from list.

(a) *Involuntary removal.* If the Chief Immigration Judge believes that an organization or attorney included on the list of free legal services providers no longer meets the qualifications set forth in this subpart, he or she shall promptly notify the organization or attorney in writing, at the organization's or attorney's last known address, of his or her intention to remove the name of the organization or attorney from the list. The organization or attorney may submit an answer within 30 days from the date the notice is served. The organization or attorney must establish by clear, unequivocal, and convincing evidence that the organization's or attorney's name should not be removed from the list. If, after consideration of any answer submitted by the organization or attorney, the Chief Immigration Judge determines that the organization or attorney no longer meets the qualifications set forth in this subpart, the Chief Immigration Judge shall promptly remove the name of the organization or attorney from the list of free legal service providers, the removal of which will be reflected in the next quarterly update, and shall notify the organization or attorney of such removal in writing, at the organization's or attorney's last known address. Organizations and attorneys shall be advised of their right to appeal this decision to the Board of Immigration Appeals in accordance with § 3.1(b) and § 103.3(a)(1)(ii) of this chapter.

(b) *Voluntary removal.* Any organization or attorney qualified under this subpart may, at any time, submit a written request to have its, his or her name removed from the list of free legal service providers. Such a request shall be honored, and the name of the organization or attorney shall promptly be removed from the list, the removal of which will be reflected in the next quarterly update.

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

5. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp. p. 166; 8 CFR part 2.

§ 103.1 [Amended]

6. Section 103.1 is amended by removing and reserving paragraph (f)(3)(iii)(U).

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

7. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

§ 212.6 [Amended]

8. In § 212.6, paragraph (d)(1) is amended in the third sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

9. The authority citation for part 235 continues to read as follows;

Authority: 8 U.S.C. 1101, 1103, 1182, 1183, 1201, 1224, 1225, 1226, 1227, 1228, 1252.

§ 235.6 [Amended]

10. In § 235.6, paragraph (a) is amended in the fourth sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

PART 236—EXCLUSION OF ALIENS

11. The authority citation for part 236 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1362.

§ 236.2 [Amended]

12. In § 236.2, paragraph (a) is amended in the third sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

PART 242—PROCEEDINGS TO DETERMINE DEPORTABILITY OF ALIENS IN THE UNITED STATES: APPREHENSION, CUSTODY, HEARING, AND APPEAL

13. The authority citation for part 242 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1186a, 1251, 1252, 1252 note, 1252a, 1252b, 1254, 1362; 8 CFR part 2.

§ 242.1 [Amended]

14. In § 242.1, paragraph (c) is amended in the fourth sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

§ 242.2 [Amended]

15. In § 242.2, paragraph (c)(2) is amended in the third sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

16. In § 242.2, paragraph (d) is amended in the fourth sentence by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

§ 242.16 [Amended]

17. In § 242.16, paragraph (a) is amended in the first sentence by removing the word ''programs'' and adding ''providing by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

§ 242.24 [Amended]

18. In § 242.24, paragraph (g) is amended in the first and second sentences by revising the phrase ''found on the free legal services list'' to read ''or attorney found on the list of free legal services providers maintained in accordance with part 3 of this chapter''.

PART 287—FIELD OFFICERS; POWERS AND DUTIES

19. The authority citation for part 287 continues to read as follows:

Authority: 8 U.S.C. 1103, 1182, 1225, 1226, 1251, 1252, 1357; 8 CFR part 2.

§ 287.3 [Amended]

20. In § 287.3, the sixth sentence is amended by removing the word ''programs'' and adding ''provided by organizations and attorneys'' in its place and by revising the reference to ''part 292a of this chapter'' to read ''part 3 of this chapter''.

PART 292—REPRESENTATION AND APPEARANCES

21. The authority citation for part 292 continues to read as follows:

Authority: 8 U.S.C. 1103, 1252b, 1362.

22. Section 292.22 is amended by revising the first sentence in paragraph (a) introductory text to read as follows:

§ 292.2 Organizations qualified for recognition; requests for recognition; withdrawal of recognition; accreditation of representatives; roster.

(a) *Qualifications of organizations.* A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service alone or the Service and the Board (including practice before the Immigration Court). * * *

* * * * *

PART 292a—[REMOVED]

23. Part 292a is removed.

Dated: February 24, 1997.

Janet Reno,

Attorney General.

[FR Doc. 97–5039 Filed 2–27–97; 8:45 am]

BILLING CODE 4410–30–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 96–NM–35–AD; Amendment 39–9951; AD 97–05–07]

RIN 2120–AA64

Airworthiness Directives; Lockheed Model 382 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Lockheed Model 382 series airplanes, that currently requires a revision to the Airplane Flight Manual to require takeoff operation in accordance with revised performance data. That AD also requires installation of certain valve housings for the propeller governor on the outboard engines. This amendment revises the applicability of the existing AD to remove certain airplanes. This amendment also revises references to a certain replacement part number of a valve housing. The actions specified by this AD are intended to ensure that the airplane maintains adequate thrust decay characteristics in the event of critical engine failure during takeoff.

DATES: Effective April 4, 1997.

The incorporation by reference of Lockheed Airplane Flight Manual Supplement 382–16, dated August 11, 1993, as listed in the regulations, was approved previously by the Director of the Federal Register as of August 10, 1994 (59 FR 35236, July 11, 1994).

ADDRESSES: The service information referenced in this AD may be obtained from Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Thomas Peters, Aerospace Engineer, Systems and Flight Test Branch, ACE–116A, FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia 30337–2748; telephone (404) 305–7367; fax (404) 305–7348.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 95–12–05, amendment 39–9255 (60 FR 28715, June 2, 1995), which is applicable to certain Lockheed Model 382 series airplanes, was published in the Federal Register on February 21, 1996 (61 FR 6579). The action proposed to supersede AD 95–12–05 to continue to require the previous revision to the Airplane Flight Manual to require takeoff operation in accordance with revised performance data. The action also proposed to continue to require the installation of certain valve housings for the propeller governor on the outboard engines. The action also proposed to revise the applicability of the existing AD to remove certain airplanes, and to revise references to a certain replacement part number of a valve housing.

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

Support for the Proposal

The commenter supports the proposed rule.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 112 Model 382 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 18 airplanes of U.S. registry will be affected by this proposed AD.

The actions that are currently required by AD 95–12–05 take approximately 8 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts cost approximately $90,000 per airplane. Based on these figures, the cost impact on U.S. operators of the actions currently required is estimated to be $1,628,640, or $90,480 per airplane.

Since this new AD only revises certain information and part numbers, it will impose no new costs to the affected operators.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator will accomplish those actions in the future if this AD were not adopted. However, the FAA has been advised that the only U.S. operator of the affected Lockheed Model 382 series airplanes has already equipped half of its fleet (9 airplanes) with the valve housing assembly that is required by this AD. Therefore, the future economic cost of this AD on U.S. operators is now only $814,320.

Regulatory Impact

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

For the reasons discussed above, I certify that this action (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3)

will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–9255 (60 FR 28715, June 2, 1995), and by adding a new airworthiness directive (AD), amendment 39–9951, to read as follows:

97–05–07 Lockheed: Amendment 39–9951. Docket 96–NM–35–AD. Supersedes AD 95–12–05, Amendment 39–9255.

Applicability: Model 382, 382E, and 382G series airplanes; equipped with a servo-type valve housing assembly having part number 714325–3 or –7 installed on any outboard engine; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To ensure that the airplane maintains adequate thrust decay characteristics in the event of critical engine failure during takeoff, accomplish the following:

(a) Within 60 days after August 10, 1994 (the effective date of AD 94–14–09, amendment 39–8961), revise the Limitations and Performance Data Sections of the FAA-approved Airplane Flight Manual (AFM) to include information specified in Lockheed Airplane Flight Manual Supplement 382–16, dated August 11, 1993, and operate the airplane accordingly thereafter. The requirements of this paragraph may be accomplished by inserting AFM Supplement 382–16 into the AFM.

(b) Within 12 months after the effective date of this AD, replace the servo-type valve housing assemblies having part number 714325–3 or –7 with a governor assembly control number 577888 on the propeller governors installed on the outboard engines, in accordance with Lockheed Document SMP–515C, Card No. CO–135. Replacement of these assemblies with governor assembly control numbers 577888, constitutes terminating action for the requirements of paragraph (a) of this AD; once the replacement is accomplished, the AFM revision may be removed.

Note 2: Propeller governors with servo-type valve housing assemblies having part number 714325–3 or –7 may be retained or replaced with a governor assembly control number 577888 for use on the inboard engine positions.

(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, Atlanta Aircraft Certification Office (ACO), FAA, Small 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, Atlanta ACO.

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

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

(e) The AFM revision shall be done in accordance with Lockheed Airplane Flight Manual Supplement 382–16, dated August 11, 1993. This incorporation by reference was approved previously by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 as of August 10, 1994 (59 FR 35236, July 11, 1994). Copies may be obtained from Lockheed Aeronautical Systems Support Company (LASSC), Field Support Department, Dept. 693, Zone 0755, 2251 Lake Park Drive, Smyrna, Georgia 30080. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Atlanta Aircraft Certification Office, Small Airplane Directorate, Campus Building, 1701 Columbia Avenue, Suite 2–160, College Park, Georgia; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on April 4, 1997.

Issued in Renton, Washington, on February 21, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–4946 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[OH–239; Amendment Number 73]

Ohio Regulatory Program

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

ACTION: Final rule; approval of amendment.

SUMMARY: OSM is approving a proposed amendment to the Ohio regulatory program (hereinafter referred to as the ''Ohio program'') under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of regulatory changes to implement the remining standards of the Federal Energy Policy Act of 1992. The amendment is intended to revise the Ohio program to be consistent with the corresponding Federal regulations as amended on November 27, 1995. (60 FR 58480).

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: George Rieger, Field Branch Chief, Appalachian Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, 3 Parkway Center, Pittsburgh, PA 15220, Telephone: (412) 937–2153.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program

On August 16, 1982, the Secretary of the Interior conditionally approved the Ohio program. Background information on the Ohio program, including the Secretary's findings, the disposition of comments, and the conditions of approval can be found in the August 10, 1982, Federal Register (47 FR 34688). Subsequent actions concerning conditions of approval and program amendments can be found at 30 CFR 935.11, 935.15, and 935.16.

II. Submission of the Proposed Amendment

By letter dated July 23, 1996, (Administrative Record No. OH–2168–00) Ohio submitted a proposed amendment to its program pursuant to SMCRA. Ohio submitted the proposed amendment at its own initiative. The Ohio amendment proposes to implement the remining standards of the Federal Energy Policy Act of 1992 and the corresponding Federal regulations as amended on November 27, 1995. (60 FR 58480). OSM announced receipt of the proposed amendment in the August 26, 1996, Federal Register (61 FR 43696) and in the same document opened the public comment period and provided an opportunity for a public hearing on the adequacy of the proposed amendment. The public comment period closed on September 25, 1996. However, a complete description of certain amendments concerning permit application requirements and revegetation time frames was inadvertently omitted from that notice. Also, Ohio submitted corrections to its proposed amendments by letter dated October 4, 1996, (Administrative Record No. OH–2168–07). Therefore, OSM announced these items in the October 18, 1996, Federal Register (61 FR 54375) and reopened the public comment period until November 4, 1996. On January 23, 1997, Ohio submitted additional changes (Administrative Record No. OH–2168–12) as a result of discussions with OSM.

III. Director's Findings

Set forth below, pursuant to SMCRA and the Federal regulations at 30 CFR 732.15 and 732.17, are the Director's findings concerning the proposed amendment. Revisions not specifically discussed below concern nonsubstantive wording changes, or revised cross-references and paragraph notations to reflect organizational changes resulting from this amendment.

A. Revisions to Ohio Regulations That Are Substantively Identical to the Corresponding Federal Regulations

1. OAC 1501:13–1–02 Definitions.

(a) New paragraph (OOO) ''Lands eligible for remining'' has been added to mean those lands that would otherwise be eligible for expenditures under section 1513.37 of the Revised Code.

(b) New paragraph (JJJJJJ) ''Unanticipated event or conditions'' has been added to mean (as used in 1501:13–5–01 of the Administrative Code) an event or condition related to prior mining activity which arises from a surface coal mining and reclamation operation on lands eligible for remining and was not contemplated in the applicable permit.

The proposed changes are found to be substantively identical to the corresponding Federal Regulations at 30 CFR 701.5.

2. OAC 1501:13–5–01 Review, public participation, and approval or disapproval of permit applications and permit terms and conditions.

(a) New paragraph (D)(7) has been added to provide that subsequent to the effective date of this rule, the prohibitions of paragraph (D)(3) of this section regarding the issuance of a new permit, shall not apply to any violation that occurs after that date; is unabated; and results from an unanticipated event or condition that arises from a surface coal mining and reclamation operation on lands that are eligible for remining under a permit issued pursuant to OAC 1501:13–4–12(L) and held by the person making application for the new permit.

(b) New paragraph (D)(7)(D) provides that for permits issued under OAC 1501:13–4–12(L), an event or condition shall be presumed to be unanticipated for the purposes of this paragraph if it: arose after permit issuance; was related to prior mining; and was not identified in the permit.

(c) New paragraph (E)(19) and subparagraphs (A), (B), and (C), are added to require that, for operations which will include remining areas under 1501:13–4–12(L) of the Administrative Code, the application includes (A) Lands eligible for remining; (B) an identification of the potential environmental and safety problems related to prior mining activity which could reasonably be anticipated to occur at the site; and (C) mitigation plans to sufficiently address these potential environmental and safety problems so that reclamation as required by the applicable requirements of Chapter 1513 of the Revised Code can be accomplished. Additionally, a semicolon and the word ''and'' are added at the end of paragraph (E)(18).

The proposed changes are found to be substantively identical to the corresponding Federal regulations at 30 CFR 773.15(b) and (c)(13).

3. OAC 1501:13–9–15 Revegetation.

Paragraph (F)(2) is revised, and subparagraph (F)(2)(A) is added, to provide that the required period of extended responsibility on lands eligible for remining shall be not less than two full years for permits issued pursuant to the requirements of OAC 1501:13–4–12 and renewals thereof.

The Director finds that these revisions are substantively identical to portions of the corresponding Federal regulations at 30 CFR 816 and 817.116(c)(2)(i) and (ii).

B. Revisions to Ohio Regulations That Are Not Substantively Identical to the Corresponding Federal Regulations

1. OAC 1501:13–4–12 Requirements for permits for special categories of mining.

(a) New paragraph (L) has been added to include the requirements for any person who submits a permit application to conduct a surface coal mining operation on lands eligible for remining. The requirements of paragraph (L) shall apply until September 30, 2004, or any later date authorized by federal law. The permit application must include: (1) A description of the proposed lands eligible for remining and a demonstration, to the satisfaction of the Chief, how such lands meet the eligibility requirements specified by Revised Code Section 1513.37; (2) Identification, to the extent not otherwise addressed in the permit application, of any potential environmental and safety problems related to the prior mining activity at the site which could be reasonably expected to occur. This identification shall be based on a due diligence investigation which shall include visual observations at the site, a record review of past mining at the site, and environmental sampling tailored to current site conditions; and (3) A description, with regard to potential environmental and safety problems identified in paragraph (2), of the mitigative measures that will be taken to ensure that the applicable reclamation requirements of Revised Code Chapter 1513 and these rules can be met.

The federal regulation at 30 CFR 785.25(b) requires that the remining application permit be made in accordance with the requirements of subchapter G, which are the permitting requirements. The Ohio rule at OAC 1501:13–4–12(L) does not include this requirement, however, OAC 1501:13–4–12(A) does require all special categories of mining to comply with the general permitting requirements of OAC 1501:13–4, therefore the Director finds that the proposed change at paragraph (L) is no less effective than the corresponding Federal regulations at 30 CFR 785.25 (b) and (c) when read in conjunction with OAC 1501:13–4–12(A).

(b) The Director also finds that paragraphs (L)(1) and (L)(3) are substantively identical to 30 CFR 785.25(a) and (b)(2), respectively. Paragraph (L)(2) is nearly identical to 30 CFR 785.25(b)(1) except that Ohio did

not include the word ''review'' in OAC 1501:13–4–12(L)(2) when describing the evaluation of past mining at the site that is required during the permitting process. 30 CFR 785.25(b)(1) requires a record review of past mining at the site. Ohio has addressed this item by including the word ''review'' in the version of OAC 1510:13–4–12(L)(2) that was officially filed through the Ohio rule promulgation process with the Ohio Legislative Service Commission on January 16, 1997. Ohio provided a copy of this letter to OSM on January 23, 1997. Therefore the amendment is found to be as effective as 30 CFR 785.25(b)(1) based on this revision.

2. OAC 1501:13–9–15 Revegetation.

(a) Ohio's revegation performance standards for lands eligible for remining generally cross-reference the performance standards for previously undisturbed lands, thus, to avoid confusion, Ohio deleted the references to ''five years'' for the period of responsibility. While the period of responsibility will remain five years for most mining operations, the deletions are consistent with the change in 30 CFR 816/817.116(c)(2)(i) which allows remining operations to have a shorter period of responsibility. Affected paragraphs and subparagraphs are: (F)(3), (F)(3)(a), (G)(3)(a), (I)(6), (J)(1)(b), (F)(4)(d), (H)(2), (L)(2), and (M)(4).

(b) Subparagraph (H)(2) is further amended by adding the words ''and hay crops also meet, at a minimum, the ground cover standards of paragraph (G)(3)(B) during the last year of the period of extended responsibility.'' The current rule could have been interpreted to allow cropland with hay as the approved crop to only meet productivity requirements without a ground cover. Ohio is adding a ground cover requirement on cropland when hay is the required crop. While the federal rules at 30 CFR 816.116(b)(2) only require a success standard approved by the regulatory authority for cropland, the Director finds the success standard to be consistent with the revegetation requirements of 30 CFR 816/817.111.

(c) Paragraph (L) is amended by deleting the words ''undeveloped land'' from the revegetation success standards for forest land, fish and wildlife habitat and other postmining land uses that have woody vegetation. Specific revegetation success standards for undeveloped land are provided under in OAC 1510:13–9–15(M). OSM previously approved Ohio's program amendment #67 to change OAC 1501:13–9–17(B)(2) to allow undeveloped land as a post mining land use only if the pre-mining land use was undeveloped. That amendment also eliminated OAC 1501:13–9–17(D)(8) which provided that proposals for a post mining land use of undeveloped land would be treated as if the post mining land use were forest land/fish and wildlife habitat. Therefore, including undeveloped land with the forest land/fish and wildlife land use revegetation standards in OAC 1501:13–9–15(L) is no longer necessary. The deletion of ''undeveloped land'' in paragraph (L) is consistent with the earlier deletion that was approved by OSM on July 27, 1994 (59 FR 38123, 38124). Thus, the Director finds that this deletion is not inconsistent with 30 CFR 816./817.116(b).

(d) New paragraph (O) is added to include revegetation standards for areas eligible for remining in each land use category. New subparagraph (1)(A) includes standards for revegetation of pasture and grazing lands and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (G)(2) of this rule. For Phase III bond release, however, new subparagraph (1)(B) requires that remined lands in this category must have ground cover equal to or exceeding seventy percent cover and be adequate to control erosion with no single area with less than thirty percent cover exceeding the lesser of three thousand square feet or .3 percent of the land affected.

New subparagraph (2)(A) includes standards for revegetation of agricultural cropland, other than prime farmland, and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (G)(2) of this rule. New subparagraph (2)(B) includes for Phase III bond release, crop yield data must at a minimum equal the average county yield for any year of the responsibility period except the first year and, hay crops also must have ground cover equal to or exceeding seventy percent cover and be adequate to control erosion with no single area with less than thirty percent cover exceeding the lesser of three thousand square feet or .3 percent of the land affected.

New subparagraph (3)(A) includes standards for revegetation of industrial, residential, or commercial land use, other than commercial forest land, and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (G)(2) of this rule. For Phase III bond release, however, new subparagraph (3)(B) requires that remined lands in this category must have ground cover equal to or exceeding seventy percent cover and be adequate to control erosion with no single area with less than thirty percent cover exceeding the lesser of three thousand square feet or .3 percent of the land affected.

New subparagraph (4)(A) includes standards for revegetation of forest land, fish and wildlife habitat, or other land which requires the establishment of woody vegetation, and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (L)(1) of this rule. For Phase III bond release, however, new subparagraph (4)(B) requires that remined lands in this category must meet the requirements of paragraph (L)(2) of this rule except that, of the minimum countable trees per acre, eighty (80) percent have been in place for at least two (2) years, on each acre on which trees or shrubs are to be planted.

New subparagraph (5)(A) includes standards for revegetation of undeveloped land and requires that for determining success of revegetation and for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (M)(1), (2) and (3) of this rule. For Phase III bond release, however, new subparagraph (5)(B) requires that remined lands in this category must meet the requirements of paragraph (M)(3) of this rule except that the herbaceous ground cover on areas not planted with trees or shrubs must have ground cover equal to or exceeding seventy percent cover and be adequate to control erosion with no single area with less than thirty percent cover exceeding the lesser of three thousand square feet or .3 percent of the land affected.

New subparagraph (6)(A) includes standards for revegetation of recreational areas where herbaceous vegetation comprises the ground cover, and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (G)(2) of this rule. For Phase III bond release, however, new subparagraph (6)(B) requires that remined lands in this category must have ground cover equal to or exceeding seventy percent cover and be adequate to control erosion with no single area with less than thirty percent cover exceeding the lesser of three thousand square feet or .3 percent of the land.

New subparagraph (6)(C) includes standards for revegetation of recreation

areas which require the planting of woody vegetation, and requires that for Phase II bond release, revegetation standards for remined lands are the same as those for previously unmined lands as required by paragraph (L)(1) of this rule. For Phase III bond release, new subparagraph (6)(D) requires that remined lands must meet the same requirements of paragraph (L)(2) of this rule which pertain to previously unmined lands in this category.

The proposed rules discussed above pertaining to Phase II bond release for each appropriate land use category for remined areas are the same rules that Ohio applies for Phase II bond release for previously unmined areas. The proposed rules in (O)(1)(B), (O)(2)(B), (O)(3)(B), (O)(5)(B) and (O)(6)(B) pertaining to Phase III bond release for each appropriate land use category require ground cover to equal or exceed 70 percent and adequately control erosion in the last year of the extended responsibility period on remining sites. The corresponding Federal rule at 816.116(b)(5) requires the vegetative ground cover shall be not less than the ground cover existing before redisturbance and shall be adequate to control erosion. The Federal rule does not specify required percentages of ground cover. The question is whether or not 70 percent cover is adequate, especially if the ground cover was greater than 70 percent before remining. To evaluate the adequacy of the proposed rule it is necessary to look at the entire Ohio rule as it pertains to revegetation success standards. Ohio's general requirements in OAC 1501:13–9–15(B)(3) and (4) require vegetation to be at least equal in extent of cover to the natural vegetation of the area; and control surface erosion. When OAC 1501:13–9–15(O) is considered in conjunction with these provisions of the Ohio rule, the proposed success standards for remining meet the requirements of the Federal rule at 30 CFR 816.116(b)(5). Therefore, in the rare case of an area being eligible for remining having greater than 70 percent ground cover before remining, the mining operator would be held to the general requirements of OAC 1501:13–9–15(B)(3) & (4) that vegetation be at least equal to the natural vegetation of the area and capable of controlling surface erosion. Additionally, the requirements that ground cover meet or exceed 70 percent in the last year of the period of extended responsibility is consistent with the Federal rule at 30 CFR 816.116/817.116(c)(2)(ii).

The Director finds that Ohio's proposed rules listed above are no less effective than the corresponding Federal Regulations at 30 CFR 816.116 and 30 CFR 817.116.

The following non-substantive changes are also proposed by Ohio:

(d) Paragraph (M) is further amended by separating the first sentence into two items with the second item being labeled as (1) and re-numbering the subsequent items accordingly. No word changes were made to these items.

(e) Definitions of ''abatement plan'', ''base line pollution load'', ''best available technology economically achievable'', ''pollution abatement area'', ''pre-existing discharge'', and ''remining NPDES permit'' are relocated from OAC 1501:13–4–15 to OAC 1501:13–1–02, without revision, and remaining paragraphs in both sections are re-lettered accordingly.

C. Revisions to Ohio's Regulations With No Corresponding Federal Regulations

1. OAC 1501:13–4–08 Hydrologic map and cross-sections.

New paragraph (A)(15) has been added to include in the hydrologic map any land determined to be eligible for remining.

2. OAC 1501:13–4–10 Uniform color code and map symbols.

New paragraph (A)(6) has been added to include any area determined to be eligible for remining shall have its perimeter designated with a dashed black line and the areas therein clearly labeled ''Remine''.

3. OAC 1501:13–4–15.

(a) The title of this section is changed from ''Authorization to conduct coal mining on previously mined areas'' to ''Authorization to conduct coal mining on pollution abatement areas''.

While there are no direct Federal counterparts to these revisions, the Director finds that they are not inconsistent with SMCRA or its corresponding Federal regulations, and do not render the State program any less effective than the federal regulations.

IV. Summary and Disposition of Comments

The Director solicited public comments and provided an opportunity for a public hearing on the proposed amendment. Because no one requested an opportunity to speak at a public hearing, no hearing was held. Comments were received from the Ohio Historic Preservation Office in a letter dated September 13. The commenter stated that ongoing coordination with the Ohio Historical Preservation Office is necessary to address preservation concerns. The Director notes that OAC 1501:13–4–01(B) requires coordination of review and issuance of permits with other federal or state laws which includes the National Historic Preservation Act of 1966 and that OAC 1501:13–5–01(A)(3) requires that a written notification of a permit application, renewal or revision be sent to all federal, state and local governmental agencies that have an interest in the area of the proposed operations. There are no remining operations that are not included in the permit application process. The program amendment does not propose to change any coordination that currently exists between OHPO and DMR concerning review of cultural and historical resources. Additionally, the commenter was concerned that remining permit applications will not be reviewed by Ohio to determine if the proposed permit area is included within an area designated as unsuitable for mining. The Director disagrees with the commenter. Pursuant to OAC 1501:13–5–01(E)(4), all mining applications, including remining sites, cannot be approved if the proposed permit area is included within an area designated unsuitable for coal mining operations.

Federal Agency Comments

Pursuant to 30 CFR 732.17(h)(11)(I), the Director solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Ohio program. The U.S. Army Corps of Engineers responded that the changes were satisfactory. No other comments were received.

Environmental Protection Agency (EPA)

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to obtain the written concurrence of the EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*). None of the revisions that Ohio proposed to make in this amendment pertain to air or water quality standards. Therefore, OSM did not request EPA's concurrence.

V. Director's Decision

Based on the above finding(s), the Director approves the proposed amendment as submitted by Ohio on July 23, 1996, and revised on October 4, 1996 and January 23, 1997. The Director is approving the proposed regulations with the understanding that they be promulgated in a form identical to that submitted to OSM. Any differences between these regulations and the State's final regulations will be

processed as a separate amendment subject to public review at a later date.

The Federal regulations at 30 CFR Part 935, codifying decisions concerning the Ohio program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

VI. Procedural Determinations

Executive Order 12866

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

Executive Order 12988

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

National Environmental Policy Act

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

Paperwork Reduction Act

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

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

Unfunded Mandates

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

List of Subjects in 30 CFR 935

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 7, 1997.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

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

PART 935—OHIO

1. The authority citation for part 935 continues to read as follows:

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

2. Section 935.15 is amended by adding paragraph (eeee) to read as follows:

§ 935.15 Approval of regulatory program amendments.

* * * * *

(eeee) The following rules, as submitted to OSM on August 26, 1996, and revised on October 4, 1996, and January 23, 1997, are approved effective February 28, 1997:

OAC 1501:13–1–02 (000) and (JJJJJJ)	Definitions.
OAC 1501:13–4–08 (A)(15)	Hydrologic map and cross sections.
OAC 1501:13–4–10 (A)(6)	Uniform color code and map symbols.
OAC 1501:13–4–12 (L)	Requirements for permits for special categories of mining.
OAC 1501:13–4–15 (deletion of (B))	Authorization to conduct coal mining on pollution abatement areas.
OAC 1501:13–5–01 (D)(7), (D)(7)(D), (E)(19) and (E)(19) (A), (B) and (C).	Review, public participation, and approval or disapproval of permit applications and permit terms and conditions.
OAC 1501:13–9–15 (F)(2), (F)(2)(A), (F)(3), (F)(3)(a), (F)(4)(d), (G)(3)(a), (H)(2), (I)(6), (J)(1)(b), (L), (L)(2), (M)(4), (O), and (O) (1) through (6).	Revegetation.

[FR Doc. 97–5038 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–05–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL–5693–8]

Clean Air Act (Act) Approval and Promulgation of State Implementation Plans; Prevention of Significant Deterioration (PSD); Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; Correction.

SUMMARY: This document contains a correction to the direct final rule concerning the State of Louisiana PSD increments for PM–10 (particulate matter 10 micrometers or less in diameter) published Tuesday, October 15, 1996 (61 FR 53639). In the October 15, 1996, Federal Register document, Section I.8.a of Regulation Louisiana Administrative Code 33:III. Chapter 5, Section 509, effective February 20, 1995, was erroneously cited as Section E.8.a.

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Mr. Samuel R. Mitz at (214) 665–8370.

SUPPLEMENTARY INFORMATION: On page 53642, the third column, under § 52.970(c)(69)(i)(A), paragraph (A) is corrected to read:

(A) Revisions to Regulation Louisiana Administrative Code 33:III.Chapter 5, Section 509, effective February 20, 1995: Section B. Definitions: Baseline Date; Section B. Definitions: Net Emissions Increase; Section D. Ambient Air Increments; Section I.8.a.; Section K.2; and Section P.4.

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and, is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (P.L. 104–4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

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 this rule in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Authority: 42 U.S.C. 7401–7671q.

Dated: February 11, 1997.

Jerry Clifford,

Acting Regional Administrator.

[FR Doc. 97–4964 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

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40 CFR Parts 52 and 81

[ME47–1–6996a; A–1–FRL–5693–5]

Approval and Promulgation of Air Quality Implementation Plans; Maine, and Redesignation of Hancock and Waldo Counties; Maine

AGENCY: Environmental Protection Agency (USEPA or Agency).

ACTION: Direct final rule.

SUMMARY: EPA is approving two requests from the State of Maine: approval of the Maine 1990 base year inventory into the Maine State Implementation Plan (SIP), referred to as the SIP revision; and a redesignation request by the State of Maine for the Hancock and Waldo counties marginal nonattainment area, referred to as the redesignation request. These actions are being taken in accordance with the Clean Air Act (CAA or the Act). The first request will establish the 1990 base year ozone emission inventories of volatile organic compounds (VOC) and oxides of nitrogen (NOx) emissions for the classified ozone nonattainment areas in Maine. The second request will redesignate the Hancock and Waldo counties marginal ozone nonattainment area from nonattainment to attainment. The second request also contains a 1993 attainment emissions inventory that will satisfy Hancock and Waldo counties requirement for a 1993 periodic inventory. A detailed rationale for the two approvals is set forth in **SUPPLEMENTARY INFORMATION.**

DATES: This action is effective on April 29, 1997, unless adverse or critical comments are received by March 31, 1997. If the effective date is delayed, timely notice will be published in the Federal Register.

ADDRESSES: Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection (mail code CAA), U.S. Environmental Protection Agency, Region I, JFK Federal Building, Boston, MA 02203. Copies of the documents relevant to this action are available for public inspection during normal business hours, by appointment at the Office Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA; the Bureau of Air Quality Control, Department of Environmental Protection, 71 Hospital Street, Augusta, ME 04333. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: For the base year inventory, Robert McConnell, (617) 565–9266, and for the Hancock and Waldo counties redesignation request Richard P. Burkhart, (617)–565–3578.

SUPPLEMENTARY INFORMATION:

I. Summary of SIP Revision

Summary

The EPA today is approving SIP revisions submitted by the State of Maine, under sections 110 and 182 of the Act. These revisions consist of the establishment of the 1990 base year ozone emission inventories for the ozone nonattainment areas in Maine. These SIP revisions have been found by EPA to meet the EPA's approval criteria for emission inventories.

Supplementary Information on SIP Revision

Maine submitted 1990 base year emission inventories for the ozone nonattainment areas in the State in final form on July 25, 1995. This portion of this document is divided into three parts:

I. Background Information
II. Summary of SIP Revision
III. Final Action

I. Background

Emission Inventory

Under the CAA as amended in 1990, States have the responsibility to inventory emissions contributing to nonattainment of a National; Ambient Air Quality Standard (NAAQS), to track these emissions over time, and to ensure that control strategies are being implemented that reduce emissions and move areas towards attainment. The CAA requires ozone nonattainment areas designated as moderate, serious, severe, and extreme to submit a plan within three years of 1990 to reduce VOC emissions by 15 percent within six years after 1990. The baseline level of emissions, from which the 15 percent reduction is calculated, is determined by adjusting the base year inventory to exclude biogenic emissions and to exclude certain emission reductions not creditable towards the 15 percent. The 1990 base year emissions inventory is the primary inventory from which the periodic inventory, the Reasonable Further Progress (RFP) projection inventory, and the modeling inventory are derived. Further information on these inventories and their purpose can be found in the ''Emission Inventory Requirements for Ozone State Implementation Plans,'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina, March 1991. A copy of this guidance is available from EPA at the regional office listed in the address section of this document. The base year inventory may also serve as part of

statewide inventories for purposes of regional modeling in transport areas. The base year inventory plays an important role in modeling demonstrations for areas classified as moderate and above.

The air quality planning requirements for marginal to extreme ozone nonattainment areas are set out in section 182 (a)–(e) of title I of the CAA. The EPA has issued a General Preamble describing the EPA's preliminary views on how the agency intends to review SIP revisions submitted under title I of the Act, including requirements for the preparation of the 1990 base year inventory (see 57 FR 13502 (April 16, 1992) and 57 FR 18070 (April 28, 1992)). In this action EPA will rely on the General Preamble's interpretation of the CAA, and the reader should refer to the General Preamble for a more detailed discussion of the interpretations of title I advanced in today's rule and the supporting rationale.

Those States containing ozone nonattainment areas classified as marginal to extreme are required under section 182(a)(1) of the CAA to submit a final, comprehensive, accurate, and current inventory of actual ozone season, weekday emissions from all sources within 2 years of enactment (November 15, 1992). This inventory is for calendar year 1990 and is denoted as the base year inventory. It includes both anthropogenic and biogenic sources of volatile organic compound (VOC), nitrogen oxides (NO_X), and carbon monoxide (CO). The inventory is to address actual VOC, NO_X, and CO emissions for the area during a peak ozone season, which is generally comprised of the summer months. All stationary point and area sources, as well as mobile sources within the nonattainment area, are to be included in the compilation. Available guidance for preparing emission inventories is provided in the General Preamble (57 FR 13498, April 16, 1992).

II. Analysis of State Submission

A. Procedural Background

The Act requires States to observe certain procedural requirements in developing emission inventory submissions to the EPA. Section 110(a)(2) of the Act provides that each emission inventory submitted by a State must be adopted after reasonable notice and public hearing.[1] Final approval of the inventory will not occur until the State revises the inventory to address public comments. Changes to the inventory that impact the 15 percent reduction calculation and require a revised control strategy will constitute a SIP revision. EPA created a ''de minimis'' exception to the public hearing requirement for minor changes. EPA defines ''de minimis'' for such purposes to be those in which the 15 percent reduction calculation and the associated control strategy or the maintenance plan showing, do not change. States will aggregate all such ''de minimis'' changes together when making the determination as to whether the change constitutes a SIP revision. The State will need to make the change through the formal SIP revision process, in conjunction with the change to the control measure or other SIP programs.[2] Section 110(a)(2) of the Act similarly provides that each revision to an implementation plan submitted by a State under the Act must be adopted by such State after reasonable notice and public hearing.

The State of Maine held several public hearings on its ozone emission inventories, the last of which occurred on June 28, 1995. The inventories were submitted to the EPA as a SIP revision on July 25, 1995, by cover letter from the Governor's designee. The inventories had originally been submitted to the EPA in December of 1992. At that time, they were reviewed by the EPA to determine completeness shortly after its submittal, in accordance with the completeness criteria set out at 40 CFR part 51, Appendix V (1991), as amended by 57 FR 42216 (August 26, 1991). The inventories were found to be complete except for the public hearing requirement. The EPA determined that for inventories that had not met the public hearing requirement, a finding of completeness would be made contingent upon the State fulfilling the public hearing requirement.[3] The submittal was found to be complete contingent upon the State fulfilling the public hearing requirement, and a letter dated February 24, 1993, was forwarded to the State indicating the completeness of the submittal. The re-submittal of the Maine base year emission inventories in July of 1995, and the accompanying documentation that the inventories had been subject to a public hearing, have fulfilled this obligation.

The EPA Region I Office has compared the final Maine emission inventories with the deficiencies noted in the various comment letters sent by EPA to the DEP and concluded that Maine has adequately addressed the issues raised by the EPA.

B. Emission Inventory Review

Section 110(k) of the CAA sets out provisions governing the EPA's review of SIP submissions, including base year emission inventory submittals in order to determine approval or disapproval under section 182(a)(1) (*see* 57 FR 13565–66 (April 16, 1992)). The EPA is approving the Maine ozone base year emission inventories submitted to the EPA in final form on July 25, 1995, based on the Level I, II, and III review findings. This section outlines the review procedures performed to determine if the base year emission inventory is acceptable or should be disapproved.

The Level I and II review process is used to determine that all components of the base year inventory are present. The review also evaluates the level of supporting documentation provided by the State and assesses whether the emissions were developed according to current EPA guidance.

The Level III review process is outlined here and consists of 10 points that the inventory must include. For a base year emission inventory to be acceptable it must pass all of the following acceptance criteria:

1. An approved Inventory Preparation Plan (IPP) was provided and the Quality Assurance (QA) program contained in the IPP was performed and its implementation documented.

2. Adequate documentation was provided that enabled the reviewer to determine the emission estimation procedures and the data sources used to develop the inventory.

3. The point source inventory must be complete.

4. Point source emissions must have been prepared or calculated according to the current EPA guidance.

5. The area source inventory must be complete.

6. The area source emissions must have been prepared or calculated according to the current EPA guidance.

7. Biogenic emissions must have been prepared according to current EPA guidance or another approved technique.

[1] Also Section 172(c)(7) of the Act requires that plan provisions for nonattainment areas meet the applicable provisions of section 110(a)(2).

[2] Memorandum from John Calcagni, Director, Air Quality Management Division, and William G. Laxton, Director, Technical Support Division, to Regional Air Division Directors, Region I-X, ''Public Hearing Requirements for 1990 Base-Year Emission Inventories for Ozone and Carbon Monoxide Nonattainment Areas,'' September 29, 1992, a copy of which is available from EPA Region I.

[3] Memorandum from John Calcagni, Director, Air Quality Management Division, to Regional Air Division Directors, Regions I–X, ''State Implementation Plan (SIP) Actions Submitted in Response to Clean Air Act (ACT) Deadlines'' October 28, 1992, a copy of which is available from EPA Region I.

8. The method (e.g., Highway Performance Modeling System or a network transportation planning model) used to develop vehicle miles travelled (VMT) estimates must follow EPA guidance, which is detailed in the document, ''Procedures for Emission Inventory Preparation, Volume IV: Mobile Sources'', U.S. Environmental Protection Agency, Office of Mobile Sources and Office of Air Quality Planning and Standards, Ann Arbor, Michigan, and Research Triangle Park, North Carolina, December 1992, a copy of which is available from EPA Region I.

9. The MOBILE model was correctly used to produce emission factors for each of the vehicle classes.

10. Non-road mobile emissions were prepared according to current EPA guidance for all of the source categories.

The base year emission inventory will be approved if it passes Levels I, II, and III of the review process. Detailed Level I and II review procedures can be found in ''Quality Review Guidelines for 1990 Base Year Emission Inventories,'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC, July 27, 1992. Level III review procedures are specified in EPA memoranda.[4]

Maine's base year emission inventories meets each of these ten criteria. Documentation of the EPA's evaluation, including details of the review procedure, is contained within the technical support document prepared for the Maine 1990 base year inventories, which is available to the public as part of the docket supporting this action.

III. Final Action on SIP Revision

Maine has submitted a complete inventory containing point, area, biogenic, on-road mobile, and non-road mobile source data, and accompanying documentation. Emissions from these sources are presented in the following table:

VOC

[Ozone seasonal emissions in tons per day]

NAA	Area source emissions	Point source emissions	On-road mobile emissions	Non-road mobile emissions	Biogenic	Total emissions
Portland	31.80	9.65	49.87	7.40	197.60	296.32
Lewiston-Auburn	14.95	2.29	20.92	3.74	122.70	164.60
Knox & Lincoln Co	4.85	0.86	6.43	1.09	68.00	81.22
Hancock & Waldo Co	7.18	1.93	8.85	1.32	216.40	235.69

NO_X

[Ozone Seasonal Emissions in Tons Per Day]

NAA	Area source emissions	Point source emissions	On-road mobile emissions	Non-road mobile emissions	Biogenic	Total emissions
Portland	6.13	19.38	62.47	4.41	NA	92.39
Lewiston-Auburn	3.08	4.49	24.36	2.28	NA	34.24
Knox & Lincoln Co	0.92	2.79	7.23	0.69	NA	11.63
Hancock & Waldo Co	1.11	5.49	11.12	0.96	NA	18.68

CO

[Ozone Seasonal Emissions in Tons Per Day]

NAA	Area source emissions	Point source emissions	On-road mobile emissions	Non-road mobile emissions	Biogenic	Total emissions
Portland	7.12	6.05	463.71	40.38	NA	517.26
Lewiston-Auburn	3.57	2.35	183.86	20.48	NA	210.26
Knox & Lincoln Co	1.26	0.06	46.88	6.20	NA	54.40
Hancock & Waldo Co	2.03	1.76	64.54	7.03	NA	75.36

Maine has satisfied all of the EPA's requirements for providing a comprehensive, accurate, and current inventory of actual ozone precursor emissions for its ozone nonattainment areas. The inventories are complete and approvable according to the criteria set out in the November 12, 1992 memorandum from J. David Mobley, Chief Emission Inventory Branch, TSD to G. T. Helms, Chief Ozone/Carbon Monoxide Programs Branch, AQMD. In today's final action, the EPA is fully approving the SIP 1990 base year ozone emission inventories submitted by Maine to the EPA for the Portland, Lewiston-Auburn, Knox and Lincoln Counties, and Hancock and Waldo Counties nonattainment areas as meeting the requirements of sections 182(a)(1) and 172(c)(3) of the CAA.

The EPA has reviewed these requests for revision of the federally approved SIP for conformance with the provisions of the Clean Air Act Amendments. The EPA has determined that this action conforms with those requirements.

[4] Memorandum from J. David Mobley, Chief, Emissions Inventory Branch, to Air Branch Chiefs, Region I–X, ''Final Emission Inventory Level III Acceptance Criteria,'' October 7, 1992; and memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors, Region I–X, ''Emission Inventory Issues,'' June 24, 1993. All of these memoranda are available from EPA Region I.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors, in relation to relevant statutory and regulatory requirements.

IV. Summary of Redesignation Request

Background

The Hancock and Waldo Counties (hereafter H-W) ozone nonattainment area is designated nonattainment for ozone and is classified as marginal (56 FR 56694). On May 13, 1996 Maine submitted a requests to have the H-W area redesignated to attainment. The H-W area had been granted a one-year extension of its attainment date (60 FR 33351).

Requirements for Redesignation

Under section 107(d)(3)(E) of the Act, the following five criteria must be met for an ozone nonattainment area to be redesignated to attainment:

1. The area must meet the ozone NAAQS.
2. The area must meet applicable requirements of section 110 and Part D of the Act.
3. The area must have a fully approved SIP under section 110(k) of the Act.
4. The area must show that its experienced improvement in air quality is due to permanent and enforceable measures, including the SIP and any applicable Federal requirements.
5. The area must have a fully approved maintenance plan under section 175A of the Act, including contingency measures.

EPA's Evaluation of Maine's Redesignation Request and Maintenance Plan for the H–W Area

Criterion 1: The area must meet the ozone NAAQS.

EPA's Evaluation: The area met the ozone standard with the 1993–1995 ozone data. The area continues to meet the ozone standard with preliminary 1996 data. The ozone data are complete and in the Aerometric Information Retrieval System (AIRS) for the McFarland Hills ozone monitoring site in Acadia National Park. That site has an expected exceedance rate per year of 0.3. The standard is an expected exceedance rate less than or equal to 1 (40 CFR Part 50 Appendix H).

An additional ozone monitoring site was begun on top of Cadillac Mountain in the park in 1995. That site began monitoring on July 25, 1996. As stated in Appendix A ''When one adjusts for the late start up, this site has a complete year of data; therefore giving it an expected exceedance rate of 1.0,'' which is attainment. In 1996 the preliminary data show no exceedance at either site. The State will continue to monitor in this area in accordance with 40 CFR part 58. All ozone data for this area are available in AIRS and can be obtained from EPA Region I.

Criteria 2 and 3 are similar and will be discussed together.

Criterion 2: The area must meet applicable requirements of section 110 and Part D.

EPA's Evaluation: EPA's redesignation policy requires an area to meet all requirements in section 110 and Part D of the Clean Air Act.

Criterion 3: The area must have a fully approved SIP under section 110(k) of the Act.

EPA's Evaluation: In order to meet this criteria, all applicable SIP elements must be approved into Maine's SIP for the H–W area.

Specific Elements

Section 110: General Requirements for Implementation Plans

Section 110(a)(2) of the Act lists the elements to be included in each SIP after adoption by the State and reasonable notice and public hearing. The elements include, but are not limited to, provisions for establishment and operation of appropriate devices, methods, systems, and procedures necessary to monitor ambient air quality; regulation of the modification or construction of stationary sources, including provisions for Part C (PSD) and D (NSR) preconstruction permit programs, criteria for stationary source emission control measures, monitoring, and reporting, provisions for modeling, and provisions for public and local agency participation. For purposes of redesignation, the H–W area SIPs were reviewed to ensure that all requirements under the Act were satisfied. EPA has determined that the individual SIPs are consistent with the requirements of section 110 of the Act.

Part D: General Provisions for Nonattainment Areas

Before any of the marginal nonattainment counties may be redesignated as attainment, they must fulfill the applicable requirements of Part D. Under Part D, an area's classification determines the requirements to which it is subject. Subpart 1 of Part D sets forth the basic nonattainment requirements applicable to all nonattainment areas. Subpart 2 of Part D establishes additional requirements for ozone nonattainment areas classified under table 1 of section 181(a). As described in the General Preamble, specific requirements of Subpart 2 may override Subpart 1's general provisions, (57 FR 13501 (April 16, 1992)). The H–W area is classified as marginal nonattainment and is in the Ozone Transport Region (OTR). Therefore, in order to be redesignated, the State must meet the applicable requirements of Subpart 1 of Part D—specifically sections 172 and 176, as well as the applicable requirements of Subpart 2 of Part D, except for OTR requirements.

Section 172 Requirements

The H–W redesignation request has satisfied all of the relevant submittal requirements under section 172 necessary for the area to be redesignated to attainment.

Section 172(c)(3) requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions. The requirement was superseded by the inventory requirement in section 182(a)(1). The MEDEP submitted such an inventory on July 26, 1995. This inventory is being approved by EPA in this document.

Section 172(c)(5) requires permits for the construction and operation of new and modified major stationary sources anywhere in the nonattainment area. The Maine NSR rules were approved by EPA on Feb. 14, 1996 (61 FR 5690).

Section 176 Conformity Requirements

EPA has previously interpreted the conformity requirements as not being applicable requirements for purposes of evaluating redesignation requests (60 FR 62748; December 7, 1995).

Subpart 2 Section 182 Requirements (Additional Requirements)

The H–W area is classified as marginal nonattainment. Therefore, Part D, Subpart 2, section 182(a) requirements apply. In accordance with guidance presented in the Shapiro memorandum,[5] the requirements that were due prior to the submission of the requests to redesignate the area must be fully approved into the SIP before the requests to redesignate the area to attainment can be approved. Those requirements are discussed below:

[5] Memorandum from Michael H. Shapiro, Acting Assistant Admin. for Air and Radiation, to Regional Air Directors, ''State Implementation Plan (SIP) Requirements for Areas Submitting Requests . . . on or After November 15, 1992,'' dated Sep 17, 1993, and available from EPA Region I.

(1) 1990 Base Year Inventory

The 1990 base year emission inventory was submitted to EPA on July 26, 1995 and found complete on July 26, 1995, and is being approved in this document.

(2) Permit Program

The Maine NSR rules were approved by EPA on Feb. 14, 1996 (61 FR 5690). An interim approval of Maine's Title V permit program was published (61 FR 49289). Final approval will be published soon.

(3) RACT Fix-Ups

Pursuant to the Section 182(a)(2)(A) RACT fix-up requirement, Maine submitted regulations for fixed roof petroleum tanks, bulk gasoline terminals, and paper coating sources which were approved by EPA on February 2, 1992 (57 FR 3946). In addition, the state submitted capture efficiency test procedures which were approved by EPA on March 22, 1993 (58 FR 15281). Thus, Maine has fulfilled the RACT fix-up requirement.

(4) Periodic Inventory

In the H–W redesignation request, the State of Maine has supplied a 1993 inventory for VOC and NO_X as part of its redesignation request. This inventory will also fulfill the required 1993 periodic inventory for Hancock and Waldo counties specified in CAA Section 182(3)(A).

(5) Emission Statements

The emission statements for Maine were approved by EPA on Jan. 10, 1995 (60 FR 2524).

(6) Offset Requirements

Section 182(a)(4) requires all major new sources or modifications in a marginal nonattainment area within the OTR to achieve offsetting reductions of precursors at a ratio of at least 1.1 to 1.0. Section 184 raises the ratio to 1.15 to 1, within the OTR. The Maine NSR rules were approved by EPA on Feb. 14, 1996 with an offset ratio of 1.15 to 1 (61 FR 5690).

Section 184 OTR Requirements

In a previous rulemaking (61 FR 53174, Oct. 19, 1996), EPA stated that since OTR requirements are regional in nature and EPA can sanction an area separately for failure to submit or failure to implement OTR requirements, these OTR measures would not be a requirement for redesignations. In sum, redesignation to attainment will not remove the requirements for Maine to adopt and implement any outstanding section 184 measures in the Hancock and Waldo Counties area.

NO_X RACT Requirements

The H–W area received a wavier from NO_X RACT requirements (60 FR 66748).

Criterion 4: The area must show that its experienced improvement in air quality is due to permanent and enforceable measures.

EPA's Evaluation: The redesignation request has shown that, through fully adopted and implemented, permanent and enforceable state and federal measures, the area's air quality has improved. The request also shows that the meteorology for the period 1989 to 1995 was not unusual.

Several permanent and enforceable control measures have been put into place in the H–W area the most effective of which is the Federal Motor Vehicle Control Program. Decrease in transported ozone has also been a major factor in the improved air quality of this region. Since 1992 other programs have also been implemented in Maine, such as Non-CTG VOC RACT, Stage I gasoline vapor recovery on smaller stations, and reformulated gasoline.

Criterion 5: The area must have a fully approved maintenance plan under section 175A of the Act, including contingency measures.

EPA's Evaluation: The state of Maine chose 1993 to be its attainment year inventory and per EPA requirements must show maintenance out to 2006. The ME submittal (Table 2) shows a decrease trend in both VOC and NO_X emissions from 1993 to 2006, and none of the intermediate years have emissions above the 1993 base line.

TABLE 2.—MAINTENANCE INVENTORY FOR H–W AREA

[Summary of H–W VOC Emissions (tons per summer day)]

Sector	1993 attain	1996 proj.	2006 proj.
Area	5.9	5.6	6.0
Point	1.4	1.4	1.5
Mobile	8.3	7.9	6.7
Totals	15.7	14.9	14.2

[Summary of H–W NO_X Emissions (tons per summer day)]

Sector	1993 attain	1996 proj.	2006 proj.
Area	0.5	0.5	0.5
Point	5.7	5.8	5.1
Mobile	11.0	10.3	9.3
Totals	17.3	16.7	14.9

The above tables show that the level of total emissions in the attainment year, 1993, are not exceeded in either the interim year, 1996, or the final year, 2006. Note, the totals may not add-up due to rounding. The state submittal shows that intermediate years also remain below the 1993 baseline.

Contingencies for Approval

Sections 107(d)(3)(E)(iv) and 175A(d) of the Act require states to include contingency provisions to correct promptly any NAAQS violations that occur after redesignation. At a minimum the state must continue to implement all SIP ozone measures in place before redesignation.

EPA's Evaluation: Maine will continue to implement its ozone SIP. The Maine request listed several possible contingency measures for the H–W area. These include: Accelerated vehicle retirement, consumer product rules on adhesives, clean-fuel fleet programs, employee commute options, marine vessel loading, pesticide application controls, rule effectiveness improvements, Stage II gasoline vapor recovery, and Transportation Control Measures (TCM's).

If the H–W area were to violate the ozone NAAQS, the MEDEP would adopt the contingency measure that would be most appropriate to minimize future violations of the NAAQS.

V. Final Action on Redesignation Request

EPA is approving the redesignation request.

VI. Procedural Background

The Agency has reviewed the request for revision of the Federally-approved State implementation plan, and the request for redesignation for conformance with the provisions of the 1990 amendments enacted on November 15, 1990.

The EPA is publishing these actions without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in a separate document in this Federal Register publication, the EPA is proposing to approve the SIP revision and the redesignation request should adverse or critical comments be filed. This action will be effective April 29, 1997 unless, by March 31, 1997, adverse or critical comments are received.

If the EPA receives such comments, the action to which those comments are relevant will be withdrawn before the effective date by publishing a subsequent document that will withdraw the final action(s). All public

comments received will be addressed in a subsequent final rule based on this action serving as a proposed rule. The EPA will not institute a second comment period on the action. Any parties interested in commenting on these actions should do so at this time. If no such comments are received, the public is advised that these actions will be effective April 29, 1997.

Nothing in these actions should be construed as permitting or allowing or establishing a precedent for any future request for revision to any State implementation plan or redesignations. Each request for revision to the State implementation plan or redesignation shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

VII. Administrative Requirements

A. Executive Order 12866

These actions have been classified as a Table 3 actions for signature by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget (OMB) has exempted these regulatory actions from E.O. 12866 review.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, the Agency certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the air quality planning status of a geographical area and does not impose any regulatory requirements on sources. The Agency certifies that the approval of the redesignation request will not affect a substantial number of small entities.

C. Unfunded Mandates

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

EPA has determined that the approval actions promulgated 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. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

D. Submission to Congress and the General Accounting Office

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

E. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 29, 1997. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).) EPA encourages interested parties to comment in response to the proposed rule rather than petition for judicial review, unless the objection arises after the comment period allowed for in the proposal.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: February 3, 1997.

John P. DeVillars,

Regional Administrator, Region I.

For the reasons set out in the preamble title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

2. Section 52.1036 is added to subpart U to read as follows:

§ 52.1036 Emission inventories.

(a) The Governor's designee for the State of Maine submitted 1990 base year emission inventories for the Knox and Lincoln Counties area, the Lewiston and Auburn area, the Portland area, and the Hancock and Waldo Counties area on July 25, 1995 as a revision to the State Implementation Plan (SIP). The 1990 base year emission inventory requirement of section 182(a)(1) of the Clean Air Act, as amended in 1990, has been satisfied for these areas.

(b) The inventory is for the ozone precursors which are volatile organic

compounds, nitrogen oxides, and carbon monoxide. The inventory covers point, area, non-road mobile, on-road mobile, and biogenic sources.

(c) The Knox and Lincoln Counties nonattainment area is classified as moderate. The Lewiston and Auburn nonattainment area is classified as moderate and consists of Androscoggin and Kennebec Counties. The Portland nonattainment area is classified as moderate and consists of Cumberland, Sagadahoc and York Counties. The Hancock and Waldo Counties nonattainment area is classified as attainment.

(d) The Governor's designee for the State of Maine submitted 1993 periodic year emission inventories for the Hancock and Waldo Counties area on May 13, 1996 as a revision to the State Implementation Plan (SIP). The 1993 periodic year emission inventory requirement of section 182(3)(A) of the Clean Air Act, as amended in 1990, has been satisfied for the Hancock and Waldo counties area.

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. In § 81.320 the ''Maine-Ozone'' table is amended by revising the entry for ''Hancock County and Waldo County Area'' to read as follows:

§ 81.320 Maine.

* * * * *

MAINE—OZONE

Designated area	Designation		Classification	
	Date [1]	Type	Date [1]	Type
* * *	*	*	*	*
Hancock County and Waldo County Area:				
Hancock County	Apr. 29, 1997	Attainment.		
Waldo County	Apr. 29, 1997	Attainment.		
* * *	*	*	*	*

[1] This date is November 15, 1990, unless otherwise noted.

[FR Doc. 97–4963 Filed 2–27–97; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 63

[AD–FRL–5695–9]

RIN 2060–AD93

National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule: amendments.

SUMMARY: The EPA is promulgating, as a direct final rule, amendments to the ''National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)'' (the ''Gasoline Distribution NESHAP''). These amendments implement a proposed settlement agreement with the American Petroleum Institute noticed for comment on November 15, 1996 regarding improvements in the screening equations for determining applicability of the Gasoline Distribution NESHAP. This action also addresses some clarifications to the NESHAP that were requested by other parties. These clarifications do not change the level of the standards or the intent of the NESHAP promulgated in 1994.

In the proposed rules section of this Federal Register, the EPA is proposing a rule that is identical to this direct final rule. If significant, adverse comments are received on the proposed rule by the due date (see **DATES** section below), this direct final rule will be withdrawn and all such comments will be addressed in a subsequent final rule based on the proposed rule. If no significant, adverse comments are timely received on the proposed rule, then the direct final rule remains effective upon publication, and no further action is contemplated on the parallel proposal published today.

DATES: This rule is effective April 14, 1997, unless adverse comments are received by March 31, 1997. If adverse comments are received, the EPA will publish timely notice in the Federal Register withdrawing the direct final rule.

Judicial Review. Under section 307(b)(1) of the Clean Air Act (Act), judicial review of NESHAP is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of these direct final amendments. Under section 307(b)(2) of the Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by the EPA to enforce these requirements.

ADDRESSES: *Docket.* Docket No. A–92–38, category VIII 1997 Amendments, containing information considered by the EPA in developing the final amendments, is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, except for Federal holidays, at the EPA's Air and Radiation Docket and Information Center, room M1500, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, DC 20460; telephone (202) 260–7548. A reasonable fee may be charged for copying. This docket also contains information considered by the EPA in proposing and promulgating the original Gasoline Distribution NESHAP.

FOR FURTHER INFORMATION CONTACT: For information concerning applicability and rule determinations, contact the appropriate EPA regional or Office of Enforcement and Compliance Assurance (OECA) representative:

Region I: Greg Roscoe, Air Programs Enforcement Office Chief, U.S. EPA, Region I, JFK Federal Building (SEA), Boston, MA 02203, Telephone number (617) 565–3221

Region II: Kenneth Eng, Air Compliance Branch Chief, U.S. EPA, Region II, 290 Broadway, New York, NY 10007, Telephone number (212) 637–4080, Fax number (212) 637–3998

Region III: Walter K. Wilkie, U.S. EPA, Region III (3AT12), 841 Chestnut Building, Philadelphia, PA 19107, Telephone number (215) 566–2150, Fax number (215) 566–2114

Region IV: Lee Page, U.S. EPA, Region IV (AR–4), 100 Alabama Street, SW, Atlanta, GA 30303–3104, Telephone number (404) 562–9131, Fax number (404) 562–9095

Region V: Howard Caine (AE–17J), U.S. EPA, Region V, 77 W. Jackson Blvd., Chicago, IL 60604, Telephone number (312) 353–9685, Fax number (312) 353–8289
Region VI: Sandra A. Cotter (6EN–AT), U.S. EPA, Region VI (6PD–R), 1445 Ross Avenue, Dallas, TX 75202–2733, Telephone number (214) 665–7347, Fax number (214) 665–7446
Region VII: Bill Peterson, U.S. EPA, Region VII, 726 Minnesota Avenue, Kansas City, KS 66101, Telephone number (913) 551–7881
Region VIII: Heather Rooney, U.S. EPA, Region VIII (8ART–AP), 999 18th Street, Suite 500, Denver, CO 80202–2405, Telephone number (303) 312–6971, Fax number (303) 312–6826
Region IX: Christine Vineyard, U.S. EPA, Region IX (Air-4), 75 Hawthorne Street, San Francisco, CA 94105, Telephone number (415) 744–1197
Region X: Chris Hall, Office of Air Quality (OAQ–107), U.S. EPA, Region X, 1200 Sixth Avenue, Seattle, WA 98101–9797, Telephone number (206) 553–1949 or (800) 424–4372 x1949
OECA: Julie Tankersley, U.S. EPA, Office of Enforcement and Compliance Assurance (2223A), 401 M Street, SW, Washington, DC 20460, Telephone number (202) 564–7002, Fax number (202) 564–0050.

For information concerning the analyses performed in developing the final rule amendments, contact Mr. Stephen Shedd, Waste and Chemical Processes Group, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 541–5397 or fax number (919) 541–0246.

SUPPLEMENTARY INFORMATION: An electronic version of these final amendments and the proposal preamble is available for download from the EPA Technology Transfer Network (TTN), a network of electronic bulletin boards developed and operated by the Office of Air Quality Planning and Standards. The TTN provides information and technology exchange in various areas of air pollution control. The service is free, except for the cost of a phone call. Dial (919) 541–5742 for data transfer of up to 14,400 bits per second. If more information on the operation of the TTN is needed, contact the systems operator at (919) 541–5384. The TTN is also available on the Internet (access: http://ttnwww.rtpnc.epa.gov).

The information presented in this preamble is organized as follows:

I. Background and Summary of Action

On December 14, 1994 (59 FR 64303), the EPA promulgated the ''National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)'' (the ''Gasoline Distribution NESHAP''). The Gasoline Distribution NESHAP regulates all hazardous air pollutants (HAP) emitted from new and existing bulk gasoline terminals and pipeline breakout stations that are major sources of HAP emissions or are located at sites that are major sources of HAP emissions. The regulated category and entities affected by this action include:

Category	Examples of regulated pentities
Industry	Bulk gasoline terminals. Pipeline breakout stations.

This table is not intended to be exhaustive but, rather, provides a guide for readers regarding entities likely to be interested in the revisions to the regulation affected by this action. To determine whether your facility is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.420. If you have questions regarding the applicability of this action to a particular entity, consult the appropriate person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

On March 29, 1995, the American Petroleum Institute (API), a trade association having members who own or operate facilities potentially subject to the Gasoline Distribution NESHAP, submitted a Petition for Administrative Stay and for Reconsideration of the Gasoline Distribution NESHAP. After lengthy negotiations with API, the EPA provided notice and requested public comment on a proposed settlement in the Federal Register on November 15, 1996 (61 FR 58547). No comments were received on the proposed settlement during the 30-day comment period. The EPA also issued a guidance memorandum (available on the TTN and in the docket), ''Guidance Concerning Notifications Required by December 16, 1996 Under Gasoline Distribution NESHAP (40 CFR Part 63, Subpart R),'' Bruce Jordan to EPA Regional Offices, November 21, 1996, clarifying the notification requirements for major sources that plan to be an area source by the first substantive compliance date of the rule, December 15, 1997.

As a result of the settlement agreement, the EPA has made modifications to the screening equations in the promulgated rule to make them more useful to facilities attempting to demonstrate that they are area sources, and therefore not subject to the control requirements of the NESHAP. These modifications are discussed in detail in Section II.A of this notice.

In response to requests by other parties, the EPA has also made several clarifications to the final NESHAP, as discussed in Section II.B of this notice, that are not a direct result of the settlement agreement. First, the language of the rule has been revised to clarify that the requirement for an excess emissions report applies to all affected facilities whether or not they have a continuous monitoring system. Second, the definition for *bulk gasoline terminal* has been inserted directly into the rule instead of cross-referencing the definition in the new source performance standards for bulk terminals. Third, the term ''federally enforceable'' has been replaced with the term ''limitations on potential to emit'' (PTE) to accommodate any eventual outcome of the EPA's current consideration of PTE issues. Fourth, the requirement that compliance be demonstrated upon the EPA's request has been clarified to include the calculations and assumptions used for the applicability screening equations. Fifth, the EPA has clarified the intended meaning of the term ''reformulated or oxygenated gasoline containing methyl tert-butyl ether (MTBE)'' as used in defining the parameter ''CF'' for the applicability screening equations. Sixth, the EPA has clarified that there is no requirement to submit emissions inventory documentation that a facility is not a major source to the Administrator for approval. These emissions inventory documents need only be maintained at the facility and provided upon request.

II. Summary of and Rationale for Rule Changes

A. Improvement of Emission Estimation Screening Equations

The final Gasoline Distribution NESHAP provides two options for facilities to obtain area source status for this rule and thus not be subject to the control requirements of this major source standard. These options are the use of an emission screening equation or performance of an HAP emissions inventory for the facility. The emissions inventory provision is currently implemented outside the provisions of this rule and approved by the permitting authority. The screening equation option allows facilities to use a specified equation in the 1994 final rule to determine their area source status under this rule, as long as they are in compliance with the equation parameters and the recordkeeping and reporting requirements in the rule. These screening equations were developed to provide facilities with a way of determining whether they are a major source without obtaining an area source determination outside the provisions of this rule.

The 1994 final rule contains two screening equations in § 63.420 (one for use by bulk gasoline terminals and one for pipeline breakout stations) to make an estimation of the total HAP emissions from the major gasoline operations at the facility. The equations identify facilities that have the potential to emit (PTE) less than 10 tons per year (tpy) of a single HAP or less than 25 tpy of a combination of HAP, which are the criteria for area sources. Since the equations in the final rule included only gasoline storage and transfer operations, the rule did not allow the equations to be used by facilities that have HAP emissions from other products (such as distillates) or that emit HAP from gasoline operations not accounted for in the equations.

The API, as part of the settlement, requested that the EPA incorporate additional modifications to those changes made to the screening equations before the 1994 promulgation in order to make the equations more useful to facilities attempting to demonstrate that they are area sources within the structure of the rule. The API said that the ''other'' HAP emissions not considered in the equation are routinely very low, and virtually every bulk gasoline terminal has such HAP emission sources. (The API's comments were directed toward bulk terminals, but they can be applied to also cover pipeline breakout stations.) As a result, they felt that the equation, as promulgated, had very little utility as a means of screening for rule applicability. The EPA reviewed API's supporting information and agreed that the utility of the screening equations needed to be improved.

The EPA and API investigated the development of a factor or expression to account for ''other'' HAP emission sources at marketing facilities. These other HAP sources consist of activities not already accounted for in the screening equations (i.e., sources other than gasoline storage vessels, gasoline loading racks and cargo tanks, and gasoline vapor leaks from equipment components). HAP emission sources not arising directly from the storage and handling of gasoline occur routinely in this source category, and include distillate fuel, additive tanks, wastewater storage/handling tanks, cleaning/degassing of tanks, subsurface recovery (and other remedial actions), service station tank bottoms storage, sample handling/laboratory activities, and pipeline transmix (interface) storage (i.e., transmix with no gasoline content). Gasoline mixtures in storage tanks, such as transmix containing gasoline, are considered to be ''gasoline'' in the emission screening equations and also in the standards.

The EPA agreed that the utility of the equations would be further enhanced by including a factor to account for these other HAP emission sources (OE). However, the EPA believed that it was necessary to limit the percentage of total facility HAP emissions that a facility could claim from other emission sources because such sources are most likely not currently permitted or subject to current enforceable limits on emissions, are part of another source category [''Organic Liquids Distribution (Non-Gasoline)''] that has yet to be studied, or are collocated at other facilities (refineries, chemical plants, military bases) and not the primary source of emissions. The API surveyed some of its member companies and concluded that HAP emissions from other sources at gasoline bulk terminals are low, ranging from 0.1 to 3.5 tons/yr. Based on this information, API suggested limiting the OE value to 5 percent of total facility HAP emissions. The EPA agrees with API that limiting the value of OE to 5 percent is appropriate to represent typical facilities in this source category. If a facility finds that OE contributes more than 5 percent of its total HAP emissions, then the facility fits into a combination of source categories and must use the emissions inventory approach to determine HAP emissions and the applicability of the Gasoline Distribution NESHAP.

Since the screening equations were originally and continue to be normalized, or set equal to ''1,'' to determine area source status, OE should thus be divided by either 10 or 25 (the tpy cutoffs defining a major source) to be incorporated into the equation. The API suggested, and the EPA agreed, that OE (in tpy) should be normalized by dividing by 25 (or multiplying by 0.04), since the OE factor will be calculated from a variety of emission sources and these emissions will most likely be composed of a combination of HAP, rather than a single HAP. Additionally, since the allowable value is small (5 percent of total facility HAP emissions), the resulting environmental effect from adding this parameter to an equation designed for screening purposes is expected to be small.

B. Clarifications

1. Excess Emissions Reports

The EPA was requested after promulgation to clarify whether the owner or operator of a pipeline breakout station needs to submit the excess emissions report required under § 63.428(h), even though the facility is not required to install a continuous monitoring system (CMS) in conjunction with the operation of a control device. The commenter also asked whether the information to be included in such a report would be limited to that indicated in § 63.428(h)(4) (late repairs of leaking equipment), and whether the required reporting frequency would be semiannual or quarterly.

The final rule promulgated in 1994, in § 63.428(h) (1) through (4), specifies information that must be included in excess emissions reports submitted by bulk gasoline terminals and pipeline breakout stations. In summary, there are four elements of information required to be included in the excess emissions report as excess emissions. They are:

(1) Exceedances or failures to maintain the monitored operating parameter value of the vapor processor,

(2) Failures to take steps to assure that reloadings of nonvapor-tight gasoline cargo tanks will not occur,

(3) Reloadings of nonvapor-tight gasoline cargo tanks before vapor tightness documentation on those tanks is obtained by the facility, and (4) certain information on equipment leaks for which no repair was attempted within 5 days or completed within 15 days after detection. The section also states that the excess emissions report is to be filed as required under § 63.10(e)(3) of CFR part 63, subpart A (General Provisions). Section

63.10(e)(3)(i) specifies that an ''excess emissions and continuous monitoring system performance report and/or a summary report'' shall be submitted by each owner or operator of an affected source required to install a CMS. Also, if the CMS data are to be used for compliance and the source experienced excess emissions, quarterly reporting is required. [(§ 63.10(e)(3)(i)(C)].

The EPA believes that this question may have arisen due to the different characteristics of bulk terminals versus pipeline breakout stations, and the different elements of information specified for the reports in § 63.428 and § 63.10. Items (1) through (3) required under § 63.428 are primarily intended to refer to activities at a bulk terminal, where the loading of gasoline cargo tanks will be controlled with a vapor processor combined with a vapor tightness (test and repair) program for the cargo tanks. However, item (1) would also apply to pipeline breakout stations that elect to install a control device and CMS for storage vessel emission control in response to § 63.427(c) and § 60.112b(a)(3). In that case, the report required from sources ''required to install a CMS'' under § 63.10(e)(3)(i) would be appropriate for pipeline breakout stations. However, for most breakout pipeline breakout stations, only item (4) pertaining to the repair of equipment leaks is applicable.

The EPA's intent in the final rule [as described in the preamble to the 1994 promulgated standards (59 FR 64316)] was to require a semiannual report under § 63.428(g) and § 63.10(e)(3) for bulk terminals and pipeline breakout stations, with this frequency increasing to quarterly in the event that any specified excess emissions occur that are listed in § 63.428(h)(1) through (4). Section 63.10(e)(3)(i)(C) requires the quarterly reporting frequency to be followed until a facility's request to reduce the frequency is approved.

In summary, all bulk terminals and pipeline breakout stations are required to submit this report, and each facility should include the information pertinent to its own situation. The initial reporting frequency is semiannual, but will increase to quarterly if excess emissions are experienced. The EPA reviewed the language of the rule and found that the rule needed revision to clarify this approach. Today's action revises the language of the rule to clarify and make more explicit the EPA's original intent that the requirement for an excess emissions report applies to all affected bulk terminals and pipeline breakout stations with or without a CMS.

2. Definition of Bulk Gasoline Terminal

In the 1994 promulgated rule, several terms were defined in § 63.421 through cross-referencing with definitions already provided in the Act; in 40 CFR 60, subparts A, K, Ka, Kb, and XX; and in 40 CFR 63, subpart A. One term intended to be defined in this way was ''bulk gasoline terminal.'' The definition for bulk gasoline terminal (as included in 40 CFR 60, subpart XX) is as follows:

Bulk gasoline terminal means any gasoline facility which receives gasoline by pipeline, ship or barge, and has a gasoline throughput greater than 75,700 liters per day. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under Federal, State or local law and discoverable by the Administrator and any other person.

The approach of cross-referencing the definition of one of the affected sources apparently created confusion, possibly because a definition for ''pipeline breakout station'' was explicitly included in § 63.421. In order to lessen the confusion, and to clearly specify that the Agency intended to apply the same facility definition to bulk terminals as was used in the bulk terminal NSPS, the definition is being inserted directly into subpart R under § 63.421. This change does not create new requirements in the rule, but merely makes more explicit the EPA's intent concerning the definition of a bulk gasoline terminal.

3. Potential To Emit and Federal Enforcement

The EPA is also replacing the term ''federally enforceable'' as a condition for some of the emission screening equation parameters with the term ''limitations on potential to emit'' (PTE). The purpose of this change is not to make any substantive decision regarding the PTE issues that are currently under review by the Agency, but rather to recognize that those issues exist and to minimize any confusion regarding how those issues should be dealt with in the interim as they relate to the Gasoline Distribution NESHAP. The EPA believes that using the term ''limitations on potential to emit'' will eliminate the need for subsequent amendments to this rule as it relates to PTE issues. PTE is defined in § 63.2 Definitions, of the General Provisions of subpart A of part 63, and the term ''limitations on potential to emit'' has been added to the list of definitions in § 63.421.

As discussed in the February 29, 1996 (61 FR 7718) Gasoline Distribution final rule amendments, the EPA is considering a number of options regarding the requirements on potential to emit limits, in response to the *National Mining* court decision. In addition, the EPA created a 2-year transition period (January 1995 until January 1997) during which the EPA will recognize limitations on PTE, so long as those limits are enforceable as a practical matter. In a policy memorandum (available on the TTN and in the docket), ''Extension of January 25, Potential to Emit Transition Policy,'' John S. Seitz and Robert I. Van Heuvelen to EPA Regional Offices, August 27, 1996, the EPA has extended this transition period for 18 months until July 31, 1998, which is later than the December 15, 1997 control equipment compliance date for all MACT source categories, including the Gasoline Distribution NESHAP. Accordingly, for the critical applicability date [1] for the Gasoline Distribution NESHAP, the EPA wishes to clarify that State-enforceable limits that are enforceable as a practical matter will be treated by the EPA as acceptable limitations on potential to emit. If, as a result of the PTE rulemaking, a decision is made that yields a requirement that PTE limitations must be federally enforceable for some or all sources, an appropriate transition period will be given to allow time for such sources to obtain federally enforceable limits.

4. Demonstration of Compliance

Section § 63.420(f) of the final rule requires an owner or operator to demonstrate compliance with any provision of the rule to which the facility is subject, upon request by the EPA. The rule has been amended to clarify that this demonstration also needs to be made, upon request, for the parameters and assumptions used in performing calculations for the applicability screening equations. This change does not impose any new requirements, but has been made to eliminate any chance for ambiguity in interpreting this rule provision.

[1] Affected sources must either be in full compliance with the major source emission standards in the Gasoline Distribution NESHAP or have been determined to be an area source no later than December 15, 1997. Additionally, each affected source was required to submit an initial notification by December 16, 1996 if it is (1) a major source, (2) a major source on December 16, 1996 and plans to be an area source by December 15, 1997, or (3) using one of the emission screening equations in § 63.420. These latter major sources (no. 3) must include in the notification a non-binding description of and a schedule for the actions that are planned to achieve area source status [§ 63.428(a)].

5. Oxygenated Gasoline

The emission screening equations in § 63.420 of the final rule use the parameter ''CF'' to account for the higher HAP content of the modified gasolines that are marketed to comply with Federal and State ozone and carbon monoxide control programs. These *reformulated* and *oxygenated* gasolines, in addition to other formula changes, contain significant levels of oxygenate, frequently the HAP methyl tert-butyl ether (MTBE), which supplies oxygen in the combustion process to reduce the amount of carbon monoxide emitted in tailpipe exhaust. The higher CF factor of 1.0 for these gasolines that use MTBE as an oxygenate, versus a CF factor of 0.161 for ''normal'' gasolines, reflects the fact that the overall HAP content of reformulated and oxygenated gasolines using MTBE as an oxygenate is significantly higher than the HAP content of normal gasoline.

The definitions given in § 63.421 for reformulated and oxygenated gasolines cross-reference existing definitions already codified at 40 CFR 80.2(ee) and 40 CFR 80.2(rr), respectively. The CFR defines *oxygenated gasoline* as ''gasoline which contains a measurable amount of oxygenate.'' However, this definition may not adequately distinguish oxygenated gasoline from normal gasoline. The reason is that, in addition to its use as an oxygenate, MTBE is often used in generally smaller concentrations to boost the octane rating of normal gasoline. Although the MTBE present in these gasolines is generally minimal, the EPA was concerned that even these small amounts could be construed as qualifying a gasoline as ''oxygenated.'' The EPA's intent was not to specify the higher CF factor for normal gasolines with minor amounts of MTBE, but only for those gasolines with a sufficient quantity of MTBE to create a substantially higher HAP content than found in normal gasolines.

Section 211(k) of the Act specifies a minimum oxygen content for reformulated gasolines of 2.0 percent by weight, while EPA guidelines issued in response to section 211(m) recommend a minimum oxygen content of 2.7 percent by weight for oxygenated gasolines. The EPA's final regulations to implement the reformulated gasoline program, promulgated on February 16, 1994 (59 FR 7716), specify a minimum allowable per-gallon oxygen content for reformulated gasoline of 1.5 weight percent when the standards are being achieved on an average basis. In order to include all of the allowable modified fuels in the CF factor definition, the same oxygen content of 1.5 weight percent is being used in these rule amendments as the cutoff defining these high-HAP gasolines. Since reformulated and oxygenated gasolines are frequently oxygenated using MTBE, this minimum oxygen content was converted to MTBE volume percent. Based on the molecular composition and density of MTBE and a typical density for gasoline, the value of 1.5 percent oxygen by weight was calculated to be equivalent to 7.6 percent MTBE by volume (available in the docket). Since this value is not inconsistent with the existing definitions for reformulated and oxygenated gasolines, but only specifies a minimum gasoline MTBE content, the promulgated definitions for ''reformulated gasoline'' and ''oxygenated gasoline'' are being retained in the rule. The two definitions for the term CF have been amended to incorporate this minimum MTBE content.

The EPA emphasizes that this change merely clarifies the Agency's intent in specifying a higher CF value for reformulated and oxygenated gasolines that use MTBE as an oxygenate. The higher CF factor of 1.0 is intended to be used in the screening equations by those facilities that handle gasoline blended with significant amounts (7.6 volume percent or more) of MTBE. The 1.0 factor should *not* be used by facilities that handle only gasoline having trace amounts of MTBE. The change has no effect on the control programs that require the marketing of these fuels, nor does it change or add any reporting, recordkeeping, or testing requirements for affected facilities.

6. Reporting Emissions Inventories

The owner or operator of a stationary source in this category is allowed to use methods other than the emission screening equations (typically an emissions inventory) to establish that the facility is not a major source, provided that he or she ''has documented and recorded to the Administrator's satisfaction that the facility is not a major source, or is not [collocated with] a major source'' [40 CFR 63.420(a)(2) and (b)(2)]. Some confusion has been expressed as to whether these documents must in all cases be submitted to the Administrator for approval prior to December 16, 1996 as an alternative to the results of the screening equation or whether it is appropriate to maintain these records at the facility. This action clarifies that there is no requirement to submit these emissions inventory type documents for approval either prior to or after December 16, 1996, and that these documents may be maintained at the facility. However, the owner or operator is required [§ 63.420(f)], ''upon request,'' to demonstrate compliance with all of the applicability provisions, including this determination that the facility is not a major source.

III. Administrative Requirements

A. Paperwork Reduction Act

The information collection requirements of the previously promulgated NESHAP were submitted to and approved by the Office of Management and Budget (OMB). A copy of this Information Collection Request (ICR) document (OMB control number 2060–0325) may be obtained from Ms. Sandy Farmer, Information Policy Branch, Environmental Protection Agency, 401 M Street, S.W. (mail code 2136), Washington, DC 20460, or by calling (202) 260–2740.

Today's amendments to the Gasoline Distribution NESHAP have no impact on the information collection burden estimates made previously. No additional certifications or filings were promulgated. Therefore, the ICR has not been revised.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether a regulation is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The criteria set forth in section 1 of the Order for determining whether a regulation is a significant rule are as follows:

(1) Is likely to have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government communities;

(2) Is likely to create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

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

The Gasoline Distribution NESHAP promulgated on December 14, 1994 was treated as a ''significant regulatory action'' within the meaning of the Executive Order. An estimate of the cost and benefits of the NESHAP was prepared at proposal as part of the background information document

(BID). This estimate was updated in the BID for the final rule to reflect comments and changes made in developing the final rule. The amendments issued today have no impact on the estimates in the final BID. Pursuant to the terms of Executive Order 12866, it has been determined that this action is a ''non-significant regulatory action'' within the meaning of the Executive Order. As such, this action was not submitted to OMB for review.

C. Regulatory Flexibility

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule. When the Agency promulgated the Gasoline Distribution NESHAP, it analyzed the potential impacts on small businesses, discussed the results of this analysis in the Federal Register, and concluded that the promulgated regulation would not result in financial impacts that significantly or differentially stress affected small companies. Since today's action imposes no additional impacts, the EPA has determined that these amendments will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act, signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, the EPA must select the 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 today's action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Reform Act do not apply to this action.

E. Regulatory Review

In accordance with sections 112(d)(6) and 112(f)(2) of the Act, this regulation will be reviewed 8 years from the date of promulgation. This review may include an assessment of such factors as evaluation of the residual health risk, any overlap with other programs, the existence of alternative methods of control, enforceability, improvements in emission control technology and health data, and the recordkeeping and reporting requirements.

F. 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 the final amendments 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 amendments in today's Federal Register. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Petroleum bulk stations and terminals, Reporting and recordkeeping requirements.

Dated: February 21, 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.*

2. Section 63.420 is amended by revising the equation and the terms ''CF'' ''CE'', ''Q'' and ''EF'' in paragraph (a)(1), and by adding the term ''OE'' to the list in paragraph (a)(1) to read as follows:

§ 63.420 Applicability.

(a) * * *

(1) * * *

$E_T = CF[0.59(T_F)(1–CE)+0.17(T_E)+0.08(T_{ES})+0.038(T_I)+8.5\times10–6(C)+KQ]+0.04(OE)$

* * * * *

CF=1.0 for bulk gasoline terminals and pipeline breakout stations that handle reformulated or oxygenated gasoline containing 7.6 percent by volume or greater MTBE;

CE=control efficiency limitation on potential to emit for the vapor processing system used to control emissions from fixed-roof gasoline storage vessels [value should be added in decimal form (percent divided by 100)];

* * * * *

Q=gasoline throughput limitation on potential to emit or gasoline throughput limit in compliance with paragraphs (c), (d), and (f) of this section (liters/day);

* * * * *

EF=emission rate limitation on potential to emit for the gasoline cargo tank loading rack vapor processor outlet emissions (mg of total organic compounds per liter of gasoline loaded);

OE=other HAP emissions screening factor for bulk gasoline terminals or pipeline breakout stations (tons per year). OE equals the total HAP from other emission sources not specified in parameters in the equations for E_T or E_P. If the value of 0.04(OE) is greater than 5 percent of either E_T or E_P, then paragraphs (a)(1) and (b)(1) of this section shall not be used to determine applicability; * * *

* * * * *

3. Section 63.420 is amended in paragarph (b)(1) by revising the equation and the text following the equation to read as follows:

§ 63.420 Applicability.

* * * * *

(b) * * *

(1) * * *

$E_P = CF[6.7(T_F)(1\text{-}CE)+0.21(T_E)+0.093(T_{ES})+0.1(T_I)+5.31\times10^{-6}(C))+0.04(OE)$;

where:

EP=emissions screening factor for pipeline breakout stations,

and the definitions for CF, T_F, CE, T_E, T_{ES}, TI, C, and OE are the same as provided in paragraph (a)(1) of this section; or

* * * * *

4. Section 63.420 is amended by revising paragraph (f) to read as follows:

§ 63.420 Applicability.

* * * * *

(f) Upon request by the Administrator, the owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of any paragraphs in this section including, but

not limited to, the parameters and assumptions used in the applicable equation in paragraph (a)(1) or (b)(1) of this section, shall demonstrate compliance with those paragraphs.

* * * * *

5. Section 63.421 is amended by adding in alphabetical order definitions for ''bulk gasoline terminal'' and ''limitation(s) on potential to emit'' to read as follows:

§ 63.421 Definitions.

* * * * *

Bulk gasoline terminal means any gasoline facility which receives gasoline by pipeline, ship or barge, and has a gasoline throughput greater than 75,700 liters per day. Gasoline throughput shall be the maximum calculated design throughput as may be limited by compliance with an enforceable condition under Federal, State or local law and discoverable by the Administrator and any other person.

* * * * *

Limitation(s) on potential to emit means limitation(s) limiting a source's potential to emit as defined in § 63.2 of subpart A of this part.

* * * * *

6. Section 63.428 is amended by revising paragraphs (g) introductory text and (h) introductory text to read as follows:

§ 63.428 Reporting and recordkeeping.

* * * * *

(g) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall include in a semiannual report to the Administrator the following information, as applicable:

* * * * *

(h) Each owner or operator of a bulk gasoline terminal or pipeline breakout station subject to the provisions of this subpart shall submit an excess emissions report to the Administrator in accordance with § 63.10(e)(3), whether or not a CMS is installed at the facility. The following occurrences are excess emissions events under this subpart, and the following information shall be included in the excess emissions report, as applicable:

* * * * *

[FR Doc. 97–4885 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 180

[PP–5F4578/R2277A; FRL–5590–4]

RIN 2070–AB78

Glufosinate Ammonium; Tolerances for Residues

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: EPA is correcting the table under § 180.473, paragraph (c) to reflect the tolerance for residues of glufosinate ammonium on corn, field, forage as stated in the petition submitted by AgrEvo USA Co.

DATES: This correction is effective on February 5, 1997.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne Miller, Product Manager (PM) 23, Registration Division, (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 237, CM #2, 1921 Jefferson Davis Highway, Arlington, VA 22202, 703–305–7830, e-mail: miller.joanne@epamail.epa.gov.

In FR Doc. 97-2838, appearing at page 5333 in the issue for Wednesday, February 5, 1997, on page 5338, in § 180.473, in the table to paragraph (c), the entry for ''corn, field, forage,'' is corrected as follows:

§ 180.473 Glufosinate ammonium; tolerances for residues.

* * * * *

Commodity	Parts per million	Expiration
*	* * *	*
Corn, field, forage	4.0	July 13, 1999
*	* * *	*

List of Subjects in Part 180

Environmental protection.

Dated: February 18, 1997.

Stephen L. Johnson,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 97–4624 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3800

[WO–660–4120–02–24 1A]

RIN 1004–AC40

Mining Claims Under the General Mining Laws; Surface Management

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is amending its surface management regulations at 43 CFR subpart 3809. The final rule requires submission of financial guarantees for reclamation of all hardrock mining operations greater than casual use, increases the types of financial instruments acceptable to satisfy the requirement for a financial guarantee, and amends the noncompliance section of the regulations to require the filing of plans of operations by operators who have a record of noncompliance. In addition, the final rule removes section 3809.1–8 on existing operations, which is no longer applicable, because all activities that were in operation in 1980 and continue in operation have now complied with this section.

EFFECTIVE DATE: March 31, 1997.

ADDRESSES: Inquiries or suggestions should be sent to the Solid Minerals Group at Director (320), Bureau of Land Management, Room 501 LS, 1849 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Richard Deery, (202) 452–0350.

SUPPLEMENTARY INFORMATION: On July 11, 1991 (56 FR 31602), BLM published a proposed rule to require submission of financial guarantees for reclamation for all hardrock mining operations greater than casual use, to designate additional financial instruments that would satisfy the requirement for a financial guarantee, and to amend the noncompliance section of the regulations to require the filing of plans of operations by operators who have a record of noncompliance. The extended 90-day comment period expired on October 9, 1991. The BLM received 218 comments on the proposed rule, including 3 citizen-petitions with numerous signatures. Of these comments, 58 were from public interest groups, 51 were from business entities or associations, 22 were from government agencies, and 135 were from individuals, not including the petitions. All of the comments were

carefully considered in developing this final rule.

Three basic points of view as to the proposed rule emerged in the comments. First, a number of comments dealt with the adequacy of the bond levels, self-certification, and the number of financial instruments acceptable under the rule. The comments stated that the bond levels set in the proposed rule were too low, and that BLM should require full cost bonding for both notices and plans of operation. Those expressing concern regarding self-certification and the number of financial instruments believe the proposed rule could lead to less security. Others simply objected to self-bonding in any form. Second, mining associations and some individuals agreed that the proposed rules were necessary, but argued that the $5,000 bond for notice level operations is excessive. Third, many of the individuals argued that the proposal discriminates against small miners and would force them out of business, if implemented.

In response to the comments regarding bond levels, BLM has amended the rule to require bonds for 100 percent of the amount that would be needed to pay for reclamation by a third-party contractor using equipment from an off-site location. This will ensure that, if the bonded party fails to perform its reclamation responsibilities, BLM will have access to adequate funds through these financial guarantee arrangements to reclaim the lands, and thereby protect the interest of the public, including Federal taxpayers. Calculation of the amount is at the operator's expense, and must be certified by a third-party professional engineer registered to practice in the State in which the operations are proposed. However, this engineer's certification is not required when the requirement for a financial guarantee is met by providing evidence of an instrument held or approved by a State agency.

The comments suggesting that the bonds were insufficient also raised several other issues. For example, they asserted that the rule did not contain detailed reclamation and bond release language. Detailed guidance on reclamation is beyond the scope of this rule. However, the final rule addresses concerns about bond release in section 3809.1–9(m), as discussed below. Under the subpart 3809 regulations, further guidance on the standards for reclamation and bond release will be dealt with on a case-by-case basis at the time a notice provided for under section 3809.1–3 or a plan of operations provided for under section 3809.1–4 is received and reviewed, and would be covered as part of the review of reclamation measures incorporated into the notice or plan.

The majority of the individual comments objected to the $5,000 minimum bond required for a notice level operation. They stated that the $5,000 self-certification would be an unnecessary regulation, because reclamation of any damage caused by small miners occurs naturally during the first winter. Those who identified themselves as recreational miners considered the proposal to be unfair, because it requires too great an expenditure. Many individual comments opposed the $5,000 financial guarantee, arguing that even self-certification would be burdensome and force small miners and prospectors out of business. Two individual comments favored the proposal, citing firsthand experience of the environmental impact of small mining operations.

The proposed rule was drafted with the assumption that notice-level operators likely would use the full 5 acres allowed and certify the existence of the full $5,000 guarantee for the entire acreage at the $1,000 per acre exploration level cap. The final rule requires the financial guarantee to cover 100 percent of the estimated costs of reclamation, with the minimum acceptable amount being $1,000 for each acre or fraction thereof disturbed.

Specific Comments

In the following portion of the preamble, comments will be discussed as they relate to various specific sections of the rule.

Section 3809.0–5 Definitions

This section of the proposed rule would have added definitions for the terms ''exploration operations'' and ''mining operations,'' and redesignated the other paragraphs to accommodate these additions. These proposed definitions were to be used to differentiate between the maximum guarantee amounts ordinarily to be required. However, since the rule has been changed elsewhere in accordance with public comments to require financial guarantees to cover 100 percent of the estimated costs of reclamation for all operations other than casual use, these definitions are no longer needed. Therefore, the proposed revisions to section 3809.0–5 are omitted in the final rule.

Section 3809.0–9 Information Collection

This section codifies the note that appeared at the beginning of Group 3800, and revises it to comply with current OMB regulations. A notice of BLM's request for approval of the information collections in subparts 3802 and 3809 was published in the Federal Register on March 5, 1996. Three comments responded to the notice, two within the public comment period. Two of the comments supported the information collection. A third objected to perceived redundancies in the information collection proposal. The supposed repetitiveness was only apparent; similar information is to be collected under each of two subparts covered by the request, but will not be collected twice for the same operation. The comment also seemed to treat the notice as pertaining to a proposed rule rather than in part to existing regulations, and objected to provisions dealing with aircraft operations in subpart 3802, arguing that BLM lacked jurisdiction. However, BLM managers do in fact manage aircraft landing areas in wilderness study areas under subpart 3802. These comments did not lead to changes in the information collection. The estimated public reporting burden is estimated to be 16 hours per response for notices and 32 hours per response for plans of operations.

Section 3809.1–9 Financial Guarantees

This section states clearly that obtaining a bond or other financial guarantee is a prerequisite to operating on an unpatented mining claim under a notice or plan of operations. It lists the types of guarantees that are acceptable, and requires that they cover the entire estimated cost of reclamation. It requires that operators report their financial guarantees to BLM and include certain enumerated information with the report. The section also provides for partial release under the guarantees when phases of reclamation are completed, and states the consequences of default or bond deficiency.

A new paragraph (a) has been added to this section in the final rule to make it clear that initiating operations under a notice or conducting operations under a plan of operations without a required financial guarantee is prohibited by regulation. Among other remedies available to the government, such conduct may be prosecuted under section 303(a) of the Federal Land Policy and Management Act (FLPMA), which provides criminal penalties for the knowing and willful violation of the regulations.

Proposed paragraph (a) is redesignated as (b) in the final rule. This paragraph, as proposed, removed language from the current regulations

exempting notice level operations from posting a financial guarantee. One comment observed that almost any normal mining activity exceeds the definition of casual use in subpart 3809 and implied that the paragraph excepting casual use from bonding requirements serves no use. No change is made in the final rule as a result of this comment. Much exploratory activity that does not require a notice to be submitted can and does take place on public lands, whether on mining claims or not: for example, exploratory activity that does not require mechanized earth-moving equipment or explosives.

Section 3809.1–9(c). Proposed paragraph (b), which has been redesignated as paragraph (c) in the final rule, would have: (1) Required certification of a financial guarantee, (2) established a guarantee amount of $5,000, (3) allowed a choice of financial instruments, (4) provided that the guarantee may be met by providing evidence of a State-held bond, (5) required the certification to accompany the filed notice, (6) permitted the authorized officer to return incomplete notices for failure to have the certification, (7) required the funds to remain available until the authorized officer has absolved the operator of reclamation responsibilities, and (8) held the operator to the reclamation standards in section 3809.1–3(d).

A number of comments addressed the various proposed requirements in this paragraph of the proposed rule.

(1) Certification of a financial guarantee.

Two comments suggested that a better course of action would be for the BLM to have the guarantee in hand rather than a certification that a guarantee exists. They cited a perceived tendency for small operators who commit violations to leave the vicinity or not restart operations on public lands, because many miners only have one operation in their lifetime and the possibility of not being able to obtain a financial guarantee for future operations is not a credible deterrent. They also cite the high cost of prosecutions.

We acknowledge the potential for such problems. The model for this proposal is the self-certification system used in administering State requirements for automobile insurance. Citizens do not customarily hand the policy to the State, but certify that it has been obtained and is available for use. Failure to have the insurance brings the imposition of penalties by the State. Notices and plans of operation will be required to contain the social security number of the operator or the employer identification number of operators or agents. Ultimately, however, the mining claimant will be responsible for the activity on the mining claim.

There will be a lower administrative cost using the certificate system since collecting the actual financial instruments necessarily would require funding for the administrative overhead to accept, sort, and process the instruments, and maintain facilities for secure storage. Second, the sanctions for noncompliance can be severe, and can in appropriate cases include criminal penalties authorized by Section 303(a) of FLPMA for knowing and willful violations of these regulations. These sanctions will be used against operators who abandon operations after committing violations.

This rule also incorporates the maximum penalties provided for in the Sentencing Reform Act of 1989 (18 U.S.C. 3571 *et seq.*). Penalty provisions such as those in FLPMA that provide for up to a year in jail or a fine of $1,000 for violators are classified as Class A misdemeanors under 18 U.S.C. 3571, and the Sentencing Reform Act provides for fines for Class A misdemeanors of up to $100,000 for individuals and $200,000 for organizations.

(2) The guarantee amount of $5,000.

This provision of the proposed rule generated the largest number of comments. Many stated that the proposed $5,000 guarantee would be excessive, burdensome, discriminatory, and damaging to small operators. On the other hand, other comments stated that the amount was insufficient for complete reclamation.

In drafting the proposed rule, it was assumed that notice level operators would use the full 5 acres allowed and be bonded for the same at the proposed exploration level cap, which was $1,000 per acre. Many comments suggested that financial guarantee requirements should be based on actual acreage disturbed. This suggestion has been adopted in the final rule. The final rule requires bonding sufficient to cover 100 percent of the estimated costs of reclamation with a $1,000 minimum rate for each acre disturbed. The minimum acceptable amount will be $1,000 if the area disturbed is less than one acre.

(3) Allowing for a choice of financial instruments.

Individual and industry association comments generally approved of the option to choose the financial instrument. Environmental groups expressed reservations as to the use of instruments with greater associated risk, such as mortgages on mining properties and liens on equipment. We acknowledge the increased risk associated with these types of instruments. In response, the rule has been amended to remove the provision for the use of mortgages on mining property and first liens on equipment.

One comment suggested that whatever financial instrument is approved, it must be redeemable by the Secretary. For plan level operations, the suggestion is a logical extension of the BLM holding the guarantee. The rule has been amended to incorporate this change for plan-level operations. For notice-level activities, this would be an unnecessary administrative burden on the operator and the authorized officer. The authorized officer does not hold the guarantee for notice-level activities, but rather the certification. If the comment were adopted in the final rule, operators would be required to get the instrument released by the authorized officer, creating an unnecessary administrative burden. Therefore, the comment is not adopted for notice-level activities.

(4) The guarantee may be met by providing evidence of a State-held bond.

This continues the provisions of the existing regulations.

(5) The certification is required to accompany the filed notice.

(6) The authorized officer may return incomplete notices for failure to have the certification.

One comment observed that nothing in the regulations requires the notice to be complete and that the notice does not have to be approved, adding that the provision regarding the notice should be modified to create a completeness review or a notice approval process. The comment observed that the situation renders the return of the notice irrelevant. As a clarification and to achieve the same purpose as the return of a notice submitted without a financial guarantee certificate, the final rule incorporates language at section 3809.1–9(a) stating that conducting operations under either a plan or a notice prior to submission of the appropriate financial guarantee is prohibited. Section 3809.3–2 on noncompliance has been amended by adding paragraph (f) to set forth the penalties contained in the statute for those who commit prohibited acts. For notices filed after the effective date of the regulations, the certification set out in paragraph (c) of this section must accompany the notice. For existing notices on file with BLM that cover active ongoing operations predating the effective date of this rule (including operations suspended due to weather), no certification is required until a new notice is filed. For existing notices on file with BLM, the claimant or operator will have to provide the certification before initiating operations.

(7) The funds are required to remain available until the authorized officer has absolved the operator of reclamation responsibilities.

As discussed below, in response to comments, a procedure for phased release or reduction of bonds as reclamation phases are completed has been included in section 3809.1–9(m) of the final rule.

(8) The operator is held to the reclamation standards in section 3809.1–3(d).

Among the general comments were several statements that BLM should develop ''clear reclamation standards'' and, as a Federal agency, should take the lead in ''defining performance standards.'' The BLM currently has regulations at 43 CFR 3809.1–3(d) and 3809.1–5(c) that govern reclamation standards. Reexamination of their adequacy is beyond the scope of this rule.

Section 3809.1–9(d). This paragraph was paragraph (c) in the proposed rule, and has been redesignated as (d) in the final rule. In the final rule, this provision requires the certification for notice-level operations to include the name, home address, home and office phone number, and social security or employer identification number of the operator, mining claimant, or its agent. It requires the operator, mining claimant, or its agent to make various statements about the financial guarantee as part of the certification, including: (1) That the mining claimant or operator for whom the individual is submitting the certification is responsible for the reclamation; (2) that the financial guarantee exists in the required amount, and its location; (3) that the guarantee will be delivered on demand within 45 days; (4) a statement acknowledging that surrender of the guarantee does not absolve the operator, mining claimant, or agent, from responsibility and does not release or waive any claim BLM may have under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or any other applicable statutes, or any regulations; and (5) a statement acknowledging that failure to have the guarantee as certified, or failure to provide the guarantee upon demand by the authorized officer may result in prosecution under the appropriate Federal statutes.

Many of the comments that generally objected to the proposed rule also objected to the content of this certification, suggesting that it assumed all operators were guilty until proven innocent. The purpose of the regulation is, however, to create a set of known standards by which to judge the performance of the notice-level operator with respect to having and maintaining the financial guarantee. Because BLM is not now requiring notice operators to supply the guarantee itself to BLM, but only to certify its existence, it is important that the operator understands fully and acknowledges his or her obligations in this regard.

One comment stated that 45 days (plus an additional 45 days, if authorized) was too long a period of time for the Government to wait for the guarantee. The time period is retained in the final rule because some instruments allowed under the rule may take time to be liquidated.

One statement observed that there was some confusion in determining the responsible party in the proposed language. The purpose of the provision is to designate a responsible party. That party may be a representative of a corporate operator. If an individual can speak for the corporation in filing a notice and a guarantee, then the same individual can bind the company to do the reclamation.

Proposed section 3809.1–9(d), redesignated as (e) in the final rule, requires each of the statements included with the certification to be initialed and dated. Failure to initial each statement will result in return of the certificate. One comment stated that this was unnecessary and that the signing and the dating of the entire certificate should suffice. Another comment noted that this procedure was overly bureaucratic. Section 3809.1–9(e) is retained in the final rule, because these separate acknowledgments will serve to establish the knowledge and legal accountability of mining claimants and operators who will be permitted under the regulations to self-certify that they have adequate financial guarantees.

Proposed section 3809.1–9(e), redesignated as (f) in the final rule, has been amended for clarification to limit its application to notice-level operators.

Proposed paragraphs (f) and (g) of section 3809.1–9, redesignated as (g) and (h) in the final rule, would have required the plan-level operator to post a bond, and required the authorized officer to set the amount at a level sufficient to pay for reclamation if the plan-level operator fails to perform the work. However, the bond requirements for exploration and mining would have been limited to $1,000 and $2,000 per acre, respectively, except that operators in noncompliance with submitted plans of operations and notices would have been required to post 100 percent bonds.

Numerous comments opposed the provisions for bond caps in the proposed rule. Many stated that the caps were far too low. One comment stated that they were too high. Another stated that there should be no bonds required of operators who do not have a record of noncompliance.

The BLM has reviewed the bonding requirements proposed in light of the comments and has decided to amend the bond amounts based on these comments. The financial guarantee requirements in the rule have been amended to require the guarantee to cover 100 percent of the estimated costs of reclamation. The final rule also states the minimum amount required for a financial guarantee, $1,000 per acre for notice-level activities and $2,000 per acre for plan-level activities. The role for financial guarantees required and held by BLM will be to ensure that money sufficient to cover full reclamation costs is available.

Proposed section 3809.1–9(h) would have required those portions of operations utilizing cyanide or other leach solutions to be bonded at 100 percent. Several comments said that the failure to include vat leach and other facilities storing or receiving solutions containing cyanide or other leach solutions in this section was improper. One comment considered the entire proposal onerous and objected to the inclusion of other leach solutions. Other comments suggested that this section be made discretionary. These comments are resolved by changes made elsewhere in the final rule, which requires all plan-level operations to be covered by 100 percent financial guarantees. A separate specific 100 percent bonding requirement for cyanide and similar operations is therefore no longer necessary—it is subsumed in the general requirement. Accordingly, this paragraph has been removed in the final rule.

Section 3809.1–9(i), as proposed, would have allowed the authorized officer to review and accept or reject any of the types of financial instruments offered by the plan level operator, including first lien security interests on mining equipment. Several comments questioned the use of this instrument, as well as first mortgages and first deeds of trust, as too risky. Upon reflection, we agree. The provisions for allowing such instruments as guarantees have been removed in the final rule. However, this paragraph has been amended in the final rule to make clear that, for purposes of the financial guarantee requirements of this section, BLM will honor the financial guarantees chosen by the affected State, if the BLM finds

that the instrument held by the State provides the same guarantee as that required by the final rule.

Section 3809.1–9(j) allows for review of operations conducted under an approved plan of operations and readjustment of the financial guarantee. The final rule allows the operator to submit a new (and less expensive, if available) form of guarantee subject to the approval of the authorized officer. This was generally supported by the comments.

Section 3809.1–9(k) allows the use of traditional instruments and expands the list to include a large number of non-traditional instruments. Most of the comments that addressed this provision generally supported it, some suggesting that second mortgages should be added to the list. One comment suggested that any instrument acceptable to the State should be acceptable to BLM. So long as the State holds the instrument the BLM will not intervene, but for security interests to be held by the United States, acceptable instruments are limited to those listed in the regulations. One comment suggested that taking a first mortgage on a mining property might lead to difficulties and potential liability risk to the United States from with hazardous materials. Upon reflection, we agree. Therefore, mortgages and liens on real property will not be acceptable as financial guarantees under this final rule.

Some comments generally disapproved of this expansion of possible security instruments, stating that there appeared to be no problem in getting traditional surety bonds. Contrary to this view, it appears that there may be a problem for the smaller operator. These same comments also took exception to the use of instruments that might not be entirely liquid and which upon liquidation may not cover the full amount. While the list of acceptable instruments is expanded to include State and municipal bonds, the final rule also incorporates changes to ensure that the security provided at the time required is not reduced by market fluctuations in the value of government-issued and commercial securities. The BLM has determined that the risk associated with expanding the range of choice of security instruments is acceptable. Whatever additional risk may be involved is offset, at least somewhat, by the amendment requiring that financial guarantees be equal to an independent professional engineer's estimate of reclamation costs. It is important to recall, in this connection, that the financial guarantee and the duty to reclaim are backed up by criminal penalties, and by the provision that the operator is not free of liability if the guarantee is cashed in and found insufficient.

By irrevocable letter of credit, section 3809.1–9(k)(3) means a letter of credit, such as described in 43 CFR 3104.1(c)(5), that identifies the Secretary of the Interior as sole payee with full authority to demand immediate payment in case of default. It must be subject to automatic renewal for periods of not less than 1 year if the mining claimant or operator fails to notify the proper BLM office of its nonrenewal and replacement by other suitable financial guarantee before the originally stated or any extended expiration date. Such letters of credit must also provide that they can be forfeited and collected by the authorized officer if not replaced by other suitable financial guarantee before their expiration date.

Section 3809.1–9(l) continues the current practice of accepting blanket statewide and nationwide bonds found in the existing regulations. This provision was generally supported in some comments, and generally opposed, without stated rationale, in others. No change is made in the final rule. Failure to reclaim will lead to forfeiture of an appropriate portion of the statewide or nationwide bond and could result in the loss of the ability to obtain any future bonds.

Section 3809.1–9(m) covers reclamation and bond release. Two comments suggested that BLM allow for bond reduction as reclamation steps are completed. Upon reflection, we agree.

Section 3809.1–9(m) in the final rule includes a procedure for phased release or reduction of bonds as reclamation phases are completed, as suggested in the comments. A guarantee will not be released until successful revegetation has been demonstrated. Limitations are also placed on release of financial guarantees in order to protect water quality.

Paragraphs (n) through (p) of section 3809.1–9, were added to the final rule based on public comment. They describe the procedures used by BLM to collect financial guarantees in order to carry out or contract for any needed reclamation not performed by the operator or mining claimant. These sections are being incorporated in the final rule to ensure a degree of uniformity in the procedures used by the various offices of the BLM in the collection and use of financial guarantees, and to complete the logical sequence of events encouraging reclamation.

Section 3809.1–9(n) of the proposed rule, redesignated as paragraph (q) in the final rule, covers release of the operator from the financial guarantee or a portion thereof upon patenting of a mining claim. One comment suggested requiring all portions of the patented claim not then being mined to be reclaimed and the part still being mined to be covered by the State requirements prior to title transfer. Such requirements would be unnecessary, because most States have mining and reclamation programs that require reclamation of private lands, including lands obtained through patents from the United States. As elsewhere, references to the mining claimant have been added in this paragraph to make it consistent with other provisions in the final rule.

Section 3809.3–1. This proposed section added a requirement in paragraph (b) for the State Director to review the list of appropriate and legal financial instruments available in the State and to publish it on a yearly basis. No significant comments were noted. However, this section has been amended editorially for purposes of brevity and clarity in the final rule.

Section 3809.3–2(e). This proposed section explained what is meant by a record of noncompliance, imposed mandatory BLM-held bonding on operators with a record of noncompliance, made State-held bonds unacceptable for those with records of noncompliance, and allowed the BLM to require all existing and subsequent notice-level operations by such an operator to be conducted only under a plan. It also allowed the State Director to determine the length of time that an operator will be held to the mandatory plan provisions (not less than 1 year and not more than 3 years).

One comment objected to the proposed language stating that financial guarantees held by the State would not be acceptable and would result in the double bonding of operators by the State and the BLM. We acknowledge this possibility, but additional security is justified when operators have compiled a record of noncompliance. No change to accommodate this comment is made in the final rule.

Two comments stated that provisions of section 3809.3–2(e) do not allow for due process. One suggested alternative language that incorporated ''due process'' while the other suggested that the language of the existing section (e) would be more balanced in protecting the due process rights, because it uses ''may'' rather than ''shall.'' The rule applies to an operator who ignores a notice of noncompliance. The appeals section of the existing regulations (not amended in this rule) includes opportunity for appeal at two levels, State Director and Interior Board of

Land Appeals. This provides sufficient protection of a party's due process rights.

One comment stated that the language in the proposed section would allow an operator to move across a State line and start with a clean record. This result was not intended in the proposed rule, and nothing in the rule requires such a narrow reading. The BLM's recordkeeping system allows proscriptions imposed in one State to be maintained BLM-wide.

One comment suggested alternative language to define when an operator has compiled a record of noncompliance and to provide additional clarity to the rule:

1. To make it clear that operators who establish a record of noncompliance will be considered in active noncompliance until the necessary actions required by the notice of noncompliance have been completed;

2. To include a 30-day time frame for the conversion of existing notices to plans;

3. To include 90-day deadlines for the filing of the mandatory financial guarantees with the authorized officer, specifying that failure to provide the guarantee will result in the withdrawal of all existing plan approvals;

4. To provide that BLM will approve no new or additional plans or plan amendments of operators who have established a record of noncompliance and who remain in active noncompliance;

5. To extend the prohibition to proprietors, partners, principals, managers, directors, or officers of the operator in active noncompliance who are responsible for the continuing noncompliance.

Another comment suggested that an operator who has a record of noncompliance should be denied all additional approvals until all prior reclamation commitments have been satisfied and all costs incurred by the surety companies or the government have been reimbursed.

The suggestion that would have BLM bar an operator or mining claimant in noncompliance, and its responsible affiliates, from obtaining new or additional approvals has not been adopted in the final rule. The BLM will study this suggestion further and may propose such a change in a future rulemaking. With limited modifications to the suggested language, the remaining suggestions are adopted, so that proposed section 3809.3–2(e) is revised in the final rule.

Section 3809.3–2(f) is added merely to reiterate the penalties contained in Section 303 of FLPMA for those who violate the regulations of subpart 3809. In response to a comment that discussed the weakness of the proposed language authorizing the return of incomplete notices, a new paragraph 3809.1–9(a) is being added to prohibit the conduct of operations without posting the appropriate financial guarantees. Then, to notify the public of the penalties associated with the violation of the regulations in subpart 3809, and to codify the penalties contained in FLPMA, the noncompliance section is also amended by adding paragraph (f). This paragraph incorporates the maximum penalties provided for in the Sentencing Reform Act of 1984 (18 U.S.C. 3571 *et seq.*), in order to bring the rule into compliance with law, and to avoid the misleading impression created by the current regulations that penalties are limited to the minimal amounts provided for in FLPMA. Penalty provisions such as those in FLPMA that provide for up to a year in jail or a fine of $1,000 for violators are classified as Class A misdemeanors under 18 U.S.C. 3561, and the Sentencing Reform Act provides for fines for Class A misdemeanors of up to $100,000 for individuals and $200,000 for organizations. As noted in the rule, the Sentencing Reform Act also authorizes the imposition of alternative fines based upon a doubling of the pecuniary gain to the defendant or loss to other persons resulting from a violation.

The principal author of this final rule is Richard Deery of the Solid Minerals Group, assisted by Ted Hudson of the Regulatory Management Group, BLM.

Compliance With the National Environmental Policy Act

It is hereby determined that this final rule does not constitute a major Federal action significantly affecting the quality of the human environment, and that no detailed statement pursuant to Section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4332(2)(C)) is required. It has been determined that this final rule is categorically excluded from further environmental review pursuant to 516 Departmental Manual (DM), Chapter 2, Appendix 1, Item 1.10. This item states that ''Policies, directives, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature * * *'' are categorically exempt. Because this rule addresses financial guarantees, we believe that it falls into this category, thereby obviating any further review under NEPA. It has also been determined that the proposal would not significantly affect the 10 criteria for exceptions listed in 516 DM 2, Appendix 2. Pursuant to the Council on Environmental Quality regulations (40 CFR 1508.4) and environmental policies and procedures of the Department of the Interior, ''categorical exclusions'' means a category of actions that do not individually or cumulatively have a significant effect on the human environment and that have been found to have no such effect in procedures adopted by a Federal agency and for which neither an environmental assessment nor an environmental impact statement is required.

Compliance With Executive Order 12866

This rule has been reviewed under Executive Order 12866. The Department of the Interior has found, based on the economic analysis contained in a Determination of Effects of Rule that is available for inspection in the office of the Solid Minerals Group at the address given in **ADDRESSES**, above, that this document is not likely to result in 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.

The current surface management regulations at 43 CFR subpart 3809 provide for 3 levels of activity involving surface use of public lands for mineral exploration and mining: (1) Casual use, causing no noticeable surface disturbance, which does not require notification to BLM of the activity; (2) notice-level activity, exceeding the threshold of casual use but not disturbing more than 5 acres per calendar year, which requires a notice to BLM before proceeding but no BLM approval or operator financial guarantee; (3) plan-level activity, disturbing more than 5 acres annually, which requires a plan approved by BLM, full NEPA compliance, and, since 1990, full cost financial guarantees.

Except for Arizona, Nevada, Alaska, and Utah, the public lands States all require some bonding for notice-level mining and mineral exploration activities. Under this rule, BLM will accept these State bonds in satisfaction of the Federal bonding requirement in most circumstances for notice-level activities—most operations at this level are bonded at ''full cost bonding'' under State laws. It follows that this rule will have an effect on notice-level activities in primarily the four States mentioned above. The effects on activities in these States cannot be assigned to specific localities within the States, and are presumed to be distributed evenly

throughout each State for purposes of this analysis.

BLM expects that corporate operators will use nationwide or statewide financial instruments, and that individual and other small operators will use project-specific financial instruments. The total economic effect of this rule is projected to be $17.10 million. The Determination of Effects includes details on how BLM reached this conclusion.

The benefits attributable to this rule result from avoiding future costs through mandatory bonding. While these savings are not predictable in the strict benefit-cost analysis sense, we discuss them here. Primarily, savings will be derived from marginal activities with limited capitalization being postponed or not carried out, and failures will not occasion reclamation costs to the public. Remaining operations would be financially stronger and less likely to fail, and if bonds are in place, public costs of failure will be minimized. Other savings will be caused by the discouraging of illegal activities or non-mining industrial activities that are sometimes disguised as mining on public lands. The bonding requirement will tend to reduce the initiation of such activities and pay for costs of cleanup.

The final rule will not adversely affect the ability of the mineral industry to compete in the world marketplace, nor should it affect investment or employment factors locally. Major corporations, large-scale companies with world-wide operations and lines of credit with commercial banks can easily absorb any additional financial responsibility created by the rule.

''Junior companies,'' large limited partnerships or wholly-owned domestic subsidiaries of venture capital-based mining companies, many of which are based in Canada, tend to grow or merge into smaller major corporations, or to fail. Generally regarded as risk takers, they are often found in frontier areas and are willing to acquire properties overlooked or discarded by majors. Their options for complying with the rule will range from resorting to established lines of credit to posting company assets as collateral to internal cash flows. The amended dollar amounts for notices in the final rule will benefit these operators by encouraging them to minimize surface disturbance and reduce the amount of reclamation liability.

Individuals and other small operators will have the fewest options for funding financial guarantees: operating cash flows, individual or company assets. The likely effect of this rule will be to limit the number of notice-level operations for each such operator at any one time. They may elect to restrict activities under a notice to only the most promising mineral prospects or to attempt to option out the property to a junior or major company with a lease agreement that includes a clause requiring the lessee to obtain and maintain the necessary financial guarantee with BLM.

Compliance With Regulatory Flexibility Act

The Department has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the final rule will not have a significant economic impact on a substantial number of small entities. The reasons for this determination are stated here and may also be found in the Determination of Effects cited above.

For the purposes of this analysis, a small entity is considered to be an individual, small firm, or partnership at arm's length from the control of any parent companies. The juniors and majors (not considered small entities), as discussed in the previous paragraphs, and entities under their direct control, have access to lines of credit and internal corporate cash flows that are not available to small entities.

The economic effect on these small operators will be either to require them to acquire a financial guarantee for each new notice or avoid new operations on claims for which they do not acquire a financial guarantee. Since small entities often hold several properties, the practical effect will be the elimination of new activities on certain claims, especially the marginal ones, and the removal of some properties from their inventory of holdings, or else operators will attempt to lease the claim to a junior or major company that has the financial resources to post financial guarantees. Therefore, the short-term impact of this rule on small entities will be to curtail some of their prospective notice-level activities.

Compliance With Executive Order 12630

The Department certifies that this final rule does not represent a governmental action capable of interference with constitutionally protected property rights. It does not provide for the taking of any property rights or interests. Therefore, as required by Executive Order 12630, the Department of the Interior has determined that the rule would not cause a taking of private property.

Compliance With Paperwork Reduction Act

The information collection requirement(s) contained in this rule have been approved by the Office of Management and Budget for approval as required by 44 U.S.C. 3501 *et seq.*, and assigned clearance number 1004–0176.

Compliance With Unfunded Mandates Reform Act

BLM has determined that this rule is not significant under the Unfunded Mandates Reform Act of 1995, because it will not 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. Further, this rule will not significantly or uniquely affect small governments.

Compliance With Executive Order 12988

The Department has determined that this rule meets the applicable standards provided in sections 3(a) and 2(b)(2) of Executive Order 12988.

List of Subjects in 43 CFR Part 3800

Administrative practice and procedure, Environmental protection, Intergovernmental affairs, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds, Wilderness areas.

For the reasons stated in the preamble, and under the authorities cited below, Part 3800, Subchapter C, Chapter II, Title 43 of the Code of Federal Regulations is amended as set forth below.

Dated: February 24, 1997.

Sylvia V. Baca,

Assistant Secretary of the Interior.

1. The authority citation for part 3800 is revised to read as follows:

Authority: 16 U.S.C. 351; 16 U.S.C. 460y–4; 30 U.S.C. 22; 31 U.S.C. 9701; 43 U.S.C. 154; 43 U.S.C. 299; 43 U.S.C. 1201; 43 U.S.C. 1740; 30 U.S.C. 28k.

Subpart 3809—Surface Management

2. The authority citation for 43 CFR subpart 3809 is removed.

3. Section 3809.0–9 is added to read as follows:

§ 3809.0–9 Information collection.

(a) The collections of information contained in subpart 3809 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1004–0176. BLM will use the information in regulating and monitoring mining and exploration operations on public lands. Response to requests for information is

mandatory in accordance with 43 U.S.C 1701 *et seq.* The information collection approval expires December 31, 1999.

(b) Public reporting burden for this information is estimated to average 16 hours per response for notices and 32 hours per response for plans of operations, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Information Collection Clearance Officer (783), Bureau of Land Management, Washington, D.C. 20240, and the Office of Management and Budget, Attention Desk Officer for the Interior Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, referring to information collection clearance number 1004–0176.

§ 3809.1–8 [Removed]

4. Section 3809.1–8 is removed.

5. Section 3809.1–9 is revised to read as follows:

§ 3809.1–9 Financial guarantees.

(a) No operator or claimant shall—

(1) Initiate operations under a notice without providing the authorized officer certification of the existence of the appropriate financial guarantee as required by paragraph (c) through (f) of this section; or

(2) Conduct operations under a plan of operations without providing the authorized officer with the appropriate financial guarantee as required by paragraphs (g) through (j) of this section.

(b) No financial guarantee is required for operations that constitute casual use under § 3809.1–2.

(c) No operations conducted under a notice in accordance with § 3809.1–3 shall be initiated until the operator or mining claimant provides to the authorized officer a certification that a financial guarantee exists to ensure performance of reclamation in accordance with the requirements of § 3809.1–3(d). Each certification must be accompanied by a calculation of reclamation costs of the proposed activities covered by the notice, as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed. However, when the requirement for a financial guarantee is met by providing evidence of an instrument held by a State agency as provided in this paragraph, the certificaton of costs by a third party professional engineer is not required. The financial guarantee must be sufficient to cover 100 percent of the estimate of the costs of reclamation, as calculated above, required by State and Federal laws and regulations, and may be in any of the forms described in paragraphs (k) and (l) of this section. In calculating the amount of the financial guarantee, each acre of disturbance or fraction thereof shall require not less than $1,000. The financial guarantee may also be met by providing evidence of an appropriate instrument held or approved by a State agency pursuant to State law or regulations so long as the instrument is equivalent to that required by this section, is redeemable by the Secretary, acting by and through BLM, and covers the same area covered by the notice. The certification must accompany the notice submitted to the proper BLM office having jurisdiction over the land in which the claim or project area is located. Failure to submit a complete certification will render the notice incomplete and it will be returned by the authorized officer. The financial guarantee covered by the certification must be available, until replaced by another adequate financial guarantee with the concurrence of the authorized officer or until released by the authorized officer, for the performance of such reclamation as required by § 3809.1–3. Such reclamation shall also include all reasonable measures identified as the result of the consultation required by the authorized officer under § 3809.1–3(c). If there is a material change in any financial guarantee on which the operator or mining claimant's certification is based, the operator or mining claimant must submit an amended certification to the authorized officer within 45 days after the material change occurs.

(d) The certification submitted by the operator, mining claimant, or its authorized agent, for any operations conducted under a notice, shall include:

(1) The name, home address, office and home telephone numbers, and social security number or employer identification number of the operator, mining claimant, or authorized agent;

(2) A statement that the mining claimant or operator for whom the individual is submitting the certification will be responsible for the required reclamation;

(3) A statement that the authorized officer will be notified at the completion of reclamation operations to arrange for a final inspection;

(4) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or $1,000 per acre or fraction thereof of disturbance as described in the attached notice, whichever is greater, exists, followed by a complete description of the financial guarantee and its location;

(5) A statement that the financial guarantee in the amount of the estimated reclamation costs, as calculated under § 3809.1–9(c), or $1,000 per acre or fraction thereof of disturbance, whichever is greater, will be delivered to the authorized officer within 45 days of a demand for its surrender, following failure to complete reclamation, unless an additional period of time not to exceed 45 days is granted in writing by the authorized officer;

(6) A statement acknowledging that surrender of the financial guarantee will not release the operator, mining claimant, or authorized agent from responsibility to ensure completion of the reclamation should the amount of the guarantee be insufficient to complete all required reclamation;

(7) A statement acknowledging that release of the requirement to maintain the financial guarantee does not release or waive any claim the Bureau of Land Management may have against any person under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or any other applicable statutes or any applicable regulations; and

(8) A statement acknowledging that non-existence of the financial guarantee or the failure to provide the guarantee upon demand for its surrender by the authorized officer may result in prosecution under 18 U.S.C. 1001, 43 U.S.C. 1733, or other appropriate authorities.

(e) Each statement required by paragraph (d) of this section to be included with the certification must be initialed and dated by the individual submitting the certification. Failure to initial all statements will result in the certification and the notice being returned as incomplete by the authorized officer.

(f) At any time, the authorized officer may require the notice-level operator or mining claimant to demonstrate the existence of the guarantee set out in the certification described in paragraph (c) of this section.

(g) Each operator or mining claimant who conducts operations under an approved plan of operations shall furnish to the authorized officer a

financial guarantee in an amount specified by the authorized officer. In determining the amount of the guarantee, the authorized officer shall consider the estimated cost of reasonable stabilization and reclamation of areas disturbed, including the cost to the BLM of conducting the reclamation, using either contract or government personnel.

(h) For activities conducted under a plan of operations, the financial guarantee must be sufficient to cover 100 percent of the costs of reclamation required by State and Federal statutes and regulations and calculated as if third party contractors were performing the reclamation after the site is vacated by the operator. This calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, but when the requirement for a financial guarantee is met by providing evidence of an instrument held or approved by a State agency, the certification of costs by a third party professional engineer will not be required. This calculation must be agreed to by the authorized officer. In no case shall the financial guarantee be less than $2,000 per acre or fraction thereof.

(i) In lieu of requiring the financial guarantee as provided in paragraph (g) of this section, the authorized officer may accept evidence of an existing financial guarantee under State law or regulations, if it is redeemable by the Secretary, acting by and through the authorized officer, and held or approved by a State agency for the same area covered by the plan of operations, upon determining that the instrument held or approved by the State provides the same guarantee as that required by this section, regardless of the type of financial instruments chosen by the State. The operator or mining claimant proposing a plan of operations may offer for the approval of the authorized officer any of the financial instruments listed in paragraphs (k) and (l) of this section. The authorized officer may reject any of the submitted financial instruments, but will do so by decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering. If the State makes a demand against the financial guarantee, thereby reducing the available balance, the operator or mining claimant must replace the amount of reduced financial guarantee with another financial guarantee instrument acceptable under this subpart.

(j) In the event that an approved plan is modified in accordance with 3809.1–7, the authorized officer will review the initial financial guarantee for adequacy and, if necessary, require the operator or mining claimant to adjust the amount of the financial guarantee to cover the estimated cost of reasonable stabilization and reclamation of areas disturbed under the plan as modified. Operators or mining claimants with an approved financial guarantee may request the authorized officer to accept a replacement financial instrument at any time after the approval of an initial instrument. The authorized officer shall review the offered instrument for adequacy and may reject any offered instrument, but will do so by a decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering.

(k) Provided that the State Director has determined that it is a legal financial instrument within the State where the operations are proposed, the financial guarantee may take the form of any of the following:

(1) Surety bonds, including surety bonds arranged or paid for by third parties.

(2) Cash in an amount equal to the required dollar amount of the financial guarantee, to be deposited and maintained in a Federal depository account of the United States Treasury by the authorized officer.

(3) Irrevocable letters of credit from a bank or financial institution organized or authorized to transact business in the United States.

(4) Certificates of deposit or savings accounts not in excess of the maximum insurable amount as set by the Federal Deposit Insurance Corporation.

(5)(i) Any instrument listed in paragraph (k)(5)(i)(A) or (B) of this section having a market value of not less than the required dollar amount of the financial guarantee and maintained in a Securities Investors Protection Corporation insured trust account by a licensed securities brokerage firm for the benefit of the Secretary of the Interior, acting by and through the authorized officer.

(A) Negotiable United States Government, State and Municipal securities or bonds.

(B) Investment-grade rated securities having a Standard and Poor's rating of AAA or AA or an equivalent rating from a nationally recognized securities rating service.

(ii) Notwithstanding the provision in paragraph (c) of this section that an operator or mining claimant conducting operations under a notice need only provide the authorized officer with a certification of the existence of the required financial guarantee, and notwithstanding the provision in paragraph (g) of this section that an operator or mining claimant conducting operations under an approved plan of operations must furnish the required financial guarantee to the authorized officer, any operator or mining claimant who chooses to use the instruments permitted under this paragraph (k)(5) in satisfaction of such provisions, must provide the authorized officer, prior to the initiation of such operations and by the end of each quarter of the calendar year thereafter, a certified statement describing the nature and market value of the instruments maintained in that account, and including any current statements or reports furnished by the brokerage firm to the operator or mining claimant concerning the asset value of the account.

(iii) The operator or mining claimant must review the market value of the account instruments by no later than December 31 of each year to ensure that their market value continues to be not less than the required dollar amount of the financial guarantee. When the market value of the account instruments has declined by more than 10 percent of the required dollar amount of the financial guarantee, the operator or mining claimant must, within 10 days after its annual review or at any time upon the written request of the authorized officer, provide additional instruments, as defined in paragraphs (k)(5)(i)(A) and (B), to the trust account so that the total market value of all account instruments is not less than the required dollar amount of the financial guarantee. The operator or mining claimant must send a certified statement to the authorized officer within 45 days thereafter describing the actions taken by the operator or mining claimant to raise the market value of its account instruments to the required dollar amount of the financial guarantee. The operator or mining claimant must include copies of any statements or reports furnished by the brokerage firm to the operator or mining claimant documenting such an increase.

(iv) Whenever, on the basis of a review conducted under paragraph (k)(5)(iii) of this section, the operator or mining claimant ascertains that the total market value of its trust account instruments exceeds 110 percent of the required dollar amount of the financial guarantee, the operator or mining claimant may request and the authorized officer will authorize a written release of that portion of the account that exceeds 110 percent of the required financial guarantee, if the operator or mining claimant is in compliance with the terms and

conditions of its notice or approved plan of operations.

(l) In place of the individual financial guarantee on each separate operation, a blanket financial guarantee covering statewide or nationwide operations may be furnished at the option of the operator or mining claimant, if the terms and conditions are determined by the authorized officer to be sufficient to comply with the regulations in this subpart.

(m) When all or any portion of the reclamation has been completed in accordance with a notice submitted pursuant to § 3809.1–3 or an approved plan of operations, the operator or mining claimant may notify the authorized officer that such reclamation has occurred and may request a reduction in the financial guarantee or BLM approval of the adequacy of the reclamation, or both. Upon any such notification, the authorized officer will promptly inspect the reclaimed area with the operator. The authorized officer will notify the operator, in writing, whether the financial guarantee can be reduced, the reclamation is acceptable, or both. The authorized officer may reduce the financial guarantee by an appropriate amount, not to exceed 60 percent of the total estimated costs of reclamation as calculated in accordance with paragraph (c) or (h) of this section, if the authorized officer determines that a portion of the reclamation has been completed in accordance with applicable requirements, including, but not limited to, requirements for backfilling, regrading, establishment of drainage control, and stabilization and neutralization of leach pads, heaps, leach-bearing tailings, and similar facilities. The authorized officer will not release that portion of the financial guarantee equal to 40 percent of the total estimated costs of reclamation until the area disturbed by operations has been revegetated to establish a diverse, effective, and permanent vegetative cover, and until any effluent discharged from the area has met, without violations and without the necessity for additional treatment, applicable effluent limitations and water quality standards for not less than 1 full year. Any such release of the financial guarantee does not release or waive any claim BLM may have against any person under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. 9601 *et seq.*, or under any other applicable statutes or any applicable regulations.

(n) If an operator or mining claimant refuses or is unable to conduct reclamation as provided in the reclamation measures incorporated into its notice or approved plan of operations or the regulations in this subpart, if the terms of the notice or decision approving a plan of operation are not met, or if the operator or mining claimant defaults on the conditions under which the financial guarantee rests, the authorized officer shall take the following action to require the forfeiture of all or part of a financial guarantee for any area or portion of an area covered by the financial guarantee:

(1) Send written notification by certified mail, return receipt requested, to the operator or mining claimant that provided the financial guarantee, and the surety on the financial guarantee, if any, and the State agency holding the financial guarantee, if any, informing them of the decision to require the forfeiture of all or part of the financial guarantee. The notification must include the reasons for the forfeiture and the amount to be forfeited. The amount shall be based on the estimated total cost of achieving the reclamation plan requirements for the area or portion of the area affected, including the administrative costs of the Bureau of Land Management.

(2) In the written notification, advise the operator or mining claimant and surety, if applicable, of the conditions under which forfeiture may be avoided. Such conditions may include, but are not limited to——

(i) Written agreement by the operator, mining claimant, or another party to perform reclamation operations in accordance with a compliance schedule which meets the conditions of the notice or decision approving a plan of operations and the reclamation plan, and a demonstration that such party has the ability to satisfy the conditions; or

(ii) Written permission from the authorized officer to a surety to complete the reclamation, or the portion of the reclamation applicable to the bonded phase or increment, if the surety can demonstrate an ability to complete the reclamation in accordance with the reclamation measures incorporated in a notice or approved plan of operations.

(o) In the event the operator or mining claimant fails to meet the requirements of the written notification provided under paragraph (n) of this section, the authorized officer will—

(1) Proceed immediately to collect the forfeited amount as provided by applicable laws for the collection of defaulted bonds or other debts if actions to avoid forfeiture have not been taken, or if an appeal has not been filed under § 3809.4, or if such appeal is filed and the decision appealed is confirmed.

(2) Use funds collected from financial guarantee forfeiture to implement the reclamation plan, or portion thereof, on the area or portion of the area to which bond coverage applies.

(p)(1) In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator or mining claimant is liable for the remaining costs. The authorized officer may complete or authorize completion of reclamation of the bonded area and may recover from the operator or mining claimant all costs of reclamation in excess of the amount forfeited.

(2) In the event the amount of financial guarantee forfeited was more than the amount necessary to complete reclamation, the unused funds shall be returned, within a reasonable amount of time, by the authorized officer to the party from whom they were collected.

(q) When a mining claim is patented, the authorized officer will release the operator or mining claimant from the portion of the financial guarantee that applies to operations within the boundaries of the patented land. The authorized officer shall release the operator or mining claimant from the remainder of the financial guarantee, including the portion covering approved means of access outside the boundaries of the mining claim, when the operator or mining claimant has completed acceptable reclamation. However, existing access to patented mining claims, if across Federal lands, shall continue to be regulated under the approved plan and shall include a financial guarantee. The provisions of this paragraph do not apply to patents issued on mining claims within the boundaries of the California Desert Conservation Area (see § 3809.6).

6. Section 3809.3–1 is amended by revising paragraph (b) to read as follows:

§ 3809.3–1 Applicability of State law.

* * * * *

(b) Each State Director will publish a notice identifying all legal financial guarantees that may be accepted by any authorized officer under his or her jurisdiction, after consultation with the appropriate State authorities to determine which of the financial instruments in § 3809.1–9(k) are allowable under State law to satisfy the financial assurance requirements relating to the reclamation requirements of that State. This list will be updated annually.

* * * * *

7. Section 3809.3–2 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 3809.3–2 Noncompliance.

* * * * *

(e) An operator or mining claimant who compiles a record of noncompliance is one who has been served with a notice of noncompliance, whose response period has passed, and who has not commenced the actions required by the authorized officer within the time frames set forth in the notice of noncompliance. An operator or mining claimant with a record of noncompliance will continue in noncompliance status until the actions required in the notice of noncompliance have been completed. Any operator or mining claimant with a record of noncompliance must submit a plan of operations within 30 days under § 3809.1–9 of this subpart for all existing and subsequent operations that would otherwise be conducted pursuant to a notice under § 3809.1–3 of this subpart. Operators or mining claimants with a record of noncompliance will be required to post financial guarantees with the authorized officer under § 3809.1–9 within 90 days after notification for all existing disturbance for which said operators or mining claimants are responsible. Failure to post such financial guarantees within the prescribed 90 days will result in the withdrawal of approval of all existing plans of operation, except that the authorized officer may approve actions proposed by an operator with a record of noncompliance to resolve the cause of the noncompliance or to protect public safety or health or prevent further unnecessary or undue environmental degradation. Financial guarantees held by a State will not be acceptable for purposes of this section, and the calculation must be certified at the operator's or mining claimant's expense by a third party professional engineer registered to practice within the State in which the activities are proposed, and agreed to by the authorized officer. The requirements of this paragraph continue in force until the operator or mining claimant has come into and remained in compliance with them and the regulations of this subpart for a period of not less than 1 calendar year but not more than 3 calendar years. The duration of the requirement will be determined by the State Director.

(f)(1) Any person constituting an operator, mining claimant, or its authorized agent, who knowingly and willfully violates any provision of this subpart is subject to arrest and trial by a United States magistrate and, if convicted, shall be subject to a fine of not more than $100,000, or the alternate fine provided for in the applicable provisions of 18 U.S.C. 3571, or imprisoned for no more than twelve months, or both.

(2) Any organization constituting an operator, mining claimant, or its authorized agent, that knowingly and willfully violates any provision of this subpart is subject to criminal prosecution and, if convicted, shall be subject to a fine of not more than $200,000, or the alternative fine provided for in the applicable provisions of 18 U.S.C. 3571.

[FR Doc. 97–5016 Filed 2–27–97; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

[CC Docket No. 90–6; FCC 96–56]

Amendment of Part 22 of the Commission's Rules To Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and To Modify Other Cellular Rules

AGENCY: Federal Communications Commission.

ACTION: Further memorandum opinion and order on reconsideration.

SUMMARY: In this *Memorandum Opinion and Order on Reconsideration*, the Commission denies the petitions for reconsideration and petitions for partial reconsideration of the Commission's *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 57 FR 53446, November 10, 1992 in this Docket.

FOR FURTHER INFORMATION CONTACT: Ramona Melson, Commercial Wireless Division, Wireless Telecommunications Bureau, (202) 418–7240.

SUPPLEMENTARY INFORMATION: This *Further Memorandum Opinion and Order on Reconsideration* in CC Docket No. 90–6, adopted on February 13, 1996 and released on January 31, 1997, is available for inspection and copying during normal business hours in the FCC Reference Center, Room 575, 2000 M Street N.W, Washington, D.C. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857–3800. Synopsis of *Further Memorandum Opinion and Order on Reconsideration*

I. Introduction

1. By these actions, we respond to petitions for reconsideration and partial reconsideration of the *Third Report and Order on Reconsideration and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket. Applicants Against Lottery Abuses (AALA) and the Committee for Effective Cellular Rules (CECR) have filed petitions for reconsideration of the *Third Report and Order*, 58 FR 27213, May 7, 1993 and Cellular Information Systems, Inc., Debtor in Possession (CIS), has filed a petition for partial reconsideration (CIS Petition) of the *Third Report and Order* 58 FR 27213, May 7, 1993. In addition, we have before us five petitions for reconsideration and three petitions for partial reconsideration of our *Memorandum Opinion and Order on Reconsideration* 58 FR 11799, March 1, 1993. We also received a request by PetroCom and Coastel for expedited action on the CIS petition (PetroCom/Coastel Request). For the reasons stated below, we deny the requests for reconsideration and partial reconsideration of the *Third Report and Order and the Memorandum Opinion and Order* 58 FR 27213, May 7, 1993. We dismiss the request for expedited action as moot.

2. As a related matter, we note that PetroCom and Coastel (collectively, ''petitioners'') filed petitions for review with the United States Court of Appeals for the District of Columbia Circuit challenging Sections 22.903(a) and 22.903(d)(1) of the Commission's rules. Petitioners contend, inter alia, that the Commission promulgated a consent requirement for de minimis extensions under Section 22.903(d)(1) without providing proper notice and opportunity for comment as required under the Administrative Procedure Act (APA), 5 U.S.C. § 553. On May 13, 1994, the court denied the petition with respect to petitioners' claim that proper notice and comment was not provided because another party, CIS, had already filed a petition for reconsideration with the Commission alleging similar violations and the petition had not yet been resolved. This *Further Memorandum Opinion and Order* addresses the notice and comment issues raised by the CIS petition and the comments filed by petitioners in support of the CIS petition. Other issues raised by petitioners and the court will be addressed in separate orders.

II. Background

3. The first licensee of a cellular radio system authorized on a channel block in

each cellular market is afforded a five-year ''build-out'' period during which it has the exclusive right to construct and operate cellular facilities on its channel block within the market. We initiated this proceeding to adopt rules for the acceptance, processing and selection of applications for new cellular systems proposing service to unserved areas. In our *First Report and Order and Memorandum Opinion and Order on Reconsideration* 56 FR 58503, November 20, 1991 in this docket, we established rules and procedures for processing and granting applications to operate cellular systems in areas as yet unserved upon expiration of the five-year ''build-out'' period. On the same day that we adopted the *First Report and Order* 56 FR 58503, November 20, 1991, we also adopted a *Further Notice of Proposed Rule Making* 56 FR 58529, November 20, 1991 in this docket which proposed changes to various cellular rules and requested additional comments on a number of issues, as a result of earlier comments filed in this docket and not resolved by the *First Report and Order* 56 FR 58503, November 20, 1991. On April 9, 1992, we released our *Second Report and Order* 57 FR 13646, April 17, 1992 in this docket, in which we adopted rules to determine the boundaries of Cellular Geographic Service Areas (CGSAs) by the use of a mathematical formula, with the objective of creating boundaries that would more closely approximate actual service to the public. The *Second Report and Order* 57 FR 13646, April 17, 1992 also modified the authorizations of existing cellular systems to redefine the boundaries of their CGSAs in accordance with the new standard. Our *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket dealt with a variety of issues governing our licensing of cellular radio facilities, specifically those issues set forth in the *Further Notice* 56 FR 58529, November 20, 1991 not previously addressed in the *Second Report and Order* 57 FR 13646, April 17, 1992. The *Third Report and Order* 58 FR 27213, May 7, 1993 also disposed of ten petitions for reconsideration of our *First Report and Order* 56 FR 58503, November 20, 1991. Petitions for reconsideration of the *Second Report and Order* 57 FR 13646, April 17, 1992 were addressed in the 1993 *Memorandum Opinion and Order on Reconsideration* 58 FR 11799, March 1, 1993 in this docket.

III. Discussion

A. Petitions for Reconsideration of the Third Report and Order Lottery Rules

4. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we adopted Sections 22.927 and 22.928 of our rules. Under these rules, an applicant or a petitioner may receive only the legitimate and prudent expenses incurred in prosecuting its application or pleading in exchange for agreeing to withdraw a mutually exclusive cellular application or a pleading. AALA argues that with a rule limiting the settlement amount that can be paid to petitioners seeking denial or dismissal of applications, the Commission should at a minimum reinstate the procedure used in the Metropolitan Statistical Area cellular licensing process for the selection and ranking of multiple selectees in cellular lotteries. AALA contends that the settlement limitations will remove all incentive for private parties to assist in checking lottery abuse. As a result, according to AALA, the rules adopted ''will deter not just frivolous petitions, but those meritorious petitions that have proven helpful to the Commission in its enforcement functions.'' AALA argues that ranking multiple selectees is the only alternative which provides the necessary incentive for private parties, through the petition to deny process, to assist the Commission in policing lottery abuses. McCaw urges the Commission to reject AALA's proposal, because history has shown that ranking lottery winners will lead to the filing of frivolous applications ''submitted by entities that figure they have nothing to lose.'' AALA responds to McCaw, contending that the settlement cap imposed on a would-be filer of a frivolous petition would ensure that the petitioner would have nothing to gain because ''the very best such a petitioner could hope for is to break even.''

5. Section 309(d) of the Communications Act provides that any party in interest may file with the Commission a petition to deny challenging the grant of an application. The petition must contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity. 47 U.S.C. § 309(d). Our obligation under the Communications Act is to provide the forum and mechanism for the filing of those petitions by parties with standing. By establishing limitations on settlements, we did not intend to encourage or discourage the filing of petitions to deny. Notwithstanding limitations on settlements, we have no basis for concluding that meritorious petitions will not continue to be filed by those parties desiring corrective or appropriate action on defective or otherwise non-grantable applications. Further, our experience with lotteries has taught us that ranking applicants for initial cellular systems encourages the filing of frivolous petitions to deny. Moreover, in the future we intend to use competitive bidding to select from among mutually exclusive cellular unserved area applications filed on or after July 26, 1993, as well as most other applications for Part 22 licenses. Thus, we do not plan to make much use of lottery procedures in the future. In light of the foregoing, we deny AALA's petition.

Standards for De Minimis Extensions

6. Section 22.903(d)(1), as adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992, allowed an applicant to propose Service Area Boundary (SAB) extensions into adjacent Metropolitan Statistical Areas (MSAs) or Rural Service Areas (RSAs), if such extensions were: (1) de minimis; and (2) demonstrably unavoidable for technical reasons of sound engineering design. The *Third Report and Order* 58 FR 27213, May 7, 1993 modified Section 22.903(d)(1) to allow only those extensions that meet the two foregoing requirements and that do not extend into the CGSA of any other licensee's cellular system on the same channel block (unless the other licensee consents to the extension), or into any adjacent MSA or RSA on a channel block for which the five year fill-in period has expired (i.e., into areas that are unserved and may be applied for only pursuant to the licensing process described in Section 22.949 of the Commission's rules).

7. CIS argues that the circumstances under which *de minimis* extensions are permitted under Section 22.903(d)(1) will not serve the public interest. CIS argues that the rule will make it more difficult for carriers to cover their markets and create the seamless cellular coverage the Commission has long encouraged. CIS claims that under the former version of the rule section, there was little incentive for a neighboring carrier to challenge a *de minimis* extension, unless that carrier had ''specific concerns'' or the extension significantly affected the market. CIS asserts that the new rule adds a layer of negotiation, and perhaps litigation, to most *de minimis* applications. Thus, CIS argues, if a licensee wants to propose a de minimis extension, it first must determine whether that extension

overlaps with the adjacent carrier's CGSA and if it does, negotiate for consent to that extension. CIS contends that if consent is not forthcoming, it is possible that the carrier requesting consent will be unable to build facilities with *de minimis* extensions in that area. According to CIS, the new rule essentially treats extensions as mutually exclusive with existing or proposed CGSAs. CIS believes our adoption of Section 22.903(d)(1) is not needed if the principles underlying our mutual exclusivity rules and original *de minimis* extension rules were followed. The net result of the new rule, CIS alleges, is to favor the earlier-licensed market over the later-licensed market and to favor well-financed carriers over less financially secure carriers, because the well-financed carriers are more likely to win the ''race to the border'' created by the new rule. CIS also maintains that, prior to the rule revision, extensions that overlapped a neighbor's CGSA did not require consent during the first ten years of cellular licensing, whereas such consent now is required. CIS contends that requiring such consent will cause some licensees to be treated differently than others have been treated in the past, even though there has been no change in the justification underlying the Commission's published rules and policies concerning *de minimis* extensions.

8. We find that CIS's arguments are not persuasive. The cellular radio industry has matured to the point where many licensees have CGSAs that have reached the borders of their respective MSAs or RSAs. In such an environment, ''border wars'' may become more common. Nevertheless, our rules do not favor either earlier-licensed carriers or better-financed carriers. Rather, any licensee, regardless of when it was licensed or how well it is financed, is entitled to protection within its CGSA, and conversely, must not cause interference by extensions into the CGSAs of other licensees, unless the parties agree to accept the intrusion. It is in the interest of cellular licensees to find mutually beneficial ways to accommodate their respective needs in providing service within their respective CGSAs.

9. Our current rule requiring consent for any SAB extensions into a licensee's CGSA is consistent with our previous policies protecting a licensee's reliable service area. Prior to the adoption of our *Second Report and Order* 57 FR 13646, April 17, 1992, *de minimis* contour extensions overlapping a neighbor's CGSA did not require prior consent from the neighbor. At that time, the CGSA was the area within an MSA or RSA that an applicant for an initial cellular system intended to serve, so it was possible for contours to extend into a neighbor's CGSA without causing interference to the neighbor's reliable service area. Furthermore, (as discussed *infra* at ¶ 14), all such contour extensions were subject to a standard authorization condition that required a licensee to change frequencies or ''pull back'' its service area boundary, if a current or future adjacent licensee encountered interference caused by any such extension. Pursuant to the *Second Report and Order* 57 FR 13646, April 17, 1992, the CGSA now represents the actual service area. Since the CGSA now is the current, rather than planned, service area, any extension into an adjacent CGSA would amount to an incursion into that licensee's actual service area. Thus, before and after the adoption of the *Second Report and Order* 57 FR 13646, April 17, 1992, a cellular licensee's reliable service area has been protected from overlap with the reliable service areas of neighboring cellular licensees by the standard pull back condition. The changes we made in the *Third Report and Order* 58 FR 27213, May 7, 1993 allow the parties to agree to have overlapping contours without imposing the pull back requirement.

10. Therefore, we conclude that the standards set forth in Section 22.903(d)(1) of the rules concerning *de minimis* SAB extensions into adjacent MSAs and RSAs serve the public interest and are consistent with our previous policies protecting a licensee's reliable service area.

Alleged Due Process Violations and Lack of Notice Under APA

11. In its petition, CIS argues that the Commission provided no notice that Section 22.903(d)(1) would be amended by the *Third Report and Order* 58 FR 27213, May 7, 1993, and thus violated the notice and comment requirements of the Administrative Procedures Act (APA). Similarly, PetroCom and Coastel argue that the *Initial NPRM* 55 FR 4882, February 12, 1990 and the *First Report and Order* 56 FR 58503, November 20, 1991 in this proceeding stated that the Commission was adopting no new requirements affecting the extension applications of existing cellular licensees. PetroCom and Coastel claim that no reasonable reader of the Commission's *Initial NPRM* 55 FR 4882, February 12, 1990 could have inferred that the Commission would change the ''*de minimis* extension regulation as it applied to existing cellular licensees.''

12. In addition, CIS, PetroCom, and Coastel contend that the only reference to contour extensions applicable to licensees seeking to expand their existing system boundaries is the proposal to codify a standard authorization condition that requires a licensee to change frequencies or ''pull back'' its service area boundary, if a current or future adjacent licensee encounters interference caused by a *de minimis* extension. The three petitioners conclude that the Commission provided no notice that it planned to change existing policy by requiring a licensee seeking to extend its contour into a neighboring licensee's CGSA to obtain the neighboring licensee's consent to that extension. CIS also argues that the Commission did not provide a reasoned explanation for the obligations adopted in the rules. CIS alleges that, by not providing sufficient notice or a reasonable basis for the new rule, we have violated due process.

13. As CIS acknowledges, proposed rules do not have to be identical to the final adopted rules, but important changes must be a ''logical outgrowth'' of the proceeding. Thus, courts have taken the view that changes from the original proposals in a rule making do not require an additional round of notice and comments where the final rules represent a ''logical outgrowth'' of the proposals. We believe that the rule changes implemented in the *Third Report and Order* 58 FR 27213, May 7, 1993 are well grounded in our previous rules and policies, and that these changes were an outgrowth of the issues raised at the initiation of this proceeding to modify the CGSAs of existing and new cellular systems.

14. A cellular licensee's service area has been protected from the contour extensions of other licensees by a standard license condition utilized prior to the adoption of the *First Report and Order* 56 FR 58503, November 20, 1991 in this proceeding. The condition was implemented as part of the Commission's longstanding policy of protecting a cellular licensee's actual service area. Prior to the adoption of the *First Report and Order* 56 FR 58503, November 20, 1991, carriers granted a *de minimis* extension into an adjacent MSA or RSA had been subject to a standard condition requiring that the extension be ''pulled back,'' if it caused interference to the protected service area of the adjacent MSA or RSA. The *Initial NPRM* 55 FR 4882, February 12, 1990 in this proceeding proposed to codify this standard condition and the *First Report and Order* 56 FR 58503, November 20, 1991 adopted this condition as Section 22.902(d)(4) of the rules. Thus, both

prior to and after the adoption of the *Second Report and Order* 57 FR 13646, April 17, 1992, a cellular licensee's reliable service area was protected by the standard pull back condition. A reasonable reader of the *Further Notice* 56 FR 58529, November 20, 1991 which proposed to establish the CGSA in the manner ultimately adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992, could have anticipated that the Commission would continue to protect a licensee's service area from interference by other licensees.

15. We believe that the changes to Section 22.903(d)(1) reflect a logical and necessary step in redetermining the CGSA of each cellular licensee. In the *Second Report and Order* 57 FR 13646, April 17, 1992, we revised Section 22.903(a) to determine the CGSA based on a licensee's authorized service area, because the method proposed in the *Initial NPRM* 55 FR 4882, February 12, 1990 underestimated the service area boundaries. Both the *Initial NPRM* 55 FR 4882, February 12, 1990 and the *Further Notice* 56 FR 58529, November 20, 1991 in this proceeding explained that a central purpose of this proceeding was to make a licensee's CGSA more closely approximate its authorized service area.

16. The modification of a licensee's CGSA to more closely approximate its service area under Section 22.903(a) means that any non-consensual extension into a licensee's CGSA on the same channel block would constitute interference from which the licensee and its customers have a right to be protected, pursuant to Section 22.911 of our rules. Our modification of the text of Section 22.903(d)(1) regarding SAB extensions encroaching upon the CGSA of another licensee was necessitated by the change in methodology to determine the CGSA and our existing interference protection rule under Section 22.911. Thus, we modified Section 22.903(d)(1) to prohibit *de minimis* extensions into the CGSA of a carrier on the same channel block in an adjacent market without the consent of the neighboring licensee. Such changes do not violate due process, nor were the changes without notice, as CIS, Petrocom and Coastel allege.

17. CIS, PetroCom, and Coastel also assert that the *Third Report and Order* 58 FR 27213, May 7, 1993 mislabeled the Commission's modification of Section 22.903(d)(1) of its Rules as a ''clarification.'' They claim that the modification of the referenced rule was more than a clarification, noting that the term ''clarification'' implies that no substantive change to the rule is being made.

18. We do not dispute that our modification of Section 22.903(d)(1) involved a revision of that rule, and we did not intend, by the language we used in the *Third Report and Order* 58 FR 27213, May 7, 1993, to suggest otherwise. The revision of Section 22.903(d)(1) simply reinforced a concept which already was stated in the introductory paragraph of Section 22.903, as revised by the *Second Report and Order* 57 FR 13646, April 17, 1992, namely, that because the method of determining the CGSA is changed to reflect a licensee's authorized service area, the CGSA is protected from interference caused by all other licensees, just as cellular licensees' service areas had been protected from interference in the past by the standard pull back condition. Once we modified the CGSA to be a licensee's authorized protected service area, no incursions into the CGSA could be allowed under our standard policy against interference, unless the carrier causing the SAB extension received consent from the affected licensee.

19. We also had to modify Section 22.903(d)(1) to prohibit extensions into an adjacent MSA or RSA for which the five-year build-out period had expired, to be consistent with our unserved area rules. Sections 22.903(d)(3)(i) through 22.903(d)(3)(iii) provided that, with respect to cellular systems proposed for unserved areas, the service area boundaries (SABs) of the proposed cells must not extend into the CGSA of any other licensee's cellular system on the same channel block, except for permissible contract extensions, or into any adjacent MSA or RSA where the five-year build-out period had expired. The same concern about interference created by SAB extensions into adjacent CGSAs that applies to unserved area applicants also applies to proposed extensions into CGSAs by existing licensees. The rights of unserved area applicants would be compromised if we allowed a licensee in an adjacent MSA or RSA to extend its service contour into the unserved area of an MSA or RSA for which the build-out period had expired without complying with the unserved area licensing procedures.

20. Therefore, we conclude that the Commission gave adequate notice for the changes the *Third Report and Order* 58 FR 27213, May 7, 1993 made in Section 22.903(d)(1) of the rules, that those changes were well grounded in our previous rules and policies, and that the changes were a logical outgrowth of the issues raised in this proceeding.

Contour Extensions During Phase I Processing

21. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we modified our policies for allowing applicants for unserved areas to propose SAB extensions during Phase I of our application processing procedures for all markets in which the five-year build-out period has expired. Specifically, we determined that initial applications filed in Phase I would not be allowed to propose any extensions into adjacent MSAs or RSAs, even if those extensions were de minimis or contract extensions. In prohibiting contour extensions in these circumstances, we explained that this restriction would simplify and expedite our licensing process and would remove a possible source of litigation as to whether such extensions were permissible. We stated that applications proposing such extensions would be dismissed as defective. We added language to effectuate our policy change to Section 22.902(b)(4)(i) of the rules and appropriately revised the language of Sections 22.903(d)(3)(ii) through Sections 22.903(d)(3)(iv).

22. CECR asserts that the Commission erred in making the foregoing rule changes. CECR argues that the *First Report and Order* 56 FR 58503, November 20, 1991 clearly delineated the circumstances under which contract extensions are permissible: where a contract exists, extensions are valid, and if no contract exists, the extension application is deemed defective. Thus, claims CECR, permitting contract extensions cannot serve as a possible source of litigation. CECR also argues that former Section 22.903(d)(3)(ii) of the rules explicitly explained the situations in which unserved area applications can propose de minimis extensions, and served to eliminate any confusion over the validity of proposed extensions, thus greatly reducing the possibility for litigation.

23. We shall not revise our rules concerning SAB extensions by Phase I applicants for unserved areas. As we stated earlier, our purpose in not permitting Phase I requests for extensions was to provide a simple and expeditious means of licensing unserved area applicants in Phase I. In addition, we believe that our Phase I licensing rules should be consistently applied across all markets. Phase I of the unserved area licensing process has ended for most of the MSAs and many of the RSAs. By the end of calendar year 1995, the five-year build-out period for most RSAs will have ended. The revisions suggested by CECR only would confuse the unserved area

licensing process by changing the rules after many of the markets have been subject to restricted SAB extension rules in the Phase I unserved licensing process.

24. We note that the prohibition against having SAB extensions beyond the borders of a particular MSA or RSA only applies to initial Phase I applications. Once a Phase I initial unserved area application has been granted, the licensee can file one Phase I major modification application and that application may propose *de minimis* or contract extensions. The application is not subject to competing applications. In addition, Phase II applications may propose a CGSA covering more than one cellular market, which includes *de minimis* and contract extensions. Thus, the prohibition against SAB extensions beyond the borders of a particular MSA or RSA is narrowly defined to include only initial Phase I unserved area applications.

System Information Update Maps

25. CECR asserts that the Commission erred by neglecting to recognize that System Information Update (SIU) maps are more than informational filings, because they define the rights of third parties, i.e., potential unserved area applicants. CECR argues, as it did in its petition for reconsideration of the *First Report and Order* 56 FR 58503, November 20, 1991, that the Commission should establish procedures by which interested parties may challenge SIU maps prior to the filing of unserved area applications. McCaw argues that CECR already has argued this issue unsuccessfully and has shown no reason why its argument warrants further Commission consideration. McCaw argues that this portion of CECR's petition should be dismissed as repetitive. CECR also observes that the *Third Report and Order* 58 FR 27213, May 7, 1993 provided that parties aggrieved by the licensee's depiction of its CGSA informally may request the Commission to correct the maps under Section 1.41 of the Commission's Rules. CECR contends that this procedure is illusory because the Commission has no obligation or timetable to resolve an informal challenge, and therefore can continue to license unserved areas within the challenged market during the pendency of the informal challenge. CECR also challenges on due process grounds the procedures established for challenging SIU maps, stating that they force unserved area applicants ''to place their own applications at risk in order to challenge a licensee's improper SIU map.'' Further, CECR claims that licensees should not be allowed to base their SIU maps on cell sites that violate state law.

26. We find that CECR's arguments are not sufficiently compelling to warrant revision to our rules. Section 22.947(c) of our rules, 47 CFR § 22.947(c), requires a licensee of a cellular system to file with the Commission 60 days before the end of its five-year build out period a system information update (SIU) consisting of a full size map, a reduced map, and an exhibit showing technical data relevant to determining the system's CGSA. These materials must accurately depict the cell locations and coverage of the system at the end of the five-year build-out period. Although SIU materials, especially the maps, are required so that potential applicants may know which areas within a particular market already are served, it is important to note, as we did in the *Third Report and Order* 58 FR 27213, May 7, 1993, that the SIU maps are more in the nature of pictorial aids for potential unserved area applicants. The SIUs are not a declaration of the cellular service rights of licensees. As set forth in the *Second Report and Order* 57 FR 13646, April 17, 1992, the position of the CGSA boundaries officially will be determined by the geographical coordinates of cell sites and the authorized facilities for the relevant cells which are contained in the Commission's station license files. Further, as we stated in the Third Report and Order, these maps will not require any Commission action, since they are not submitted for approval. The manner in which the SIU maps are drawn is determined by the new mathematical formula for determining service areas set forth in Section 22.911(a) of our rules. We expect that licensees will accurately depict their CGSAs using the prescribed formula, and that errors will be the exception and not the rule.

27. It is not necessary to delay the filing, processing, and granting of unserved area applications in order to afford potential litigants the opportunity to challenge SIUs. Applicants who believe that reported adjacent CGSAs are in error or have been misdepicted may file applications, pursuant to the requirements of the unserved area rules, for areas they believe constitute at least 130 square kilometers (50 square miles), and state in their applications why they disagree with the depictions or representations of adjacent CGSAs. Once such an applicant has become a tentative selectee, if it has made a *prima facie* case that an adjacent licensee has misdepicted its CGSA, that licensee will have the burden of responding to any allegations concerning the depiction of its CGSA, and the Commission will resolve the dispute. Further, we have noted that interested parties may file informal requests for Commission action to correct SIU maps pursuant to Section 1.41 of the Rules. As to the state law concerns raised by CECR, if a licensee has constructed cellular facilities that violate relevant state law, any member of the public can notify the appropriate state authority, which then can impose appropriate sanctions.

Phase I Processing Procedures

28. In the *Third Report and Order* 58 FR 27213, May 7, 1993, we explained that, during Phase I of our processing procedures for unserved area applications, an existing licensee may file an application to expand its existing CGSA in any manner or, in the alternative, apply for a new non-contiguous CGSA in an unserved portion of its market. Either of the applications would be considered to be a single unserved area application. CECR requests that we clarify that the *Third Report and Order* 58 FR 27213, May 7, 1993 allows an existing licensee to file either an initial Phase I unserved area application to expand its existing CGSA, or an application specifying a new non-contiguous CGSA within its market, but not both. CECR's request has been rendered moot by the changes to Section 22.949(a)(1)(ii) of the rules, which became effective after the release of the *Third Report and Order* 58 FR 27213, May 7, 1993. The rule section now expressly prohibits applicants from filing more than one Phase I initial application for any cellular market.

B. Petitions for Reconsideration of the Memorandum Opinion and Order

Alleged Lack of Notice Under APA

29. The *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 in this proceeding established that interference occurs when subscriber traffic is captured in a home market by an adjacent market system, due to contour extensions into the home market's CGSA, and that cellular licensees are entitled to protection from this type of interference. A cellular licensee may continue to operate existing facilities that produce a service area boundary extension into a subsequently-authorized portion of the CGSA of another cellular system on the same channel block until the licensee of that system requests that the SAB extension be removed from its CGSA. When such a request is received, the adjacent market system operator is obligated to pull back the SAB

extensions by reducing the transmitting power or antenna height (or both) at the offending cell site locations, or obtain written consent from the other licensee to permit the SAB extension.

30. Five petitions for reconsideration and three petitions for partial reconsideration of the *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 were filed. These petitions allege, *inter alia,* that our adoption of Section 22.903(f) of the rules, 47 CFR 22.903(f), violated the notice and comment requirements for rule making proceedings under Section 553 of the APA, 5 U.S.C. § 553, and the notice and hearing provisions of Sections 309 and 316 of the Communications Act of 1934, 47 U.S.C. §§ 309 and 316, and former Section 22.100(b)(4) of the Commission's rules.

31. New Par, CIS and the Joint Petitioners claim that the Commission gave no public notice it was contemplating the rule changes incorporated in new Section 22.903(f), and therefore the Commission did not comply with Section 553 of the APA, 5 U.S.C. § 553, which requires an agency to give adequate written notice and opportunity to comment on proposals in rule making proceedings. New Par claims that the Commission provided no notice that it even was considering a change to the standard by which interference and SAB extensions would be evaluated. CIS also argues that there is no mention of the new substantive obligations imposed by Section 22.903(f) on licensees either in the *Further Notice* 56 FR 58529, the *First Report and Order* 56 FR 58503, November 20, 1991, or the *Second Report and Order* 57 FR 13646, April 17, 1992 in this proceeding.

32. New Par and the Joint Petitioners assert that prior to the adoption of Section 22.903(f), the Commission's rules concerning interference between cellular licensees provided that remedial action was required only where actual, as opposed to theoretical, electrical interference occurred. New Par argues that former Section 22.100(b)(ii) stated that the Commission ''will only consider complaints of interference which significantly interrupt or degrade a radio service,'' and former Section 22.902(a) provided that, in the event ''harmful interference'' occurs that two or more cellular licensees cannot resolve themselves, the Commission may require a licensee to make system changes ''necessary to avoid such interference.'' In contrast, New Par argues, Section 22.903(f) assumes that interference exists where licensee SABs overlap and requires the entire removal of SAB extensions without regard to whether the complaining party's service in fact has experienced a significant degradation and without regard to whether the removal of such extensions might result in harmful effects on service to the public in either licensee's market.

33. We reject petitioners' argument that our adoption of Section 22.903(f) did not comport with the notice and comment requirements of the APA. We have reasonably and consistently placed the public on notice of our intention to change the standards for measuring cellular service areas in our continuing efforts to provide seamless cellular service with the least amount of interference to licensed carriers. The matters at issue in this docket encompassed the manner in which service area contours were to be calculated and the implications for existing systems if the defined contours changed. Section 22.903(f) reflects a logical outgrowth of this debate.

34. As previously discussed (supra at ¶ 14), the *Initial NPRM* 55 FR 4882, February 12, 1990 and *Further Notice* 56 FR 58529, November 20, 1991 in this proceeding made clear that we intended to change the method by which a CGSA is determined. Ultimately, the *Second Report and Order* 57 FR 13646, April 17, 1992 established that the CGSA is the geographic area the Commission considers served by a cellular system and the area within which a cellular system is entitled to protection. A companion issue raised in evaluating the boundaries of the CGSA was the potential for interference caused by the extension of newly-redefined SABs outside a licensee's MSA or RSA into the CGSA of a neighboring cellular system on the same channel block. Based upon the comments we received, we concluded that capture of subscriber traffic is a form of interference. Thus, we were compelled to amend our rules to provide protection to cellular licensees against such interference.

Alleged Notice and Hearing Rights Under the Communications Act and the Commission's Rules

35. The Joint Petitioners and New Par contend that the Commission cannot order (or allow an adjacent licensee to require) licensees to pull back authorized contour extensions (including new SABs created by the new formula adopted in the *Second Report and Order* 57 FR 13646, April 17, 1992) without complying with the notice and hearing requirements of Sections 309 and 316 of the Communications Act and Section 22.100(b)(4) of the Commission's rules.

36. New Par argues that each SAB extension authorized by the Commission is conditioned upon the licensee not causing interference to adjacent licensees and that any action requiring a licensee to withdraw its SAB from areas where its RF signals in fact do not significantly degrade or disrupt other radio service is a modification of that licensee's authorization. According to New Par, Sections 309 and 316 of the Communications Act require the Commission to conduct a hearing to determine whether and to what extent interference exists each time it wishes to order an authorized contour extension to be ''pulled back.'' New Par also contends that Section 22.100(b)(4) of the rules codifies the foregoing theory by providing that the Commission may order cellular system modifications to eliminate alleged interference only after notice and opportunity for hearing.

37. We reject the petitioners' argument that the Commission must comply with the notice and hearing requirements of Sections 309 and 316 of the Communications Act each time a licensee is directed to pull back authorized contour extensions. Those provisions provide for a hearing process before Commission modification of a particular license. The sections do not deprive the Commission of its authority to establish rules of general applicability to an industry through its rule making authority.

38. It is well established that licenses may be modified through rule making proceedings without affording parties an adjudicatory hearing, if the generic rules otherwise are procedurally and substantively valid. In *WBEN Inc.* v. *United States,* 396 F.2d 601 (2d Cir. 1968), *cert. denied,* 393 U.S. 914 (1968), the Court held that the Commission need not engage in evidentiary hearings required for modification of a particular license, explaining that,

> [W]hen, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring an agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them.

Once a rule has been adopted, there is no need to hold a hearing each time that rule is applied. Our *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 makes clear that Section 22.903(f)(2)(i) allows the Commission (or an adjacent licensee) to require a licensee to ''pull back'' an authorized SAB extension into the adjacent licensee's CGSA. Thus, there is no need for a hearing each time Section 22.903(f)(2)(i) or its replacement, Section 22.911(d), is enforced.

39. We find that the hearing procedure under Section 22.100(b)(4) of our rules is inapplicable to rule changes made through our rule making authority. Section 22.100(b)(4) requires that interference between base stations that have been properly authorized shall be ''resolved'' by the licensees. The rule section also states that if the licensees cannot resolve the interference, the Commission, ''after notice and opportunity for hearing,'' may order whatever changes in equipment or operation it deems necessary. Hearings under Section 22.100(b)(4) would be involved only if the carriers could not comply with the directive of the rule section to resolve interference problems. Such hearings would not be required between cellular licensees because cellular licensees have always been licensed on the condition that licensees must ''pull back'' any contour that interferes with a neighboring cellular system and Section 22.911(d) provides a specific remedy for resolving the interference problem at hand. We also observe that the Commission has been given the power recently to make changes in the frequencies, authorized power, and the times of operation of any station without conducting a hearing.

Standards for Determining Permissible SAB Extensions

40. The Joint Petitioners, New Par, Sussex, and CIS argue that the adoption of Section 22.903(f)(1) of the rules regarding capture is inconsistent with the Commission's goal of achieving nationwide seamless cellular service. New Par, Sussex, and CIS note that the *Memorandum Opinion and Order* 58 FR 11799, March 1, 1993 states that overlapping SAB contours actually promote a seamless environment and that SAB extension ''pullbacks'' should be used only as a last resort. CIS and Sussex argue that the new rule is contrary to basic principles of cellular system design and will restrict the ability of licensees to provide adequate coverage within their markets, thus undermining the original purpose of the Commission's de minimis extension policy. CIS claims that the rule will discourage the development of seamless cellular coverage at the borders between markets.

41. Joint Petitioners argue that Section 22.903(f) undermines the Commission's stated goals of creating a ''level playing field'' for all cellular licensees and devising rules and policies to encourage informal agreements between licensees to resolve boundary disputes. New Par, McCaw, and the Joint Petitioners claim that Section 22.903(f) neither requires good faith negotiations among adjacent licensees nor enables an extending licensee to rebut the presumption of interference in the form of capture of subscriber traffic. McCaw and New Par assert that the rule appears to conflict with the *Memorandum Opinion and Order,* 58 FR 11799, March 1, 1993 which states that progress toward achieving the Commission's goal of establishing ''rules and policies that will lead to the efficient provision of nationwide seamless cellular service to the public'' will depend in large part upon the success of informal negotiations between cellular licensees on ''mutually agreeable arrangements of facilities that provide an efficient juncture between adjacent systems.'' New Par argues that later-licensed carriers will have the ability and incentive to force neighboring licensees to consent to otherwise unwarranted extensions, because of the earlier-licensed carrier's inability to suffer the loss of service that would result from an SAB pull-back. Joint Petitioners similarly conclude that existing operators may be forced to curtail service from previously authorized facilities ''largely at the whim'' of subsequent licensees.

42. New Par argues that the institution of the presumption that subscriber capture occurs in every case where an SAB overlaps with a CGSA is arbitrary and capricious and results in removing from the Commission its statutory obligation to resolve service issues consistent with the public interest. McCaw opposes the rule because it has the practical effect of precluding SAB extensions where no subscriber traffic capture actually occurs. Sussex argues that an administrative agency cannot create a presumption which operates to deny a fair opportunity to rebut it without violating the due process clauses of the Fifth and Fourteenth Amendments. Consequently, Sussex argues that the U.S. Constitution will not allow the Commission to impose an automatic requirement to remove SAB overlap without first granting the encroaching carrier the opportunity to show: (1) that there is no subscriber capture, or (2) that the capture does not result from SAB overlap.

43. McCaw and New Par recommend modifications to Section 22.903(f) as follows: (1) require licensees protesting SAB extensions to demonstrate that these extensions cause actual interference, prior to mandating system modification; and (2) continue to promote good faith negotiations of such boundary disputes on an informal basis prior to having to ''pull back'' authorized SAB extensions. Sprint agrees with McCaw and New Par that boundary questions should be settled with good faith negotiations on an informal basis. The Joint Petitioners also urge that Section 22.903(f)(2)(i) be modified to make rebuttable the presumption of subscriber capture, where an SAB extension has been authorized into an adjacent licensee's CGSA during the latter licensee's five-year fill-in period.

44. CIS also recommends that former Section 22.903(d)(1) of the rules, setting forth *de minimis* extension criteria, be modified to allow a contour extension when the extension is necessary to compensate for an existing extension from another cellular system. Sussex recommends that the Commission allow carriers to install cells with contour overlaps into adjacent carriers' CGSAs so long as the overlaps are *de minimis* and are necessary to provide service within the overlapping carrier's market area, regardless of whether the carrier consents to the extension. Further, Sussex argues that any conflicts arising from such overlaps be resolved through the frequency coordination process and the requirement of inter-carrier cooperation. In essence, Sussex asks that the Commission return to the means of handling contour overlap which existed before the adoption of Section 22.903(f). Radiofone opposes Sussex's solution, fearing that elimination of protection of CGSAs against intrusions from neighboring carriers would lead to ''rampant interference, endless litigation and disservice to the public.''

45. Before addressing the petitioners' arguments, we emphasize that a cellular licensee has an obligation to serve the public wherever demand exists within its market, and that cellular licensees therefore have a duty to negotiate with each other in good faith regarding agreements for SAB overlaps. Successful negotiations of such contracts or agreements could be offered as evidence of performance in the public interest when cellular licenses are considered for renewal, pursuant to new Section 22.940 of our Rules. Conversely, failure to serve the public due to failure to negotiate reasonable solutions to SAB overlap problems with adjoining carriers could reflect negatively on a licensee seeking renewal.

46. The language of former Section 22.903(f)(2)(i) was somewhat ambiguous, because the first sentence stated that it is ''presumed'' that subscriber traffic is captured if a service area boundary (SAB) of one cellular system extends into the CGSA of another operating cellular system. Nevertheless, New Par and Sussex's arguments concerning the creation of a

rebuttable presumption have been rendered moot by the removal of the presumption language in rule Section 22.903(f). The *Part 22 Rewrite Order* 59 FR 59502, November 17, 1992 transferred most of the language of former Section 22.903(f) to current rule Section 22.911(d) and changed some of the introductory language in the new rule. Section 22.911(d)(2)(i) expressly prohibits non-consensual contour extensions from one cellular system into the CGSA of another cellular system. The first sentence of Section 22.911(d)(2)(i) states: ''Subscriber traffic is captured if an SAB of one cellular system overlaps the CGSA of another operating cellular system''—(emphasis added). The new rule removes any suggestion of a presumption created by the prior rule.

47. We observe that current Section 22.911(d)(2)(i) of our rules is based upon predicted service areas as defined by an expert agency and is designed to avoid litigation over the exact location of actual interference. The idea of ''interference free'' service areas is a constant in Part 22 of our rules. See, e.g., Sections 22.351, 22.537, 22.567, and 22.912(a) of our rules. 47 CFR 22.351, 22.537, 22.567 and 22.912(a). In order to ensure uniformity and simplicity in administering our rules, and to prevent potentially endless litigation, we must rely on objective, rather than subjective standards for the protection of services. Section 22.911(d)(2)(i) provides a simple, objective standard to determine when capture occurs, and encourages parties to reach agreement on the resulting effects of SAB overlap.

48. We also reject CIS's request that Section 22.903(d)(1) [now 22.912(a)] of the rules be modified to allow a cellular licensee to extend service contour into an adjoining market to compensate for the adjoining licensee's extension into the licensee's market. Absent agreement between the affected parties, licensees are entitled to operate in their service areas free from co-channel and first adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block. 47 CFR 22.911(d) (formerly 22.903(f)).

49. Our goal is to provide nationwide seamless cellular service to the public. As we indicated in the *Memorandum Opinion and Order*, 58 FR 11799, March 1, 1993 rather than require the total elimination of SAB extensions, or mandate reciprocal SAB extensions as suggested by CIS, a better result in most cases is some degree of SAB overlap between systems with the location of balanced signal strengths negotiated informally between the adjacent licensees on the same channel block. We believe informal negotiations between parties in determining mutually agreeable arrangements between adjacent systems will achieve the most expeditious and effective resolution of service boundary issues. Thus, promoting negotiation between parties eliminates possible protracted administrative and court proceedings, and provides incentives for cellular providers to come to agreement on boundary issues arising from the convergence of expanding systems. In sum, permitting market forces to drive resolution of these issues will effectuate seamless cellular service nationwide more quickly than the proposals offered by petitioners.

IV. Ordering Clause

50. Accordingly, pursuant to Sections 4(i), 303(r) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 405(a), *It is ordered* that the petitions for reconsideration and partial reconsideration of the *Third Report and Order and Memorandum Opinion and Order on Reconsideration* 58 FR 27213, May 7, 1993 in this docket, and the *Memorandum Opinion and Order on Reconsideration*, 58 FR 11799, March 1, 1993 *Are denied*, and the ''Request to Expedite Action and Comments in Support of Cellular Information Systems, Inc.'' *Is dismissed* as moot.

List of Subjects in 47 CFR Part 22

Communications common carriers, Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 97–4870 Filed 2–27–97; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1319

[STB Ex Parte No. 598]

Exemption of Freight Forwarders in the Noncontiguous Domestic Trade From Rate Reasonableness and Tariff Filing Requirements

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Board exempts freight forwarders in the noncontiguous domestic trade from tariff filing requirements. This action eliminates an unnecessary regulatory burden and should provide freight forwarders with additional flexibility to meet the needs of their customers.

EFFECTIVE DATE: These rules are effective March 30, 1997.

FOR FURTHER INFORMATION CONTACT: James W. Greene, (202) 927–5612. [TDD for the hearing impaired: (202) 927–5721.]

SUPPLEMENTARY INFORMATION: The Board's decision adopting these regulations is available to all persons for a charge by phoning DC NEWS & DATA, INC., at (202) 289–4357.

Small Entities

The Board certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule removes an unnecessary regulatory burden and, to the extent that it affects small entities, the effect should be favorable.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1319

Exemptions, Freight forwarders, Tariffs.

Decided: February 13, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, the Board adds a new part 1319 to title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1319—EXEMPTIONS

Sec.

Authority: 49 U.S.C. 721(a) and 13541.

§ 1319.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Freight forwarders subject to the Board's jurisdiction under 49 U.S.C. 13531 are exempted from the tariff filing requirements of 49 U.S.C. 13702.

[FR Doc. 97–4868 Filed 2–27–97; 8:45 am]

BILLING CODE 4915–00–P

Proposed Rules

Federal Register
Vol. 62, No. 40
Friday, February 28, 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

Commodity Credit Corporation

7 CFR Part 1496

RIN 0560–AF09

Procurement of Processed Agricultural Commodities for Donation Under Title II, Public Law 480; Public Meeting

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Public meeting on proposed regulation.

SUMMARY: Notice is hereby given that a public meeting will be held on March 13, 1997. The purpose of the forum is for members of the U.S. Government involved in Title II of the Agricultural Trade Development and Assistance Act of 1954, (Public Law 480) to meet with the public and receive comments and suggestions with respect to the proposed regulation issued by the Commodity Credit Corporation (CCC) on February 12, 1997 (62 FR 6497). The proposed regulation would revise CCC's procedures for purchasing processed agricultural commodities donated overseas under Title II of Public Law 480, implement recent statutory changes, and adopt a simpler and more efficient procurement process.

DATES: The meeting will be held March 13, 1997 from 9:30 to 12:00.

ADDRESSES: The meeting will be held at Room 107A in the Administration Building at the U.S. Department of Agriculture in Washington, D.C. Those planning to attend the meeting should write to USDA/FSA, Procurement and Donations Division, Export Operations Branch, Rm. 5755-S, Mail Stop 0551, P.O. Box 2415, Washington D.C. 20013–2415.

FOR FURTHER INFORMATION CONTACT: Jeff Jackson, (202) 720–3995 or the FSA Homepage (http://www.fsa.usda.gov).

SUPPLEMENTARY INFORMATION: To accommodate all participants, we request that individuals planning to attend should so inform the Department in writing at the address listed above. Please indicate the company represented, if any, including the names and titles of individuals attending and whether individuals plan to present verbal comments at the meeting. Initial comments will be limited to five minutes and taken in the order in which the participants sign-in the day of the meeting.

Signed at Washington, D.C. on February 21, 1997.

Bruce R. Weber,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 97–5024 Filed 2–27–97; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–05–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model Avro 146–RJ 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 all British Aerospace Model Avro 146–RJ series airplanes. This proposal would require modifying the electrical system in the equipment bay area by replacing certain cables, clamps, and fairleads. This proposal is prompted by a report indicating that the incorrect size of electrical cables were used in the generator feeder circuit between certain busbars and existing generator feeder cables. As a result, generator contactors are not compatible with generator rating requirements and can overheat. The actions specified by the proposed AD are intended to prevent possible overheating and damage to the electrical generator feeder cables, which could cause a fire or the loss of essential electrical systems.

DATES: Comments must be received by April 9, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 97–NM–05–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 British Aerospace Regional Aircraft Limited, Avro International Aerospace Division, Customer Support, Woodford Aerodrome, Woodford, Cheshire SK7 1QR, England. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tim Backman, Aerospace Engineer, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2797; 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 97–NM–05–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. 97–NM–05–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified the FAA that an unsafe condition may exist on all British Aerospace Model Avro 146–RJ series airplanes. The CAA advises that, in the electrical equipment bay, a design drawing error allowed the incorrect size of electrical cables to be used in the aircraft generator feeder circuit between busbars AC1 and AC2. For this reason, existing 6ANC generator feeder cables between AC1 and AC2 busbars and generator contactors are not compatible with generator rating requirements. When only one alternating current (AC) generator is on-line and the AC hydraulic pump is operating, the feeder cable could overheat and cause damage. This condition, if not corrected, could result in a possible fire or loss of essential electrical systems.

Explanation of Relevant Service Information

British Aerospace has issued Service Bulletin SB.24–113–01532A, dated March 12, 1996, and Revision 1, dated June 18, 1996, which describe procedures for replacing the existing 6ANC generator feeder cables installed between the AC1 and AC2 busbars; replacing the generator contactors with larger 4ANC size cables; and modifying existing clamps and fairleads to accommodate the larger diameter cables. This modification is identified as HCM01532A in the service bulletin.

Replacing the electrical cables and modifying the various components in the electrical equipment bay in accordance with the service bulletin will preclude possible feeder cable overheat and subsequent damage that could lead to a fire or loss of essential systems.

The CAA classified this service bulletin as mandatory and issued British airworthiness directive 006–03–96, dated March 12, 1996, in order to assure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Conclusions

This airplane model is manufactured in the United Kingdom 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 CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, 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 modifying the electrical system in the electrical equipment bay. The actions would be required to be accomplished in accordance with the service bulletin described previously.

Cost Impact

The FAA estimates that 10 British Aerospace Model Avro 146–RJ series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 4 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Required parts would cost approximately $300 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $5,400, or $540 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

British Aerospace Regional Aircraft Limited, Avro International Aerospace Division (Formerly British Aerospace, plc; British Aerospace Commercial Aircraft Limited): Docket 97–NM–05–AD.

Applicability: All Model Avro 146–RJ series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been otherwise modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (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 possible overheating of the feeder cable and subsequent damage, which could lead to a possible fire or loss of essential electrical systems, accomplish the following:

(a) Prior to the accumulation of 500 flight cycles after the effective date of this

AD, modify the electrical system in the electrical equipment bay in accordance with British Aerospace Service Bulletin SB.24–113–01532A, dated March 12, 1996, or Revision 1, dated June 18, 1996.

(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 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.

(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 February 21, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–4948 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–13–U

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14 CFR Part 39

[Docket No. 94–NM–117–AD]

RIN 2120–AA64

Airworthiness Directives; Fokker Model F28 Mark 0100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to certain Fokker Model F28 Mark 0100 series airplanes, that would have required installation of additional ''EXIT'' signs at the overwing emergency exits. That proposal was prompted by a report indicating that the ''EXIT'' signs for the overwing emergency exits, as currently installed, would not be visible to passengers during an emergency evacuation when the emergency exit doors are open. This action revises the proposed rule by expanding the applicability of the proposed rule to include additional airplanes. The actions specified by this proposed AD are intended to ensure the ''EXIT'' signs for overwing emergency exits are clearly visible during an evacuation.

DATES: Comments must be received by March 14, 1997.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 94–NM–117–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 94–NM–117–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. 94–NM–117–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to certain Fokker Model F28 Mark 0100 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the Federal Register on January 18, 1995 (60 FR 3585). That NPRM would have required installation of two additional ''EXIT'' signs, one above and between the left-hand overwing emergency exits, and one above and between the right-hand overwing emergency exits. That NPRM was prompted by a report indicating that the ''EXIT'' signs for the overwing emergency exits, as currently installed, would not be visible to passengers during an emergency evacuation when the emergency exit doors are open. That condition, if not corrected, could delay or impede the evacuation of passengers during an emergency.

Actions Since Issuance of Previous Proposal

One comment that was submitted in response to the NPRM raised questions concerning the applicability of the proposed AD. The commenter, a U.S. operator, noted that the proposal would apply to only 20 of the 40 Fokker F28 Model Mark 0100 series airplanes in its fleet. However, this operator pointed out that all 40 of its Model F28 Mark 0100 series airplanes have the same overwing emergency exit sign configuration (i.e., emergency exit signs on the covers of the operating handles), and do not have the emergency exit signs above the overwing emergency exits, was proposed by this AD. This operator also pointed out that, if the effectivity listing in Fokker Service Bulletin SBF100–33–015, Revision 1, dated March 21, 1994 (which was referenced as the appropriate source of service information in the proposal) is incorrect, then other operators' fleets also could be affected.

Based on this comment, the FAA worked in consultation with the Rijksluchtvaartdienst (RLD), which is the airworthiness authority for the Netherlands, and Fokker, to determine that 20 Model F28 Mark 0100 series airplanes were excluded inadvertently from the effectivity listing of the

referenced service bulletin. Those 20 airplanes had provisions for the new exit signs incorporated during production; however, in accordance the operators' request, the airplanes were delivered with the old exit sign configuration. In light of this, those 20 airplanes are subject to the same unsafe condition addressed in the original proposal.

Accordingly, the FAA has revised the applicability and the cost impact information of this supplemental NPRM to include the additional 20 airplanes.

Conclusion

Since this change expands the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

Cost Impact

The FAA estimates that 40 Fokker Model F28 Mark 0100 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 71 work hours per airplane to accomplish the proposed installation, and that the average labor rate is $60 per work hour. Required parts would cost approximately $1,600 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $234,400, or $5,860 per airplane.

Note: For the additional 20 airplanes that have been added to the applicability of this supplemental NPRM, the estimated work hours, above, may be overstated, since many of the steps relevant to the installation have already been accomplished during production.

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:

Fokker: Docket 94–NM–117–AD.

Applicability: Model F28 Mark 0100 series airplanes, having the following serial numbers, certificated in any category:

Serial Numbers

11244
11245
11248 through 11256 inclusive
11261
11268 through 11283 inclusive
11286
11289
11290
11291
11293
11295 through 11297 inclusive
11300
11303
11306 through 11308 inclusive
11310 through 11315 inclusive
11331
11333
11334
11337
11338
11345
11346
11349
11357
11358
11365
11366
11372
11373
11379
11380
11391
11392
11398, and
11399.

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 ensure that the ''EXIT'' signs for the overwing emergency exit are clearly visible during an evacuation, accomplish the following:

(a) Within 8 months after the effective date of this AD, install two additional ''EXIT'' signs, one above and between the left-hand overwing emergency exits, and one above and between the right-hand overwing emergency exits, in accordance with Fokker Service Bulletin SBF100–33–015, Revision 1, dated March 21, 1994.

(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. 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.

(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 February 21, 1997.

James V. Devany,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 97–4949 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–13–U

FEDERAL TRADE COMMISSION

16 CFR Part 436

Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Trade Commission (the ''Commission'') proposes to commence a rulemaking proceeding to amend its Trade Regulation Rule entitled Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures (''the Franchise Rule'' or ''the Rule'').

On April 7, 1995, the Commission solicited comment on the Franchise Rule, as part of its periodic review of all Commission trade regulations and guides. On the basis of the record developed during the review of the Franchise Rule, the Commission proposes to commence a rulemaking to amend the Franchise Rule. The Commission is soliciting written comment, data, and arguments concerning this proposal. In addition, the Commission solicits comment on how the Commission can ensure the broadest participation by affected interests in the Rule amendment process.

DATES: Comments must be submitted on or before April 30, 1997.

ADDRESSES: Written comments should be identified as ''16 CFR Part 436'' and sent to Secretary, Federal Trade Commission, Room 159, Sixth Street and Pennsylvania Ave., N.W. Washington, DC 20580. To facilitate prompt and efficient review and dissemination of the comments to the public, all written comments should also be submitted, if possible, in electronic form, on either a 5¼ or a 3½ inch computer disk, with a label on the disk stating the name of the commenter and the name and version of the word processing program used to create the document. Programs based on DOS are preferred. In order for files from other operating systems to be accepted, they should be submitted in ASCII text format.

The Commission will also accept comments submitted to the following E-Mail address: ''FRANPR@ftc.gov''. In addition, commenters may leave a short comment on a telephone hotline number designated for this purpose: (202) 326–3573.

All comments will be placed on the public record and will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552, and the Commission's Rules of Practice, 16 CFR 4.11, during normal business days from 8:30 a.m. to 5:00 p.m., at the Public Reference Room, Room 130, Federal Trade Commission, 6th Street and Pennsylvania Avenue, N.W. Washington, DC 20580. In addition, comments will be placed on the Internet at the FTC's web site: http://www.ftc.gov.

FOR FURTHER INFORMATION CONTACT: Steven Toporoff, (202) 326–3135, or Myra Howard (202) 326–2047, Division of Marketing Practices, Bureau of Consumer Protection, Federal Trade Commission, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

Part A—General Background Information

The Commission is publishing this notice pursuant to Section 18 of the Federal Trade Commission (''FTC'') Act, 15 U.S.C. 57a *et seq.*, and the provisions of Part 1, Subpart B of the Commission's Rules of Practice, 16 CFR 1.7, and 5 U.S.C. 551 *et seq*. This authority permits the Commission to promulgate, modify, and repeal trade regulation rules that define with specificity acts or practices that are unfair or deceptive in or affecting commerce within the meaning of Section 5(a)(1) of the FTC Act, 15 U.S.C. 45(a)(1).

The Commission promulgated the Franchise Rule on December 21, 1978, 43 FR 59614. On April 7, 1995, the Commission published a request for comment on the Rule, 60 FR 17656 (''FR Notice''), as part of its continuing review of its trade regulation rules (''Rule Review'') to determine their current effectiveness and impact. The FR Notice sought comment on the standard regulatory review questions, such as what are the costs and benefits of the Rule, what changes in the Rule would increase the Rule's benefits to consumers and how would those changes affect compliance costs, and what changes in the marketplace and new technologies may affect the Rule.

The FR Notice also sought comment on several specific issues: (1) Whether the Commission should amend the Rule by replacing the disclosures with those set forth in the revised Uniform Franchise Offering Circular (''UFOC'') guidelines; (2) Whether the Commission should amend the Rule to distinguish between disclosures required for business opportunities and those required for franchises; (3) Whether the Commission should retain the conditional exemption for trade show promoters; (4) Whether the Commission should amend the Rule to require franchisors to disclose earnings information; and (5) Whether the Commission should amend the Rule to address new marketing practices (such as international franchise sales) and new technologies (such as the Internet).

In addition to soliciting written comment on these issues, Commission staff held two public workshop conferences on the Rule. Staff held the first conference on September 11–13, 1995, in Bloomington, Minnesota. The participants discussed whether there is a continuing need for the Rule, and, if so, whether the Commission could improve the Rule. Staff held the second conference in Washington, D.C., on March 11, 1996, and the participants focused on the application of the Franchise Rule to international franchise sales.[1]

The Rule Review elicited 75 written comments.[2] The comments generally express continuing support for the Rule, stating that pre-sale disclosure is a cost-effective way to disseminate material information to prospective franchisees that otherwise might be unavailable.[3] Pre-sale disclosure is also necessary to prevent fraud[4] and to reduce the level of post-sale franchise relationship disputes.[5] Most commenters state that the Rule's benefits outweigh the costs

[1] The transcript of the September 1995 Conference is cited as ''[name of commenter], TR at ____;'' the transcript of the March 1996 Conference is cited as ''[name of commenter], TR2 at ____.'' For a complete list of panelists, and the abbreviations used to identify each panelist in this Advance Notice of Proposed Rulemaking (''ANPR''), see Attachments 1 and 2. The transcripts are on the public record and are available for public inspection.

[2] The commenters included franchisors, franchisees, franchisor and franchisee trade associations, state franchise and business opportunity regulators, Bar Associations, franchise consultants, academicians, and a journalist. The comments are cited as ''[name of commenter], Comment [designated number], at ____.'' For a complete list of the commenters, and the abbreviations used to identify each commenter in this ANPR, see Attachment 3. All Rule Review comments are on the public record and are available for public inspection.

[3] *See, e.g.*, DSA, Comment 21, at 2; Commissioner McDonald, Comment 30, at 2; Rabenberg, TR at 103–06. *See also* IFA, Comment 32, at 4; Little Caesars, Comment 31, at 1; Southland Corp., Comment 37, at 2. *But see* Midgol, Comment 3, at 2; AAFD, Comment 39, at 3. Several commenters recommended that the Commission replace its Rule with the UFOC disclosure format. *See, e.g.*, IFA, Comment 32, at 2–3; Simon, Comment 36, at 3–4.

[4] *See, e.g.*, General Ryan, Comment 25, at 1; Bortner, Comment 37, at 1; NASAA, Comment 43, at 1.

[5] *See, e.g.*, ABA AT, Comment 22, at 7–8; SBA Advocacy, Comment 34, at 9; Simon, Comment 36, at 2; Shay, TR at 22–23.

imposed on consumers.[6] On the basis of the Rule Review record, the Commission has decided that the Rule serves a useful purpose. Nonetheless, the Commission seeks additional comment on possible modifications to the Rule, as discussed below.

Part B—Objectives the Commission Seeks to Achieve and Possible Regulatory Alternatives

1. Modifications to the Franchise Rule Disclosure Requirements

a. Background

The Commission wants to ensure that the Franchise Rule continues to serve a useful purpose and does not impose unnecessary regulatory burdens. Accordingly, the Commission seeks comment on whether the Rule itself or any specific provisions of the Rule no longer serve a useful purpose and should be deleted.

The Commission also recognizes that many commenters recommend that the Commission revise the Rule's disclosure requirements. In particular, these commenters suggest that the Commission replace the Rule's disclosures with those set forth in the revised UFOC guidelines.[7] They contend that the UFOC's disclosures are superior to those of the Rule, and the UFOC's format is more ''user friendly.'' [8] This group of commenters further believes that revising the Rule to mirror the UFOC guidelines would promote a more uniform, national disclosure standard.[9] Commenters also believe that, as a practical matter, the vast majority of franchisors use the UFOC in order to comply with state registration laws. Thus, they conclude that revising the Rule would cause few franchisors to incur additional costs.[10]

A few commenters, however, oppose revising the Rule based on the UFOC guidelines model. They contend that small or regional franchisors who use the FTC format will incur significant expenses if forced to convert to a disclosure format akin to the UFOC guidelines.[11]

Some commenters also recommend that, if the Commission revises the Rule based on the UFOC guidelines disclosure requirements, it should first modify or fine-tune several of those disclosures. For example, several commenters recommend that the Commission revise the disclosure of statistics on the franchisees who have left the franchise system (Item 20 of the UFOC). They note that Item 20, as currently written, may cause franchisors to overcount franchisee closures, leading to inflated franchisee failure rates.[12] Commenters also recommend that the Commission continue to permit a three-year phase-in of audited financial statements.[13]

b. Objectives and Regulatory Alternatives

On the basis of the Rule Review record, the Commission wishes to explore further whether it should revise the Rule's disclosures based on the UFOC guidelines.[14] At the same time, the Commission recognizes that franchisors and state regulators have more than two years of experience with the revised UFOC disclosure requirements. Accordingly, in considering whether to revise the Rule based upon the UFOC model, the Commission seeks additional comment on whether any of the UFOC's required disclosures should be modified or fine-tuned.

In particular, the Commission seeks comment on whether the litigation disclosures (Item 3 of the UFOC guidelines) should be expanded to include the disclosure of lawsuits filed by franchisors against franchisees. This modification would require the broadest disclosure of lawsuits involving the franchise relationship.

Further, the Commission seeks comment on whether the disclosure of franchisee statistics (Item 20 of the UFOC guidelines) should be modified. In particular, the Commission solicits comment on whether the franchisee statistics, as required by Item 20 of the UFOC, accurately reflect franchisees' performance history and, if they do not, how could the Commission modify those disclosures to reflect such performance history more accurately? In connection with the disclosure of information concerning former and existing franchisees, the Commission also seeks comment on the use of ''gag-order'' provisions by franchisors that may effectively bar some franchisees from sharing their experiences with prospective franchisees. The Commission is concerned that such gag-orders may enable franchisors to circumvent the very purpose of a disclosure such as Item 20 of the UFOC—to enable prospective franchisees to learn material information about the franchise system through discussions with former and existing franchisees.

Finally, the Commission wants to ensure that the Rule does not create unreasonable barriers to entry for start-up franchisors. Accordingly, the Commission seeks comment on whether it should retain its policy of permitting a three-year phase-in of audited financial statements for new entrants.

2. Distinguishing Between Disclosure Requirements for Business Opportunities and for Franchises

a. Background

The Franchise Rule covers different types of business arrangements: package and product franchises and business opportunities. In package and product franchises, the investor sells goods or services that are associated with the franchisor's trademark and are subject to significant control by, or receive significant assistance from, the franchisor.[15] In contrast, business opportunities often do not involve a trademark. Rather, the investor typically distributes goods or services supplied by the seller or an affiliate and receives accounts or locations in which to conduct the business. Vending machine or rack display routes are typical examples of a business opportunity.

The Franchise Rule imposes identical disclosure requirements for business opportunities and franchises. In the FR Notice, the Commission sought comment on whether the Commission should distinguish between these two business formats. The Commission also asked how the Rule should define the

[6] *See, e.g.*, Dub, Comment 2, at 2; McBirney, Comment 7, at 2; ABA AT, Comment 22, at 8–9.

[7] *See, e.g.*, D'Imperio, Comment 16, at 1; ABA AT, Comment 22, at 5–6; General Ryan, Comment 25, at 1; Snap-On, Comment 27, at 1; NASAA, Comment 43, at 2; Forte Hotels, Comment 52, at 1.

[8] *See, e.g.*, Wieczorek, Comment 23, at 2; IFA, Comment 32, at 3–4; AAFD, Comment 39, at 6; CA BLS, Comment 45, at 4; Simon, TR at 211; Perry, TR at 263.

[9] *See, e.g.*, Wieczorek, Comment 23, at 1; Maxey, TR at 36.

[10] *See, e.g.*, McBirney, Comment 7, at 2; Wieczorek, Comment 23, at 1; Lewis, Comment 40, at 1; Hayden, Comment 42, at 1; CA BLS, Comment 45, at 1–2.

[11] *See* Dub, Comment 2, at 1–2; Nopar, Comment 26, at 1–2. *See also* Century 21, Comment 41, at 1.

[12] *See, e.g.*, Simon, TR at 224; Perry, TR at 263.

[13] *See, e.g.*, Wieczorek, Comment 23, at 2; IFA, Comment 32, at 4.

[14] This proposal does not contemplate preemption of state law. If the Commission were to revise its Rule based upon the UFOC disclosure requirements, there would be no change in state franchise laws. Franchisors would remain free to use either the UFOC format or the Commission's format, albeit the two formats would be substantially similar. In addition, any state modifications to the UFOC guidelines in the future would not alter the Commission's disclosure requirements, unless the Commission similarly amended its Rule.

[15] Restaurant outlets are a typical example of a package franchise, where the investor typically produces goods or services according to the franchisor's specifications. Gasoline stations are an example of a product franchise, where the investor typically gains the right to distribute the franchisor's trademarked products.

term ''business opportunity'' and what disclosures are relevant to the sale of business opportunities.

The commenters overwhelmingly recommend that the Commission amend the Rule to distinguish between business opportunities and franchises.[16] Commenters note that business opportunities and franchises are distinct business formats[17] and that it is confusing to use the term ''franchise'' to describe both formats.[18] There is no consensus, however, on how to define a business opportunity or what pre-sale disclosures are appropriate for the sale of business opportunities.

b. Objectives and Regulatory Alternatives

The Rule Review record supports amending the Rule to distinguish between disclosure requirements for business opportunities and for franchises. The record also supports amending the Rule to define precisely the term ''business opportunity.''

At this time, however, the Commission is not prepared to make specific recommendations on either the appropriate disclosures for business opportunities, or a definition of the term ''business opportunity.'' During the Rule Review, the Commission received only a few comments addressing this issue. Specifically, the Commission received comments from one business opportunity purchaser,[19] one association that arguably represents the interests of some business opportunity sellers,[20] and one attorney who has represented multilevel distributors.[21] At this time, the record is insufficient on this issue.

In order to develop the record more fully on business opportunities, the Commission solicits comment on which types of business opportunities are known to engage in deceptive or fraudulent conduct and what disclosures are material to business opportunity purchasers. In addition, the Commission seeks comment on the appropriate definition of the term ''business opportunity.''

As a starting point in the discussion, the Commission solicits comment on the following definition of ''business opportunity'' contained in many Federal District Court injunctions[22] obtained by the Commission: ''Business opportunity'' is defined as any written or oral business arrangement, however denominated, which consists of the payment of any consideration for:

A. The right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

B. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business, or the entry by an existing business into a new line or type of business.

The Commission also solicits suggestions of alternative definitions of the term ''business opportunity.'' Finally, the Commission seeks comment on how it can ensure greater participation by business opportunity interests in the rulemaking process.

3. Conditional Exemption for Trade Show Promoters

a. Background

Trade show promoters are jointly and severally liable for Rule violations as ''franchise brokers.'' However, they are conditionally exempt from liability if they provide attendees at their shows with a specific consumer education notice. In the FR Notice, the Commission solicited comment on whether the Commission should retain this conditional exemption.

Several commenters, including several trade show promoters and their representatives, recommend that the Commission no longer hold trade show promoters jointly and severally liable as brokers for Rule violations. They contend that trade show promoters do not function as franchise brokers as contemplated by the Rule.[23] Further, they believe that trade show promoters lack the ability to monitor franchisor-exhibitors' sales practices at shows[24] and do not have any incentive to mislead consumers.[25] In the alternative, commenters urge the Commission to retain the conditional exemption for trade show promoters. They contend that holding trade show promoters liable as ''brokers'' would harm both franchisors and consumers by making it impossible for trade shows to continue in business.[26]

Other commenters recommend that the Commission revoke the conditional exemption on the grounds that trade show promoters should be held accountable for questionable advertising and sales practices made at shows they sponsor.[27] They contend that franchise show promoters should not be able to turn a ''blind eye'' to violations of the Franchise Rule, while indirectly profiting from such violations.[28]

b. Objectives and Regulatory Alternatives

The Commission wishes to explore further whether trade show promoters should no longer be held liable as ''franchise brokers.'' The Rule Review record supports the view that trade show promoters do not act as brokers: they do not participate in the offer and sale of franchises, do not make sales recommendations, and do not create materials used by franchisor-exhibitors to sell franchises (such as brochures, product displays, agreements, or disclosure documents). Further, trade show promoters, as a practical matter, lack the ability to monitor franchisor-exhibitors' sales practices at their shows. Accordingly, the Commission seeks comment on whether the Commission should amend the Rule's definition of the term ''franchise broker'' to specifically exempt trade show promoters.

At the same time, the Commission seeks comment on whether prospective franchisees attending trade shows should readily be able to verify claims made by franchisor-exhibitors and their sales agents. Our law enforcement experience indicates that franchisors and business opportunity sellers at trade shows may make various oral or written misrepresentations or unsubstantiated earnings claims. Accordingly, the Commission solicits comment on whether a trade show sales section should be added to the Rule that would require franchisors and their sales agents to have readily available for public inspection at each trade show they attend either a specimen copy of their disclosure document or a letter

[16] *See, e.g.*, Kestenbaum, Comment 14, at 1–2; D'Imperio, Comment 16, at 1–3; Commissioner McDonald, Comment 30, at 3–4; SBA Advocacy, Comment 34, at 37–39; NASAA, Comment 43, at 2–3; Rabenberg, TR at 129; Shay, TR at 132.

[17] *See, e.g.*, DSA, Comment 21, at 2.

[18] *See, e.g.*, D'Imperio, Comment 16, at 1; DSA, Comment 21, at 2.

[19] *See* Rabenberg, Comment 28.

[20] *See* DSA, Comment 21.

[21] *See* Brooks, Comment 29.

[22] *See, e.g., F.T.C.* v. *Telecommunications of America, Inc.*, Civ. No. 95–693–CIV-ORL–22 (M.D. Fla. 1995)(Stipulated Final Order for Permanent Injunction); *F.T.C.* v. *United States Business Bureau*, Civ. No. 95–6636–CIV-Ferguson (S.D. Fla. 1995)(Stipulated Final Order for Permanent Injunction); *F.T.C.* v. *Car Checkers of America*, Civ. No. 93–623 (MLP) (D. N.J. 1993)(Stipulated Final Order for Permanent Injunction).

[23] *See, e.g.*, Brownstein Zeidman, Comment 33, at 3–4; Perry, TR at 262.

[24] *See, e.g.*, Q.M. Marketing, Comment 17, at 2; Wieczorek, Comment 23, at 3; CA BLS, Comment 45, at 10.

[25] *See* Brownstein Zeidman, Comment 33, at 4. *See also* Huke, TR at 235.

[26] *See* Brownstein Zeidman, Comment 33, at 8. *See also* Gaston, Comment 46, at 1.

[27] *See, e.g.*, General Ryan, Comment 25, at 2; Commissioner McDonald, Comment 30, at 6; Bortner, Comment 37, at 3; NASAA, Comment 43, at 2.

[28] *See* Hayden, Comment 42, at 2.

from an attorney stating that, although they are covered by the Rule's definition of a franchise, they fall within one of the Rule's exclusions or exemptions. In the alternative, the Commission solicits comment on whether the Rule's definition of ''personal meeting'' should be modified to require all franchisors and their sales agents to have readily available for public inspection at each trade show they attend either a specimen copy of their disclosure document or a letter from an attorney stating that, although they are covered by the Rule's definition of a franchise, they fall within one of the Rule's exclusions or exemptions.

4. Earnings Disclosures

a. Background

In the FR Notice, the Commission solicited comment on whether it should modify the Rule to require franchisors to disclose earnings information. The Commission also solicited comment on the extent to which franchisors disclose financial data to prospective franchisees; the types of financial data currently available to franchisors; the costs and benefits of possible required earnings disclosures; and possible earnings disclosure formats and exemptions.

State franchise regulators, franchisees, and franchisee representatives recommend that the Commission mandate earnings disclosures. They believe that earnings information is the most material information prospective franchisees need to make an informed investment decision.[29] They also believe that franchisors already have such information and that it is deceptive for such franchisors to fail to disclose this information to prospective franchisees.[30] They also contend that disclosure of earnings information will reduce the level of false and unsubstantiated oral and written earnings claims.[31] Several commenters also contend that the franchise marketplace and competition would benefit from the free flow of earnings information.[32] Finally, commenters note that a mandatory earnings disclosure would correct the misrepresentation made by some franchisors that the Franchise Rule or the FTC prohibits the making of earnings disclosures.[33]

Franchisors generally oppose mandatory disclosure of earnings information.[34] They contend that it is impossible for the Commission to create one earnings disclosure format for all franchised businesses that will not be misleading, noting that information collected from franchisees is not uniform[35] and may be inaccurate.[36] In addition, they contend that not all franchisors have the contractual ability to gather earnings data from their franchisees.[37] These commenters are also concerned that earnings information collected from franchisees may have little predictive value to a prospective franchisee[38] and that such information may be misinterpreted as a guarantee of future performance.[39] They also believe that mandating an earnings disclosure would increase the burdens and costs on existing franchisees: franchisors may require them to submit earnings information and may subject them to increased liability for reporting inaccurate earnings information.[40] For these reasons, many commenters believe that mandating earnings disclosures would have a negative impact upon the franchisor-franchisee relationship.[41]

b. Objectives and Regulatory Alternatives

The Commission believes that consumers should have access to material information before investing in a franchise or business opportunity. The Rule Review record, however, does not support the view that a franchisor's failure to provide earnings information is necessarily deceptive or unfair. Approximately 20 percent of franchisors currently choose to make earnings disclosures.[42] Thus, in theory, prospective franchisees can find franchise systems that voluntarily disclose earnings information.[43] If prospective franchisees were to seek out such franchise systems, or demand the disclosure of such information from franchisors, ordinary market forces may compel an increasing number of franchisors to disclose earnings information voluntarily, without federal government intervention.

In addition, the Rule Review record indicates that prospective franchisees can obtain earnings information from other sources. For example, typical expenses, such as labor and rent, may be available from industry trade associations and industry trade press.[44] In addition, prospective franchisees are free to discuss earnings and other performance issues with former and existing franchisees.

Moreover, the Rule Review record does not provide a sufficient basis for the Commission to formulate an earnings disclosure that would be both useful and not misleading to prospective franchisees. Finally, mandating earnings might impose additional burdens and costs on existing franchisees. Yet, the Rule Review record is insufficient to establish that these increased burdens and costs are outweighed by benefits to prospective franchisees.

Nonetheless, the Commission believes that it is important to correct the misrepresentation made by some franchisors that the Commission or the Franchise Rule actually prohibits the disclosure of earnings information. At the same time, the Commission wants to caution prospective franchisees not to rely on unsubstantiated earnings representations. Accordingly, the Commission solicits comment on whether the Rule should be modified to require all franchisors to make the following prescribed statement in their disclosure document:

The FTC's Franchise Rule permits a franchisor to provide you with information about the actual or potential sales, income, or profits of its outlets, provided that there is a reasonable basis for such information and the franchisor offers to provide you with written substantiation. You should not rely on any information on sales, income, or profits provided by a franchisor or its salesperson if written substantiation is not offered.

[29] *See, e.g.*, Lagarias, Comment 13, at 1–2; SBA Advocacy, Comment 34, at 55; AFA, Comment 38, at 1; AAFD, Comment 39, at 6.

[30] *See, e.g.*, Pennell, Comment 5, at 1; Brown, Comment 9, at 3–129; Lagarias, Comment 13, at 3; AFA, Comment 38, at 1.

[31] *See, e.g.*, Lagarias, Comment 13, at 2; AAFD, Comment 39, at 7; Selden, Comment 49, at 4.

[32] *See, e.g.*, ABA AT, Comment 22, at 5–6.

[33] *See, e.g.*, Lagarias, Comment 13, at 2; AFA, Comment 38, at 9; Perry, Comment 44, at 5.

[34] *See, e.g.*, Dub, Comment 2, at 4; RENN, Comment 24, at 2; Snap-On, Comment 27, at 2; IFA, Comment 32, at 14; Gaston, Comment 46, at 1.

[35] *See* U-Save Auto Rental, Comment 19, at 2; IFA, Comment 32, at 12–13; Simon, Comment 36, at 6.

[36] *See, e.g.*, Glenn, Comment 6, at 2; SRA International, Comment 8, at 3; CA BLS, Comment 45, at 13; Forseth, TR at 298; Tifford, TR at 303–04; Gaston, TR at 533.

[37] *See, e.g.*, Glenn, Comment 6, at 2; U-Save Auto Rental, Comment 19, at 3; Nopar, Comment 26, at 2; Simon, Comment 36, at 7.

[38] *See, e.g.*, Dub, Comment 2, at 4; SRA International, Comment 8, at 2; RENN, Comment 24, at 2; Nopar, Comment 26, at 4.

[39] *See, e.g.*, D'Imperio, Comment 16, at 11; Simon, Comment 36, at 5.

[40] *See, e.g.*, RENN, Comment 24, at 2; Little Caesars, Comment 31, at 2; Simon, Comment 36, at 4–5; Century 21, Comment 41, at 2; Medicap, Comment 48, at 2.

[41] *See, e.g.*, Glenn, Comment 6, at 2; SRA International, Comment 8, at 3; Simon, Comment 36, at 7; Gaston, TR at 531–32. *See also* ABA AT, Comment 22, at 11.

[42] *See, e.g.*, Bortner, Comment 37, at 3; NASAA, Comment 43, at 3.

[43] *See* Lewis, Comment 40, at Exhibit G (compilation of sales, cost, and profit information on 145 franchise systems in 70 business categories).

[44] *See, e.g.*, U-Save Auto Rental, Comment 19, at 2; RENN, Comment 24, at 1.

In addition, the Commission solicits comment on whether franchisors who do not disclose earnings information should include the following additional prescribed statement:

This franchisor does not make any representations about sales, income, or profits. We also do not authorize our salespersons to make any such representations either orally or in writing.

5. New Marketing Practices and Technological Developments

a. Background

In the FR Notice, the Commission sought information on new marketing practices and technological developments that might have an impact on the Rule. In response, several commenters note the increase in international franchise sales by American franchisors.[45] These commenters request that the Commission clarify its position on whether the Franchise Rule applies in such circumstances. In order to develop the record on this issue, Commission staff held a one-day public workshop conference in March 1996.

The Rule Review record strongly supports modification of the Rule to clarify that international franchise sales are not within its purview. Among other factors, commenters note that: (1) the Commission did not contemplate international franchising when it promulgated the Rule;[46] (2) the disclosures required by the Franchise Rule are aimed at the domestic market;[47] (3) foreign franchise purchasers are sophisticated and do not need the Rule's protections;[48] (4) attempting to comply with the Franchise Rule in foreign sales might result in the dissemination of inaccurate or misleading information;[49] and (5) application of the Franchise Rule to international sales would unnecessarily impede competition.[50]

In addition to the international sales issue, the Commission explored whether the Rule should be modified in light of increased sales of franchises and business opportunities through the telephone and the Internet. For example, one commenter observes that the day may come when franchise sales are conducted solely via computer without any ''personal meeting.'' [51]

The Commission also believes that two additional marketing developments warrant further comment. First, the Commission notes the increased sale of ''stream of revenue'' package franchises. Most often used in commercial janitorial services franchises, stream of revenue franchises involve a promise by the franchisor to provide the franchisee with accounts that will generate a certain level of income. The franchisee then selects the level of accounts desired and pays a franchise fee that varies in some proportion to the value of those accounts. The Commission believes that the offer of accounts worth a certain value suggests to the prospective franchisee a particular level of potential income, which constitutes the making of an earnings representation under the Rule.

Second, the Commission notes the increasing sale of ''co-branded'' franchises, in which two or more franchisors combine forces to offer a franchisee the opportunity to operate two or more trademarked franchises in one outlet. For example, an ice cream franchisor and a donuts franchisor might offer one joint franchise system. In such circumstances, the Commission is uncertain whether the franchisee is purchasing two individually trademarked franchises (and thus should receive separate disclosures from each franchisor) or is purchasing a hybrid franchise arrangement that has its own risks (and thus should receive a single unified disclosure document).[52]

b. Objectives and Regulatory Alternatives

The Commission wants to ensure that the Rule does not impose unnecessary costs and burdens without corresponding benefits to consumers. Accordingly, the Commission seeks comment on whether it should modify the Rule to clarify that the Rule does not reach the sale of franchises to be located or operated outside the United States, its territories, and possessions. The Commission also seeks comment on the appropriate language for such a modification.

The Commission also wants to ensure that consumers receive pre-sale disclosures early in the sales process. The Rule requires franchisors to provide prospective franchisees with a disclosure document at the earlier of the ''time for making of disclosures'' [53] or the first ''personal meeting.'' [54] The Commission believes that the term ''personal meeting,'' which triggers the franchisor's obligation to provide a disclosure document, may be obsolete in light of the increasing use of the telephone and the Internet to market franchises and business opportunities. The term ''personal meeting'' contained in the Rule was designed to reach that point in the sales process when the franchise seller engages a prospective franchisee in substantive discussion about the venture being offered. Accordingly, the Commission seeks comment on whether the Rule should be modified to replace the term ''personal meeting'' with a term such as ''first substantive discussion.'' The Commission seeks comment on alternatives, as well as any costs or benefits associated with each such alternative. At the same time, the Commission seeks comment on how franchisors might be able to comply with the Rule's disclosure requirements through the Internet.

In addition, the Commission wants to ensure that franchisors and franchisees are clear about what constitutes an earnings representation that would trigger the Rule's substantiation requirements. Accordingly, the Commission seeks comment on whether it should amend the Rule's treatment of earnings representations to make explicit that the offer of a stream of revenue franchise is the making of an earnings representation that would trigger the Rule's earnings substantiation requirements.

Finally, the Commission wants to ensure that prospective franchisees receive complete and relevant disclosures. Accordingly, the Commission seeks comment on the sale of co-branded franchises. In particular, the Commission seeks information on the extent to which franchise sales involve more than one trademark. It also

[45] *See, e.g.*, IFA, Comment 32, at 15–16; Zwisler, Comment 59, at 6; Tifford, TR at 199. *See generally* Mazero, Comment 50.

[46] *See, e.g.*, Clanton, TR2 at 169; Baer, TR2 at 160–61; Wulff, TR2 at 154.

[47] *See, e.g.*, Wieczorek, Comment 60, at 3–5; Pepsico, Comment 62, at 2–3; IFA, Comment 63, at 4; Clanton, TR2 at 169.

[48] *See, e.g.*, IFA, Comment 64, at 3; Loewinger, TR2 at 85; Swartz, TR2 at 113. *See also* Mazero, Comment 50, at 33; Zwisler, Comment 59, at 3.

[49] *See, e.g.*, Friday's, Comment 58, at 1; Mazero, TR at 188. *See also* Wieczorek, Comment 60, at 3–5; Miolla, TR2 at 74–75; Ainsley, TR2 at 116.

[50] *See, e.g.*, Zeidman, TR2 at 109; Brennan, TR2 at 165; Mills, TR2 at 203.

[51] *See* Pineles, TR at 180–81.

[52] Co-branding raises a number of disclosure issues. For example, should the purchaser of a co-branded franchise receive disclosures of franchisee statistics from each individual franchisor participating in the co-branded arrangement, or should the purchaser also receive statistics on previous purchasers of the co-branded franchise. Similarly, must termination and renewal rights be consistent for each participating franchisor, or may each participating franchisor impose their own termination and renewal rights?

[53] The term ''time for making of disclosures'' means ten business days prior to the earlier of: (1) the execution of a franchise agreement or other agreement imposing a binding legal obligation; or (2) the payment of a fee in connection with the sale of the proposed franchise. *See* 15 CFR § 436.2(g).

[54] The term ''personal meeting'' means a face-to-face meeting held for the purpose of discussing the sale or possible sale of a franchise. *See* 16 CFR § 426.2(o).

solicits comment on whether there is any confusion among franchisors with respect to their disclosure obligation when joining forces to sell a co-branded franchise. The Commission also seeks comment on whether any need exists to clarify the Rule to address disclosure obligations with respect to the sale of a co-branded franchise system.

6. Alternatives to Burdensome Regulations and Enforcement

a. Background

On March 4, 1995, the White House issued a Memorandum directed at all heads of federal departments and agencies on the Regulatory Reinvention Initiative. This memorandum makes regulatory reform a top priority. Among other things, the memorandum asks agencies to learn from those affected by regulation, as well as to consider ways to promote better communication, consensus building, and a less adversarial environment between regulators and the regulated. Specifically, the memorandum asks agencies to consider if the intended goals of regulation can be achieved in a more efficient, less intrusive way, and whether private sector alternatives can better achieve the public good envisioned by the regulation.

In response to the March 4, 1995, memorandum on the Regulatory Reinvention Initiative, the Commission intends to reduce regulatory burdens, where appropriate. The Commission also intends to use the private sector as a partner in a cooperative effort to tackle deceptive and unfair trade practices where they exist. Indeed, developing partnership with industry has become vital in an age of reduced law enforcement resources. Thus, in addition to its role as a vigilant law enforcement agent, the Commission will encourage self-regulation by the private sector, where appropriate.

b. Objectives and Regulatory Alternatives

In keeping with the goals of the Regulatory Reinvention Initiative, the Commission seeks comment on whether it should develop a program to reduce or waive civil penalties for violations of the Franchise Rule under limited circumstances. In an age of decreasing resources, the Commission questions whether it should continue to use its limited resources to pursue technical or minor violations of the Franchise Rule, instead of focusing its attention on more serious violations that have caused significant consumer injury.

Accordingly, the Commission solicits comment on: (1) whether it should develop a program to reduce or waive civil penalties for technical or minor violations of the Franchise Rule; (2) under what circumstances should the Commission consider reducing or waiving civil penalties?; (3) under what circumstances would it be inappropriate for the Commission to reduce or waive a civil penalty?; and (4) what terms and conditions should accompany the waiver or reduction of a civil penalty? The Commission also seeks comments on the costs and benefits of any such program to reduce civil penalties on both franchisors and franchisees?

7. The Rulemaking Process

The Commission seeks the broadest participation by the affected interests in the rulemaking. To that end, the Commission will revise the Franchise Rule through an ''open rulemaking,'' which will provide all affected interests numerous opportunities to submit comments and to participate in the rule amendment process.

The Commission encourages all interested parties to submit written comments. The Commission, however, recognizes that some interested parties may find it easier to submit comments through the Internet or by telephone. Accordingly, the Commission will permit comments to be filed via an E-Mail address on the Internet and through a telephone hotline number designated for this purpose.

The Commission also expects the affected interests to assist the Commission in analyzing various options and in drafting a proposed amended rule. The Commission believes that public workshop conferences to discuss the various issues involving the Rule are a productive and efficient means to develop the record and explore various alternatives. The Commission will also use public workshop conferences to assist the Commission in drafting a proposed amended rule.

a. Internet Comments

Staff will place a copy of this ANPR on the Internet at the FTC's web site: http://www.ftc.gov. In addition, the Commission will accept comments through the Internet. Accordingly, all interested parties may submit a comment through an E-Mail address designated for this purpose: ''FRANPR@ftc.gov.'' Each comment should contain the name and address of the commenter. The Commission will place all comments on the public record and on the Internet at its web site.

b. Telephone Hotline

Parties interested in submitting a comment via telephone may do so by calling the Commission's telephone hotline number designated for this purpose: (202) 326–3573. This hotline number is intended to facilitate public comment on the rulemaking; it is not intended as a hotline number for disseminating franchise information or for receiving complaint information. The Commission requests all callers to identify themselves clearly, including their name, address, and telephone number. Staff will transcribe all messages verbatim and place them on the public record and on the Internet at the FTC's web site.

c. Public Workshop Conferences

In order to facilitate the greatest participation by the public in the rule amendment process, Commission staff will hold several public workshop conferences to discuss the issues noted above. Staff will announce a schedule of these conferences after the close of the comment period.

Part C—Request for Comments

Members of the public are invited to comment on any issues or concerns they believe are relevant or appropriate to the Commission's consideration of the proposed amendments to the Franchise Rule. The Commission requests that factual data upon which the comments are based be submitted with the comments. In addition to the issues raised above, the Commission solicits public comment on the specific questions identified below. These questions are designed to assist the public and should not be construed as a limitation on the issues on which public comment may be submitted.

Questions

A. The Franchise Rule

1. Is there a continuing need for the Commission's Franchise Rule? Are there any specific Rule disclosure requirements that no longer serve a useful purpose? Should the Commission modify the Rule to delete those requirements? What would be the costs and benefits to franchisors and to prospective franchisees?

B. The UFOC Guidelines

2. Should the Commission revise the Rule based on the UFOC guidelines disclosure requirements? What would be the costs and benefits to franchisors and to prospective franchisees?

3. If the Commission revises the Rule based on the UFOC guidelines disclosure requirements, should the

Commission modify the litigation disclosures (Item 3 of the UFOC) to require franchisors to disclose law suits filed by franchisors against franchisees, in addition to suits by franchisees against franchisors? What would be the costs and benefits to franchisors and to prospective franchisees?

4. If the Commission revises the Rule based on the UFOC guidelines disclosure requirements, should the Commission modify the franchisee statistics disclosures (Item 20 of the UFOC guidelines), and if so, how? What would be the costs and benefits to franchisors and to prospective franchisees?

5. To what extent do franchisors use ''gag orders'' to inhibit former or existing franchisees from speaking with prospective franchisees or other parties? Should the Commission modify the Rule to prohibit franchisors from using such gag order provisions and, if so, how? What alternatives would ensure that prospective franchisees can freely obtain information from former and existing franchisees about their experiences with the franchise system? What would be the costs and benefits of such alternatives?

6. Should the Commission retain the three-year phase-in of financial statements for new entrants? What alternative phase-in provisions would be appropriate? What are the costs and benefits of each alternative?

7. If the Commission uses the UFOC guidelines as a model for revising the Franchise Rule, should the Commission consider modifying or fine-tuning any of the UFOC disclosure requirements? Which ones should be modified and, if so, how? What would be the costs and benefits to franchisors and to prospective franchisees?

C. Business Opportunities

8. What types of business opportunities are common in the United States? What trade associations or other organizations represent the interests of business opportunities?

9. Are there certain types of business opportunities where purchasers are more likely to lose money than others? What are the characteristics of these loss-prone business opportunities? How can the Commission distinguish between the loss-prone business opportunities and those that are more likely to prove profitable?

10. What types of business opportunities are known to engage in fraud? How can the Commission distinguish between fraudulent business opportunities and legitimate business opportunities?

11. Should the minimum investment of $500 that triggers Franchise Rule coverage be lowered for business opportunities? If so, what should be the minimum threshold? What would be the costs and benefits of such a minimum? What would be the costs and benefits of requiring disclosures for sales that involve investments smaller than $500.

12. How should the Commission define the term ''business opportunity'' for Rule purposes? What characteristics distinguish selling a business opportunity from just selling goods or services? How can these characteristics be used to limit the scope of any business opportunity rule? What would be the costs and benefits of any definition offered?

13. What types of offers of assistance are crucial to a business opportunity? In seeking to define the term ''business opportunity,'' what types of assistance should the Commission focus on? What would be the costs and benefits of such proposals?

14. Should the Commission define the term ''business opportunity'' as:

Any written or oral business arrangement, however denominated, which consists of the payment of any consideration for:

A. The right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and

B. More than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business, or the entry by an existing business into a new line or type of business.

What alternative definitions of the term ''business opportunity'' would be appropriate? What would be the costs and benefits of each alternative?

15. What pre-sale disclosures are necessary to ensure that business opportunity purchasers receive material information necessary to make an informed investment decision? What would be the costs and benefits of each such disclosure?

16. What pre-sale disclosures are necessary to prevent fraud in the sale of business opportunities? What would be the costs and benefits of each such disclosure?

D. Trade Shows

17. Should the Commission modify the Rule to exempt trade show promoters from Rule coverage as brokers? What would be the costs and benefits of such an exemption?

18. Should the Commission modify the Rule to contain a separate trade show sales provision that would require franchisor-exhibitors, brokers, and their agents to have readily available at trade shows for public inspection either a specimen copy of their disclosure document or a letter explaining why they fall within one of the Rule's exclusions or exemptions? If so, how should the Commission define the term ''available for public inspection?'' What would be the costs and benefits of this proposal?

19. In the alternative, should the Commission modify the Rule's definition of ''personal meeting'' to require franchisor-exhibitors, brokers, and their agents to have readily available at trade shows for public inspection either a specimen copy of their disclosure document or a letter explaining why they fall within one of the Rule's exclusions or exemptions? If so, how should the Commission define the term ''available for public inspection?'' What other alternatives should the Commission consider to reduce the instances of deceptive sales representations at trade shows? What would be the costs and benefits of each proposal?

E. Earnings Disclosures

20. To what extent do franchisors represent that either the Rule or the Commission prohibits them from making earnings representations? Is there a need to clarify the Rule to make clear that neither the Commission nor the Rule prohibits franchisors from making earnings representations?

21. Should the Commission modify the Rule to require all franchisors to make the following prescribed statement:

The FTC's Franchise Rule permits a franchisor to provide you with information about the actual or potential sales, income, or profits of its outlets, provided that there is a reasonable basis for such information and the franchisor offers to provide you with written substantiation. You should not rely on any information on sales, income, or profits provided by a franchisor or its salespersons if written substantiation is not offered.

What alternative language would be appropriate? What would be the costs and benefits of such a disclosure?

22. Should the Commission modify the Rule to require all franchisors who do not make earnings disclosures to make the following additional prescribed disclosure:

This franchisor does not make any representations about sales, income, or profits. We also do not authorize our salespersons to make any such

representations either orally or in writing.

Would such a disclosure be interpreted to hold harmless a franchisor whose sales people routinely make unauthorized earnings representations? What alternative language would be appropriate? What would be the costs and benefits of such a disclosure?

23. Should the Commission modify the Rule's treatment of earnings representations to make explicit that the sale of ''stream of revenue contracts'' is the making of an earnings claim? What would be the costs and benefits of such a modification?

24. Should the Commission modify the Rule's disclosures for earnings claims in advertising? What are the costs and benefits associated with each of the disclosures for earnings claims in advertising? Does the ''caution'' disclosure provide any information that is not already conveyed by the other required disclosure concerning the percentage of outlets that have achieved the earnings claimed?

25. Should the Commission modify the Rule to require a disclosure for earnings claims only if a significant percentage of outlets do not achieve the earnings claimed? If so, what percentage should trigger the disclosure requirement? What would be the costs and benefits of adopting such an approach?

F. New Marketing Approaches and New Technologies

26. Should the Commission modify the Rule to clarify that the Rule does not reach the sale of franchises to be located or operated outside the United States, its territories, and possessions? If so, please provide recommended language for such a modification. What would be the costs and benefits of such a modification?

27. Should the Commission continue to use the term ''personal meeting'' for making disclosures in light of the use of the telephone, the Internet, and other technologies to sell franchises? Should the Commission replace the term ''personal meeting'' with the term ''first substantive discussion?'' If so, how should the term ''first substantive discussion'' be defined? What other term would be appropriate? What would be the costs and benefits of such a modification?

28. Should the Commission permit franchisors to comply with the Franchise Rule's disclosure obligations by posting disclosure documents on the Internet? What would be the costs and benefits to both franchisors and prospective franchisees? What aspects of the Rule (or UFOC requirements) might hinder compliance via the Internet? How might the Commission modify the Rule to protect consumers from any potentially deceptive or unfair practices that might arise from firms' efforts to comply with the Rule's disclosure provisions via the Internet?

29. To what extent do franchisors offer for sale multi-trademark franchises (''co-branded'' franchises) in the United States? Do franchisors have sufficient guidance under the Rule to determine their disclosure obligations with respect to the sale of co-branded franchises? Do franchisees purchasing a co-branded franchise need additional or different disclosures than those who purchase a single-trademark franchise? Should the Commission modify the Rule to address these concerns and, if so, how? What would be the costs and benefits of any such modification?

G. Self Regulation and Alternatives to Law Enforcement

30. Should the Commission develop a program to reduce or waive civil penalties for certain violations of the Franchise Rule? Under what circumstances would it be appropriate for the Commission to waive or reduce civil penalties involving Franchise Rule violations? What terms or conditions should accompany such a waiver or reduction of civil penalties? Under what circumstances would it be inappropriate to reduce or waive civil penalties? What would be the costs and benefits of such a program on franchisors and franchisees?

H. Additional Issues

31. How can the Commission ensure the broadest participation in the rulemaking process by affected interests? How can the Commission identify affected interests, facilitate the submission of comments, and increase participation by affected interests at future public workshop conferences?

List of Subjects in 16 CFR Part 436

Advertising, Business and industry, Franchising, Trade practices.

Authority: 15 U.S.C. 41–58.

By direction of the Commission.

Donald S. Clark,

Secretary.

Attachment 1—September 1995 Public Workshop Conference

Panelists

1. Harold Brown (''Brown''), Brown & Stadfeld
2. Sam Damico (''Damico''), Q.M. Marketing, Inc.
3. Connie B. D'Imperio (''D'Imperio''), Color Your Carpet, Inc.
4. Eric Ellman (''Ellman''), Direct Selling Association (''DSA'')
5. Mark B. Forseth (''Forseth''), Locke Purnell Rain Harrell
6. Mike Gaston (''Gaston''), Barkley & Evergreen
7. Susan Kezios (''Kezios''), American Franchisee Association (''AFA'')
8. William Kimball (''Kimball''), Iowa Coalition for Responsible Franchising
9. Warren Lewis (''Lewis''), Lewis & Trattner
10. Steven Maxey (''Maxey''), North American Securities Administrators Association, Inc. (''NASAA'')
11. Joyce G. Mazero (''Mazero''), Locke Purnell Rain Harrell
12. Barry Pineles (''Pineles''), U.S. Small Business Administration (''SBA Advocacy'')
13. Robert Purvin (''Purvin''), American Association of Franchisees & Dealers (''AAFD'')
14. Steven Rabenberg (''Rabenberg''), Explore St. Louis
15. Matthew R. Shay (''Shay''), International Franchise Association (''IFA'')
16. Neil A. Simon (''Simon''), Hogan & Hartson
17. Robin Spencer (''Spencer''), representing American Franchisee Association
18. Leonard Swartz (''Swartz''), Arthur Andersen & Co.
19. John Tifford (''Tifford''), Brownstein Zeidman & Lore
20. Ronnie Volkening (''Volkening''), The Southland Corporation
21. Dennis E. Wieczorek (''Wieczorek''), Rudnick & Wolfe
22. William J. Wimmer (''Wimmer''), Iowa Coalition for Responsible Franchising

Public Participants

1. Peter Denzen (''Denzen'')
2. Bob Hessler (''Hessler''), Wendy's
3. Chris Huke, (''Huke''), SC Promotions
4. Michael Jorgensen (''Jorgensen'')
5. Robert L. Perry (''Perry'')
6. Brian Schnell (''Schnell''), Gray, Plant, Mooty

Attachment 2—March 1996 Public Workshop Conference

Panelists

1. Kay M. Ainsley (''Ainsley''), Ziebart International Corp.
2. John R.F. Baer (''Baer''), Keck, Mahin & Cate
3. Michael Brennan (''Brennan''), Rudnick & Wolfe
4. Joel R. Bucksberg (''Bucksberg''), HFA Inc.
5. David A. Clanton (''Clanton''), Baker & McKenzie
6. Kenneth R. Costello (''Costello''), Loeb & Loeb
7. Edward J. Fay (''Fay''), Kwik Kopy Corp.
8. Mark B. Forseth (''Forseth''), Locke Purnell Rain Harrell
9. Byron E. Fox (''Fox''), Hunton & Williams
10. Bruce Harsh (''Harsh''), International Trade Specialist, U.S. Department of Commerce
11. Arnold Janofsky (''Janofsky''), Precision Tune
12. Susan P. Kezios (''Kezios''), American Franchisee Association (''AFA'')

13. Alex S. Konigsberg, QC (''Konigsberg''), Lapoint Rosenstein
14. Andrew P. Loewinger (''Loewinger''), Abraham Pressman & Bauer
15. H. Bret Lowell (''Lowell''), Brownstein Zeidman & Lore
16. John Melle (''Melle''), Office of U.S. Trade Representative
17. Raymond L. Miolla (''Miolla''), Burger King Corp.
18. Alec Papadakis (''Papadakis''), Hurt Sinisi Papadakis
19. Matthew R. Shay (''Shay''), International Franchise Association (''IFA'')
20. Neil A. Simon (''Simon''), Hogan & Hartson
21. Leonard Swartz (''Swartz''), Arthur Andersen & Co.
22. Greg L. Walther (''Walther''), Outback Steakhouse International
23. Dennis E. Wieczorek (''Wieczorek''), Rudnick & Wolfe
24. Erik B. Wulff (''Wulff''), Hogan & Hartson
25. Philip F. Zeidman (''Zeidman''), Brownstein Zeidman & Lore
26. Carl Zwisler (''Zwisler''), Keck, Mahin & Cate

Public Participants

1. Jeff Brams (''Brams''), Sign-A-Rama and Shipping Connection
2. Pamella Mills (''Mills''), Baker & McKenzie

Attachment 3—Table of Commenters

Comment 1. Robert E. Mulloy, Jr. (''Mulloy'')
Comment 2. Stanley M. Dub (''Dub''), Dworken & Bernstein
Comment 3. Marvin J. Migdol (''Migdol''), Nationwide Franchise Marketing Services
Comment 4. SCPromotions, Inc. (''SCPromotions'')
Comment 5. R. Dana Pennell (''Pennell'')
Comment 6. Robin Day Glenn (''Glenn'')
Comment 7. Jack McBirney (''McBirney''), McGrow Consulting
Comment 8. SRA International (''SRA International'')
Comment 9. Harold Brown (''Brown''), Brown & Stadfeld
Comment 10. Ronald N. Rosenwasser (''Rosenwasser'')
Comment 11. Louis F. Sokol (''Sokol'')
Comment 12. J. Howard Beales III (''Beales''), Professor, George Washington University
Comment 13. Peter Lagarias (''Lagarias'')
Comment 14. Harold L. Kestenbaum (''Kestenbaum'')
Comment 15. Walter D. Wilson (''Wilson''), Better Business Bureau of Central Georgia, Inc.
Comment 16. Connie B. D'Imperio (''D'Imperio''), Color Your Carpet, Inc.
Comment 17. Q.M. Marketing, Inc. (''Q.M. Marketing'')
Comment 18. David Gurnick (''Gurnick''), Kindel & Anderson
Comment 19. U-Save Auto Rental (''U-Save Auto Rental'')
Comment 20. The Longaberger Co. (''Longaberger'')
Comment 21. Direct Selling Association (''DSA'')
Comment 22. American Bar Association, Section of Antitrust Law (''ABA AT'')
Comment 23. Dennis E. Wieczorek (''Wieczorek''), Rudnick & Wolfe
Comment 24. Real Estate National Network (''RENN'') (representing Better Homes and Gardens Real Estate Service; Century 21 Real Estate Corp.; Coldwell Bankers Residential Group; Electronic Realty Associates (''ERA''); Realty World Corp.; Re/Max International; and The Prudential Real Estate Affiliates)
Comment 25. Attorney General Jim Ryan (''General Ryan), State of Illinois
Comment 26. Alan S. Nopar (''Nopar''), Bosco, Blau, Ward & Nopar
Comment 27. Snap-On, Inc. (''Snap-On'')
Comment 28. Steven Rabenberg (''Rabenberg''), Explore St. Louis
Comment 29. Douglas M. Brooks (''Brooks''), Martland & Brooks
Comment 30. Robert N. McDonald (''Commissioner McDonald''), Securities Commissioner, State of Maryland
Comment 31. Little Caesars (''Little Caesars'')
Comment 32. International Franchise Association (''IFA'')
Comment 33. Brownstein Zeidman & Lore (''Brownstein Zeidman'')
Comment 34. Jere W. Glover (''Glover''), Counsel for Advocacy, U.S. Small Business Administration (''SBA Advocacy'')
Comment 35. Jan Meyers (''Representative Meyers''), Chair, House Committee on Small Business
Comment 36. Neil A. Simon (''Simon''), Hogan & Hartson
Comment 37. Deborah Bortner (''Bortner''), Washington State Department of Financial Institutes, Securities Division
Comment 38. American Franchisee Association (''AFA'')
Comment 39. American Association of Franchisees & Dealers (''AAFD'')
Comment 40. Warren Lewis (''Lewis''), Lewis & Trattner
Comment 41. Century 21 Real Estate Corp. (''Century 21'')
Comment 42. John Hayden (''Hayden'')
Comment 43. North American Securities Administrators Association, Inc. (''NASAA'')
Comment 44. Robert L. Perry (''Perry'')
Comment 45. The State Bar of California, Business Law Section (''CA BLS'')
Comment 46. Mike Gaston (''Gaston''), Barkley & Evergreen
Comment 47. The Southland Corporation (''Southland'')
Comment 48. Medicap Pharmacies, Inc. (''Medicap'')
Comment 49. Rochelle B. Spandorf (''Spandorf''), ABA Forum on Franchising, Andrew C. Selden (''Selden''), David J. Kaufmann (''Kaufmann'')
Comment 50. Joyce G. Mazero (''Mazero''), Locke Purnell Rain Harrell
Comment 51. Mark B. Forseth (''Forseth''), Locke Purnell Rain Harrell
Comment 52. Forte Hotels (''Forte Hotels'')
Comment 53. R.A. Politte (''Politte'')
Comment 54. Politte (*see supra*, Comment 53)
Comment 55. Brown (*see supra*, Comment 9)
Comment 56. Wieczorek (*see supra*, Comment 23)
Comment 57. Scott Shane (''Shane''), Georgia Institute of Technology
Comment 58. Friday's
Comment 59. Carl E. Zwisler (''Zwisler''), Keck, Mahin & Cate
Comment 60. Wieczorek (*see supra*, Comment 23)
Comment 61. Enrique A. Gonzalez (''Gonzalez''), Gonzalez Calvillo Y Forastierei
Comment 62. Pepsico Restaurants International (''Pepsico'')
Comment 63. IFA (*see supra*, Comment 32)
Comment 64. Atlantic Richfield Company (''ARCO'')
Comment 65. David Clanton (''Clanton'')
Comment 66. Leonard Swartz (''Swartz''), Arthur Andersen & Co.
Comment 67. John R.F. Baer (''Baer''), Keck, Mahin & Cate
Comment 68. Lynn Scott (''Scott'')
Comment 69. Eversheds (''Eversheds'')
Comment 70. Brownstein Zeidman (*see supra*, Comment 33)
Comment 71. Penny Ward (''Ward''), Baker & McKenzie
Comment 72. Matthias Stein (''Stein'')
Comment 73. Byron Fox (''Fox''), Hunton & Williams
Comment 74. Papa Johns Pizza (''Papa Johns'')
Comment 75. Harold L. Kestenbaum (*see supra*, Comment 14)

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BILLING CODE 6750–01–P

16 CFR Part 601

Proposed Notices of Rights and Duties Under the Fair Credit Reporting Act

AGENCY: Federal Trade Commission.

ACTION: Publication of proposed guidance for forms, and request for public comment.

SUMMARY: The Federal Trade Commission is publishing for public comment three notices that it is required to prescribe under recent amendments to the Fair Credit Reporting Act. Under those amendments, which become effective September 30, 1997, consumer reporting agencies will be required to provide: A summary of rights under the law to consumers; a notice of responsibilities under the law to parties who regularly furnish such agencies with consumer information, and a notice of responsibilities under the law to parties who obtain consumer reports from the agency. Under the statute, a consumer reporting agency will be in compliance with these requirements if it provides notice forms substantially similar to those prescribed by the Commission.

DATES: Comments must be received on or before March 31, 1997.

ADDRESSES: Comments should be addressed to: Office of the Secretary,

Federal Trade Commission, Room H–159, Sixth Street and Pennsylvania Avenue NW, Washington, DC 20580. Submissions should be marked ''Proposed Notices of Rights and Duties under the Fair Credit Reporting Act, 16 CFR Part 601—Comment.''

FOR FURTHER INFORMATION CONTACT: Clarke Brinckerhoff or William Haynes, Attorneys, Division of Credit Practices, Federal Trade Commission, Washington, DC 20580, 202–326–3224.

SUPPLEMENTARY INFORMATION:

I. Background

A major revision of the Fair Credit Reporting Act (''FCRA'') was included in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (Pub. L. 104–208), signed by the President on September 30, 1996. The revisions of the FCRA are set forth in a portion of the omnibus bill (Title II, Subtitle D, Chapter 1), the ''Consumer Credit Reporting Reform Act of 1996'' (CCRRA). The provisions discussed in this publication become effective on September 30, 1997.

The amended FCRA requires each consumer reporting agency (''CRA,'' usually a credit bureau) to provide certain notices, and mandates that the Federal Trade Commission (''Commission'' or ''FTC'') prescribe the content of all three notices and the form of one notice.

The FCRA amendments require each CRA to provide as part of its file disclosure to consumers a written summary of consumer rights (''summary'' or ''consumer summary'') under the FCRA ((CCRRA Section 2408(d), FCRA Section 609(c)).[1] Section 2408(d)(1) of the CCRRA adds a new Section 609(c) to the FCRA that describes the required summary of consumer rights and the FTC's mandate with respect to it. The new section specifies certain items that must be in the summary, requires the Commission to prescribe the form and content of the disclosure, and states that the provision will not take effect until the Commission has prescribed the summary.

Each CRA must also provide a notice of responsibilities under the FCRA to persons who buy consumer information from the CRA (''user notice''), and a notice of responsibilities under the FCRA to persons who regularly furnish consumer information to the CRA (''furnisher notice'') (CCRRA Section 2407(b), FCRA Section 607(d)(1)). The amended law states that the ''Commission shall prescribe the content of the notices'' to be provided (FCRA Section 607(d)(2)).

For each of the three required disclosures, a CRA complies with the law if it provides the applicable person with a notice that is substantially similar to that prescribed by the Commission (FCRA Sections 607(d)(2) and 609(c)(3)).

II. Opportunity for Public Comment

The Commission welcomes comments related in any way to the proposed consumer summary, user notice, or furnisher notice. The Commission is particularly interested in comments in the following areas.

A. Consumer Summary

1. Balancing brevity and completeness

The statute gives conflicting guidance as to whether the summary should be brief or comprehensive. It is described as a ''summary of all the rights the consumer has under'' the FCRA (Section 609(c)(1)(A)) that includes ''a brief description of * * * all rights of consumers'' provided by that law (Section 609(c)(2)(A)). Arguably, no document that is actually a ''summary''—or that constitutes a ''brief description'' of FCRA consumer rights—could literally include ''all'' of them. The proposal seeks to meet these various statutory goals by prescribing a summary that is both reasonably comprehensive and user friendly for consumers. Is the proposed notice too long in any way to be effective as a summary, and if so, how should it be abbreviated? Conversely, are there important consumer rights that are not included in the proposed form or are discussed too briefly? Please identify any specific sections of the proposed summary that are viewed as too lengthy or incomplete.

2. Statutorily-required items

Section 609(c)(2) mandates that the summary include an explanation of how the consumer may assert his or her rights, list all federal agencies with administrative authority under the FCRA in a form that will help consumers find the appropriate agency, and include specific statements concerning (1) state laws and authorities that may assist consumers, and (2) the fact that verifiable accurate information that is not outdated under Section 605 need not be removed. Are the statutorily-required items accurately and understandably presented? In what way, if any, could they be improved? Specifically, the Commission has drafted the table of federal agencies at the end of the summary to comply literally with Section 609(c)(2)(C) by including all agencies granted enforcement authority by Section 621(b)(1). Is what way, if any, could this table be shortened or made more understandable?

3. Terminology

Because the summary is a document intended to inform consumers, the proposal is written in non-technical language, to the extent it is possible to do so and also include in sufficient detail the large number of important consumer rights conferred by the FCRA. Are there sections which can be improved by simplifying the presentation to make it easier for consumers to understand? Are there sections where the language does not accurately convey the substance of the provision? How could such sections be improved?

4. Form issues

The Commission is required to ''prescribe the form and content of'' the consumer summary (Section 609(c)(3)) (emphasis added). The goal is to create a notice that sets forth all statutorily required items in a form that is readable, understandable, and attractive. The Commission proposes to prescribe that the text be provided on paper no smaller than 8½x11 inches in size, in type size no smaller than 12-point type (8-point for the chart of federal agencies), in a document separate from the consumer report. Generally, is there a format that would better convey the same information to consumers? If so, what is it and what costs would it entail? Is there a format that would convey the same information to consumers in a less expensive manner? If so, what is it and what cost saving would it achieve?

5. Numeric changes

The Commission realizes that some of the numbers in the notice may change over time. For example, the permissible charges for file disclosures or telephone numbers of agencies may change. Such changes will be incorporated in any revisions to the summary the Commission may prescribe from time to time. In addition, the Commission proposes that all notices issued prior to such revisions that contain accurate and updated information concerning numeric changes will be considered ''substantially similar'' to the prescribed notice as to those items. Is there a better way to accommodate such changes?

[1] The CRA must also provide the consumer summary to any party to whom it provides a consumer report for employment purposes (CCRRA Section 2403(b), FCRA Section 604(o)(1)(B)), and the employer must in turn provide the report and the summary to the consumer before taking adverse action against him or her (FCRA Section 604(o)(3)).

B. Furnisher Notice

1. Content of notice

The proposed notice summarizes the responsibilities imposed upon furnishers of information to CRAs by Section 623 of the FCRA. Are all statutory obligations of furnishers included? Is the presentation accurate and understandable? In what way can it be improved? Is it sufficient for the notice to refer furnishers to the complete text of the FCRA at the Internet web site maintained by the Commission, or would the notice be improved if it was expanded to add the complete text of Section 623?

2. Scope of notice

The FCRA directs the Commission to prescribe a notice setting forth the responsibilities of any party ''who regularly and in the ordinary course of business furnishes (consumer) information to the agency'' and requires each CRA to provide the notice to all such parties (CCRRA Section 2407(b), FCRA Section 607(d)). Two of the listed duties apply only to parties who furnish information to CRAs regularly, and thus by inference, not to occasional information providers. Would some CRAs send these notices to occasional as well as regular furnishers? If so, would addition of a reference to the duties of occasional, as well as regular, providers be helpful?

3. Terminology

The Commission's proposed notice summarizes the duties of furnishers. This summary is written in non-technical language, but with the expectation that regular providers of information to CRAs will be relatively sophisticated and will be able to understand both the language of the statute and the description of duties. Is the description of duties accurate and understandable for this audience? What improvements can be made?

C. User Notice

1. Number of Notices

The ''users'' of consumer reports fall into a number of categories, and the duties imposed by the FCRA vary by user category. Accordingly, CRAs could send out one notice to all users setting forth all of the user requirements of the FCRA or they could send out notices that contain only those responsibilities that pertain to the particular user. The Commission is proposing a single notice, which first specifies the general responsibilities that apply to all users of consumer reports from a CRA (Part I). The proposed notice then lists the responsibilities that are specific to certain categories of users: users of consumer reports for employment purposes (Part II); users of investigative consumer reports (Part III); users of medical information (Part IV); users of ''prescreened'' lists (Part V); and users who are resellers (Part VI). Should there be a single notice or multiple notices? If multiple notices are appropriate, which types of users should receive particularized notices? Can CRAs easily determine through the certifications they receive from users which portions of the proposed notice are applicable to which users?

2. Content of notice

The proposed notice discusses the principal portions of the FCRA that impose specific obligations upon all those who receive consumer reports and has included these in the six parts of the proposed notice. Are there other statutory requirements that should be included? Should additional information be included in the notice? Will the length of the notice impose substantial burdens upon CRAs? Are there ways to modify the notice to reduce this burden?

3. Terminology

The Commission expects that user notices will be sent to a wide range of users and that these persons will have varying degrees of legal sophistication. Are the duties set forth in the proposed notice clear and understandable? Can they be improved upon?

D. Timing of Distribution of Notices

With respect to the consumer summary, Section 609(c) makes clear that it must be provided every time a CRA makes a written file disclosure under the section. With respect to the furnisher and user notices, however, Section 607(d) provides no specific guidance. Is there a need for advice from the Commission about the timing of the distribution of furnisher and user notices to ensure that the documents are distributed in such a way that they are meaningful and effective? If so, when should the notices be distributed? Should the distribution of the user notice vary based on the recipient's status (*e.g.*, regular and occasional users)?

E. Impact on Small Businesses

The Commission is seeking comments on the impact that its prescription of these notices will have on small entities and for suggestions as to any ways in which the Commission can both meet its obligations under the FCRA and, if possible, lessen any burden imposed on small businesses.

The FCRA itself requires three types of notices containing specified types of information, and also specifies how one type (the consumer notices) must be distributed. Accordingly, this discussion does not cover the necessity for any of the notices or the distribution requirements for the consumer notices.

The Commission is prescribing these notices at the direction of Congress. The purpose of these notices is described in section I above. There is no requirement that the notices used be exactly as prescribed by the Commission. Rather, there is a presumption of compliance with the FCRA if notices are used that are substantially similar to those prescribed by the Commission. (FCRA Sections 607 and 609).

A search of proprietary data bases has revealed approximately 500 consumer reporting agencies that have sales of $5 million or less per year—the threshold for ''small'' credit reporting businesses as defined by the Small Business Administration. However, because the consumer reporting industry is dominated by a number of large companies who provide most of the information sold by smaller entities in the industry, the Commission believes that most of these 500 companies either are affiliated, or have contractual arrangements, with one of the large consumer reporting agencies in the industry. These large agencies, as well as industry trade associations, may make information about the notice requirements and the Commission's prescribed forms available to the smaller entities. The Commission's staff plans to make information about complying with the new FCRA requirements available through various means, including placing the prescribed forms on the Commission's Internet home page.

The FCRA imposes no specific record keeping or reporting requirements directly tied to the use of the notices prescribed by the Commission. In addition, there are no federal rules or regulations that conflict with or duplicate the notices prescribed by the Commission.

In these circumstances, the Commission does not believe that the prescription of the notices will have a significant economic impact upon small business. In fact, the Commission's ''prescription'' of these notices may lessen the burden on small businesses, since these entities can—but need not—adopt the Commission's forms and thereby avoid the risk and expense of developing their notices independently. To ensure that no significant economic impact is overlooked, however, the Commission seeks comments on this issue. The Commission also seeks

comments on possible alternatives to the language of the proposed notices to accomplish the stated objectives within the statutory framework. Specifically, what benefits and costs to consumers and businesses would result from the proposed notices? Would the proposed notices have a significant economic impact on a substantial number of small business entities? If so, explain the nature of any such impact.

F. Firm Timetable for Comments

The FTC intends to move promptly in order to allow time for (1) the staff to review and consider comments on the proposed summary and notices, (2) the agency to prescribe them in final form, and (3) the industry to prepare and use the final versions of the documents when the amendments take effect on September 30, 1997. The public should therefore anticipate no extension of the 30-day comment period.

III. Review under the Paperwork Reduction Act

The FTC has reviewed the three notices that the FCRA amendments require it to prescribe—the Summary of FCRA Rights, the Notice of User Obligations, and the Notice of Furnisher Obligations—for the purpose of determining whether the agency will ''conduct or sponsor'' any ''collection(s) of information'' as these terms are defined in the OMB regulation that implements the Paperwork Reduction Act (44 U.S.C. Chapter 35) (''PRA''), 5 C.F.R. Part 1320.

A. Conduct or Sponsor

The purpose of the PRA is to minimize the Federal paperwork burden that agencies impose on individuals, businesses, State and local governments, and others by collecting unnecessary or duplicative information. 44 U.S.C. Section 3501; 5 C.F.R. § 1320. Thus, an agency must seek and obtain clearance from OMB before it ''conducts or sponsors'' a ''collection of information'' from ten or more persons during a 12 month period. 44 U.S.C. Section 3507; 5 C.F.R. 1320.5.

The FCRA amendments require the credit reporting agencies to provide relevant parties with a Notice of User Obligations and a Notice of Furnisher Obligations that describe certain investigation, disclosure, and recordkeeping requirements. The amendments further require the FTC to prescribe the ''content'' of the notices. So doing will not trigger the application of the PRA. The PRA is triggered when an agency ''conduct[s) or sponsor[s)'' a collection of information. The investigation, disclosure, and recordkeeping requirements described in the User and Furnisher Notices are imposed by the statute and the notices merely describe the requirements of the new FCRA. Further, the requirements contained in the notices become effective on October 31, 1997, regardless of whether the FTC has provided the language for these forms by that time.

The FCRA amendments also require the Commission to prescribe the content and form of a new Summary of Consumer Rights that must be provided to consumers. Because the amended FCRA further provides that: ''[n)o disclosures shall be required under this subsection [discussing the Summary of Consumer Rights) until the date on which the Federal Trade Commission prescribes the form and content of such disclosures * * *,'' it could be argued that the Commission's actions in prescribing the manner and content of the Summary of Consumer Rights may be considered to ''require'' or ''cause'' the disclosures to occur. Nevertheless, as discussed below, we have determined that none of these notices constitute a ''collection of information.''

B. Collection of Information

Because the three notices to be prescribed by the Commission contain information that must be distributed to third parties, these documents involve public disclosures that would otherwise constitute ''collections of information'' under the PRA. However, OMB has recognized that some disclosures do not entail the ''collection of information'' and are thus outside the Act's paperwork control provisions. Specifically relevant here is OMB's determination that a disclosure requirement is not a ''collection of information'' when the information to be disclosed is supplied by the government. 5 C.F.R. 1320.3(c)(2). In such a situation, a mandate to disclose does not impose any requirement to collect the information to be disclosed.

The information in the proposed FCRA notices will be supplied by the government. The proposed notices supply all the information that subject firms will be required to disclose. The FCRA requires credit reporting agencies to provide these (or substantially similar) notices. FCRA Sections 607(d)(2) and 609(c)(3). The latitude provided by the statute to use language other than the precise language prescribed by the FTC does not undercut this concept because the consumer reporting agencies can simply adopt these notices for distribution without any change to the language. We have concluded therefore that these notices do not fall within the definition of ''collection of information'' because they are ''[t)he public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public * * *'' 5 C.F.R. § 1320.3(c)(2). Thus, the PRA does not apply.

List of Subjects in 16 CFR Part 601

Credit, Trade practices.

Pursuant to 15 U.S.C. 1681g and 1681s, the FTC hereby proposes to add to Subchapter F of Chapter I of 16 CFR a new Part 601 to read as follows:

PART 601—SUMMARY OF CONSUMER RIGHTS, NOTICE OF USER RESPONSIBILITIES, AND NOTICE OF FURNISHER RESPONSIBILITIES UNDER THE FAIR CREDIT REPORTING ACT

Sec.

Authority: 15 U.S.C. 1681g and 1681s.

§ 601.1 Authority and purpose.

(a) *Authority.* This part is issued by the Commission pursuant to the provisions of the Fair Credit Reporting Act (15 U.S.C. 1681 *et seq.*), as most recently amended by the Consumer Credit Reporting Reform Act of 1996 (Title II, Subtitle D, Chapter 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997), Public Law 104–208, 110 Stat. 3009–426 (Sept. 30, 1996).

(b) *Purpose.* The purpose of this part is to comply with sections 607(c) and 609(c) of the Fair Credit Reporting Act, as amended. Section 609(c)(3) directs the FTC to prescribe the form and content of a summary of consumers' legal rights under the FCRA that the amended law requires each consumer reporting agency to provide when disclosing the information in its file to consumers, and section 609(c)(4) provides that the summary need not be provided until the FTC has in fact prescribed its form and content. Section 607(d)(2) directs the FTC to prescribe the content of notices that consumer reporting agencies are required to provide to parties that supply information to, or purchase consumer reports from, the agency. These notices will set forth the responsibilities under the FCRA of all persons who furnish information to consumer reporting agencies or use information subject to the FCRA.

§ 601.2 Legal effect.

The forms prescribed by the FTC do not constitute a trade regulation rule. They carry out the directive in the statute that the FTC prescribe the summary and notices. A consumer reporting agency that provides notices substantially similar to those prescribed by the FTC will be in compliance with Section 607(d) or 609(c) of the FCRA, as applicable.

Appendix A to Part 601—Prescribed Summary of Consumer Rights

The prescribed form for this summary is as a separate document, on paper no smaller than 8½x11 inches in size, with text no less than 12-point type (8-point for the chart of federal agencies), in bold or capital letters as indicated. The form in this appendix prescribes both the content and the sequence of items in the required summary. A consumer reporting agency that is not required by law to have a toll-free number may omit the sentence inviting consumers to call that number. A summary may accurately reflect changes in numerical items that change over time (e.g., dollar amounts, or phone numbers and addresses of federal agencies), and remain in compliance.

BILLING CODE 6750–01–P

A Summary of Your Rights Under the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) is designed to promote accuracy, fairness, and privacy of information in the files of every "consumer reporting agency" (CRA). Most CRAs are credit bureaus that gather and sell information about you -- such as where you work and live, if you pay your bills on time, and whether you've been sued, arrested, or filed for bankruptcy -- to creditors, employers, and other businesses. The FCRA gives you specific rights in dealing with CRAs, and requires them to provide you with a summary of these rights as listed below. You can find the complete text of the FCRA, 15 U.S.C. 1681 et seq., at the Federal Trade Commission's web site (*http://www.ftc.gov*).

- **You must be told if information in your file has been used against you.** Anyone who uses information from a CRA to take action against you -- such as denying an application for credit, insurance, or employment -- must give you the name, address, and phone number of the CRA that provided the report.

- **You can find out what is in your file.** A CRA must give you all the information in your file, and a list of everyone who has requested it recently. However, you are not entitled to a "risk score" or a "credit score" that is based on information in your file. There is no charge for the report if your application was denied because of information supplied by the CRA, and if you request the report within 60 days of receiving the denial notice. You are also entitled to one free report a year if you certify that (1) you are unemployed and plan to seek employment within 60 days, (2) you are on welfare, or (3) your report is inaccurate due to fraud. Otherwise, a CRA may charge you a fee of up to eight dollars.

- **You can dispute inaccurate information with the CRA.** If you tell a CRA that your file contains inaccurate information, the CRA must reinvestigate the items (usually within 30 days) unless your dispute is frivolous. The CRA must pass along to its source all relevant information you provided. The CRA also must supply you with written results of the investigation and a copy of your report, if it has changed. If an item is altered or deleted because you dispute it, the CRA cannot place it back in your file unless the source of the information verifies its accuracy and completeness, and the CRA provides you a written notice that includes the name, address and phone number of the source.

- **Inaccurate information must be deleted.** A CRA must remove inaccurate information from its files, usually within 30 days after you dispute its accuracy. The largest credit bureaus must notify other national CRAs if items are altered or deleted. **However, the CRA is not required to remove data from your file that is accurate unless it is outdated or cannot be verified.**

- **You can dispute inaccurate items with the source of the information.** If you tell anyone -- such as a creditor who reports to a CRA -- that you dispute an item, they may not then report the information to a CRA without including a notice of your dispute. In addition, once you've notified the source of the error in writing, they may not continue to report it if it is in fact an error.

- **Outdated information may not be reported.** In most cases, a CRA may not report negative information that is more than seven years old; ten years for bankruptcies.

- **Access to your file is limited.** A CRA may provide information about you only to those who have a need recognized by the FCRA -- usually to consider an application you have submitted to a creditor, insurer, employer, landlord, or other business.

- **Your consent is required for reports that are provided to employers or that contain medical information.** A CRA may not report to your employer, or prospective employer, about you without your written consent. A CRA may not divulge medical information about you without your permission.

- **You can stop a CRA from including you on lists for unsolicited credit and insurance offers.** Creditors and insurers may use file information as the basis for sending you unsolicited offers of credit or insurance. Such offers must include a toll-free number for you to call and tell the CRA if you want your name and address excluded from future lists or offers. If you notify the CRA through the toll-free number, it must keep you off the lists for two years. If you request and complete the CRA form provided for this purpose, you can have your name and address removed indefinitely.

- **You may seek damages from violators.** You may sue a CRA or other party in state or federal court for violations of the FCRA. If you win, the defendant may have to pay damages and reimburse you for attorney fees. If you lose and the court specifically finds you sued in bad faith, you or your attorney may have to pay the defendant's fees.

You may have additional rights under state law. You may wish to contact a state or local consumer protection agency or a state attorney general to learn those rights.

If you have questions or believe your file contains errors, call our toll-free number _____

The FCRA gives several different federal agencies authority to enforce the FCRA:

FOR QUESTIONS OR CONCERNS REGARDING:	PLEASE CONTACT:
CRAs, creditors and others not listed below	Federal Trade Commission Bureau of Consumer Protection - FCRA Washington, DC 20580 * 202-326-xxxx
National banks, federal branches/agencies of foreign banks (word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance Management, Mail Stop 6-6 Washington, DC 20219 * 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 * 202-452-3693
Savings associations and federally chartered savings banks (word "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Programs Washington, DC 20552 * 800-842-6929
Federal credit unions (words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 * 703-518-6360
Banks that are state-chartered, or are not Federal Reserve System members	Federal Deposit Insurance Corporation Division of Compliance & Consumer Affairs Washington, DC 20429 * 800-934-FDIC
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission	Department of Transportation Office of Financial Management Washington, DC 20590 * 202-366-1306
Activities subject to the Packers and Stockyards Act, 1921	Department of Agriculture Office of Deputy Administrator - GIPSA Washington, DC 20250 * 202-720-7051

Appendix B to Part 601 - Prescribed Notice of Furnisher Responsibilities

The appendix prescribes the content of the required notice.

NOTICE TO FURNISHERS OF INFORMATION: OBLIGATIONS OF FURNISHERS UNDER THE FCRA

The Fair Credit Reporting Act (FCRA) has been amended to impose responsibilities on all persons who furnish information to consumer reporting agencies. These responsibilities are found in Section 623 of the FCRA. All information furnishers should become familiar with the law and may want to consult with their counsel to ensure that they are in compliance. The FCRA, 15 U.S.C. 1681 et seq., is set forth in full at the Federal Trade Commission's Internet web site (*http://www.ftc.gov*). Section 623 imposes the following duties:

General Prohibition on Reporting Inaccurate Information:

The FCRA prohibits information furnishers from providing information to a consumer reporting agency (CRA) that they know (or consciously avoid knowing) is inaccurate. However, if a furnisher clearly and conspicuously discloses an address to consumers to which disputes may be directed, the furnisher is not subject to this general prohibition. *Sections 623(a)(1)(A) and (a)(1)(C)*

Duty to Correct and Update Information:

If at any time a furnisher determines that information provided to a CRA is not complete or accurate, the furnisher must provide complete and accurate information to that agency. In addition, the furnisher must notify all CRAs that received the information of any corrections, and must thereafter report only the complete and accurate information. *Section 623(a)(2)*

Duties After Notice of Dispute from Consumer:

If a consumer notifies a furnisher, at the address specified by the furnisher for such notices, that specific information is inaccurate, and the information is in fact inaccurate, the furnisher must thereafter report the correct information to CRAs. *Section 623(a)(1)(B)*

If a consumer notifies a furnisher that the consumer disputes the completeness or accuracy of any information reported by the furnisher, the furnisher may not subsequently report that information to a CRA without providing notice of the dispute. *Section 623(a)(3)*

Duties After Notice of Dispute from Consumer Reporting Agency:

If a CRA notifies a furnisher that a consumer disputes information provided by the furnisher, the furnisher has a duty to follow certain procedures. The furnisher must:

- Conduct an investigation and review all relevant information provided by the CRA. *Sections 623(b)(1)(A) and (b)(1)(B)*

• Report the results to the CRA, and, if the investigation establishes that the information was, in fact, incomplete or inaccurate, report the results to all CRAs that received the information and that compile and maintain files on a nationwide basis. *Sections 623(b)(1)(C) and (b)(1)(D)*

• Do the above within the time period set in the FCRA for the CRA itself to review and correct any inaccuracies, which is 30 days (unless the consumer provides relevant additional information during the 30 days, in which case the time period is 45 days). *Section 623(b)(2)*

Duty to Report Voluntary Closing of Accounts:

When a consumer voluntarily closes an account, the furnisher must report this fact when it provides information to CRAs for the time period in which the account was closed. *Section 623(a)(4)*

Duty to Report Dates of Delinquencies:

If a furnisher reports information concerning a delinquent account placed for collection, charged to profit or loss, or subject to any similar action, the furnisher must, within 90 days, provide the CRA with the month and the year that the delinquency commenced so that the agency will know how long to keep the information in the consumer's file. *Section 623(a)(5)*

Appendix C to Part 601 - Prescribed Notice of User Responsibilities

The appendix prescribes the content of the required notice.

NOTICE TO USERS OF CONSUMER REPORTS: OBLIGATIONS OF USERS UNDER THE FCRA

The Fair Credit Reporting Act (FCRA) requires that this notice be sent to inform users of consumer reports of their legal obligations. The following is a summary of the responsibilities imposed by the FCRA. The FCRA, 15 U.S.C. 1681 et seq., is set forth in full at the Federal Trade Commission's Internet web site (*http://www.ftc.gov*).

I. OBLIGATIONS OF ALL USERS OF CONSUMER REPORTS

A. Users Must Have a Permissible Purpose

Congress has limited the use of consumer reports to protect consumers' privacy. All users must have a permissible purpose under the FCRA to obtain a consumer report. Section 604 of the FCRA contains a list of the permissible purposes under the law. These are:

- As permitted by order of a court or a federal grand jury subpoena. *Section 604(a)(1)*

- For any purpose if the consumer gives permission in writing. *Section 604(a)(2)*

- For the extension of credit as a result of an application from a consumer, or the review or collection of a consumer's account. *Section 604(a)(3)(A)*

- For employment purposes, including hiring and promotion decisions, where the consumer has given written permission. *Sections 604(a)(3)(B) and 604(b)*

- For the underwriting of insurance as a result of an application from a consumer. *Section 604(a)(3)(C)*

- When there is a legitimate business need, in connection with a business transaction that is initiated by the consumer. *Section 604(a)(3)(F)(i)*

- To review a consumer's account to determine whether the consumer continues to meet the terms of the account. *Section 604(a)(3)(F)(ii)*

- To determine a consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status. *Section 604(a)(3)(D)*

• For use by a potential investor or servicer, or current insurer, in a valuation of, or an assessment of, the credit or repayment risks associated with an existing credit obligation. *Section 604(a)(3)(E)*

• For use by state and local officials in connection with the determination of child support payments, or modifications and enforcement thereof. *Sections 604(a)(4) and 604(a)(5)*

In addition, creditors and insurers may obtain certain consumer report information for the purpose of making unsolicited offers of credit or insurance. The particular obligations of users of this "prescreened" information are described in Section V below.

B. Users Must Provide Certifications

Section 604(f) of the FCRA prohibits any person from obtaining a consumer report from a consumer reporting agency (CRA) unless the person certifies the permissible purpose(s) for which the report is being obtained and certifies that the report will not be used for any other purpose.

C. Users Must Notify Consumers When Adverse Actions Are Taken

The term "adverse action" is defined very broadly by Section 603 of the FCRA. "Adverse actions" include all business, credit, and employment actions affecting consumers that can be considered to have a negative impact -- such as unfavorably changing credit or contract terms or conditions, denying or canceling credit or insurance, and denying employment or promotion.

1. Adverse Actions Based on Consumer Reports

If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required by Section 615 of the FCRA to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:

• The name, address, and telephone number (including any toll-free telephone number) of the CRA that provided the report.

• A statement that the CRA did not make the adverse decision and cannot explain why the decision was made.

• A statement setting forth the consumer's right to obtain a free copy of the consumer report from the CRA if the consumer requests the report within 60 days.

• A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

2. Adverse Actions Based on Information Obtained From Third Parties Who Are Not Consumer Reporting Agencies

If a person takes an adverse action in connection with a credit transaction for personal, family, or household purposes that is based either wholly or partly upon information from a person other than a CRA, and the information is the type of consumer information covered by the FCRA, Section 615(b)(1) of the FCRA requires that the user clearly and accurately disclose to the consumer his or her right to obtain disclosure of the nature of the information that was relied upon by making a written request within 60 days of notification. The user must provide the disclosure within a reasonable period of time following the consumer's written request.

3. Adverse Actions Based on Information Obtained From Affiliates

If a person takes an adverse action involving credit, insurance, or employment based on information of the type covered by the FCRA, and this information was obtained from an entity affiliated with the user of the information by common ownership or control, Section 615(b)(2) requires the user to notify the consumer of the adverse action. The notification must inform the consumer that he or she may obtain a disclosure of the nature of the information relied upon by making a written request within 60 days of receiving the adverse action notice. If the consumer makes such a request, the user must disclose the nature of the information not later than 30 days after receiving the request. (Information that is obtained directly from an affiliated entity relating solely to its transactions or experiences with the consumer, and information obtained in a consumer report from an affiliate are not covered by Section 615(b)(2).)

II. OBLIGATIONS OF USERS WHEN CONSUMER REPORTS ARE OBTAINED FOR EMPLOYMENT PURPOSES

If information from a CRA is used for employment purposes, the user has specific duties, which are set forth in Section 604(b) of the FCRA. The user must:

• Make a clear and conspicuous written disclosure to the consumer before the report is obtained, in a document that consists solely of the disclosure, that a consumer report may be obtained.

• Obtain prior written authorization from the consumer.

• Certify to the CRA that the above steps have been followed, that the information being obtained will not be used in violation of any federal or state equal opportunity law or

regulation, and that, if any adverse action is taken based on the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer.

• Before taking an adverse action, provide a copy of the report to the consumer as well as the summary of the consumer's rights. (The user should receive this summary from the CRA, because Section 604(b)(1)(B) of the FCRA requires CRAs to provide a copy of the summary with each consumer report obtained for employment purposes.)

III. OBLIGATIONS OF USERS OF INVESTIGATIVE CONSUMER REPORTS

Investigative consumer reports are a special type of consumer report in which information about a consumer's character, general reputation, personal characteristics, and mode of living is obtained through personal interviews. Consumers who are the subjects of such reports are given special rights under the FCRA. If a user intends to obtain an investigative consumer report, Section 606 of the FCRA requires the following:

• The user must disclose to the consumer that an investigative consumer report may be obtained. This must be done in a written disclosure that is mailed, or otherwise delivered, to the consumer not later than three days after the date on which the report was first requested. The disclosure must include a statement informing the consumer of his or her right to request additional disclosures of the nature and scope of the investigation as described below, and must include the summary of consumer rights required by Section 609 of the FCRA. (The user should be able to obtain a copy of the notice of consumer rights from the CRA that provided the consumer report.)

• The user must certify to the CRA that the disclosures set forth above have been made and that the user will make the disclosure described below.

• Upon the written request of a consumer made within a reasonable period of time after the disclosures required above, the user must make a complete disclosure of the nature and scope of the investigation that was requested. This must be made in a written statement that is mailed, or otherwise delivered, to the consumer no later than five days after the date on which the request was received from the consumer or the report was first requested, whichever is later in time.

IV. OBLIGATIONS OF USERS OF CONSUMER REPORTS CONTAINING MEDICAL INFORMATION

Section 604(g) of the FCRA prohibits consumer reporting agencies from providing consumer reports that contain medical information for employment purposes, or in connection with credit or insurance transactions, without the specific prior consent of the consumer who is the subject of the report. In the case of medical information being sought for employment purposes, the consumer must explicitly consent to the release of the medical information in addition to authorizing the obtaining of a consumer report generally.

V. OBLIGATIONS OF USERS OF "PRESCREENED" LISTS

The FCRA permits creditors and insurers to obtain limited consumer report information for use in connection with unsolicited offers of credit or insurance under certain circumstances. *Sections 603(l), 604(c), 604(e), and 615(d)* This practice is known as "prescreening" and typically involves obtaining a list of consumers from a CRA who meet certain preestablished criteria. If any person intends to use prescreened lists, that person must (1) before the offer is made, establish the criteria that will be relied upon to make the offer and grant credit or insurance, and (2) maintain such criteria on file for a three-year period beginning on the date on which the offer is made to each consumer. In addition, any user must provide with each written solicitation a clear and conspicuous statement that:

- Information contained in the consumer's file was used in connection with the transaction.

- The consumer received the offer because he or she satisfied the criteria for credit worthiness or insurability used to screen for the offer.

- Credit or insurance may not be extended if, after the consumer responds, it is determined that the consumer does not meet the criteria used for screening or any applicable criteria bearing on credit worthiness or insurability, or the consumer is not able to furnish required collateral.

- The consumer may prohibit the use of information in his or her file in connection with future prescreened offers of credit or insurance by contacting the notification system established by the CRA that provided the report. This statement must include the address and toll-free telephone number of the appropriate notification system.

VI. OBLIGATIONS OF RESELLERS

Section 607(e) of the FCRA requires any person who obtains a consumer report for resale to take the following steps:

- Disclose the identity of the end-user to the source CRA.

- Identify to the source CRA each permissible purpose for which the report will be furnished to the end-user.

- Establish and follow reasonable procedures to ensure that reports are resold only for permissible purposes, including procedures to obtain: (1) the identity of all end-users; (2) certifications from all users of each purpose for which reports will be used; and (3) certifications that reports will not be used for any purpose other than the purpose(s) specified to the reseller. Resellers must make reasonable efforts to verify this information.

VII. LIABILITY FOR VIOLATIONS OF THE FCRA

Failure to comply with the FCRA can result in state or federal enforcement actions, as well as private lawsuits. *Sections 616, 617, and 621.* In addition, any person who knowingly and willfully obtains a consumer report under false pretenses may face criminal prosecution. *Section 619*

By direction of the Commission.
Donald S. Clark,
Secretary.

[FR Doc. 97–4987 Filed 2–27–97; 8:45 am]
BILLING CODE 6750–01–C

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[CA 009–0028; FRL–5694–9]

Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision; South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing a limited approval and limited disapproval of revisions to the California State Implementation Plan (SIP) for ozone. The revisions concern the control of oxides of nitrogen (NO_X) from boilers, process heaters, and internal combustion engines. The intended effect of proposing limited approval and limited disapproval of these rules is to regulate emissions of NO_X in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). EPA's final action on this proposed rulemaking will incorporate these rules into the Federally approved SIP. EPA has evaluated these rules and is proposing a simultaneous limited approval and limited disapproval under provisions of the CAA regarding EPA actions on SIP submittals and general rulemaking authority because these revisions, while strengthening the SIP, also do not fully meet the CAA provisions regarding plan submissions and requirements for nonattainment areas.

DATES: Comments on this proposed action must be received in writing on or before March 31, 1997.

ADDRESSES: Comments may be mailed to: Andrew Steckel, Rulemaking Office (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Copies of the rules and EPA's evaluation report of each rule are available for public inspection at EPA's Region IX office during normal business hours. Copies of the submitted rules are also available for inspection at the following locations:

South Coast Air Quality Management District, 21865 E. Copley Drive, Diamond Bar, CA 91765–4182.

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 ''L'' Street, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Mae Wang, Rulemaking Office (AIR–4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, Telephone: (415) 744–1200.

SUPPLEMENTARY INFORMATION:

Applicability

The rules being proposed for limited approval and limited disapproval are South Coast Air Quality Management District (SCAQMD) Rule 1109, Emissions of Oxides of Nitrogen from Boilers and Process Heaters in Petroleum Refineries, adopted by SCAQMD on August 5, 1988; and Rule 1110.2, Emissions from Gaseous- and Liquid-Fueled Internal Combustion Engines, adopted on December 9, 1994.

Background

On November 15, 1990, the Clean Air Act Amendments of 1990 (CAA) were enacted. Pub. L. 101–549, 104 Stat. 2399, codified at 42 U.S.C. 7401–7671q. The air quality planning requirements for the reduction of NO_X emissions through reasonably available control technology (RACT) are set out in section 182(f) of the CAA. On November 25, 1992, EPA published a notice of proposed rulemaking (NPR) entitled ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement) which describes the requirements of section 182(f). The NO_X Supplement should be referred to for further information on the NO_X requirements and is incorporated into this document by reference.

Section 182(f) of the CAA requires States to apply the same requirements to major stationary sources of NO_X (''major'' as defined in section 302 and sections 182 (c), (d), and (e)) as are applied to major stationary sources of volatile organic compounds (VOCs), in moderate or above ozone nonattainment areas. The Los Angeles-South Coast Air Basin is classified as extreme;[1] therefore this area was subject to the RACT requirements of section 182(f), section 182(b)(2), and the November 15, 1992 deadline, cited below.

Section 182(b)(2) requires submittal of RACT rules for major stationary sources of VOC emissions (not covered by a pre-enactment control technique guidelines (CTG) document or a post-enactment CTG document) by November 15, 1992. There were no NO_X CTGs issued before enactment and EPA has not issued a CTG document for any NO_X sources since enactment of the CAA. The RACT rules covering NO_X sources and submitted as SIP revisions are expected to require final installation of the actual NO_X controls as expeditiously as practicable, but no later than May 31, 1995.

This document addresses EPA's proposed action for SCAQMD Rule 1109, Emissions of Oxides of Nitrogen from Boilers and Process Heaters in Petroleum Refineries, and Rule 1110.2, Emissions from Gaseous- and Liquid-Fueled Internal Combustion Engines. The SCAQMD adopted Rule 1109 on August 5, 1988, and the rule was submitted by the California Air Resources Board (CARB) to EPA on March 26, 1990. Rule 1110.2 was adopted on December 9, 1994, and submitted on April 13, 1995. The above rules were found to be complete on June 20, 1990, and May 2, 1995, respectively, pursuant to EPA's completeness criteria that are set forth in 40 CFR Part 51 Appendix V,[2] and are being proposed for limited approval and limited disapproval into the SIP.

Rule 1109 and Rule 1110.2 control NO_X emissions from refinery boilers and process heaters, and internal combustion (I/C) engines. NO_X emissions contribute to the production of ground level ozone and smog. These rules were adopted as part of SCAQMD's efforts to achieve the National Ambient Air Quality Standards for ozone and in response to the CAA requirements cited above. The following is EPA's evaluation and proposed action for these rules.

EPA Evaluation and Proposed Action

In determining the approvability of a NO_X rule, EPA must evaluate the rule for consistency with the requirements of the CAA and EPA regulations, as found in section 110 and Part D of the CAA, and 40 CFR Part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans). EPA's interpretation of these requirements, which forms the basis for this action, appears in the NO_X Supplement and various other EPA policy guidance documents.[3] Among these provisions is

[1] The Los Angeles-South Coast Air Basin Area retained its designation of nonattainment and was classified by operation of law pursuant to sections 107(d) and 181(a) upon the date of enactment of the CAA. See 55 FR 56694 (November 6, 1991).

[2] EPA adopted the completeness criteria on February 16, 1990 (55 FR 5830) and, pursuant to section 110(k)(1)(A) of the CAA, revised the criteria on August 26, 1991 (56 FR 42216).

[3] Among other things, the pre-amendment guidance consists of those portions of the proposed post-1987 ozone and carbon monoxide policy that concern RACT, 52 FR 45044 (November 24, 1987); and ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations, Clarification to Appendix D of November 24, 1987 Federal Register Notice'' (Blue Book) (notice of availability was published in the Federal Register on May 25, 1988).

the requirement that a NO_X rule must, at a minimum, provide for the implementation of RACT for major stationary sources of NO_X emissions.

For the purposes of assisting State and local agencies in developing NO_X RACT rules, EPA prepared the NO_X Supplement to the General Preamble, cited above (57 FR 55620). In the NO_X Supplement, EPA provides guidance on how RACT will be determined for stationary sources of NO_X emissions. While most of the guidance issued by EPA on what constitutes RACT for stationary sources has been directed towards application for VOC sources, much of the guidance is also applicable to RACT for stationary sources of NO_X (see section 4.5 of the NO_X Supplement). In addition, pursuant to section 183(c), EPA has issued alternative control technique documents (ACTs) that identify alternative controls for all categories of stationary sources of NO_X. The ACT documents provide information on control technology for stationary sources that emit or have the potential to emit 25 tons per year or more of NO_X. However, the ACTs will not establish a presumptive norm for what is considered RACT for stationary sources of NO_X. In general, the guidance documents cited above, as well as other relevant and applicable guidance documents, have been set forth to ensure that submitted NO_X RACT rules meet Federal RACT requirements and are fully enforceable and strengthen or maintain the SIP.

SCAQMD Rule 1109 controls emissions of nitrogen oxides from boilers and process heaters located in petroleum refineries with rated capacities greater than 40 MBtu per hour heat input. The rule requires units to meet a 0.03 pound per million Btu heat input limit in accordance with a phased time schedule. The emission limits will strengthen the SIP, but this rule contains deficiencies which must be corrected. Those deficiencies include Executive Officer discretion in approving continuous emission monitoring equipment and test methods, insufficient records to determine compliance, and an unapprovable provision for an alternative emission control plan.

Rule 1110.2 controls NO_X, carbon monoxide (CO), and reactive organic gases (ROG) from I/C engines. The emission limits in this rule are 36 ppm for NO_X, 2000 ppm for CO, and 250 ppm for ROG. Certain types of units specifically identified in the rule may have an allowable NO_X emission limit of approximately 45 ppm. In setting these limits, the SCAQMD considered emission reductions, control technologies, cost-effectiveness, and environmental impacts. EPA agrees that the limits incorporated into SCAQMD Rule 1110.2 are consistent with the Agency's guidance and policy for making RACT determinations, and that these limits satisfy the RACT requirement. The limits of Rule 1110.2 will strengthen the SIP, but this rule contains deficiencies with respect to the requirements of the CAA and EPA regulations as interpreted in the various policy guidance documents discussed earlier. Certain existing units are not required to be in compliance until the year 2004, which is well beyond the statutory May 31, 1995 deadline, and the rule allows for Executive Officer discretion in approving continuous emission monitoring equipment and test methods for determining compliance with emission limits.

EPA has evaluated the submitted rules described above for consistency with the CAA, EPA regulations, and EPA policy, and although these rules will strengthen the SIP, they still contain deficiencies which were required to be corrected pursuant to the section 182(a)(2)(A) requirement of Part D of the CAA. A more detailed discussion of the sources controlled, the limits required, justification for why these limits satisfy RACT, and the rule deficiencies can be found in the Technical Support Document (TSD) for each rule, available from the U.S. EPA Region IX office. Because of the deficiencies, these rules are not consistent with the interpretation of section 172 of the 1977 CAA as found in the Blue Book and may lead to rule enforceability problems. As a result, these rules are not approvable pursuant to section 182(a)(2), section 182(b)(2), section 182(f) and Part D of the CAA.

For the reasons mentioned above, EPA cannot grant full approval of these rules under section 110(k)(3) and Part D. Also, because the submitted rules are not composed of separable parts which meet all the applicable requirements of the CAA, EPA cannot grant partial approval of the rules under section 110(k)(3). However, EPA may grant a limited approval of the submitted rules under section 110(k)(3) in light of EPA's authority pursuant to section 301(a) to adopt regulations necessary to further air quality by strengthening the SIP. The approval is limited because EPA's action also contains a simultaneous limited disapproval. In order to strengthen the SIP, EPA is proposing a limited approval of the SCAQMD's submitted Rule 1109 and Rule 1110.2, under sections 110(k)(3) and 301(a) of the CAA as meeting the requirements of section 110(a) and Part D.

At the same time, EPA is also proposing a limited disapproval of these rules because they contain deficiencies which must be corrected in order to fully meet the requirements of section 182(a)(2), section 182(b)(2), section 182(f), and Part D of the Act. Under section 179(a)(2), if the Administrator disapproves a submission under section 110(k) for an area designated nonattainment, based on the submission's failure to meet one or more of the elements required by the Act, the Administrator must apply one of the sanctions set forth in section 179(b) unless the deficiency has been corrected within 18 months of such disapproval. Section 179(b) provides two sanctions available to the Administrator: highway funding and offsets. The 18 month period referred to in section 179(a) will begin on the effective date of EPA's final limited disapproval. Moreover, the final disapproval triggers the Federal Implementation Plan (FIP) requirement under section 110(c). It should be noted that the rules covered by this NPR have been adopted by the SCAQMD and are currently in effect in the SCAQMD. EPA's final limited disapproval action will not prevent the SCAQMD or EPA from enforcing these rules.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any State implementation plan. Each request for revision to the State implementation plan shall be considered separately in light of specific technical, economic and environmental factors and in relation to relevant statutory and regulatory requirements.

Regulatory Process

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. section 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C sections 603 and 604. Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Limited approvals under section 110 and 301 and subchapter I, Part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, it does not have a significant impact on affected small

entities. Moreover, due to the nature of the Federal/State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.* , 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. section 7410 (a)(2).

Unfunded Mandates

Under Sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of $100 million or more to the private sector or to State, local, or tribal governments in the aggregate.

Through submission of this State implementation plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under Part D of the Clean Air Act. These rules may bind State, local, and tribal governments to perform certain actions and also require the private sector to perform certain duties. The rules being proposed for limited approval and limited disapproval by this action will impose no new requirements because affected sources are already subject to these regulations under State law. Therefore, no additional costs to State, local, or tribal governments or to the private sector result from this action. EPA has also determined that this proposed action does not include a mandate that may result in estimated costs of $100 million or more to State, local, or tribal governments in the aggregate or to the private sector.

Executive Order 12866

This action has been classified as a Table 3 action for signature by the Regional Administrator under procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by a July 10, 1995 memorandum from Mary Nichols, Assistant Administrator for Air and Radiation. The Office of Management and Budget has exempted this regulatory action from review under Executive Order 12866.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: February 12, 1997.

Felicia Marcus,

Regional Administrator.

[FR Doc. 97–4966 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Parts 52 and 81

[ME47–1–6996b; A–1–FRL–5693–6]

Approval, Maine Air Quality Implementation Plans; and Redesignation of Hancock and Waldo Counties; Maine

AGENCY: Environmental Protection Agency (USEPA or Agency).

ACTION: Proposed rule.

SUMMARY: USEPA is proposing to approve under the Clean Air Act two requests from the State of Maine: approval of the Maine 1990 base year inventory into the Maine State Implementation Plan; and a redesignation request by the State of Maine. The first request will establish the 1990 base year inventory of volatile organic compounds and oxides of nitrogen emissions for the classified ozone nonattainment areas in Maine. The second request will redesignate the Hancock and Waldo counties marginal ozone nonattainment area from nonattainment to attainment, and approve the 1993 attainment year inventory for Hancock and Waldo counties as the required 1993 periodic inventory. In the Final Rules Section of this Federal Register, EPA is approving the State's request as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to that direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this proposal. Any parties interested in commenting on this proposal should do so at this time.

DATES: Comments must be received on or before March 31, 1997.

ADDRESSES: Comments may be mailed to Susan Studlien, Deputy Director, Office of Ecosystem Protection (mail code CAA), U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Boston, MA 02203. Copies of the State submittal and EPA's technical support document are available for public inspection during normal business hours, by appointment at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, Region I, One Congress Street, 11th floor, Boston, MA and the Bureau of Air Quality Control, Department of Environmental Protection, 71 Hospital Street, Augusta, ME 04333. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: For the base year inventory, Robert McConnell, (617) 565–9266, and for the Hancock and Waldo counties redesignation request Richard P. Burkhart, (617) 565–3578.

SUPPLEMENTARY INFORMATION: For additional information, see the direct final rule which is located in the Rules Section of this Federal Register.

Authority: 42 U.S.C. 7401–7671q.

Dated: February 3, 1997.

John P. DeVillars,

Regional Administrator, Region I.

[FR Doc. 97–4965 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 63

[AD–FRL–5696–1]

RIN 2060–AD93

National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule: Amendments.

SUMMARY: On December 14, 1994, the EPA promulgated the ''National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)'' (the ''Gasoline Distribution NESHAP'), pursuant to section 112 of the Clean Air Act (Act). This action is proposing amendments to those final standards in order to implement a proposed settlement agreement with the American Petroleum Institute noticed for comment on November 15, 1996 regarding improvements in the screening equations for determining applicability of the Gasoline Distribution NESHAP. No comments were received on the noticed proposed settlement agreement. This action also proposes some

clarifications to the NESHAP that were requested by other parties. Since the EPA does not anticipate receiving adverse comments or holding a public hearing, the amendments 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 (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 March 31, 1997 unless a hearing is requested by March 10, 1997. If a hearing is requested, written comments must be received by April 14, 1997.

Public Hearing. Anyone requesting a public hearing must contact the EPA no later than March 10, 1997. If a hearing is held, it will take place on March 14, 1997, beginning at 9:00 a.m.

ADDRESSES: *Comments.* Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket No. A–92–38 (see docket section below), room M1500, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The EPA requests that a separate copy also be sent to Mr. Stephen Shedd, whose address is listed in the **FOR FURTHER INFORMATION CONTACT** section below.

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. JoLynn Collins, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–5671.

Docket. Docket No. A–92–38, category VIII 1997 Amendments, containing information considered by the EPA in developing the proposed amendments, is available for public inspection and copying between 8:00 a.m. and 5:30 p.m., Monday through Friday, except for Federal holidays, at the EPA's Air and Radiation Docket and Information Center, room M1500, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, DC 20460; telephone (202) 260–7548. A reasonable fee may be charged for copying. This docket also contains information considered by the EPA in proposing and promulgating the original Gasoline Distribution NESHAP.

FOR FURTHER INFORMATION CONTACT: For information concerning applicability and rule determinations, contact the appropriate EPA regional or Office of Enforcement and Compliance Assurance (OECA) representative:

Region I: Greg Roscoe, Air Programs Enforcement Office Chief, U.S. EPA, Region I, JFK Federal Building (SEA), Boston, MA 02203, Telephone number (617) 565–3221

Region II: Kenneth Eng, Air Compliance Branch Chief, U.S. EPA, Region II, 290 Broadway, New York, NY 10007, Telephone number (212) 637–4080, Fax number (212) 637–3998

Region III: Walter K. Wilkie, U.S. EPA, Region III (3AT12), 841 Chestnut Building, Philadelphia, PA 19107, Telephone number (215) 566–2150, Fax number (215) 566–2114

Region IV: Lee Page, U.S. EPA, Region IV (AR–4), 100 Alabama Street, SW, Atlanta, GA 30303–3104, Telephone number (404) 562–9131, Fax number (404) 562–9095

Region V: Howard Caine (AE–17J), U.S. EPA, Region V, 77 W. Jackson Blvd., Chicago, IL 60604, Telephone number (312) 353–9685, Fax number (312) 353–8289

Region VI: Sandra A. Cotter (6EN-AT), U.S. EPA, Region VI (6PD–R), 1445 Ross Avenue, Dallas, TX 75202–2733, Telephone number (214) 665–7347, Fax number (214) 665–7446

Region VII: Bill Peterson, U.S. EPA, Region VII, 726, Minnesota Avenue, Kansas City, KS 66101, Telephone number (913) 551–7881

Region VIII: Heather Rooney, U.S. EPA, Region VIII (8ART–AP), 999 18th Street, Suite 500, Denver, CO 80202–2405, Telephone number (303) 312–6971, Fax number (303) 312–6826

Region IX: Christine Vineyard, U.S. EPA, Region IX (Air-4), 75 Hawthorne Street, San Francisco, CA 94105, Telephone number (415) 744–1197

Region X: Chris Hall, Office of Air Quality (OAQ–107), U.S. EPA, Region X, 1200 Sixth Avenue, Seattle, WA 98101–9797, Telephone number (206) 553–1949 or (800) 424–4372 x1949

OECA: Julie Tankersley, U.S. EPA, Office of Enforcement and Compliance Assurance (2223A), 401 M Street, SW, Washington, DC 20460, Telephone number (202) 564–7002, Fax number (202) 564–0050.

For information concerning the analyses performed in developing the proposed amendments, contact Mr. Stephen Shedd, Waste and Chemical Processes Group, Emission Standards Division (MD–13), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number (919) 541–5397 or fax number (919) 541–0246.

SUPPLEMENTARY INFORMATION: An electronic version of the proposal preamble and the direct final rule is available for download from the EPA Technology Transfer Network (TTN), a network of electronic bulletin boards developed and operated by the Office of Air Quality Planning and Standards. The TTN provides information and technology exchange in various areas of air pollution control. The service is free, except for the cost of a phone call. Dial (919) 541–5742 for data transfer of up to 14,400 bits per second. If more information on the operation of the TTN is needed, contact the systems operator at (919) 541–5384. The TTN is also available on the Internet (access: http://ttnwww.rtpnc.epa.gov).

On December 14, 1994 (59 FR 64303), the EPA promulgated the ''National Emission Standards for Hazardous Air Pollutants for Source Categories: Gasoline Distribution (Stage I)'' (the ''Gasoline Distribution NESHAP''). The Gasoline Distribution NESHAP regulates all hazardous air pollutants (HAP) emitted from new and existing bulk gasoline terminals and pipeline breakout stations that are major sources of HAP emissions or are located at sites that are major sources of HAP emissions. The regulated category and entities affected by this action include:

Category	Examples of regulated entities
Industry	Bulk gasoline terminals. Pipeline breakout stations.

This table is not intended to be exhaustive but, rather, provides a guide for readers regarding entities likely to be interested in the amendments to the regulation affected by this action. To determine whether your facility is regulated by this action, you should carefully examine all of the applicability criteria in 40 CFR 63.420. If you have questions regarding the applicability of this action to a particular entity, consult the appropriate person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

The specific amendments to the promulgated Gasoline Distribution NESHAP that are being proposed are described in detail in the direct final rule located in the final rules section of this Federal Register. The Agency is seeking comments on these proposed amendments and on the pertinent support materials found in the docket. If no significant, adverse comments are timely received, no further activity is contemplated in relation to this proposed action, and the direct final rule in the final rules section of this Federal Register will automatically go into effect on the date specified in that rule. If significant adverse comments are

timely received, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule. Since the EPA will not institute a second comment period on these proposed amendments, any parties interested in commenting should do so during this comment period.

For further supplemental information, the detailed rationale, and the rule amendments, see the notice containing the direct final rule in the final rules section of this Federal Register.

Administrative Requirements

A. Paperwork Reduction Act

The information collection requirements of the previously promulgated NESHAP were submitted to and approved by the Office of Management and Budget (OMB). A copy of this Information Collection Request (ICR) document (OMB control number 2060–0325) may be obtained from Ms. Sandy Farmer, Information Policy Branch, Environmental Protection Agency, 401 M Street, S.W. (mail code 2136), Washington, D.C. 20460, or by calling (202) 260–2740.

Today's proposed amendments to the Gasoline Distribution NESHAP have no impact on the information collection burden estimates made previously. No additional certifications or filings are being proposed. Therefore, the ICR has not been revised.

B. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether a regulation is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The criteria set forth in section 1 of the Order for determining whether a regulation is a significant rule are as follows:

(1) Is likely to have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal government communities;

(2) Is likely to create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

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

The Gasoline Distribution NESHAP promulgated on December 14, 1994 was treated as a ''significant regulatory action'' within the meaning of the Executive Order. An estimate of the cost and benefits of the NESHAP was prepared at proposal as part of the background information document (BID). This estimate was updated in the BID for the final rule to reflect comments and changes made in developing the final rule. The amendments being proposed today have no impact on the estimates in the final BID. Pursuant to the terms of Executive Order 12866, it has been determined that this action is a ''non-significant regulatory action'' within the meaning of the Executive Order. As such, this action was not submitted to OMB for review.

C. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions. When the Agency promulgated the Gasoline Distribution NESHAP, it analyzed the potential impacts on small businesses, discussed the results of this analysis in the Federal Register, and concluded that the promulgated regulation would not result in financial impacts that significantly or differentially stress affected small companies. This proposed rule would not have a significant impact on a substantial number of small entities because it would impose no additional impacts on small businesses beyond those analyzed in the original rulemaking and would simplify the administration of the rule for all governmental jurisdictions. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act, signed into law on March 22, 1995, the EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, the EPA must select the 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 today's action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, the requirements of the Unfunded Mandates Reform Act do not apply to this action.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Petroleum bulk stations and terminals, Reporting and recordkeeping requirements.

Dated: February 21, 1997.

Carol M. Browner,

Administrator.

[FR Doc. 97–4886 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

[OPPTS–42187E; FRL–5592–1]

40 CFR Part 799

RIN 2070–AC76

Proposed Test Rule for Hazardous Air Pollutants; Extension of Comment Period on Proposed Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period on proposed test rule.

SUMMARY: EPA is extending the public comment period from March 31, 1997 to April 30, 1997 on the proposed rule to require manufacturers and processors of 21 hazardous air pollutants (HAPs) to test these substances for certain health effects. This proposed rule was published in the Federal Register on June 26, 1996 (61 FR 33178)(FRL–4869–1). On December 23, 1996, EPA extended the public comment period on the proposed rule from January 31, 1997 to March 31, 1997 (61 FR 67516)(FRL–5580–6).

DATES: Written comments on the proposed rule must be received by EPA on or before April 30, 1997.

ADDRESSES: Submit three copies of written comments on the proposed HAPs test rule, identified by document control number (OPPTS–42187A; FRL–4869–1) to: U.S. Environmental Protection Agency, Office of Pollution

Prevention and Toxics (OPPT), Document Control Office (7407), Rm. G–099, 401 M St., SW., Washington, DC 20460.

A public version of the official rulemaking record supporting this action, excluding confidential business information (CBI), is available for inspection at the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC 20460, from 12 noon to 4 p.m., Monday through Friday, except on legal holidays.

All comments that contain information claimed as CBI must be clearly marked as such. Three sanitized copies of any comments containing information claimed as CBI must also be submitted and will be placed in the public record for this rulemaking. Persons submitting information that they believe is entitled to treatment as CBI must assert a business confidentiality claim in accordance with 40 CFR part 2. This claim must be made at the time that the information is submitted to EPA. If a submitter does not assert a confidentiality claim at the time of submission, EPA will treat the information as non-confidential and may make it available to the public without further notice to the submitter.

Comments and data may also be submitted in electronic form by sending electronic mail (e-mail) to: oppt-ncic@epamail.epa.gov. Such comments and data must be submitted in an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect 5.1 file format or ASCII file format. All comments and data in electronic form must be identified by (OPPTS–42187A)(FRL–4869–1). No information claimed as CBI should be submitted through e-mail. Comments in electronic form may be filed online at many federal depository libraries.

The official record of this action, as well as the public version, will be maintained in paper form. EPA will transfer all comments received electronically into paper form and will place the paper copies in the official record. The official record is the paper record maintained at the address listed at the beginning of the ''ADDRESSES'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Rm. ET–543B, Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 554–1404; TDD: (202) 554–0551; e-mail: TSCA-Hotline@epamail.epa.gov.

For technical information contact: Richard Leukroth, Project Manager, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, 401 M St., SW, Washington, DC, 20460; telephone: (202) 260–0321; fax: (202) 260–8850; e-mail: leukroth.rich@epamail.epa.gov.; or Gary Timm, Senior Technical Advisor, Chemical Control Division (7405), Office of Pollution Prevention and Toxics, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460; telephone: (202) 260–1859; fax: (202) 260–8168; e-mail: timm.gary@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: The HAPs rule proposed testing, under section 4(a) of the Toxic Substances Control Act (TSCA), of: 1,1'-biphenyl, carbonyl sulfide, chlorine, chlorobenzene, chloroprene, cresols [3 isomers], diethanolamine, ethylbenzene, ethylene dichloride, ethylene glycol, hydrochloric acid, hydrogen fluoride, maleic anhydride, methyl isobutyl ketone, methyl methacrylate, naphthalene, phenol, phthalic anhydride, 1,2,4-trichlorobenzene, 1,1,2-trichloroethane, and vinylidene chloride. EPA would use the data generated under the rule to implement several provisions of section 112 of the Clean Air Act and to meet other EPA data needs and those of other Federal agencies. In the HAPs proposal, EPA solicited proposals for enforceable consent agreements (ECAs) regarding the performance of pharmacokinetics (PK) studies which would permit extrapolation from data developed from oral exposure studies to predict effects from inhalation exposure.

On October 18, 1996, EPA extended the public comment period on the proposed rule from December 23, 1996 to January 31, 1997 (61 FR 54383)(FRL–5571–3). This extension was to allow more time for the submission of proposals for ECAs on PK and adequate time for comments on the proposed rule to be submitted after the Agency has considered the ECA proposals. EPA has received several proposals for ECAs on PK. Due to the complexity of the issues raised by these proposals, the Agency extended the public comment period to March 31, 1997 (61 FR 67516, December 23, 1996) to allow more time to consider the ECAs and to finalize the test guidelines to be referenced in the proposed HAPs test rule.

In the HAPs proposed rule published on June 26, 1996 (61 FR 33178), testing would be conducted using the OPPTS harmonized guidelines that were proposed on June 20, 1996 (61 FR 31522)(FRL–5367–7). The process of developing these guidelines is proceeding at the same time as the development of the HAPs test rule. As stated in the original proposal, the OPPTS harmonization process may result in the finalization of the guidelines prior to the end of the comment period for the proposed rule. If so, EPA will publish the final guidelines used in the HAPs rule in order to allow for public comment on the applicability of the finalized guidelines to the HAPs rule.

There has been an additional delay in finalizing the guidelines. The Agency has decided to extend the comment period on the HAPs test rule to allow for the publication of the final guidelines.

In addition, the Agency anticipates responding to the submitters of proposals for ECAs on PK by no later than March 31, 1997.

Accordingly, EPA is extending the comment period on the proposed rule to April 30, 1997.

List of Subjects in 40 CFR Part 799

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: February 25, 1997.

Charles M. Auer,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 97–5193 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 382

[Docket No. R–158]

RIN 2133–AB19

Determination of Fair and Reasonable Guideline Rates for the Carriage of Bulk and Packaged Preference Cargoes on U.S.-Flag Commercial Vessels

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The regulations at 46 CFR part 382 prescribe the administrative procedures and methodology for determining fair and reasonable rates for the carriage of dry and liquid bulk and packaged preference cargoes on United States commercial cargo vessels. MARAD proposes to amend those regulations to prescribe cost averaging as the methodology used for

determining rates and to implement conforming procedural changes. MARAD also intends to request approval of a reduced information collection under these regulations.

DATES: Written comments on this rule, including information collection requirements, are requested, and must be received on or before April 29, 1997.

ADDRESSES: Comments may be mailed or otherwise delivered to the Secretary, Maritime Administration, Room 7210, Department of Transportation, 400 Seventh Street S.W., Washington, D.C. 20590. All comments will be made available for inspection during normal business hours at the address above. Commenters wishing MARAD to acknowledge receipt of comments should enclose a stamped, self-addressed envelope or postcard.

FOR FURTHER INFORMATION CONTACT: Michael P. Ferris, Director, Office of Costs and Rates, Maritime Administration, Washington, D.C. 20590, Tel. (202) 366–2324.

SUPPLEMENTARY INFORMATION: Section 901(b)(1) of the Merchant Marine Act of 1936 (the Act), as amended (46 App. U.S.C. 1241(b)), cited as the Cargo Preference Act of 1954, requires that at least 50 percent of any equipment, materials or commodities purchased by the United States or for the account of any foreign nation without provision for reimbursement, or acquired as the result of funds or credits from the United States, shall be transported on privately owned U.S.-flag commercial vessels, to the extent that such vessels are available at fair and reasonable rates. In 1985, section 901 was amended to exclude certain programs from the application of cargo preference and to raise the U.S.-flag share to 75 percent on certain others. Upon request, MARAD provides fair and reasonable rates (also referred to as guideline rates) to U.S. shipper agencies. Section 901(b)(2) of the Act provides the authority for MARAD (by delegation from the Secretary of Transportation) to issue regulations governing the administration of section 901(b)(1). In 1989, MARAD issued regulations at 46 CFR Part 382 (''Rule''), that initially became effective on January 1, 1990. The Rule contains regulations that govern the calculation of fair and reasonable rates.

Under the current Rule, MARAD establishes fair and reasonable rates, so-called guideline rates, which apply to the waterborne portion of cargo transportation and consist of four components: (1) Operating costs; (2) capital costs; (3) port and cargo handling costs; and (4) brokerage and overhead. The operating cost component of the guideline rate for each participating bulk vessel reflects actual vessel operating costs that are based on historical data modified to the current period by utilizing escalation factors for wage and non-wage costs. All eligible annual operating costs are added together for each vessel and divided by the total number of operating days for that vessel to yield a daily operating cost. The cost is escalated to the current year and multiplied by estimated total voyage days to provide the operating cost segment for the voyage.

There is a fuel cost segment of the operating costs that MARAD calculates for each vessel on the basis of actual reported fuel consumption at sea and in port. The actual fuel consumption of each vessel is multiplied by the corresponding projected number of voyage days at sea and in port to calculate total units of fuel consumed. Current fuel prices are applied to fuel consumed to produce the fuel segment of the operating cost component. MARAD then adds the totals of the fuel and non-fuel operating cost segments to produce the operating cost component for the voyage.

The capital cost component is presently calculated individually for each participating bulk vessel and consists of an allowance for depreciation and interest, plus a reasonable return on investment. Depreciation is calculated by the straight-line method, based on a 20-year economic life and utilizing a residual value of 2.5 percent. However, if the owner acquired an existing vessel, the vessel is depreciated by the straight-line method over the remaining period of its 20-year economic life, but not fewer than 10 years. Capitalized improvements are depreciated straight-line over the remainder of the 20-year period, but not fewer than 10 years.

For the purpose of calculating interest expense, MARAD assumes that original vessel indebtedness is 75 percent of the owner's capitalized vessel cost and that principal payments are made in equal annual installments over a 20-year period. To compute the interest cost, the owner's actual interest rate is applied to the constructed outstanding debt on the vessel. Where the owner has a variable interest rate, MARAD uses the owner's rate prevailing at the time of calculation, and if there is no interest rate available, MARAD selects an appropriate interest rate.

MARAD allows a return on capital cost (investment), with two components, return on equity and return on working capital. The rate of return is based upon a five-year average of the most recent rates of return for a cross section of transportation industry companies, including maritime companies. Equity in the vessel is assumed to be the vessel's constructed net book value less constructed indebtedness. Working capital is the dollar amount necessary to cover operating and voyage expenses. The annual depreciation, interest, return on equity and return on working capital are divided by 300 operating days to determine a daily amount. The total of these elements is multiplied by estimated voyage days to determine the capital cost component used in the fair and reasonable rate calculation.

The port and cargo handling cost component of the guideline rate is determined for each voyage on the basis of the actual cargo tender terms for the commodity, load and discharge ports, and lot size. Costs used to determine the port and cargo cost component are based on the most current data from all available sources and verified from data received on completed cargo preference voyages. The brokerage and overhead component of the guideline rate is the aggregate of the cost components for operating, capital and port and cargo handling, multiplied by an 8.5 percent allowance for broker's commissions and overhead. The total of these four components is now divided by cargo tons (which cannot be less than 70 percent of the vessel's cargo deadweight) to determine the guideline rate.

Under existing regulations, whenever a vessel carries preference cargo and subsequently transports additional cargo prior to its return to the United States, MARAD reexamines the guideline rate that it calculated for the preference voyage. This reexamination may result in the recalculation of the original guideline rate, incorporating the additional voyage itinerary, costs and revenues which occurred as a result of the carriage of the additional cargo. If a vessel is scrapped or sold after discharging a preference cargo, MARAD now adjusts the guideline rate to reflect the termination of the voyage after discharge. If the rate received by the operator for the preference cargo exceeds the adjusted guideline rate for the one-way voyage, MARAD informs the shipper agency who may then require the operator to repay the difference in the ocean freight.

Advance Notice of Proposed Rulemaking

MARAD decided that revisions to the Rule may be necessary to encourage development of a modern and efficient merchant marine and to reduce government-wide cargo preference

costs. As a result, on April 19, 1995, MARAD issued an Advance Notice of Proposed Rulemaking (ANPRM) (60 FR 19559), soliciting comments from the public. MARAD identified three alternative methodologies in the ANPRM, in addition to the current guideline rate methodology described above, that it is considering to reduce cargo preference costs. The three alternatives were:

Foreign Market Differential—Under this methodology, MARAD would calculate the added costs associated with owning and operating a vessel under the U.S.-flag resulting from U.S. laws and regulations and the U.S. standard of living. This procedure would identify a modern and efficient target vessel or vessels available worldwide and estimate costs under foreign ownership and under U.S. ownership, if operated in the most efficient manner practical. The resulting cost differential would be prorated over specific voyages, as cargoes are tendered, and added to the foreign bids for such voyages to determine the fair and reasonable rate for U.S.-flag operators.

Significant problems exist with this method, both in terms of economic impact on U.S.-flag ship owners and the legislative history of the Cargo Preference Act. First and foremost of these problems is the difficulty of identifying and quantifying all of the additional costs of U.S.-flag ownership. While some of these costs, including wages and benefits, are easily identified, such costs as the additional cost of meeting U.S. labor standards, safety and environmental requirements are not subject to quantification that would be undisputed. Secondly, since preference cargoes historically move between different geographic areas than commercial cargoes, a direct comparison with the ''foreign market'' may not be possible. Finally, the Cargo Preference Act of 1954 intended that only rates for U.S.-flag commercial vessels are to be considered in the determination of what is fair and reasonable. See Comp. Gen. B–95832 (Feb. 17, 1955) (unpublished), cited in *H.R. Rep. No. 80*, 84th Cong., 1st. Sess., 18 (1955). Accordingly, MARAD cannot employ a foreign market-based system.

Cost Averaging—A methodology utilizing vessel cost averaging would be constructed in much the same manner as the current Rule methodology, except that average vessel costs would replace individual vessel costs in the calculation of the fair and reasonable rate. There are three basic cost areas which would be the most likely candidates for averaging: Vessel operating costs, vessel capital costs, and fuel. Any one, or a combination of any of the three cost areas could be included in a cost averaging methodology.

Market Based—Under a market based methodology, a vessel operator's bid would be considered fair and reasonable if it were submitted in a competitive environment. A competitive environment would be established if there were a required number of qualified bids made by independent and non-affiliated U.S.-flag vessel operators. A market-based methodology would actually be a combination of methodologies because a cost-based determination would be made in instances where an insufficient number of independent bids were received. The cost-based rate could be determined as prescribed in the existing Rule or by use of some other methodology like those described above. A review of the legislative history of the Cargo Preference Act of 1954, indicates that adoption by MARAD of a market based methodology may require additional enabling legislation.

Comments to ANPRM

Seven sets of comments were received in response to the ANPRM. Commenters represented U.S. shipper agencies, operators and industry associations. Comments were offered in support of, and in opposition to all four alternatives, with no clear consensus. The U.S. Agency for International Development (USAID) also offered an alternative similar to *Worldscale* for use in determining guideline rates. Commenters generally supported the need for guideline rate reform and were unanimous that any methodology must encourage investment in efficient vessels.

One commenter proposed an alternative method whereby rates for U.S.-flag operators would be capped at defined comparable foreign rates plus a fixed percentage premium. Theoretically, this would be a ceiling rate, and anything less than the ceiling would be fair and reasonable by definition. The foreign rates would be based on averaged foreign rates for comparable cargoes and cargo lots for any preceding calendar year. The basis for any premium would still be the additional costs of U.S.-flag ownership and operation.

Public Meetings

After an initial review of the comments received on the ANPRM, MARAD believed it would be beneficial to meet with interested parties to explore further the need for change and potential methodologies. MARAD held two meetings. On July 12, 1995, members of the shipping community and other interested parties met with MARAD. The meeting generated considerable discussion on the topics of guideline rate alternatives and the added costs associated with owning and operating U.S.-flag vessels. Most persons present considered that an enumeration of the legal and regulatory costs imposed on U.S.-flag vessels would be very valuable. However, it was generally believed that it would be too difficult to construct a methodology accurately comparing the cost of operating under the U.S.-flag to the cost of operating under appropriate competitive foreign flags. With respect to a market based system, several attendees noted that the market should be left alone to regulate supply and demand. At the conclusion of the July 12 meeting, there was a consensus that what was needed were changes to (1) prevent abnormally high rate fixtures and (2) encourage efficiency. The averaging methodology was considered the best means to accomplish these goals.

On July 14, 1995, MARAD met on the same subject with representatives of the United States Department of Agriculture (USDA) and the United States Agency for International Development (USAID), the major government shipper agencies. Many of the same issues which arose at the July 12, 1995 meeting were discussed at this meeting. The discussion centered on the foreign market differential and cost averaging methodologies. There appeared to be support for both of these methodologies, although the shipper agencies expressed some reservations concerning specific items, e.g., are there sufficient vessels available in each category to make averaging possible and whether or not a new vessel should serve as the target vessel of a market based evaluation.

A question also arose regarding the effect that the proposed changes would have on the ability of the U.S.-flag commercial fleet to meet the preference reservations established by the cargo preference laws. Those laws currently require that 75 percent of specified preference cargoes be reserved for U.S.-flag participation. There is concern that the proposed changes would make it impossible for the commercial fleet to provide adequate availability to meet the statutory cargo reservation requirements. Although some high cost operators may be adversely affected, given current and foreseeable market conditions, sufficient U.S.-flag tonnage should be available to attain the 75 percent participation level.

As a result of MARAD's experience in determining guideline rates and the information received from the ANPRM and meetings with interested parties, MARAD is proposing to amend the Rule in order to improve the fair and reasonable rate-making process. The following is a discussion of proposed changes to 46 CFR Part 382.

Averaging

One of the principal criticisms of the existing Rule, which is based on individual vessel costs, is that it fails to provide sufficient incentives for efficient vessels to operate in the cargo preference trade. Conversely, the current methodology has not adequately controlled the rates provided to the less efficient operators. Averaging costs would provide the same operating and capital cost allowances for all vessels competing for the carriage of a specific preference cargo, creating an incentive for vessels to operate more efficiently. The resulting lower guideline rates would prevent the government from paying excessive rates for the use of less efficient (more costly) vessels, especially in times of high market rates for vessels in the trade. Accordingly, MARAD proposes that the operating costs, including fuel consumption, capital costs and speed, used in the construction of the guideline rate be averaged for all vessels within specific size categories. The averages would be computed twice a year. MARAD would calculate the averages more frequently, if necessary. The impact of the change to averaging would be a reduction in the guideline rate levels calculated for less efficient vessels and an increase in the guideline rate levels of the more efficient vessels.

Vessel Categories

In order to administer a guideline rate system based on average costs effectively and fairly, MARAD would place vessels in categories where a minimal amount of distortion is evident from cost variations that are solely based on vessel size. For example, the maintenance costs for a 15,000 DWT vessel are less than the maintenance cost of an 80,000 DWT vessel because, among other items, the 80,000 DWT vessel has more surface area to paint. In choosing size categories, MARAD examined the sizes and costs of vessels that have carried preference cargo, the number of vessels of similar size, and the cargo amounts carried on individual voyages in the preference trade. MARAD also considered the difference between vessel types (i.e., bulk carriers, tankers, tug/barges, and general cargo), and trading patterns in arriving at the proposed vessel categories. As a result, MARAD proposes that vessels be placed in four categories on the basis of CDWT. The NPRM defines CDWT as Summer DWT less a five percent allowance for fuel, stores and other capacity reductions. MARAD proposes to specify the following vessel categories:

Category I—Less than 8,000 CDWT
Category II—8,000—19,999 CDWT
Category III—20,000—34,999 CDWT
Category IV—35,000 CDWT and over

Tug/barge combinations would be included with other vessels of similar size in computing the average. Tug/barge combinations are often slower with lower per diem costs than self-propelled vessels. Vessel speed will also be averaged to place vessels and tug/barge units on a comparable basis. Since tug/barge combinations sometimes vary and costs for more tugs than barges are reported, MARAD proposes to match the costs of a single tug with a single barge based on the barge's operating history. To the extent tugs or barges are grouped in the data submission, MARAD would match classes of vessels. Cost categories would include an equal number of tugs and barges. As tug DWT is minimal and does not factor into cargo capacities, only the barge Cargo Deadweight Capacity (CDWT) would be used in determining the placement of tug/barge combinations in size categories. In the unusual case where more than one barge is towed by the same tug, the guideline would be based on the total tonnage carried.

Since speed would be averaged across vessel types, the separate weather delay factors in § 382.3(e)(6) would no longer be necessary. After reviewing actual vessel speeds on preference voyages, MARAD believes that a five percent delay factor is sufficient for all vessel types. With the weather delay factor being equalized, specific definitions to distinguish tug/barge units from other bulk vessels, including integrated tug/barge units, would no longer be necessary. Based on the above discussions, MARAD proposes to amend § 382.3(a),(b) and (e)(6) to implement cost averaging as the new guideline rate methodology.

Although other categories were suggested by commenters, MARAD believes the categories chosen best reflect the vessel size and cargo distributions of the existing U.S.-fleet serving the preference trade. Further, MARAD believes that the proposed categories better accommodate small cargo size shipments. In calculating guideline rates, MARAD will use costs from the vessel size category best suited for the size of the cargo.

Information Collection Requirements

MARAD is proposing to reduce reporting and auditing requirements to the maximum extent possible while continuing to recognize the agency's need for accurate cost and financial information. MARAD is proposing two changes to reduce the amount of data reported or the frequency of reporting. This NPRM proposes that annual operating cost data for similar vessels within a category could be provided in the aggregate on a single schedule rather than individually for each vessel. Should the operators take advantage of this option, a substantial reduction in the time and cost of operator preparation is expected to occur. This proposal would also change the filing of post voyage reports from a voyage based requirement (60 days after each voyage) to a semi-annual requirement. Semi-annual reporting with a ninety day lag time (versus 60 days) will reduce the paperwork burden on the operators. To implement these concepts, the agency proposes to amend § 382.2(b)(8) to authorize aggregate schedule filings, and amend § 382.2(c) to change post-voyage filing to a semi-annual requirement.

Two changes are also proposed to reduce the audit burden on operators, the Department of Transportation, Office of the Inspector General (OIG), and MARAD. The first proposed change would allow an operator to have its submissions certified by an independent certified public accountant (CPA). This would alleviate the need for audit by the OIG. Audits of cargo preference submissions have proven to be a significant cost both to the operators and the government. Since many operators have other ongoing audit requirements, MARAD believes that the certification of the cost submissions would reduce the burden on most operators. The second change would provide a more exact requirement for the preparation of the accounting data used for cost submissions. Currently, submissions must be prepared in accordance with Uniform Financial Reporting Requirements (46 CFR Part 232), using generally accepted accounting principles (GAAP). Part 232 allows the operator to report to MARAD using an accounting basis that is different from the one it normally uses for financial reporting, so long as GAAP is used. Since GAAP allows different accounting treatments for certain types of expense, some operators are reporting costs to MARAD in the manner most advantageous to them. The choice can have a major impact on an individual vessel's guideline rate. For example, drydocking costs, which occur on a

multi-year cycle, can be accrued over the cycle (which includes more than one rate year) or expensed in the current reporting period. This interpretation has caused some problems with auditing the data, increasing costs to the operators and the government. MARAD proposes to require the operator to use the accounting treatment it already uses for its own records and audited financial statements. Accordingly, MARAD proposes to amend § 382.2(a) to provide the alternative of certification by a CPA and to amend § 382.2(d) to require the use of consistent accounting practices under GAAP.

MARAD is also proposing to make three minor reporting changes: First, the Official Coast Guard Identification Number (official number) would be used to identify a vessel. Since vessels change names but the official number always stays with the vessel, it is a better identifier. Secondly, § 382.2(b)(2) would be amended to clarify the DWT requirement as summer DWT in metric tons and eliminate the requirement for Suez and Panama Canal net register tons. The requirements for canal net register tons (CNRT) is not necessary. The original intent was to use CNRT to estimate canal tolls when calculating guideline rates, but to date no practical system has been developed for those estimations. Finally, § 382.2(b)(9) would be amended to clarify the definition of ''operating day''. Days spent waiting, even when the vessel is seaworthy and fully manned, in anticipation of booking a cargo or waiting for laydays to begin, have never been considered operating days for the purpose of calculating guideline rates.

Overall, MARAD estimates changes in information collection burden as follows:

Current		Proposed	
Responses	Hours	Responses	Hours
250	1,000	125	500

New Vessel Allowance

One goal of this rulemaking is to encourage newer and more efficient vessels to enter the cargo preference market. There are certain conditions which this regulation cannot affect, such as the three year waiting period before foreign-built vessels are eligible to carry preference cargo, irregular amount of cargoes available throughout the year, and depressed market conditions, which are primarily responsible for the lack of newer U.S.-flag vessels in the preference market. MARAD is proposing that newly constructed vessels, and vessels acquired prior to the fifth anniversary of their construction, receive an additional allowance for acquisition capital in the guideline rate that will continue for a period of five years after acquisition by the owner. The new vessel allowance would total ten percent of capitalized acquisition costs (reduced to a daily basis for use in the guideline rate based on a 300 day operating year) for the first year after acquisition. The amount would decline by one percentage point each subsequent year. No allowance will be included in the guideline rate after the fifth year following acquisition. MARAD believes this would offset any disincentives for newer vessel entrants in the proposed rule. Therefore, it is proposed that a new § 382.3(b)(4) be added to the rule which provides a new vessel allowance.

Seventy Percent Limitation

The current Rule provides that, for the purposes of calculating guideline rates, calculated cargo tonnage shall not be less than 70 percent of the vessel's cargo capacity. This provision was intended to protect the Government from excessive rates in cases where a lone bidder with a large vessel bids on a small cargo lot. Experience has shown, however, that the actual result has been to limit competition. The proposed system is cargo size driven in that the category of costs used in determining the guideline rate will be based on the total amount of cargo carried. For example, if 30,000 tons of cargo is booked for carriage, costs from Category III will be used to calculate the guideline rate. As such, the guideline rate for the carriage of that cargo for a 30,000 CDWT vessel would be the same as a 50,000 CDWT vessel. In such a system, the 70 percent rule is not necessary, and MARAD proposes to eliminate that restriction.

Determination of Voyage Length

One concern of the bulk operators has been the method for determining voyage length in § 382.3(e)(1). One provision requires that a voyage be calculated on a round voyage basis. Another requires adjustment of the guideline rate to reduce allowable voyage days for purposes of rate calculation if a backhaul cargo is obtained. It has been MARAD's experience that, together, these requirements discourage full participation in the bulk preference cargo trades and do not consistently provide equitable treatment in the guideline rate procedures. These requirements do not reflect how bulk operations are conducted.

In the U.S. preference trades, the majority of cargoes originate in the U.S. Gulf. As a result, vessels generally return to Gulf ports after completion of a voyage to await the next cargo opportunity. If that opportunity originates from a point of origin outside the Gulf, the vessel (1) must position for the cargo, and (2) will most likely return to the Gulf. In some instances a succeeding U.S. load opportunity will arise before the vessel returns to its original preference load port and it will divert directly to the load point for the successive cargo. In either event, a point-to-point round voyage does not occur.

Bulk operators, particularly tankers, frequently bid on a preference cargo in consideration of obtaining a backhaul cargo. If there is a realistic prospect of carrying a backhaul cargo, the operator will likely bid lower than where there is no backhaul cargo. The prospect of profitable backhauls would also encourage the participation of more U.S.-flag vessels in the preference trades, resulting in more competition and lower fixture rates. However, with the backhaul disincentive in the existing rule, the Government could lose the benefit of the operator's incentive to bid low.

Between May 1, 1990 and June 30, 1995, MARAD calculated 1,029 guideline rates. Of these, only 30 resulted in recalculations because of backhauls. Because most backhauls are marginal in nature, they usually contribute very little revenue above their costs. As a result, only five of the 30 recalculated rates resulted in calculated recapture, i.e., a reduction in payments to the operator. Compared to the total revenue generated by the voyages for which backhauls were calculated, the total recapture has amounted only to four-tenths of one percent of total gross revenue. The expected benefits of recapture are outweighed by the administrative expense, higher fixture rates, and lost competitive opportunities. For these reasons, MARAD is proposing elimination of the backhaul adjustment provision.

MARAD is proposing two changes to § 382.3(e)(1) to conform the existing method of determining voyage length with the realities of bulk preference operations. First, instead of requiring that the rate be based on a round-trip voyage, MARAD would choose the most appropriate port range for the return leg based on the practices of the owner and the prospects for subsequent employment at the load port. The second change would be to eliminate the requirement for a rate adjustment when the operator obtains a backhaul cargo.

Capital Cost Component

Five changes are being proposed within this cost category. The purpose of the proposed changes is to simplify or clarify rate calculations.

Section 382.3(b)(2)(ii) refers only to vessels with a 20-year economic life in determining the interest amount in the capital cost component of a guideline rate. In practice, many vessels have been sold, reconstructed and/or improved, and periods of economic life vary from vessel to vessel. In these instances, the various depreciation periods used to determine the guideline rate were defined in paragraph (b)(2)(I) of that section, but were not explicitly mentioned in paragraph (b)(2)(ii), Interest. To clarify paragraph (b)(2)(ii), MARAD proposes to include therein a cross reference to paragraph (b)(2)(I) with respect to the periods of depreciation to be used in determining interest expense in the guideline rate.

The second proposed change affects the method of determining depreciation. The current Rule uses a residual value of 2.5 percent of a vessel's initial book value as part of the depreciation calculation. For purposes of simplification and to conform to existing conditions for vessel scrapping, MARAD is proposing to eliminate use of the residual value in the calculation of depreciation.

The third proposed change to the capital cost calculation concerns situations where interest rates are not available for certain capitalized items. When this occurs, the rule now specifies that a ''current long term rate, the Title XI [Vessel Financing] rate if available,'' be used in the guideline rate for determining the capital component. MARAD has found that the ten-year Treasury-bill (T-bill) rate plus one percent is an appropriate and readily available substitute. Accordingly, MARAD proposes to amend § 382.3(b)(2)(ii) to specify the ten-year T-bill rate plus one percent as the rate used in the fair and reasonable rate calculation when no interest rate is available or for vessels without mortgage debt.

The fourth proposed change also relates to the interest rate used to calculate capital costs. Section 382.3(b)(2)(ii) specifies that, when variable interest rates are part of the mortgage, the rate ''at the time of the calculation * * * shall be used.'' To assist in the computation of more flexible guideline rates, MARAD proposes to use the interest rate in effect on the first business day of the year or the first business day on or after July 1, whichever is appropriate. Therefore, MARAD proposes to amend § 382.3(b)(2)(ii) to specify January 1 and July 1 as the dates on which the interest rates in effect would be used in lieu of variable interest rates for the calculation of fair and reasonable rates.

The final proposed change to capital costs is the provision pertaining to the return on working capital. A statement would be added to new § 382.3(b)(3) noting that the return on working capital is a voyage related capital cost element.

Port and Cargo Handling Cost Component

To conform to the proposed new averaging system, MARAD would amend § 382.3(c) to specify that port and cargo costs will be determined by vessel category.

One-Way Rates

Section 382.3(e)(1) provides for a one-way rate when a vessel is scrapped or immediately sold after discharge of the preference cargo. The term ''immediately'' has created some confusion. MARAD proposes to amend this paragraph by striking ''immediately'' and adding ''and does not return to the United States as a U.S.-flag vessel.'' This language specifies the conditions under which MARAD considers a voyage to be one-way, will assure that an operator selling or transferring a vessel foreign is not compensated by a cargo preference program intended to promote U.S.-flag vessels.

Total Revenue Rates

On numerous occasions more than one cargo has been booked on a vessel subject to the guideline rate regulations. Also, there have been occasions when there have been multiple load and/or discharge ports. These situations often make the calculation of individual rates for particular parcels and/or destinations, as required by § 382.3(f) and (g), impossible. Accordingly, when this occurs, MARAD proposes to calculate a ''Total Revenue Rate''. The guideline rate would be calculated normally, but the final rate would be expressed as gross revenue for the total voyage, rather than as a rate per ton. So long as the revenue from the sum of the individual parcels does not exceed the total revenue calculated in the guideline, the individual rates would be considered fair and reasonable. Section 382.3(f) would be modified to remove the references to individual rates for separate parcels carried on the same voyage. Paragraph (g) of that section would also be modified by including language to allow the use of either a cost per ton or other measure that MARAD determines appropriate.

Administrative Practices

MARAD is also proposing to change certain of its administrative practices for prescribing guideline rates. While these changes do not necessitate actual changes in the regulations, MARAD is seeking comments with respect to its proposals. These changes will (1) allow differentiation between cargo tender terms when determining delay factors (for delays in port and days not worked) to more appropriately reflect the risk of delay inherent in the terms; (2) expand the applicability of an initial guideline rate calculation to cover most substitute vessels.

Delay Factors

Section 382.3(e)(3) includes in the calculation of voyage days in port a factor to account for delays and days not worked. It has been MARAD's practice not to differentiate between cargo tender terms in arriving at an appropriate delay factor. In reality, different cargo terms have different levels of risk of delay associated with them. For example, Free In and Out (FIO) terms have defined load and discharge rates, generally with payment of demurrage and despatch by the charterer and vessel owner, respectively, while FBT (Full Berth Terms) carry unlimited risk of delay without compensation. MARAD proposes to change its practices to provide delay factors which more appropriately reflect the risk of delay inherent in the cargo tender terms. For example, a guideline rate calculated for an FIO cargo where the tender included demurrage and despatch premiums could use the load and discharge guarantee rates included in the tender; for an FBT voyage, historical experience or current conditions may require using delay factors in the load or discharge ports.

Guideline Rate Requests

On average, MARAD calculates two guideline rates for each cargo actually fixed. This is generally the result of substitutions, voyage variations, add-on cargoes, audits and similar recalculations. It is currently MARAD's practice to provide a guideline rate when requested by a shipper agency. MARAD intends to substantially reduce the incidence of these calculations and determine only one guideline rate for each preference cargo which is based on the initially requested vessel and cargo. That guideline rate would also be applicable to all other vessels that might actually carry the cargo and for amounts plus or minus five percent of the

original request, except in the case where there is a substitution of a vessel eligible to receive the ''new vessel allowance'' for an older vessel, or vice versa. Rates would also be recalculated, if requested, for add-on preference cargoes which increase cargo size by more than five percent. MARAD will not recalculate a rate for add-on commercial cargo.

Revised Rate Methodology

The guideline or fair and reasonable rates proposed to be established by MARAD would apply only to the waterborne portion of cargo transportation, to consist of four components: (1) Operating costs; (2) capital costs; (3) port and cargo handling costs; and (4) brokerage and overhead. The operating cost component of the fair and reasonable rate would reflect average vessel operating costs for vessels within the specified size categories previously discussed, based on the historical data submitted in accordance with § 382.2 of this rule. MARAD would modify the operating costs to the current period, utilizing escalation factors for wage and non-wage costs. To the extent vessels are time chartered or leased, operators would submit both operating and capital costs, including all capitalized costs and interest rates for vessels subject to capital leases.

All eligible annual operating costs for vessels within a category would be added together and divided by the total number of operating days for those vessels to yield a daily operating cost. The cost would be indexed to the current year and multiplied by estimated total voyage days to yield the operating cost segment for the voyage. The amount of cargo fixed would be the basis for selecting which vessel category of cost averages would be used in calculating a guideline rate.

Fuel consumption would be figured on the basis of actual reported fuel consumption at sea and in port for vessels within the same category. The average fuel consumptions of vessels in the category would be multiplied by the corresponding projected number of voyage days at sea and in port to yield total fuel consumed. MARAD would obtain from published sources current spot market fuel prices, at bunkering ports consistent with sound commercial practice, and apply them to fuel consumed to produce the fuel segment of the operating cost component. The total of the fuel and non-fuel operating cost segments would be added together to yield the operating cost component for the voyage.

The capital cost component would be based on participating vessels in the applicable size category. It would consist of an allowance for depreciation and interest and a reasonable return on investment. Depreciation would be straight-line based on a 20-year economic life. However, if the owner acquired an existing vessel, the vessel would be depreciated on a straight-line basis over the remaining period of its 20-year economic life, but not fewer than 10 years. Capitalized improvements would be depreciated straight-line over the remainder of the 20-year period, but not fewer than 10 years, commencing with the capitalization date for those improvements.

For the purpose of calculating interest expense, MARAD would assume that original vessel indebtedness is 75 percent of the owner's capitalized vessel cost and that principal payments are made in equal annual installments over the economic life of the vessel. To compute the interest cost, the owners' actual interest rates would be applied to the vessel's outstanding constructed debt, using the depreciation schedule in § 382.3(b)(2)(ii). Where the owner has a variable interest rate, the owner's rate prevailing at the time of calculation of the average capital cost component would be used. In cases where there is no interest rate available, and for operators without vessel debt, MARAD would use the ten-year T-bill rate plus one percent.

As in the existing Rule, return on investment would have two components, return on equity and return on working capital. The rate of return would be based upon a five-year average of the most recent rates of return for a cross section of transportation industry companies, including maritime companies. Equity would be assumed to be a vessel's constructed net book value less constructed principal amounts. Working capital would be voyage based and is the dollar amount necessary to cover operating and voyage expenses.

A new vessel allowance would be included in the capital component of newly built vessels and vessels acquired when five years of age or less. The new vessel allowance would be paid for the first five years following construction or acquisition. This allowance would equal ten percent of the vessel's capitalized costs during the first year following construction or acquisition, and would decline by one percentage point each of the subsequent four years. To arrive at the voyage allowance, the annual amount would be divided by 300 operating days and multiplied by estimated voyage days.

The average annual depreciation, interest, and return on equity for vessels in the category would be divided by 300 operating days to determine a daily amount. The total of these elements would be multiplied by estimated voyage days and added to the return on working capital and the new vessel allowance to determine the capital cost component used in the fair and reasonable rate calculation.

The port and cargo handling cost component would be determined for each voyage on the basis of vessels in the category and the actual cargo tender terms for the commodity, load and discharge ports, and lot size. The costs would include applicable fees for wharfage and dockage of the vessel, canal tolls, cargo loading and discharging, and all other voyage costs associated with the transportation of preference cargo. Costs used to determine the port and cargo cost component would be based on the most current data from all available sources and verified from data received on completed cargo preference or commercial voyages.

To determine the brokerage and overhead component of the fair and reasonable rate, MARAD would add the cost components for operating, capital, and port and cargo handling and multiply that sum by an 8.5 percent allowance for broker's commissions and overhead. The total of these four components, expressed as total revenue or as a rate per ton, whichever is most applicable, would be the fair and reasonable rate.

If a vessel is scrapped or sold after discharging a preference cargo, and the vessel does not return to the United States as a U.S.-flag vessel, the guideline rate would be adjusted to reflect the termination of the voyage after cargo discharge. If the rate received by the operator for the preference cargo exceeds the adjusted guideline rate for the one-way voyage, the operator would be required to repay the difference in ocean freight to the shipper agency.

In special circumstances, certain procedures prescribed in this rule may be waived, so long as the procedures adopted are consistent with the Act and with the intent of these regulations.

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review); DOT Regulatory Policies and Procedures; Public Law 104–121.

This rulemaking is not considered an economically significant regulatory action under Section 3(f) of E.O. 12866. It is not considered to be a major rule

for purposes of Congressional review under Public Law 104–121. It is anticipated that savings to the Government of less than $1 million per year will result. Accordingly, the program will not have an annual effect on the economy of $100 million or more. While this rule does not involve any change in important Departmental policies, it is considered significant under DOT Regulatory Policies and Procedures and E.O. 12866 because it addresses a matter of considerable importance to the maritime industry and may be expected to generate significant public interest. Accordingly, the Office of Management and Budget has reviewed this rule.

MARAD has estimated the potential economic impact of this rulemaking. To determine what effect the proposed changes would have had on guideline rates, 167 rates were recalculated for the years 1992 through 1995 using the revised methodology. This sample represented 25% to 30% of the total fixtures for each of the four years. The rate sample chosen was reflective of the operators and countries in the complete data base. For 1992 and 1993, the recalculated rates were below the original guideline rates 54% of the time. In 1994 and 1995, the ratio of recalculated rates falling below original guideline calculations rose to 60%.

The rates calculated for the sample were compared to actual cargo fixture rates to evaluate the ability of averaging to reduce program costs. The chart included below summarizes the results of the sample data. Using averaging, twelve percent of the rates in the sample were lower, while only 10 percent rose. The dollar cost reduction for the rates compared equates to about one million dollars over the period. Assuming the relationship holds constant over the remainder of the rates calculated in the period, a savings of $3.3 million could have been realized.

GUIDELINE RATE CHANGES UNDER AVERAGING METHOD COMPARISON OF HISTORICAL GUIDELINE RATES TO PROPOSAL

Year	Sample size	Preference revenue		Net savings	Direction of change	
		Original	Revised		Down	Up
1992	53	$82,929,000	$82,434,000	$495,000	5	4
1993	67	137,344,000	136,812,000	532,000	14	13
1994	36	50,607,000	50,607,000	0	0	0
1995	11	15,985,000	15,982,000	3,000	1	0
Total	167	286,865,000	285,835,000	1,030,000	20	17
Total percentage of change	.....	.....	.....	.....	12	10

The data for 1994 and 1995 also demonstrate how a bad market depresses the rates offered for preference cargoes. Even though rates calculated using the averaging method fell below the original guideline rate 60% of the time, actual fixture rates during that period were still below recalculated guidelines. This result is neither unexpected nor undesirable. In fact, it validates the category cost averaging method as being able to hold rates down in a very good market while not being responsible for pushing the rates to the level of a bad market. Even though reducing program costs is a goal of this proposed new method, it is important that rates still be fair to an efficient operator.

Federalism

The Maritime Administration has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612 and has determined that it would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Maritime Administration certifies that this regulation would not have a significant economic impact on a substantial number of small entities. There are approximately twenty-five vessel operators that participate in this program, none of which are small entities.

Environmental Assessment

This regulation does not significantly affect the environment. Accordingly, an Environmental Impact Statement is not required under the National Environmental Policy Act of 1969.

Paperwork Reduction Act

This proposed rulemaking reduces the current requirement for the collection of information. The Office of Management and Budget (OMB) has reviewed and approved the information collection and record keeping requirements (approval number 2133–0514) in the current rule under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD's) intentions to request extension of approval for three years of a currently approved information collection. Copies of this request can be obtained from the Office of Costs and Rates.

Title of Collection: Determination of Fair and Reasonable Rates for the Carriage of Bulk Preference Cargoes (46 CFR Part 382).

Type of Request: Extension of currently approved information collection.

OMB Control Number: 2133–0514.

Form Number: None.

Expiration Date of Approval: 9/30/97.

Summary of Collection of Information: Two different types of data are required: Vessel Operating Costs and Capital Costs—Part 382 requires U.S.-flag vessel Operators to submit this data to MARAD on an annual basis. The costs are used by MARAD in determining fair and reasonable guideline rates for the carriage of preference cargoes on U.S.-flag vessels. Voyage costs and voyage days—(Post Voyage Report)—This information is required to be filed by a U.S.-flag operator after the completion of a cargo preference voyage.

Need and Use of the Information: The information collected is used by MARAD to calculate fair and reasonable rates for U.S.-flag vessels engaged in the carriage of preference cargoes. If the information is not collected, the fair and reasonable rates could be inaccurate thus leading to a lack of adequate protection of the government's financial interest in obtaining the lowest possible U.S.-flag cost for shipping government cargoes.

Description of Respondents: U.S.-flag vessels are owned and operated by U.S. citizens under the U.S.-flag. The vessels

consist of tug/barges, dry bulk vessels, break bulk liner vessels, LASH, and tankers.

Annual Responses: 125 (total)—50 filings of vessel operating costs and capital costs from U.S. operators; 75 filings of Post Voyage Reports.

Annual Burden: 500 hours—This rule would not impose any unfunded mandates.

List of Subjects in 46 CFR Part 382

Agricultural commodities, Confidential business information, Government procurement, Loan programs—foreign relations, Maritime carriers, Reporting and recordkeeping requirements.

Accordingly, 46 CFR Chapter II is hereby proposed to be amended by revising Part 382, to read as follows:

PART 382—DETERMINATION OF FAIR AND REASONABLE RATES FOR THE CARRIAGE OF BULK AND PACKAGED PREFERENCE CARGOES ON U.S.-FLAG COMMERCIAL VESSELS

Sec.
382.1 Scope.
382.2 Data submission.
382.3 Determination of fair and reasonable rates.
382.4 Waiver.

Authority: 46 App. U.S.C. 1114, 1241(b); 49 CFR 1.66.

§ 382.1 Scope.

The regulations in this part prescribe the type of information that shall be submitted to the Maritime Administration (MARAD) by operators interested in carrying bulk and packaged preference cargoes, and the method for calculating fair and reasonable rates for the carriage of dry (including packaged) and liquid bulk preference cargoes on U.S.-flag commercial vessels, except vessels engaged in liner trades, as defined in 46 CFR 383.1, pursuant to section 901(b) of the Merchant Marine Act, 1936, as amended, 46 App. U.S.C. 1214(b).

§ 382.2 Data submission.

(a) *General.* The operators shall submit information, described in paragraphs (b) and (c) of this section, to the Director, Office of Costs and Rates, Maritime Administration, Washington, D.C. 20590. To the extent a vessel is time chartered, the operator shall also submit operating expenses for that vessel. All submissions shall be certified by the operators. A further review and certification by an independent Certified Public Accountant (CPA) is recommended. Submissions not certified by an independent CPA are subject to verification, at MARAD's discretion, by the Office of the Inspector General, Department of Transportation. MARAD's calculations of the fair and reasonable rates for U.S.-flag vessels shall be performed on the basis of cost data provided by the U.S.-flag vessel operator as specified herein. If a vessel operator fails to submit the required cost data, MARAD will not construct the guideline rate for the affected vessel, which may result in such vessel not being approved by the sponsoring Federal agency.

(b) *Required vessel information.* The following information shall be submitted not later than April 30, 1998, for calendar year 1997 and shall be updated not later than April 30 for each subsequent calendar year. In instances where a vessel has not previously participated in the carriage of cargoes described in § 382.1, the information shall be submitted not later than the same date as the offer for carriage of such cargoes is submitted to the sponsoring Federal agency, and/or its program participant, and/or its agent and/or program's agent, or freight forwarder.

(1) Vessel name and official number.

(2) Vessel DWT (summer) in metric tons.

(3) Date built, rebuilt and/or purchased.

(4) Normal operating speed.

(5) Daily fuel consumption at normal operating speed, in metric tons (U.S. gallons for tugs) and by type of fuel.

(6) Daily fuel consumption in port while pumping and standing, in metric tons (U.S. gallons for tugs), by type of fuel.

(7) Total capitalized vessel costs (list and date capitalized improvements separately), and applicable interest rates for indebtedness (where capital leases are involved, the operator shall report the imputed capitalized cost and imputed interest rate).

(8) Operating cost information, to be submitted in the format stipulated in 46 CFR 232.1, on Form MA–172, Schedule 301. Operators are encouraged to provide operating cost information for similar vessels that the operator considers substitutable within a category, as defined in § 382.3(a)(1), in the aggregate on a single schedule. Information shall be applicable to the most recently completed calendar year.

(9) Number of vessel operating days pertaining to data reported in paragraph (b)(8) of this section for the year ending December 31. For purposes of this part, an operating day is defined as any day on which a vessel or tug/barge unit is in a seaworthy condition, fully manned, and either in operation or standing ready to begin pending operations.

(c) *Required port and cargo handling information.* The port and cargo handling costs listed in this paragraph (c) shall be provided semi-annually for each cargo preference voyage terminated during the period. The report shall identify the vessel, cargo and tonnage, and round-trip voyage itinerary including dates of arrival and departure at port or ports of loading and discharge. The semi-annual periods are as follows:

Period/Due date

April 1–September 30—January 1
October 1–March 31—July 1

(1) *Port expenses.* Total expenses or fees, by port, for pilots, tugs, line handlers, wharfage, port charges, fresh water, lighthouse dues, quarantine service, customs charges, shifting expenses, and any other appropriate port expense.

(2) *Cargo expense.* Separately list expenses or fees for stevedores, elevators, equipment, and any other appropriate expenses.

(3) *Extra cargo expenses.* Separately list expenses or fees for vacuvators and/or cranes, lightering (indicate tons moved and cost per ton), grain-to-grain cleaning of holds or tanks, and any other appropriate expenses.

(4) *Canal expenses.* Total expenses or fees for agents, tolls (light or loaded), tugs, pilots, lock tenders and boats, and any other appropriate expenses. Indicate waiting time and time of passage.

(d) *Other requirements.* Unless otherwise provided, operators shall use generally accepted accounting principles and 46 CFR Part 232, Uniform Financial Reporting Requirements, for guidance in submitting cost data. Notwithstanding the general provisions in 46 CFR 232.2(c) for MARAD program participants, each operator shall submit cost data in the format that conforms with the accounting practices reflected in the operator's trial balance and, if audited statements are prepared, the audited financial statements. Data requirements stipulated in paragraph (b) of this section that are not included under those reporting instructions shall be submitted in a similar format. If the operator has already submitted to MARAD, for other purposes, any data required under paragraph (b) of this section, its submission need not be duplicated to satisfy the requirements of this part.

(e) *Presumption of confidentiality.* MARAD will initially presume that the material submitted in accordance with the requirements of this part is privileged or confidential within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4). In the

event of a subsequent request for any portion of that data under the FOIA, MARAD will inform the submitter of such request and allow the submitter the opportunity to comment. The submitter shall claim or reiterate its claim of confidentiality at that time by memorandum or letter, stating the basis for such assertion of exemption from disclosure, including, but not limited to, statutory and decisional authorities. The Freedom of Information Act Officer, or the Chief Counsel of MARAD, will inform the submitter of the intention to disclose any information claimed to be confidential, after the initial FOIA request, or after any appeal of MARAD's initial decision, respectively.

(Approved by the Office of Management and Budget under control number 2133–0514)

§ 382.3 Determination of fair and reasonable rate.

Fair and reasonable rates for the carriage of preference cargoes on U.S.-flag commercial vessels shall be determined as follows:

(a) *Operating cost component*—(1) *General.* An operating cost component for each category, based on average operating costs of participating vessels within a cargo size category, shall be determined, at least twice yearly, on the basis of operating cost data for the calendar year immediately preceding the current year that has been submitted in accordance with § 382.2. The operating cost component shall include all operating cost categories, as defined in 46 CFR 232.5, Form MA–172, Schedule 301, Operating Expenses. For purposes of these regulations, charter hire expenses are not considered operating costs. MARAD shall index such data yearly to the current period, utilizing the escalation factors for wage and nonwage costs used in escalating operating subsidy costs for the same period.

(2) *Fuel.* Fuel costs within each category shall be determined based on the average actual fuel consumptions, at sea and in port, and current fuel prices in effect at the time of the preference cargo voyage(s).

(3) *Vessel categories.* (i) Vessels shall be placed in categories by cargo deadweight capacities (CDWT), as follows:

Group I—under 8,000 CDWT
Group II—8,000—19,999 CDWT
Group III—20,000—34,999 CDWT
Group IV—35,000 CDWT and over

(ii) For purposes of paragraph (a)(3)(i) of this section, CDWT is defined as Summer DWT less five percent.

(b) *Capital component*—(1) *General.* An average capital cost component shall be constructed, at least twice yearly, consisting of vessel depreciation, interest, and return on equity.

(2) *Items included.* The capital cost component shall include:

(i) *Depreciation.* The owner's capitalized vessel costs, including capitalized improvements, shall be depreciated on a straight-line basis over a 20-year economic life, unless an owner purchased or reconstructed the vessel when its age was greater than 10 years old. To the extent a vessel is chartered or leased, the operator shall submit the capitalized cost and imputed interest rate. In the event these items are not furnished, MARAD will construct these amounts. When vessels more than 10 years old are acquired, a depreciation period of 10 years shall be used. Capitalized improvements made to vessels more than 10 years old shall be depreciated over a 10-year period. When vessels more than 10 years old are reconstructed, MARAD will determine the depreciation period.

(ii) *Interest.* The cost of debt shall be determined by applying the vessel owner's actual interest rate to the outstanding vessel indebtedness. MARAD shall assume that original vessel indebtedness is 75 percent of the owner's capitalized vessel cost, including capitalized improvements, and that annual principal payments are made in equal installments over the economic life of the vessel as determined in accordance with paragraph (b)(2)(i) of this section. Where an operator uses a variable interest rate, the operator's actual interest rate at the time of calculation of the average capital cost component shall be used. The ten-year Treasury bill (T-bill) rate plus one percent on the first business day of the year or the first business day on or after July 1 shall be used for operators without vessel debt and when the actual rate is unavailable.

(iii) *Return on equity.* The rate of return on equity shall be computed in the same manner as described in paragraph b)(3) of this section. For the purpose of determining equity, it shall be assumed that the vessel's constructed net book value, less outstanding constructed principal, is equity. The constructed net book value shall equal the owner's capitalized cost minus accumulated straight-line depreciation.

(3) *Return on working capital.* For each voyage a return on working capital shall be included as part of the capital cost element. Working capital shall equal the dollar amount necessary to cover 100 percent of the averaged operating costs and estimated voyage costs for the voyage. The rate of return shall be based on an average of the most recent return of stockholders' equity for a cross section of transportation companies, including maritime companies.

(4) *New vessel allowance.* Newly constructed vessels and vessels acquired during or before their fifth year of age will receive an additional allowance for acquisition capital as part of the capital cost element. For the first year following construction or acquisition by the operator, a daily amount equal to ten percent of capitalized acquisition costs, divided by 300 operating days, shall be included. This amount shall be reduced by one percent of capitalized acquisition costs each subsequent year. No allowance shall be included after the fifth year following construction or acquisition.

(5) *Voyage component.* The annual depreciation, interest, and return on equity shall be divided by 300 vessel operating days to yield the daily cost factors. Total voyage days shall be applied to the daily cost factors and totaled with the return on working capital and new vessel allowance for the voyage to determine the daily capital cost component.

(c) *Port and cargo handling cost component.* MARAD shall calculate an estimate of all port and cargo handling costs on the basis of the reported cargo tender terms. The port and cargo handling cost component shall be based on vessels in the category and the most current information available verified by information submitted in accordance with § 382.2(c), or as otherwise determined by MARAD, such as by analysis of independent data obtained from chartering agencies.

(d) *Brokerage and overhead component.* An allowance for broker's commission and overhead expenses of 8.5 percent shall be added to the sum of the operating cost component, the capital cost component, and the port and cargo handling cost component.

(e) *Determination of voyage days.* The following assumptions shall be made in determining the number of preference cargo voyage days:

(1) The voyage shall be round-trip with the return in ballast to a port or port range selected by MARAD as the most appropriate, unless the vessel is scrapped or sold after discharge of the preference cargo and does not return to the United States as a U.S.-flag vessel. In this event, only voyage days from the load port to the discharge port, including time allowed to discharge, shall be included.

(2) Cargo is loaded and discharged as per cargo tender terms interpreted in accordance with the ''International Rules For the Interpretation of Trade

Terms'' (INCOTERMS) published by the International Chamber of Commerce.

(3) Total loading and discharge time includes the addition of a factor to account for delays and days not worked.

(4) One extra port day is included at each anticipated bunkering port.

(5) An allowance shall be included for canal transits, when appropriate.

(6) Transit time shall be based on the average speed of vessels in the category plus an additional five percent to account for weather conditions.

(f) *Determination of cargo carried.* The amount of cargo tonnage and the category of costs used to calculate the rate shall be based on the tender offer or charter party terms. In instances when separate parcels of preference cargo are booked or considered for booking on the same vessel, whether under a single program or different programs, a guideline rate shall be provided based on the combined voyage.

(g) *Total rate.* The guideline rate shall be the total of the operating cost component, the capital cost component, the port and cargo handling cost component, and the broker's commission and overhead component. The fair and reasonable rate can be expressed as total voyage revenue or be divided by the amount of cargo to be carried, as prescribed in paragraph (f) of this section, and expressed as cost per ton, whichever MARAD deems most appropriate.

§ 382.4 Waiver.

In special circumstances and for good cause shown, the procedures prescribed in this part may be waived in keeping with the circumstances of the present, so long as the procedures adopted are consistent with the Act and with the intent of this part.

By Order of the Maritime Administrator.

Dated: February 24, 1997.

Joel C. Richard,

Secretary.

[FR Doc. 97–5017 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–81–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MM Docket No. 93–25] [FCC 97–24]

DBS Public Interest Rulemaking

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; additional comments sought.

SUMMARY: The Commission solicits updated comments in this proceeding to reflect changed circumstances in the DBS industry since the release in 1993 of the Notice of Proposed Rule Making to implement section 25 of the 1992 Cable Act. Among the issues on which the Commission seeks revised public comment are how sections 312(a)(7) and 315 of the Communications Act should be applied to DBS providers, how the requirement to reserve 4–7 percent of channel capacity for non-commercial programming should be implemented, and what public interest or other requirements, if any, should be imposed on DBS providers in addition to the minimum specified requirements.

DATES: Comments must be submitted on or before March 31, 1997. Replies must be submitted on or before April 30, 1997.

ADDRESSES: Federal Communications Commission, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: John Stern, International Bureau, (202) 418–0746 or Brian Carter, International Bureau, (202) 418–2119.

SUPPLEMENTARY INFORMATION:

1. Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (''1992 Cable Act'') added a new Section 335 to the Communications Act of 1934 that directed the Commission to initiate a rulemaking to impose public interest or other requirements for providing video programming on direct broadcast satellite (''DBS'') service providers. On March 2, 1993, the Commission released a Notice of Proposed Rule Making seeking comment on its proposals to implement the different provisions of section 25 (''DBS Public Interest NPRM'').[1] On September 16, 1993, after the Commission had received comments and reply comments in this proceeding, the United States District Court for the District of Columbia held that section 25 of the 1992 Cable Act was unconstitutional.[2] This ruling effectively froze the DBS Public Interest NPRM pending the Commission's appeal of the decision. Nearly three years later, on August 30, 1996, the United States Court of Appeals for the District of Columbia Circuit reversed the District Court and held that section 25 was constitutional.[3]

2. In light of the relatively long interval between release of the DBS Public Interest NPRM and the Court's recent decision upholding section 25, the Commission, by this public notice, seeks to update and refresh the record in this proceeding. The DBS industry has grown and changed dramatically over the last four years. Accordingly, the Commission requests new and revised comments on each of the issues raised in the DBS Public Interest Rulemaking and on any other issues relevant to implementation of section 25.

Section 25(a) of the 1992 Cable Act (47 U.S.C. 335(a)) states:

> The Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming. Any regulations prescribed pursuant to such rulemaking shall, at a minimum, apply the access to broadcast time requirement of section 312(a)(7) and the use of facilities requirements of section 315 to providers of direct broadcast satellite service providing video programming. Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.

3. With respect to this section of the statute we seek updated comments on issues that include but are not limited to the following: How should the requirements of sections 312(a)(7) and 315 of the Communications Act be applied to DBS providers?[4] What ''public interest or other requirements'', if any, should be imposed on DBS providers in addition to the minimum requirements described above? In the 1993 DBS Public Interest NPRM we tentatively proposed not to adopt additional public service requirements, based on ''the flexible regulatory approach taken for DBS and its early stage of development.''[5] Should the rapid deployment of the DBS industry over the last several years, including technological advances that may in the near future allow DBS providers to offer some local programming alter this conclusion? If so, how?

4. We also seek updated comments on how we should apply the separate requirements imposed by section 25(b) of the 1992 Cable Act. Section 25(b)(1) mandates that a DBS provider ''reserve a portion of its channel capacity, equal to not less than 4 percent nor more than

[1] 58 FR 12917 (Mar. 8, 1993); 8 FCC Rcd 1589 (1993).

[2] *Daniels Cablevision, Inc.* v. *United States,* 835 F. Supp. 1 (D.D.C. 1993).

[3] *Time Warner Entertainment Co., L.P.* v. *FCC,* 93 F.3d 957 (D.C. Cir. 1996); *petition for rehearing pending.*

[4] See *DBS Public Interest NPRM,* 8 FCC Rcd 1589 at ¶¶ 21–28.

[5] *Id.* at ¶ 29.

7 percent, exclusively for noncommercial programming of an educational or informational nature.'' Among the questions we asked in our NPRM on this section were whether, and if so how, we should define the term ''noncommercial'' programming.[6] Pursuant to section 25(b)(3), this channel capacity must be made available, to ''national educational programming suppliers, upon reasonable prices, terms, and conditions.'' What other entities, if any, must be afforded access to channel capacity under this provision?[7] How should the term ''reasonable prices, terms, and conditions'' be defined? How should these section 25(b) provisions be interpreted and implemented?[8]

5. Because DBS, as a satellite service, is likely to be delivered on a regional rather than national basis, we seek comment on the international ramifications of any public interest obligations we may adopt. Finally, we seek comment on any other issues relevant to the implementation of section 25.

6. Comments filed in response to this Public Notice should be filed on or before March 31, 1997 and replies should be filed on or before April 30, 1997. Commenters should note that while this Public Notice references the original docket number (MM Docket No. 93–25), this proceeding will be handled by the International Bureau. Copies of relevant documents can be obtained in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 2100 M Street, NW., Suite 140, Washington, DC 20037. For further information contact John Stern at (202) 418–0746 or Brian Carter at (202) 418–2119.

List of Subjects in 47 CFR Part 76

Equal employment opportunity, Reporting and recordkeeping requirements.

Federal Communications Commission.

William S. Caton,

Acting Secretary.

[FR Doc. 97–5090 Filed 2–27–97; 8:45 am]

BILLING CODE 6712–01–P

[6] *Id.* at ¶ 44.

[7] *Id.* at ¶ 43.

[8] *See Id.* at ¶¶ 37–51.

Notices

Federal Register
Vol. 62, No. 40
Friday, February 28, 1997

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Research, Education, and Economics

National Agricultural Research, Extension, Education, and Economics Advisory Board Meeting

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92–463), the United States Department of Agriculture announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

SUPPLEMENTARY INFORMATION: The Secretary of Agriculture has asked the National Agricultural Research, Extension, Education, and Economics Advisory Board to obtain Stakeholder input on the priority issues for agricultural research, extension, education, and economics, and to establish an ongoing line of communication to the diverse stakeholder groups. The Advisory Board, which represents 30 constituent categories, as specified in the Federal Agriculture Improvement and Reform Act of 1996 (Pub. L. 104–127, 110 Stat. 1156–1184), has scheduled a Stakeholder Symposium on March 25th in Washington, D.C. The Advisory Board has broadly defined ''stakeholder'' within the context of its activities as follows: ''any individual or group of individuals who have vested interested in, or are affected by, food and agricultural research, extension, education, and economics.''

Approximately 150 individuals will participate in the Stakeholder Symposium, which represents one of several meetings being planned throughout the country to address the USDA Research, Education, and Economics (REE) draft Strategic Plans.

The March 25th Stakeholder Symposium will focus on the content of the REE Strategic Plans (i.e., plans of Agricultural Research Service (ARS), Cooperative State Research, Education, and Extension Service (CSREES), Economic Research Service (ERS), the National Agricultural Statistics Service (NASS), and REE mission area) and how well these plans contribute to the cross-cutting goals:

(1) Agricultural System that is Highly Competitive in the Global Economy,

(2) Safe and Secure Food and Fiber System,

(3) Healthy, Well-Nourished Population,

(4) Greater Harmony Between Agriculture and the Environment, and

(5) Enhanced Economic Opportunity and Quality of Life for Americans.

Stakeholder input to the Strategic Plans will be organized around the following panel sessions: (a) Plant Systems; (b) Animal Systems; (c) Nutrition, Food Quality, and Health; (d) Natural Resources and Environment; (e) Processes and New Products; (f) Markets, Trade, and Policy; and (g) Human Capacity Building.

Each panelist will present a 10-minute formal statement on the Strategic Plans and how well they support the goals for USDA research, extension, education, and economics.

The general meeting of the Advisory Board will be held March 26–27, 1997. The meeting agenda includes: a report on the findings of the Stakeholder Symposium, a discussion of activities required under the FAIR Act of 1996, and the Board's recommendations for long-term agenda items. The Advisory Board will also begin discussions for its review and recommendations to the REE Implementation and Annual Performance Plans. The Advisory Board's Executive Committee and the REE Strategic Plan Working Group will provide progress reports to the Advisory Board. The membership of the newly formed agricultural facilities ''Strategic Planning Task Force'' will be announced. Invited speakers will provide the Advisory Board with an overview of the USDA National Research Initiative, USDA budget outlook, and farm concentration issues.

DATES: March 25, 1997, 8:15 a.m.–7:00 p.m.; March 26, 1997, 8:30 a.m.–5:30 p.m.; and March 27, 1997, 8:30 a.m.–4:00 p.m.

PLACE: Hotel Washington, Washington Room, 15th and Pennsylvania Avenue, NW, Washington, DC.

TYPE OF MEETING: Open to the public.

COMMENTS: The public may file written comments before or after the meeting with the contact person listed below.

FOR FURTHER INFORMATION CONTACT: Deborah Hanfman, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board, Research, Education, and Economics Advisory Board Office, Room 3918 South, U.S. Department of Agriculture, STOP: 2255, 1400 Independence Avenue, SW, Washington, DC 20250–2255. Telephone: 202–720–3684.

Done at Washington, D.C. this 21st day of February 1997.

Catherine E. Woteki,

Acting Under Secretary, Research, Education, and Economics.

[FR Doc. 97–4968 Filed 2–27–97; 8:45 am]

BILLING CODE 3410–22–M

Animal and Plant Health Inspection Service

[Docket No. 96–098–1]

Dupont Agricultural Products; Receipt of Petition for Determination of Nonregulated Status for Genetically Engineered Soybeans

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has received a petition from Dupont Agricultural Products seeking a determination of nonregulated status for soybeans designated as sublines G94–1, G94–19, and G168 derived from transformation event 260–05 that have been genetically engineered to produce high oleic acid oil. The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. In accordance with those regulations, we are soliciting public comments on whether these soybean sublines present a plant pest risk.

DATES: Written comments must be received on or before April 29, 1997.

ADDRESSES: Please send an original and three copies of your comments to

Docket No. 96–098–1, Regulatory Analysis and Development, PPD, APHIS, Suite 3C03, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 96–098–1. A copy of the petition and any comments received may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30p.m., Monday through Friday, except holidays. Persons wishing access to that room to inspect the petition or comments are asked to call in advance of visiting at (202) 690–2817.

FOR FURTHER INFORMATION CONTACT: Dr. Ved Malik, BSS, PPQ, APHIS, Suite 5B05, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–7612. To obtain a copy of the petition, contact Ms. Kay Peterson at (301) 734–7612; e-mail: mkpeterson@aphis.usda.gov.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.''

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for determination of nonregulated status must take and the information that must be included in the petition.

On January 8, 1997, APHIS received a petition (APHIS Petition No. 97–008–01p) from Dupont Agricultural Products (Dupont) of Wilmington, DE, requesting a determination of nonregulated status under 7 CFR part 340 for high oleic acid soybean sublines G94–1, G94–19, and G168 (sublines G94–1, G94–19, and G168) derived from transformation event 260–05. The Dupont petition states that the subject soybean sublines should not be regulated by APHIS because they do not present a plant pest risk.

As described in the petition, sublines G94–1, G94–19, and G168 have been genetically engineered to contain the GmFad 2–1 gene, which causes a coordinate silencing of itself and the endogenous GmFad 2–1 gene. Suppression of the GmFad 2–1 gene in developing soybeans prevents the addition of a second double bond to oleic acid, resulting in a greatly increased oleic acid content only in the seed. The resulting oil contains an abundance of monosaturated oleic acid (82–85%), a reduced concentration of polysaturated fatty acids, and lower palmitic acid content. While the subject soybean sublines also contain the GUS and Amp marker genes, tests indicate that these genes are not expressed in the transgenic soybean plants. The added genes were introduced into meristems of the elite soybean line A2396 by the particle bombardment method, and their expression is controlled in part by gene sequences derived from the plant pathogens *Agrobacterium tumefaciens* and cauliflower mosaic virus.

Dupont's soybean sublines G94–1, G94–19, and G168 are currently considered regulated articles under the regulations in 7 CFR part 340 because they contain gene sequences derived from plant pathogenic sources. The subject soybean sublines have been evaluated in field trials conducted since 1995 under APHIS notifications. In the process of reviewing these notifications for field trials, APHIS determined that the vectors and other elements were disarmed and that the trials, which were conducted under conditions of reproductive and physical containment or isolation, would not present a risk of plant pest introduction or dissemination.

In the Federal Plant Pest Act, as amended (7 U.S.C. 150aa *et seq.*), ''plant pest'' is defined as ''any living stage of: Any insects, mites, nematodes, slugs, snails, protozoa, or other invertebrate animals, bacteria, fungi, other parasitic plants or reproductive parts thereof, viruses, or any organisms similar to or allied with any of the foregoing, or any infectious substances, which can directly or indirectly injure or cause disease or damage in any plants or parts thereof, or any processed, manufactured or other products of plants.'' APHIS views this definition very broadly. The definition covers direct or indirect injury, disease, or damage not just to agricultural crops, but also to plants in general, for example, native species, as well as to organisms that may be beneficial to plants, for example, honeybees, rhizobia, etc.

The Food and Drug Administration (FDA) published a statement of policy on foods derived from new plant varieties in the Federal Register on May 29, 1992 (57 FR 22984–23005). The FDA statement of policy includes a discussion of the FDA's authority for ensuring food safety under the Federal Food, Drug and Cosmetic Act (21 U.S.C. 201 *et seq.*), and provides guidance to industry on the scientific considerations associated with the development of foods derived from new plant varieties, including those plants developed through the techniques of genetic engineering. Dupont has begun the consultative process with FDA on the subject soybean sublines.

In accordance with § 340.6(d) of the regulations, we are publishing this notice to inform the public that APHIS will accept written comments regarding the Petition for Determination of Nonregulated Status from any interested person for a period of 60 days from the date of this notice. The petition and any comments received are available for public review, and copies of the petition may be ordered (see the **ADDRESSES** section of this notice).

After the comment period closes, APHIS will review the data submitted by the petitioner, all written comments received during the comment period, and any other relevant information. Based on the available information, APHIS will furnish a response to the petitioner, either approving the petition in whole or in part, or denying the petition. APHIS will then publish a notice in the Federal Register announcing the regulatory status of Dupont's high oleic acid soybean sublines G94–1, G94–19, and G168 derived from transformation event 260–05 and the availability of APHIS' written decision.

Authority: 7 U.S.C. 150aa–150jj, 151–167, and 1622n; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.2(c).

Done in Washington, DC, this 24th day of February 1997.

Terry L. Medley,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 97–5023 Filed 2–27–97; 8:45 am]

BILLING CODE 3410–34–P

Forest Service

Central Zone Noxious Weed Control Project; Idaho Panhandle National Forests, Kootenai and Shoshone Counties, Idaho

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an Environmental Impact Statement.

SUMMARY: The USDA Forest Service will prepare an environmental impact statement (EIS) to disclose the potential

environmental effects of noxious weed treatment on the Fernan and Wallace Districts (Central Zone). Treatment sites would be at various locations across the zone and are within the Coeur d' Alene Basin Ecosystem, Wallace and Fernan Ranger Districts, Idaho Panhandle National Forests, Kootenai and Shoshone Counties, Idaho.

The proposed action to control populations of noxious and undesirable weeds is designed to prevent the spread of these weeds and promote the retention and health of native and/or desirable plants within this ecosystem. The proposed action would use an integrated pest management approach to control weeds. This approach includes mechanical, biological, cultural, and chemical control. Most treatment sites are located near or along forest roads, trails, or recreation sites.

The major species considered for control include spotted knapweed (*Centaurea maculosa*), orange hawkweed (*Hieracium aurantiacum*), meadow hawkweed (*Hieracium pratense*), dalmation toadflax (*Linaria dalmatica*), Canada thistle (*Cirsium arvense*), common St. Johnswort (*Hypercium perforatum*), hound's tongue (*Cynoglossum officinale*), rush skeletonweed (*Chondrilla juncea*), leafy spurge (*Euphorbia esula*) and purple loosestrife (*Lythrum salicaria*). Other species may include common tansy (*Tanacetum vulgare*), diffuse knapweed (*Centaurea diffusa*), yellow toadflax (*Linaria vulgaris*), ox-eye daisy (*Chrysanthemum leucanthemum*), sulphur cinquefoil (*Potentilla recta*), Viper's Bugloss (*Echium vulgare*), Russian knapweed (*Centaurea repens*), musk thistle (*Carduus nutans*), and bull thistle (*Cirsium vulgare*). New invader species which are unknown at this time to occur on the zone would be a high priority for control.

This project-level EIS will tier to the Idaho Panhandle National Forests Land and Resource Management Plan (Forest Plan) (USDA Forest Service, Idaho Panhandle National Forests, September 1987), and references the Idaho Panhandle National Forests Weed Pest Management EIS, (USDA Forest Service, Idaho Panhandle National Forests, October 1989); the Bonners Ferry Ranger District Noxious Weed Management Project Final EIS (USDA Forest Service, Idaho Panhandle National Forests, September 1995), the Priest Lake Noxious Weed Control Final EIS (USDA Forest Service, Idaho Panhandle National Forests, 1997) and the St. Joe Noxious Weed Draft EIS (USDA Forest Service, Idaho Panhandle National Forests, 1996).

DATES: Written comments and suggestions should be received no later than April 14, 1997.

ADDRESSES: Submit written comments and suggestions on the proposed management activities or requests to be placed on the project mailing list to Kristen Philbrook, Project Leader, Fernan Ranger District, 2502 E. Sherman Ave., Coeur d' Alene, ID 83814.

FOR FURTHER INFORMATION CONTACT: Kristen Philbrook, EIS Team Leader, Fernan Ranger Station, (208) 769–3000.

SUPPLEMENTARY INFORMATION: The primary purposes for weed control are as follows:

(1) Prevent or limit the spread of noxious weeds that displace native vegetation in the Coeur d' Alene ecosystem;

(2) Eliminate new invaders before they become established;

(3) Prevent or limit the spread of weeds into areas containing little or no infestation in order to promote the retention and health of native and/or desirable species;

(4) Reduce weed seed sources along travel routes;

(5) Comply with Federal and State laws regulating management of noxious weeds.

Approximately 60 treatment sites have been identified across the Wallace and Fernan Ranger Districts. Infestations that are discovered would be treated within the scope of the Final EIS and Record of Decision. The Forest Plan provides guidance for management activities within the potentially affected areas through its goals, objectives, standards and guidelines, and management-area direction. The Forest Plan directs that forest pests be managed by an integrated pest management approach. The decisions to be made are what action, if any, should be taken to control weeds in the Coeur d' Alene Ecosystem, where treatment should be applied, and what types of treatment(s) should be used.

The Forest Service will consider a range of alternatives. One of these will be the ''no action'' alternative in which none of the proposed treatment activities would be implemented. Additional alternatives will represent the range of control methods currently available for treatment of weeds.

Public participation in an important part of the analysis and will play an important role in developing the alternatives. The mailing list for public scoping will be developed from responses to this NOI, and to a Scoping Notice sent out to interested individuals, organizations and agencies. In addition, the public is encouraged to visit with Forest Service officials during the analysis and prior to the decision. The Forest Service will also be seeking information, comments, and assistance from Federal, State, and local agencies and other individuals or organizations who may be interested in or affected by the proposed actions. Comments from the public and other agencies will be used in preparation of the Draft EIS.

The draft environmental impact statement is expected to be filed with the Environmental Protection Agency (EPA) and available for public review in June, 1997, At that time, the EPA will publish a Notice of Availability of the draft environmental impact statement in the Federal Register. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the Federal Register.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions (*Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 553 (1978)). Also, environmental objections that could be raised at the draft environmental statement stage but that are not raised until after completion of the final environmental statement may be waived or dismissed by the courts (*City of Angoon* v. *Hodel,* 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc.* v. *Harris,* 490 F. Supp. 1334, 2338 (E.D. Wis. 1980)). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day scoping comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns regarding the proposed action, comments on the draft environmental impact statement should be specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the

Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

I am the responsible official for this environmental impact statement. My address is Fernan Ranger District, 2502 E. Sherman Ave. Coeur d' Alene, ID 83814.

Dated: February 18, 1997.

Susan Matthews,

District Ranger.

[FR Doc. 97–4979 Filed 2–27–97; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds to the Procurement List commodities and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: March 31, 1997.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: On June 28, 1996 and January 7, 1997, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (60 FR 33711 and 61 FR 964) of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodities and service and impact of the addition on the current or most recent contractors, the Committee has determined that the commodities and service listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and service to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and service.

3. The action will result in authorizing small entities to furnish the commodities and service to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the commodities and service proposed for addition to the Procurement List.

Accordingly, the following commodities and service are hereby added to the Procurement List:

Commodities

Stand, Office Machine
7110–01–136–1563
7110–00–601–9835
7110–00–601–9849
(Requirements for GSA Zone 1 only)

Service

Temporary Administrative/General Support Services for GSA Regions 1, 2, 3, 4, 5, 6, 8, 9, 10 and National Capitol Region
(Up to 50% of the Government's requirement)

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Beverly L. Milkman,

Executive Director.

[FR Doc. 97–5044 Filed 2–27–97; 8:45 am]

BILLING CODE 6353–01–P

Committee for Purchase From People Who Are Blind or Severely Disabled

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to Procurement List.

SUMMARY: The Committee has received proposals to add to the Procurement List services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

COMMENTS MUST BE RECEIVED ON OR BEFORE: March 31, 1997.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Crystal Square 3, Suite 403, 1735 Jefferson Davis Highway, Arlington, Virginia 22202–3461.

FOR FURTHER INFORMATION CONTACT: Beverly Milkman (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the services to the Government.

2. The action does not appear to have a severe economic impact on current contractors for the services.

3. The action will result in authorizing small entities to furnish the services to the Government.

4. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following services have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Janitorial/Custodial, Buildings 2186, 5115 and 5324, Fort Campbell, Kentucky
NPA: Progressive Directions, Inc., Clarksville, Tennessee

Library Services

Minot Air Force Base, North Dakota
NPA: Minot Vocational Adjustment Workshop, Inc., Minot, North Dakota

Mail and Messenger Service

Naval Facilities Engineering Command, Southern Division, Charleston, South Carolina
NPA: Goodwill Industries of Lower South Carolina, Inc., Charleston, South Carolina

Mailroom Operation

U.S. Customs Indianapolis Center, 6026 Lakeside Boulevard, Indianapolis, Indiana
NPA: Goodwill Industries of Central Indiana, Inc., Indianapolis, Indiana

Switchboard Operation

VA Medical Center and Administration Building 21, 3600 30th Street, Des Moines, Iowa

NPA: Goodwill Industries of Central Iowa, Des Moines, Iowa

Beverly L. Milkman,

Executive Director.

[FR Doc. 97–5045 Filed 2–27–97; 8:45 am]

BILLING CODE 6353–01–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting

AGENCY: U.S. Commission on Civil Rights.

DATE AND TIME: Friday, March 7, 1997, 8:00 a.m.

PLACE: Ramada Inn, 2700 U.S. 82 East, Greenville, Mississippi 38701.

STATUS:

AGENDA

I. Approval of Agenda
II. Approval of Minutes of February 14, 1997 Meeting
III. Announcements
IV. Staff Report
V. State Advisory Committee Appointments for Alabama, Colorado, Connecticut, Idaho, Kansas, Kentucky, Massachusetts, Minnesota, and New Jersey.
VI. Future Agenda Items

CONTACT PERSON FOR FURTHER INFORMATION: Barbara Brooks, Press and Communications (202) 376–8312.

Stephanie Y. Moore,

General Counsel.

[FR Doc. 97–5195 Filed 2–26–97; 2:35 p.m.]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.

Title: Broadwoven Fabrics (Gray) Average Weight and Width Study.

Form Number(s): MC22T.

Agency Approval Number: None.

Type of Request: New collection.

Burden: 945 hours.

Number of Respondents: 315.

Avg Hours Per Response: 3 hours.

Needs and Uses: The Census Bureau collects and publishes data quarterly on the production of broadwoven fabrics. Data is collected and published on the basis of square yardage produced by type of fabric. This study supplements the quarterly collection and gathers data every five years on the basis of linear yards and pounds produced. The Census Bureau conducts this survey as part of the 5-year census of manufactures. This survey provides conversion factors (from square yards to linear yards and pounds) which are used by industry and Government analysts to monitor the continuing changes in the weight and width of fabric. These factors provide a means of comparing fabric yardage produced to the volume of fiber consumed. The factors also help analysts follow changes in machinery used by the textile industry. Federal users of the survey data regularly include the Departments of Commerce, State, Labor, Treasury, and the U.S. Trade Representative under the aegis of the Committee for the Implementation of Textile Agreements (CITA). The interagency CITA uses the survey data to monitor potential market disruptions resulting from trade in gray broadwoven fabric. Additionally, the Department of Agriculture uses survey data to monitor trends affecting the demand for cotton, and the Department of Justice and the Federal Trade Commission for evaluation of anticompetitive impacts of mergers and acquisitions. Businesses and trade associations use the data to assess market trends and to project potential growth opportunities in broadwoven fabric.

Affected Public: Business or other for-profit.

Frequency: Every 5 years.

Respondent's Obligation: Mandatory.

Legal Authority: Title 13 USC, Sections 131, 193 and 224.

OMB Desk Officer: Jerry Coffey, (202) 395–7314.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482–3272, Department of Commerce, room 5312, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jerry Coffey, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: February 24, 1997.

Linda Engelmeier,

Departmental Forms Clearance Officer, Office of Management and Organization.

[FR Doc. 97–4958 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–07–P

Foreign-Trade Zones Board

[Docket 9–97]

Foreign-Trade Zone 21, Charleston, South Carolina; Application for Subzone Status, Bayer Corporation (Rubber Chemicals), Goose Creek, South Carolina

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the South Carolina State Ports Authority, grantee of FTZ 21, requesting special-purpose subzone status for the rubber chemicals manufacturing facility of Bayer Corporation (Bayer) in Goose Creek, South Carolina. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on February 18, 1997.

The Bayer Corporation is a subsidiary of the Bayer AG (Germany), a global manufacturer of health care and life science products, chemicals and imaging systems. Its Fibers, Organics and Rubber Division operates the Goose Creek rubber chemicals manufacturing facility. (Bayer has several other manufacturing facilities in Goose Creek, but they are not included in this request.)

Bayer's rubber chemicals manufacturing plant (100,000 sq.ft./4.4 acres) is located within the Bushy Park Industrial Complex, Highway 503 in Goose Creek (Berkeley County), South Carolina. The facility (60 employees) produces rubber chemicals used in the production of a variety of industrial rubber products including tires, hoses, belts, seals and gaskets. The main products currently manufactured at the plant are benzothiazyl-2-cyclohexylsulfenamide (CBS) and benzothiazyl-2-dicyclohexylsulfenamide (DCBS), rubber chemical accelerators; 2,2'Dibenzamido diphenyldisulfide (DBD), a peptizer used to improve the mixing performance of natural rubber; and N-(1,3-dimethyl-butyl)-N'-phenyl-p-phenylene diamine (6PPD), an antidegradant to prevent ozone damage. The Bayer facilities include a new state-of-the-art plant for the production of CBS and DCBS and expanded facilities for DBD production. Some 10 to 50 percent of production is exported.

Zone procedures would exempt Bayer from Customs duty payments on foreign materials used in production for export. On domestic shipments, the company would be able to choose the duty rates that apply to the finished products (duty-free to 15.1% + $0.017/kg) instead of the rates otherwise applicable to the

foreign materials. The HTSUS categories and duty rates for the finished products are as follows:

Product	HTSUS No.	Duty rate
DBD	2930.90.2600	duty-free.
6PPD	2921.59.8090	15.1% + $0.017/kg.
CBS	2934.20.8000	13.3% + $0.026/kg.
DCBS ...	2934.20.2500	duty-free.

The HTSUS categories and duty rates for the primary foreign-sourced inputs are as follows:

Input	HTSUS No.	Duty rate
Benzoyl chloride.	2916.32.2000	7.1%.
4ADPA	2921.51.5000	15.1% + $0.017/kg.
Sodium MBT.	2934.20.2000	10.7% + $0.006/kg.
Dicyclohe-xylamine.	2921.30.3000	13.7% + $0.026/kg.

Foreign materials account for some 20 to 40 percent of the value of the final products. The application indicates that the savings from zone procedures will help improve the international competitiveness of the Bayer plant and will help increase exports.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is April 29, 1997. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to May 14, 1997).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce Export Assistance Center, 81 Mary St., Charleston, South Carolina 29403

Office of the Executive Secretary, Foreign-Trade Zones Board, U.S. Department of Commerce, Room 3716, 14th & Pennsylvania Avenue, NW., Washington, DC 20230

Dated: February 21, 1997.

John J. Da Ponte, Jr.,

Executive Secretary.

[FR Doc. 97–5031 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–DS–P

International Trade Administration

[A–570–845, A–570–846]

Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Brian C. Smith or Michelle A. Frederick, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–1766 and (202) 482–0186, respectively.

THE APPLICABLE STATUTE: Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act) are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Rounds Agreements Act (URAA).

FINAL DETERMINATIONS: We determine that brake drums and brake rotors from the People's Republic of China (PRC) are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Act.

Case History

Since the amended preliminary determination in the brake drum investigation (Amended Preliminary Determination of Sales at Less Than Fair Value: Brake Drums from the People's Republic of China, 61 FR 60682 (November 29, 1996)), the following events have occurred:

The petitioner, the Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers, and all of the respondents [1] requested a hearing.

From October 1996 through January 1997, we verified the questionnaire responses of the selected respondents. In January 1997, we issued our verification reports.

Interested parties submitted additional information on surrogate values on January 9 and 10, 1997, for consideration in the final determinations. Also in January 1997, at the Department's request, we received revised computer tapes incorporating data corrections identified at the verifications from the following respondents: CAIEC, Dalian, Qingdao, Shenyang/Laizhou, Southwest, Xinchangyuan and Xinjiang.

The petitioner and all of the respondents submitted case briefs on January 21, 1997, and rebuttal briefs on January 27, 1997. The Department held a public hearing for these investigations on January 29, 1997.

Scope of the Investigations

The products covered by these two investigations are (1) certain brake drums and (2) certain brake rotors.

Brake Drums

Brake drums are made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake drums limit their use to the following types of motor vehicles: automobiles, all-terrain vehicles, vans and recreational vehicles under ''one ton and a half,'' and light trucks designated as ''one ton and a half.''

Finished brake drums are those that are ready for sale and installation without any further operations. Semi-finished drums are those on which the surface is not entirely smooth, and has undergone some drilling. Unfinished drums are those which have undergone some grinding or turning.

These brake drums are for motor vehicles, and do not contain in the casting a logo of an original equipment manufacturer (OEM) which produces vehicles sold in the United States (*e.g.*, General Motors, Ford, Chrysler, Honda, Toyota, Volvo). Brake drums covered in this investigation are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake drums that are made of gray cast iron, which contain a steel

[1] The respondents in the brake drums case are: (1) China North Industries Guangzhou Corporation (CNIGC); (2) Qingdao Metal, Minerals & Machinery Import & Export Corporation (Qingdao); (3) China National Machinery Import & Export Corporation (CMC); (4) Beijing Xinchangyuan Automobile Fittings Corporation, Ltd. (Xinchangyuan); and (5) Yantai Import/Export Corporation (Yantai).

The respondents in the brake rotors case are: China National Automotive Industry Import & Export Corporation (CAIEC), Shandong Laizhou CAPCO Industry (Laizhou CAPCO) and their U.S. affiliate CAPCO International USA (CAPCO USA)(collectively CAIEC/Laizhou CAPCO); CNIGC; China North Industries Dalian Corporation (Dalian); Shenyang Honbase Machinery Co., Ltd., Lai Zhou Luyuan Automobile Fitting Co., Ltd. (collectively Shenyang/Laizhou) and their U.S. affiliates MAT Automotive, Inc., and Midwest Air Technologies, Inc. (MAT); Southwest Technical Import & Export Corporation, Yangtze Machinery Corporation (collectively Southwest), and its U.S. affiliate MMB International, Inc. (MMB); China National Machinery and Equipment Import & Export (Xinjiang) Corporation, Ltd. (Xinjiang); and Yantai.

plate, but otherwise meet the above criteria.

Brake drums are classifiable under subheading 8708.39.5010 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and Customs purposes, our written description of the scope of this investigation is dispositive.

Brake Rotors:

Brake rotors are made of gray cast iron, whether finished, semifinished, or unfinished, ranging in diameter from 8 to 16 inches (20.32 to 40.64 centimeters) and in weight from 8 to 45 pounds (3.63 to 20.41 kilograms). The size parameters (weight and dimension) of the brake rotors limit their use to the following types of motor vehicles: automobiles, all-terrain vehicles, vans and recreational vehicles under ''one ton and a half,'' and light trucks designated as ''one ton and a half.''

Finished brake rotors are those that are ready for sale and installation without any further operations. Semi-finished rotors are those on which the surface is not entirely smooth, and has undergone some drilling. Unfinished rotors are those which have undergone some grinding or turning.

These brake rotors are for motor vehicles, and do not contain in the casting a logo of an original equipment manufacturer (OEM) which produces vehicles sold in the United States (*e.g.*, General Motors, Ford, Chrysler, Honda, Toyota, Volvo). Brake rotors covered in this investigation are not certified by OEM producers of vehicles sold in the United States. The scope also includes composite brake rotors that are made of gray cast iron, which contain a steel plate, but otherwise meet the above criteria.

Brake rotors are classifiable under subheading 8708.39.5010 of the HTSUS. Although the HTSUS subheading is provided for convenience and Customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigations

The period of these investigations (POI) comprises each exporter's two most recent fiscal quarters prior to the filing of the petition. For Southwest, the POI is June 1995–December 1995. For all other respondents, the POI is July 1995–December 1995.

Separate Rates

Each of the participating respondents in these investigations claim to be eligible for individual dumping margins. Of those, CAIEC/Laizhou CAPCO, CMC, CNIGC, Dalian, Qingdao, Southwest, Xinjiang and Yantai claim to be owned by ''all the people.''

The ownership structure of the remaining respondents is as follows:

(1) Shenyang/Laizhou are affiliated parties. Shenyang is owned entirely by GRI Honbase, a Hong Kong company which is U.S. owned. Laizhou is a joint venture between GRI Honbase and ''all the people.'' The share in Laizhou owned by ''all the people'' is a minority share.

(2) Xinchangyuan is a joint venture between a U.S. company and a PRC company, Beijing Changyuan Automotive Parts Factory. The PRC company is the majority shareholder and is owned by ''all the people.''

As stated in the Final Determination of Sales at Less than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585, 22586 (May 2, 1994) (Silicon Carbide) and in the Final Determination of Sales at Less than Fair Value: Furfuryl Alcohol from the People's Republic of China, 60 FR 22544 (May 8, 1995) (Furfuryl Alcohol), ownership of a company by ''all the people'' does not require the application of a single rate. Accordingly, each of these respondents is eligible for separate rate consideration.

To establish whether a firm is sufficiently independent from government control to be entitled to a separate rate, the Department analyzes each exporting entity under a test arising out of the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) (Sparklers) and amplified in Silicon Carbide. Under the separate rates criteria, the Department assigns separate rates in nonmarket economy cases only if the respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

1. Absence of De Jure Control

Each of the respondents has placed on the administrative record a number of documents to demonstrate absence of *de jure* control, including laws, regulations and provisions enacted by the State Council of the central government of the PRC. Each has also submitted documents which establish that brake drums and brake rotors are not included on the list of products that may be subject to central government export constraints. In addition, the respondents Xinchangyuan and Laizhou each submitted the ''Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures'' (April 13, 1988). The articles of this law authorize joint venture companies to make their own operational and managerial decisions.

In prior cases, the Department has analyzed the laws which the respondents have submitted in this record and found that they establish an absence of *de jure* control. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides With Rollers From the People's Republic of China, 60 FR 54472 (October 24, 1995) (Drawer Slides); see also Furfuryl Alcohol. We have no new information in these proceedings which would cause us to reconsider this determination.

However, as in previous cases, there is some evidence that the PRC central government enactments have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. (See Silicon Carbide and Furfuryl Alcohol.) Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

2. Absence of De Facto Control

The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the export prices are set by or subject to the approval of a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses (see Silicon Carbide and Furfuryl Alcohol). These factors are not necessarily exhaustive and other relevant indicia of government control may be considered.

CAIEC/Laizhou CAPCO, CMC, Qingdao, Shenyang/Laizhou, Southwest, Xinchangyuan, Xinjiang, and Yantai asserted, and we verified, the following: (1) They establish their own export prices; (2) they negotiate contracts, without guidance from any governmental entities or organizations; (3) they make their own personnel decisions; and (4) they retain the proceeds of their export sales, use profits according to their business needs and have the authority to sell their assets and to obtain loans. In addition, the questionnaire responses submitted by the above-referenced respondents

indicate company-specific pricing during the POI which does not suggest coordination among exporters. During the verification proceedings, Department officials viewed such evidence as sales documents, company correspondence, and bank statements. This information supports a finding that there is a *de facto* absence of government control of the export functions of these companies. Consequently, we have determined that these exporters have met the criteria for the application of separate rates.

CNIGC and Dalian also claimed separate rates and provided additional documentation at verification in support of their claims that there is a *de facto* absence of government control of the export functions of their companies. However, for the final determinations, we have denied these respondents separate rates. Since the preliminary determinations, we have collected additional information which indicates that CNIGC and Dalian are still branches of the national corporation, China North Industries Corporation (NORINCO), which is controlled by the PRC government (see Comment 1 for further discussion).

China-Wide Rate

U.S. import statistics indicate that the total quantity and value of U.S. imports of brake drums and brake rotors from the PRC is substantially greater than the total quantity and value of brake drums and brake rotors reported by all PRC companies that submitted responses in both the brake drums and brake rotors cases. Given these significant discrepancies, we have no choice but to conclude that not all exporters of PRC brake drums and brake rotors responded to our questionnaire. Accordingly, we are applying in each investigation a single antidumping deposit rate—the China-wide rate—to all exporters in the PRC (other than those named above and those exporters which cooperated with our investigations but which were not selected as respondents and received separate rates), based on our presumption that those respondents who failed to show that they are entitled to separate rates are under common control by the PRC government. See, e.g., Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026 (April 30, 1996) (Bicycles).

Facts Available

The China-wide antidumping rate is based on adverse facts available. Section 776(a)(2) of the Act provides that ''if an interested party or any other person—(A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority * * * shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.'

In addition, section 776(b) of the Act provides that, if the Department finds that an interested party ''has failed to cooperate by not acting to the best of its ability to comply with a request for information,'' the Department may use information that is adverse to the interests of that party as the facts otherwise available. The statute also provides that such an adverse inference may be based on secondary information, including information drawn from the petition.

When multiple companies are treated as a single enterprise, the enterprise must submit a complete, consolidated response. If it fails to do so, the Department may base the margin calculation for the enterprise on the facts available. Additionally, as discussed above, those PRC exporters that have not qualified for a separate rate have been treated as a single enterprise. Because some exporters of the single enterprise failed to respond to the Department's requests for information, that single enterprise is considered to have failed to cooperate to the best of its ability. Accordingly, consistent with section 776(b)(1) of the Act, we have applied in each investigation the higher of the applicable margin from the petition or the highest rate calculated for a respondent in each proceeding as total adverse facts available. In both cases, based on our comparison of the calculated margins for the other respondents in these proceedings to the estimated margins in the petitions, we have concluded that the petition is the most appropriate record information on which to form the basis for the China-wide rate in the brake drums and brake rotors investigations.

Section 776(c) of the Act provides that where the Department relies on ''secondary information,'' the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The Statement of Administrative Action (SAA), accompanying the URAA clarifies that the petition is ''secondary information.'' See SAA at 870. The SAA also clarifies that ''corroborate'' means to determine that the information used has probative value. *Id.* However, where corroboration is not practicable, the Department may use uncorroborated information.

In accordance with section 776(c) of the Act, we corroborate the margins in the petition to the extent practicable. The petitioner based export prices on prices charged by U.S. distributors of brake drums and brake rotors and deducted from these prices a distributor mark-up. We compared the starting prices used by the petitioner to prices derived from U.S. import statistics and found that the similarity to the import statistics corroborated the starting prices in the petition. See Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from South Africa, 61 FR 24271 (May 14, 1996). We found that the deduction for the distributor mark-up was sufficiently documented for purposes of corroboration by examining affidavits submitted by industry experts.

The normal value (NV) was based on factors of production employed by the petitioner to produce brake drums and brake rotors, and to the extent possible, surrogate factor values which were obtained from Indian publicly available information. When analyzing the petition, the Department examined and confirmed the accuracy of the NV data as provided in the petition by comparing the values used in the petition with values obtained from publicly available information collected in these and previous non-market economy (NME) investigations. However, in examining the factors which served as the basis for NVs calculated in the petition, the Department found that petitioner treated certain factory overhead items as direct materials. Therefore, we have recalculated NV in the petition by treating these items as part of factory overhead. In addition, we assigned an Indian surrogate value to one material for which a value based on a U.S. price was assigned previously in our NV calculations (See Margin Corroboration Memorandum from the team to Gary Taverman, dated February 12, 1997). Thus, the highest revised petition rate for brake drums is 86.02 percent. The highest revised petition rate for brake rotors is 43.32 percent.

Fair Value Comparisons

To determine if the brake drums and brake rotors from the PRC sold to the United States by the PRC exporters receiving separate rates were sold at less

than fair value, we compared the ''United States Price'' (USP) to NV, as specified in the ''United States Price'' and ''Normal Value'' sections of this notice.

United States Price

We based USP on export price (EP) in accordance with section 772(a) of the Act, when the brake drums or brake rotors were sold directly to the first unaffiliated purchaser in the United States prior to importation and when constructed export price (CEP) methodology was not otherwise appropriate. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI-wide weighted-average EPs to the factors of production.

Shenyang/Laizhou/MAT and Southwest/MMB both claimed that their sales are EP, not CEP, transactions and that the Department should treat their sales accordingly. However, the Department has determined that the sales of these two companies are CEP transactions (*see* Comment 14 for Shenyang/Laizhou/MAT and Comment 16 for Southwest/MMB).

We corrected the respondents' data for errors and minor omissions found at verification. For CMC, Xinjiang and Yantai, we calculated EP in accordance with our preliminary determinations. In addition, we made company-specific adjustments as follows:

1. CAIEC/Laizhou CAPCO

We calculated EP and CEP in accordance with our preliminary calculations, except that we (a) corrected credit expenses, inland freight, repacking, indirect selling expenses, and inventory carrying expenses; (b) removed credit returns from CAPCO's U.S. sales database; (c) recalculated commissions based on the verified commission rates; (d) revised brokerage and handling expenses; and (e) deducted from the U.S. price of certain sales an inspection charge based on information obtained at verification.

2. Qingdao

We calculated EP in accordance with our preliminary calculations except that we excluded U.S. sales of one product that was found to be outside the scope of the investigation.

3. Shenyang/Laizhou/MAT

We calculated EP and CEP in accordance with our preliminary calculations except that we have recalculated credit and indirect selling expenses based on information obtained at verification.

4. Southwest/MMB

We calculated EP and CEP in accordance with our preliminary calculations except that we have adjusted the gross unit price for certain U.S. sales where the price was incorrectly reported. We then recalculated the credit and indirect selling expenses to take into account revised prices.

5. Xinchangyuan

We calculated EP in accordance with our preliminary calculations except that we did not deduct foreign brokerage and handling expenses based on information derived at verification (see Comment 21 below). In addition, we excluded U.S. sales of three products that were found to be outside the scope of the investigation.

Normal Value

A. Factors of Production

In accordance with section 773(c) of the Act, we calculated NV based on factors of production reported by the factories in the PRC which produced brake drums and/or brake rotors for the exporters. Where an input was sourced from a market economy and paid for in market economy currency, we used the actual price paid for the input to calculate the factors-based NV in accordance with our practice. See *Lasko Metal Products* v. *United States*, 437 F. 3d 1442, 1443 (Fed. Cir. 1994). We valued the remaining factors using publicly available information from India where possible. Where appropriate Indian values were not available, we used publicly available information from Indonesia.

B. Factor Valuations

The selection of the surrogate values was based on the quality and contemporaneity of the data. Where possible, we attempted to value material inputs on the basis of tax-exclusive domestic prices. Where we were not able to rely on domestic prices, we used import prices to value factors. As appropriate, we adjusted input prices to make them delivered prices. For those values not contemporaneous with the POI, we adjusted for inflation using wholesale price indices or, in the case of labor rates, consumer price indices, published in the International Monetary Fund's International Financial Statistics. For a complete analysis of surrogate values, see the Preliminary Determinations Factors Memorandum, dated October 3, 1996, and the Final Determinations Factors Memorandum, (Final Factors Memorandum) dated February 24, 1997. We have noted changes to surrogate valuation since the preliminary determinations as follows:

To value unfinished castings used in producing rotors, we used a purchase price for unfinished castings contained in the 1995–96 financial report of the Indian producer, Jayaswals Neco Limited (Jayaswals), because only this producer's financial report contained a POI purchase value for unfinished castings used to produce brake rotors that are within the scope of our investigation (see Comment 15).

To value copper, copper powder, ferromanganese, ferrosilicon, other ferrosilicon, ferrochromium, manganese, limestone, lubrication oil, adhesive tape, corrugated cartons, nails, polyethylene, fiberboard, steel angles, steel stamp, steel straps, printed and unprinted labels, instruction sheets, wood brackets, wood pallets and wood crates, we used import prices for months contemporaneous with the POI for which such data were available from Monthly Statistics of the Foreign Trade of India (Monthly Statistics). Where submitted data encompassed part of the POI but also encompassed months outside the POI, we limited our use of such data to the portion contemporaneous with the POI.

To value pig iron, steel scrap and iron scrap, we used the input-specific prices contained in the 1995–96 financial report of the Indian producer, Shivaji Works Limited (Shivaji) because Shivaji produces goods which are in the same general category as the subject merchandise (*e.g.*, products similar to what the respondents produce) and because we find that the separate line-item values for pig iron, steel scrap and iron scrap contained in Shivaji's report are more specific than the prices for these same inputs contained in the Indian publication Steel Authority of India Limited (SAIL) or in Monthly Statistics (see Comment 7).

To value steel sheet, steel strip and steel wire rod, we used POI prices from SAIL and not from Monthly Statistics (see Comment 7).

To value scrap wood, we have used a price from a 1990 U.S. government publication, Marketing Opportunities for Social Forestry Produce in Uttar Pradesh, because the price is more specific to the input than the value previously obtained from Monthly Statistics.

We could not obtain a product-specific price from India to value lug nuts for PRC companies which purchased this input from non-market economies (NME). Therefore, we used Indonesian import data covering July through November 1995 from

Indonesian Foreign Trade Statistical Bulletin (see Bicycles).

To value barge rates, we relied on information from an August 1993 cable from the U.S. consulate in India. Since the preliminary determinations, the respondents submitted new prices for coke, ball bearings and LPG gas for consideration in the final determinations. However, we have continued to rely on the values assigned to these inputs in the preliminary determinations for our final determinations (see Comment 7 and Final Factors Memorandum for further discussion).

To value factory overhead, SG&A, and profit in the brake drums and brake rotors cases, we calculated a simple average using the financial reports of Jayaswals, Kalyani Brakes Limited (Kalyani), Krishna Engineering Works (Krishna), Nagpur Alloy Castings Limited (Nagpur), and Rico Auto Industries Limited (Rico) because these companies produced both brake drums and brake rotors within the scope of these investigations during the POI. We did not use the financial reports of Ennore Foundaries Limited (Ennore), Electrosteel Castings Limited (Electrosteel), Bhagwati Autocast Limited (Bhagwati), or Shivaji in the surrogate factory overhead, SG&A, and profit percentage calculations because there was no indication in the reports or any corroborating publicly available information showing that these companies produced brake drums or brake rotors within the scope of these investigations during the POI (see Comment 5).

Where appropriate, we have removed from the surrogate overhead and SG&A calculations the excise duty amount listed in the financial reports (see Bicycles, 61 FR 19039). We also made certain adjustments to the percentages calculated as a result of reclassifying expenses contained in the financial reports.

For the Indian companies, we treated the line item labeled ''stores and spares consumed'' as part of factory overhead where possible and not part of materials consumed because stores and spares are not direct materials consumed in the production process. Publicly available information examined in the preliminary determination indicates that Indian accounting practices require Indian companies to record molding inputs (*i.e.*, all types of sand, bentonite, lead powder, steel pellets (if used for sand cores or molding), coal powder and waste oil) under ''stores and spares consumed.'' Therefore, we are considering these molding inputs as indirect materials (*i.e.*, a part of factory overhead), and are not valuing them as materials. In addition to the molding materials mentioned above, based on our verification findings, we find that additional materials previously valued as direct inputs such as dextrin, parting spray, rust inhibitor, antirust, steel shot, cutting oil, cleaning agent, and dehydration oil, are in fact indirect materials not incorporated into the final product. Therefore, we have also considered these additional materials part of factory overhead (see Comment 8). We have continued to treat rustproofing oil, limestone and firewood as direct materials and valued them accordingly (see Comment 8).

We have considered the line item labeled ''raw materials consumed'' to include direct materials such as pig iron, steel scrap, and steel inputs, and non-steel direct inputs and not included them in factory overhead. The designation of these items is consistent with standard accounting procedures and recent determinations (see Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China, 61 FR 14062 (March 29, 1996) (PVA) and Bicycles). We based our factory overhead calculation on the cost of goods manufactured rather than on the cost of goods sold. We also included interest and/or financial expenses in the SG&A calculation. In addition, we only reduced interest and financial expenses by amounts for interest income if the Indian financial report noted that the income was short-term in nature (see Comment 6). Where a company did not distinguish interest income as a line item within total ''other income'' we used the relative ratio of interest income to total other income as reported for the Indian metals industry in the Reserve Bank of India Bulletin. (For a further discussion of other adjustments made, see Final Factors Memorandum).

Verification

As provided in section 782(i) of the Act, we verified the information submitted by all selected respondents for use in our final determinations. We used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by the respondents.

Critical Circumstances

Section 735(a)(3) of the Act provides that, in a final determination, the Department will determine whether:

(A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or

(ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales, and

(B) there have been massive imports of the subject merchandise over a relatively short period.

Because there is no history of dumping and material injury by reason of dumped imports for either brake drums or brake rotors, we conducted our analysis under section 735(a)(3)(A)(ii) of the Act (importer knowledge of dumping and material injury).

1. Importer Knowledge of Material Injury

Pursuant to the URAA, and in conformance with the WTO Antidumping Agreement, the statute now includes a provision requiring the Department to determine, when relying upon section 735(a)(3)(A)(ii) to determine whether critical circumstances exist, whether the importer knew or should have known that there would be material injury by reason of the less than fair value sales. In this respect, the preliminary finding of the International Trade Commission (ITC) is instructive, especially because the general public, including importers, is deemed to have notice of that finding as published in the Federal Register. Thus, the Department has determined that a preliminary ITC finding of a reasonable indication of present material injury to the U.S. industry, when coupled with massive imports and a high rate of dumping by a given exporter (see Importer Knowledge of Dumping section, below) permits the conclusion that importers of the subject merchandise from such exporters knew or should have known that such imports would cause injury to the domestic industry. When the ITC has preliminarily found no reasonable indication that a U.S. industry is experiencing present material injury by reason of the dumped subject merchandise, but only a threat of such injury, the Department has determined that it is not reasonable to conclude that an importer knew or should have known that its imports would cause material injury. (See Decision Memorandum Regarding Imputed Knowledge of Material Injury.)

Because the ITC preliminarily determined that there is no reasonable indication that the U.S. brake drums industry is experiencing present material injury, but only a reasonable indication of threat of material injury,

we find that the ''importer knowledge of material injury'' prong is not met with respect to brake drums. Therefore, we find that critical circumstances do not exist with respect to brake drums, and it is not necessary to examine the other critical circumstances criteria for this product. Because the ITC preliminarily determined that there is a reasonable indication that the U.S. brake rotors industry is, in contrast, experiencing present material injury, we determine that critical circumstances exist with respect to those exporters of brake rotors which we have determined are responsible for massive imports and high dumping margins, as described below.

2. Importer Knowledge of Dumping

In determining whether an importer knew or should have known that the exporter was selling the subject merchandise at less than fair value, the Department normally consider margins of 15 percent and 25 percent or more sufficient to impute knowledge of dumping for CEP sales and EP sales respectively.

Since the company-specific margins in the final determinations for brake drums and brake rotors are below 15 percent for CEP sales (with the exception of brake rotors sales made by Southwest) and below 25 percent for EP sales, we have not imputed importer knowledge of dumping and injury with respect to any firms except Southwest in the brake rotors investigation. Therefore, we have only analyzed the brake rotor shipment data of Southwest.

3. Massive Imports

When examining the volume and value of trade flow data, the Department typically compares the export volume for equal periods immediately preceding and following the filing of the petition. Pursuant to 19 CFR 353.16(f)(2), unless the imports in the comparison period have increased by at least 15 percent over the imports during the base period, we will not consider the imports to have been ''massive.'' In order to determine whether there have been massive imports of brake rotors for the companies for which we have determined that there is knowledge of dumping and material injury, we compared sales from August 1995 to February 1996 (the comparison period) to sales from March 1996 to September 1996 (the base period).

In determining whether imports have been ''massive,'' pursuant to 19 CFR 353.16(f), we will normally consider, in addition to the volume and value of imports, any seasonal trends affecting the merchandise and the share of domestic consumption accounted for by the imports. There is no indication on the record that brake rotors are a seasonal product. Also, we were unable to consider the share of U.S. consumption represented by the selected respondents, because we have insufficient information with regard to the selected respondents'' market share of domestic consumption. Based on our analysis of Southwest, we determine that the increase in imports was less than 15 percent with respect to that firm. Because imports from Southwest have not been massive, we determine that critical circumstances do not exist with respect to imports of subject merchandise from this company.

4. Unexamined Respondents/China-Wide Entity

As indicated in Preliminary Critical Circumstances Determinations, 61 FR 55269 (October 25, 1996), and in the Preliminary Determinations, 61 FR 53190 (October 10, 1996), the Department does not believe it is appropriate to find critical circumstances with respect to respondents whose individual data have not been analyzed due to the Department's own administrative constraints. Therefore, we do not consider critical circumstances to exist with regard to the non-analyzed cooperative respondents in the brake rotors case.

With respect to the China-wide entity, we are imputing knowledge of dumping, based on the China-wide dumping rate. As noted above, we have determined that importers knew or should have known that there would be material injury to the U.S. brake rotors industry based on the ITC's preliminary determination of a reasonable indication of present material injury for brake rotors. In the absence of shipment data for the China-wide entity, we have determined based on the facts available, and making the adverse inference permitted under section 776(b) of the Act because this entity did not provide an adequate response to our questionnaire, that there were massive imports of brake rotors. See Preliminary Critical Circumstances Determinations, 61 FR at 55269. Furthermore, we note that the record indicates a post filing surge in U.S. brake rotor imports from the PRC which is not accounted for by the cooperating respondents. Therefore, for the China-wide entity, we determine that critical circumstances exist with respect to imports of brake rotors.

5. Conclusion

With regard to brake rotors, we find that critical circumstances exist only for companies subject to the China-wide rate.

With regard to brake drums, we find that critical circumstances do not exist.

Interested Party Comments

General Comments

Comment 1: Separate Rates—CNIGC and Dalian

The petitioner maintains that there is sufficient evidence on the record to deny CNIGC and Dalian separate rates in these cases. It points out that these respondents failed to demonstrate at verification that they were (1) not part of NORINCO, a trading company which is monitored, if not controlled, by the PRC government; (2) not part of the NORINCO Group, an organization controlled by the People's Liberation Army (PLA); and (3) independent from the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), because they withheld all information concerning their relationship with MOFTEC. The petitioner further contends that the PRC government deliberately withheld information which might have revealed that CNIGC and Dalian were part of the NORINCO Group.

CNIGC and Dalian maintain that they demonstrated at verification the absence of both *de jure* and *de facto* government control over their export activities and that they have established through documentation that they are separate from NORINCO and are entitled to a separate rate. In addition, they argue that there is no information on the record that supports the claim that they are affiliated with the PRC government. Moreover, the two respondents contend that the PRC government did not fail to cooperate with the Department because they answered the Department's questions to the extent possible. However, if the Department decides that the PRC government was uncooperative, then they maintain that the Department cannot impute this lack of cooperation to CNIGC or Dalian. They cite to Notice of Court Decision; Exclusion From the Application of the Antidumping Duty Order, in Part; Termination of Administrative Review in Part; and Amended Final Determination: Certain Compact Ductile Iron Waterworks Fittings and Glands from the People's Republic of China, 60 FR 2078 (January 6, 1995) and Final Determination of Sales at Less Than Fair Value: Certain Helical Spring Lock Washers from the People's Republic or China, 58 FR 48833 (September 20, 1993) in support of their arguments.

DOC Position

The Department's NME separate rates policy is based upon a rebuttable presumption that NME entities operate under government control and do not merit separate rates. This presumption can only be overcome by a respondent's affirmative showing that it operates without *de jure* or *de facto* government control.

CNIGC and Dalian have met their affirmative evidentiary burden with respect to the Department's criteria of *de jure* control, insofar as they have provided copies of business licenses and applicable government statute granting them the right to operate as independent trading companies.

These two respondents have also provided evidence that purportedly demonstrates absence of *de facto* control. However, other evidence supports a conclusion that Dalian and CNIGC remain under the control of the national corporation, NORINCO. Dalian and CNIGC were, until 1988 and 1991, respectively, legal and operational subsidiaries of NORINCO. Although PRC law and regulations mandated the legal and operational separation of these branches from their parent, evidence on the record suggests that the two respondents have only partially severed their ties to NORINCO, and are still recognized in the PRC and overseas as branches of NORINCO.

At the Department's visit to NORINCO's Beijing office, we obtained a NORINCO brochure which identifies CNIGC and Dalian as branches of NORINCO. The brochure continued to be distributed to the public as of the time of verification in late 1996. See exhibit 3 of the NORINCO verification report, dated January 8, 1997. This is consistent with the verification finding that NORINCO still maintains an office within the headquarters of CNIGC. See CNIGC verification report dated January 8, 1997, at 6. It is also consistent with 1995 information obtained from the U.S. Department of Defense which states that ''Norinco Guangzhou [CNIGC] is a leading branch of NORINCO,'' and with a 1996 Company Intelligence International article indicating that CNIGC is a branch of NORINCO. Thus, it appears that the *de facto* relationship between government-controlled NORINCO and its branches, including Guangzhou and Dalian, has not been entirely severed.

We note that in the instant investigation, NORINCO has not made a claim of independence from government control. Furthermore, there is evidence on the record that NORINCO is controlled by the PRC government. See, *e.g.,* organizational chart submitted to the file on October 3, 1996, describing NORINCO as under the control of the PRC's State Council, and Foreign Broadcast Information Service reports.

In view of CNIGC's and Dalian's continuing ties to NORINCO, and in the absence of a showing that NORINCO is independent from government control, the two respondents fail to overcome the presumption of *de facto* government control. Thus, we have not assigned separate rates to these companies.

Comment 2: Treatment of Non-Selected Respondents

The petitioner maintains that the Department had sufficient resources to investigate all of the responding PRC companies in these investigations. The petitioner further states that the Department should, at a minimum, request shipment data from non-selected respondents in order to determine whether critical circumstances exist for those companies, especially since U.S. import statistics indicate that massive imports of one product type (*i.e.,* brake rotors) has occurred. The petitioner cites to Bicycles in support of its argument.

Eight respondents (*i.e.,* the ten respondents except for Shenyang/Laizhou and Southwest) (hereafter referred to as ''the eight respondents'') state that the Department's sampling methodology is not contrary to law. However, the eight respondents claim that the Department should not impute knowledge of likelihood of material injury to U.S. importers merely because of the existence of dumping, maintaining that there is no inherent causal relationship between dumping and injury. Therefore, the eight respondents argue that the Department should find critical circumstances exist only if it determines that importers knew or should have known that there was likely to be material injury because of sales of brake drums and brake rotors at less than fair value.

DOC Position

We disagree in part with the petitioner and the respondents. In accordance with section 777A(c)(2) of the Act, given our limited resources, we had to limit the number of respondents examined in these cases in order to lessen the administrative burden on the Department, and we did so by choosing the largest exporters to the United States (see Honey and Bicycles). As for requesting shipment data from the non-selected respondents which have cooperated in these investigations, we did not do so due to the Department's own administrative constraints, which limited our ability to examine questionnaire responses or request shipment data for analysis. With respect to importer knowledge of material injury by reason of sales at less than fair value, the Department's position has changed since the preliminary determination. This decision is now based on the ITC's preliminary determination, in conjunction with massive imports and a high level of dumping. (See ''Importer Knowledge of Material Injury'' section of this notice and Decision Memorandum from the team to Richard W. Moreland, dated February 24, 1997).

Comment 3: Facts Available

The petitioner argues that the Department should resort to facts available and deny all of the respondents separate rates. According to the petitioner, throughout these proceedings the respondents have submitted to the Department ''boiler plate'' answers in response to the antidumping questionnaire, significantly revised their responses during the course of the proceedings, and requested numerous extensions of time to submit their incorrect data. In addition, the petitioner claims that the Department found a large number of errors at verification for the respondents and lists both general and respondent-specific instances upon which the Department should base an adverse facts available determination (see the petitioner's January 21, 1997, case brief, at 13–20.)

The petitioner also contends that the Department should deny separate rates to the companies under investigation because they withheld information regarding their relationship with MOFTEC, and because it could not be determined from a meeting at the Ministry of Machinery Industry and letters sent to MOFTEC whether the respondents have any relationship with any level of the PRC government. The petitioner further urges the Department to assign the China-wide rate to all of the respondents, claiming that not doing so may cause a massive diversion of shipments of the subject merchandise between PRC companies, with exports being shifted to companies assigned lower rates.

The eight respondents first contend that the petitioner erroneously equates ''facts available'' with ''adverse assumptions.'' They argue that the Act has been amended so that the Department cannot automatically make an adverse inference when applying facts available, but rather must consider all evidence on the record in

determining whether adverse inferences are warranted.

The eight respondents and Southwest argue that there is no instance in these proceedings that would justify the Department resorting to adverse inferences or resorting to facts available. They state that (1) there were no instances in any of the verifications in which the Department was unable to verify particular information; (2) the errors described by petitioner often were adverse to the respondents; and (3) when the Department did find errors, the Department was able to obtain and verify the correct information. Moreover, they maintain that there is no evidence that they failed to cooperate by not acting to the best of their ability to comply with Departmental requests for information or that the errors discovered during verification undermined the validity of any responses.

With respect to separate rates, all of the respondents stated that they had made adequate showings of independence.

Respondent Shenyang/Laizhou states that the Department may use facts available in making its determination if necessary information is not on the record or if a respondent: (1) Withholds requested information, (2) fails to provide requested information by the deadlines for the submission of the information, or in the form and manner requested, (3) significantly impedes an investigation, or (4) provides unverifiable information. (See Section 776 of the Act). Information that is adverse to a respondent may be used by the Department when the respondent ''has failed to cooperate by not acting to the best of its ability to comply with a request for information.'' (See Section 776(b) of the Act). Shenyang/Laizhou notes that none of these conditions are present in its case and that although a few discrepancies were noted at verification, they were resolved during verification.

Furthermore, all respondents urge the Department to make those corrections to the corresponding databases which were brought to the attention of the Department prior to and during verification.

Lastly, all respondents address the list of verification errors noted by the petitioner as reason for facts available, arguing that while the Department verified every factor input, for those that were in error, the corrections were clerical and minor in nature. They further assert that with respect to the areas affected by these errors, there are alternative verified data on the record that allow for recalculation of the relevant factors.

DOC Position

We agree with all respondents that neither an across-the-board denial of separate rates nor an across-the-board recourse to ''total'' facts available is warranted in these investigations. First, regarding the petitioner's concern over the massive diversion of shipments of brake drums and rotors between exporters if the Department does not assign the China-wide rate to all exporters, the Department has established that the companies receiving separate rates in these investigations operate independently of each other and of government entities with respect to their exports of the subject merchandise. Thus, these respondents have been assigned rates based on their different cost and pricing structures. It would be a normal phenomenon that respondents with lower dumping margins would experience an increase in sales of the subject merchandise as a result of an increase in customers' demand for products with lower duty margins.

Second, we disagree with the petitioner that the other companies (*i.e.*, not including CNIGC and Dalian) in these investigations should be denied separate rates based on the facts available. The information submitted on the record by each of these companies, as well as the Department's verification findings, show that these respondents under investigation have met the qualifying criteria for separate rates (see ''Separate Rates'' section for further discussion). The records in these investigations affirmatively indicate the absence of *de jure* and *de facto* control by government entities over those responding companies' operations with respect to the products under investigation. In its verification, the Department found no evidence that these respondents are controlled by MOFTEC or the Ministry of Machinery Industry, or any level of the PRC government.

Third, we disagree with the petitioners depiction of the respondents'' ''numerous'' extension requests and errors. In this instance, the number of extensions granted was not extraordinary, nor did these extensions prevent the petitioner from commenting on the responses or the Department from making its preliminary determinations.

Lastly, with respect to the errors listed by the petitioner, a review of the respondents' response revisions indicates that such revisions were not unduly extensive. We do not believe that failure to initially submit an error-free response, or the correction of these errors, should result in the use of facts available because we found no basis to conclude that these errors affect the overall integrity of the response. Moreover, in an antidumping investigation, it is not unusual to encounter errors throughout the proceeding up to the commencement of verification.

As described in Ferrosilicon from Brazil: Final Results of Antidumping Duty Administrative Review, 61 FR 59407 (November 22, 1996), errors that are not substantial do not affect the integrity of the response. In addition, the errors in question do not warrant wholesale rejection of the reported data since all such deficiencies can be corrected using verified data on the record.

Comment 4: CEP Deductions and Circumstance-of-Sale (COS) Adjustments

Southwest argues that the Department should not make adjustments to CEP transactions for indirect selling expenses, credit and profit because making an adjustment to one side of the equation without making a comparable adjustment to the other results in an unfair calculation. Alternatively, Southwest suggests that if the Department makes these adjustments to the U.S. price then the Department should make similar adjustments to NV.

The petitioner states that section 772(c)(2)(D) of the Act requires the Department to reduce CEP by the selling expenses associated with economic activity in the United States, and that the Act provides no exception for cases involving NMEs. As for making COS adjustments, the petitioner states that section 773(a)(6)(C) of the Act does not require the Department to make COS adjustments to NV unless it has been established to the satisfaction of the administering authority that such adjustments are warranted.

DOC Position

We agree with the petitioner. Section 772(d)(1) of the Act requires the Department to reduce CEP by the selling expenses associated with economic activity in the United States (see SAA at 153, Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996), and Bicycles at 19031. Moreover, section 772(d)(3) of the Act requires us to make a deduction for profit associated with CEP selling expenses (see SAA at 154, and Bicycles, at 19032). As for COS adjustments to NV, given the imprecise nature of the information about direct and indirect selling expenses in the record in these cases (*e.g.*, the financial reports of

Indian producers), we have no basis to conclude that such adjustments are warranted in these cases (see Bicycles at 19031).

Comment 5: Indian Producer Financial Statements

The respondents, except for Southwest, argue that the Department should only use data from financial statements of Indian producers of brake drums and brake rotors to calculate factory overhead, SG&A and profit percentages in respective investigations. In addition, the respondents maintain that the Department should only consider using data from the financial statements of Ennore, Jayaswals, Kalyani, Krishna, Nagpur, and Rico because these Indian companies produce the subject merchandise. The respondents claim that the financial reports of Electrosteel and Shivaji should not be used to derive the percentages because neither company produces the subject merchandise. Alternatively, if the Department uses financial data from Shivaji's report, then the eight respondents claim that the Department must also use Electrosteel's financial data because both companies produce grey iron castings which are similar to the subject merchandise. The respondents cite to the Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products From the People's Republic of China, 62 FR 1708 (January 13, 1997) (Melamine), Notice of Final Determination of Sales at Less Than Fair Value: Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the Hungarian People's Republic, 52 FR 17428 (May 8, 1987), and Bicycles in support of their arguments.

The respondent Southwest maintains that all but Ennore's financial report should be used to calculate the percentages because there is no publicly available information indicating that Ennore produced the subject merchandise during the POI. It argues that a letter from Ennore (submitted on the record by other respondents) that stated that this company produces brake drum castings should be rejected as ''private information.''

The petitioner states that the Department should use the financial reports of Ennore, Jayaswals, Kalyani, Krishna, Nagpur, Rico and Shivaji to calculate percentages for both investigations and that the Department should calculate the percentages based on the petitioner's calculations of the data as shown in its case brief.

DOC Position

The Department disagrees with certain of the respondent's specific statements, while agreeing in general, that the companies selected for calculation of factory overhead, SG&A, and profit should reflect the Department's preference for ''the most product-specific information possible from the surrogate market'' as noted in Melamine. Based on publicly available information, we find that Jayaswals, Kalyani, Krishna, Nagpur and Rico produced both brake drums and brake rotors within the scope of these investigations and sold during the POI. Therefore, we are using these Indian producers' financial reports to calculate surrogate percentages for use in both investigations. We are not using the financial data of Electrosteel or Ennore because we have no publicly available information which indicates that these companies produced subject merchandise during the POI. Although the eight respondents submitted a letter from Ennore which stated that it produces brake drums, we have relied on publicly available information instead of the private correspondence as the basis for our decision because we normally prefer to rely on publicly available information and consider the contents of the correspondence files of a company, by nature, not to be publicly available information. We are not using Shivaji's financial report for these calculations because publicly available information, along with information from the U.S. consulate in India, establishes that Shivaji did not produce subject merchandise during the POI.

Comment 6: Adjustments to Indian Financial Reports' Data

The eight respondents argue that, when calculating SG&A, the Department should offset the interest and financial expenses by the amount of financial gains (*i.e.*, items such as ''operating income, miscellaneous receipts, miscellaneous income, and other interest income'') when calculating SG&A. They contend that adding the financial expenses to SG&A without reducing those amounts by any corresponding operating income results in imprecise and overstated selling expenses. They cite to the Notice of Final Results of Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice from Brazil (Orange Juice), 55 FR 26721 (June 29, 1990) (Comment 8) in which the Department offset financial expenses with short-term operating income.

The petitioner argues that the Department should not offset financial expenses against financial gains, citing *Bicycles*, and claims that section 773(a)(7) of the Act states that an offset to NV is only required upon sufficient showing that differences exist justifying the adjustment.

DOC Position

We agree with the respondents that we should offset interest expense by the amount of short-term interest income when calculating G&A, as in Orange Juice and in accordance with Departmental practice. However, we disagree that operating income or all of miscellaneous receipts should be in the offset. We do not include in our offset long-term interest income nor short-term income from activities such as rental. Thus, we reduced interest expenses by amounts for interest income for those items identified in the financial reports as being related to short-term interest, and utilized the April 1995 Indian Reserve Bank Bulletin to allocate a portion of ''other income'' or ''miscellaneous receipts'' as short-term interest income for those companies which did not specify a breakdown of their non-operating income.

The petitioner's reliance on section 773(a)(7) of the Act and Bicycles is misplaced. Section 773(a)(7) deals with level of trade adjustments. The comment in Bicycles to which the petitioner refers deals with a circumstance-of-sale (COS) adjustment. 61 FR at 19031 (Comment 1). This adjustment is not a COS adjustment but simply a reduction in the total amount of SG&A expenses based on short-term income received by the Indian producer.

Comment 7: Surrogate Values for Certain Material Inputs

The petitioner asserts that the Department should value pig iron, steel sheet, steel wire rod and steel scrap using POI import prices from the Indian publication Monthly Statistics rather than the POI domestic prices from the Indian publication SAIL or from the financial reports of certain Indian producers because the prices in Monthly Statistics are exclusive of taxes and duties whereas the prices in SAIL and in the financial reports are not. If the Department elects not to use pig iron prices from Monthly Statistics, then the petitioner urges the Department to use Indian Iron & Steel Company Limited (IISCO) prices rather than SAIL prices for the same reason noted above. The petitioner claims that the Department should not value ball bearing cups by using prices from Indian Customs Daily Lists provided by International Data Services (IDS) because IDS data is of

inferior quality and is therefore unreliable. For coke, the petitioner maintains that the article containing domestic prices submitted by all of the respondents on January 10, 1997, indicates that the prices are controlled by the Indian government and therefore should not be considered.

The eight respondents maintain that in past NME cases the Department has expressed a clear preference for using tax-exclusive domestic prices rather than import prices when valuing factors of production. In addition, they state that in previous NME cases, the Department has used SAIL data when the specificity of the steel product has been most important in valuing the factor. They cite to Drawer Slides and to the Notice of Final Results of Administrative Review: Certain Helical Spring Lock Washers from the People's Republic of China, 61 FR 41994, 41997 (August 13, 1996) in support of their argument. For ball bearing cups, the respondents maintain that the *IDS* data is publicly available information and is more specific to imports of ball bearing cups than the category of ''other ball/roller bearing parts'' listed in Monthly Statistics. For coke, they state that the data from Economic Times of Mumbai provide prices for coke which are contemporaneous with the POI and specific to Indian foundry industries.

DOC Position

We disagree in part with both the petitioner and the respondents. The fact that domestic prices may include taxes is not determinative when deciding which prices are preferable for use in valuing the factors of production. For pig iron, steel scrap and iron scrap, we find that the separated line item prices for each of these inputs in Shivaji's 1995–96 report are more specific than the prices contained in SAIL, Monthly Statistics or IISCO. Therefore, the prices in Shivaji's report are more reflective of prices paid for inputs used by domestic producers of castings (*i.e.*, products of the same general category as the subject merchandise). We have also removed, where possible, any taxes included in the prices obtained from Shivaji's report.

The Department normally prefers to use prices that are representative of prices in effect during the POI. For ball bearing cups, we find that the IDS data is less representative of prices in effect during the POI than the prices contained in Monthly Statistics because the IDS data, selected by the respondents, consist of a single transaction at a single port for a single customer and do not appear to be more product-specific than the Monthly Statistics data. Therefore, we have valued this input using prices from Monthly Statistics.

For coke, though the prices from Economic Times of Mumbai are POI prices, we find that these prices are clearly government administered. Since we have a POI coke value from Monthly Statistics in these investigations which is not government administered, we have used these prices to value this input.

Comment 8: Treatment of Indirect Materials

All of the respondents urge that, in calculating NV, the Department should continue to consider molding inputs as indirect materials and part of factory overhead, rather than as materials consumed. In addition, Southwest maintains that the Department should also treat dextrin, steel shot, antirust, cutting oil, cleaning agent, dehydrating oil, and rustproofing oil as indirect materials and part of factory overhead. In order for a material to be considered a direct material, Southwest argues that the material must be physically incorporated into the finished product, citing the Compendium of Statements and Standards published by the Institute of Chartered Accountants of India. Finally, Shenyang/Laizhou claims that limestone and firewood should be treated as indirect materials because they are not physically incorporated into the final product.

The petitioner did not comment on this issue.

DOC Position

We have continued to treat molding materials listed in the ''Factors of Production'' section of this notice as indirect materials because although these inputs are used to produce the subject merchandise, these inputs are not incorporated into the final product and are also categorized as ''stores and spares consumed'' based on Indian accounting standards. According to the Compendium of Statements and Standards, in order for a material to be considered as part of factory overhead, it must ''assist the manufacturing process, but * * * not enter physically into the composition of the finished product.'' We agree that dextrin, steel shot, antirust, cutting oil, cleaning agent and dehydrating oil are indirect materials and should be treated as part of factory overhead, because the function of these materials is to ''assist'' in the manufacturing process and do not enter physically into the composition of the finished product. With respect to rustproofing oil, we find that this input is a direct material because it is used as a packaging material. As for limestone and firewood, we find that limestone is a direct material which is consumed during the smelting process as flux (*i.e.*, a material resulting from the production process which removes undesirable substances, like sand, from the metal bath) and that firewood is an energy input used in the production process.

Comment 9: Surrogate Value for Rustproofing Oil

Southwest claims that if the Department treats rustproofing oil as a direct material, then the Department should value it using the value of lubrication oil because other respondents, such as CAIEC/Laizhou CAPCO, use rustproofing oil for the same process. Thus, the Department should use the same surrogate value for all respondents (*i.e.*, lubrication oil).

The petitioner did not comment on this issue.

DOC Position

We disagree with Southwest. We found at the verification of Southwest's factory that it used a rustproofing oil, not lubrication oil, to coat its finished brake rotors for packaging. In contrast, although we found that CAIEC/Laizhou CAPCO used an oil to protect its brake rotors before packaging, it is clear that CAIEC/Laizhou CAPCO uses lubrication oil and not rustproofing oil. However, given that we could not obtain a surrogate value for rustproofing oil, we have used the value of lubrication oil to value this input for all respondents.

Comment 10: Foreign Inland Freight

The eight respondents maintain that the Department should not deduct an amount for foreign inland freight from EP or CEP because that expense was incurred by the factories and not by the trading companies. According to these respondents, the original places of shipment were the seaports where the suppliers delivered the merchandise for shipment to the United States. Citing Notice of Final Results of Antidumping Duty Administrative Review: Titanium Sponge from the Russian Federation, 61 FR 58525 (November 15, 1996), (Titanium Sponge from Russia), they claim that the Department should consider the seaports from which the subject merchandise was shipped to be the original places of shipment and to deduct only the movement charges incurred in transporting the merchandise from the PRC to the U.S. customers from EP and CEP. Alternatively, they maintain that if the Department does deduct the foreign inland freight from the factories to the seaports from EP and CEP, then the

Department should, at a minimum, ensure that a similar amount is excluded from the overhead and selling expense ratios calculated for building normal value. They contend that if the overhead and selling expense ratios are derived from Indian producer financial statements wherein overhead and/or SG&A contain delivery expenses, the inclusion of such expenses in normal value with the simultaneous exclusion of such expenses from EP and CEP would constitute double-counting.

The petitioner did not comment on this issue.

DOC Position

The Department disagrees with the respondents'' implied conclusion that in these investigations, the cost of transporting the subject merchandise from the factory to the PRC port of exportation should be treated as a component of the factories'' total costs (*i.e.*, as a factor in the construction of normal value) instead of as a deduction from the price to the U.S. customer. While it is true that, in Titanium Sponge from Russia, the Department did not deduct factory-to-port movement charges from the U.S. starting price, and instead included ''in normal value an amount for the inland freight,'' the circumstances in that particular case were very different from those of the instant investigations. Our normal methodology is to strip all movement charges, including all foreign inland freight, from the U.S. price being compared to NME normal value based on factors of production. The facts in these instant investigations differ from those in Titanium from the Russian Federation, wherein (1) the subject merchandise produced in an NME country was sold to an exporter located in a market economy without knowledge on the part of the producer of the United States as the ultimate destination and (2) the exporter took physical possession of the subject merchandise. Since neither of these conditions apply to these instant investigations, the comparison to Titanium from the Russian Federation is misplaced, and the Department has followed its normal methodology.

The respondents in these investigations are either (1) PRC self-exporting producers, such as Xinchangyuan or (2) PRC trading companies, such as CMC, which purchased subject merchandise from PRC producers. We are therefore deducting the surrogate value for the cost of transporting the subject merchandise from the factories to the port of exportation from the U.S. price, whether EP or CEP, in keeping with our past practice. See Bicycles. As to the respondents'' claim that the overhead and/or SG&A rates applied in calculating normal value may already contain the cost of transporting the merchandise to the port as a selling expense, and that the deduction of foreign inland freight charges from the U.S. price constitutes a double-counting of expenses, we have ensured that any expense line-item which refers to ''freight,'' ''movement,'' ''carriage,'' or ''transportation'' of goods, as well as the portion of ''vehicle maintenance'' and ''vehicle depreciation'' expenses applicable to product delivery, have been removed from the total SG&A costs and total overhead costs contained in the financial statements of Indian companies used in calculating NV.

Comment 11: Use of Exchange Rates

The eight respondents maintain that when calculating the exchange rate used in converting Indian surrogate values into U.S. dollars, the Department should use the buying exchange rates for U.S. dollars contained in Federal Exchange Bulletin, because the issue here is not how many dollars it takes to purchase one Indian rupee, but rather how many rupees are required to purchase one U.S. dollar.

The petitioner argues that the Department should not reject its use of daily Indian rupee-U.S. dollar exchange rates from the Federal Reserve Bank of Chicago and argues that there is no merit in respondents' request for the Department to abandon the use of these exchange rates in favor of simple average rates in the Federal Exchange Bulletin.

DOC Position

We agree with the petitioner. Based on Policy Bulletin 96–1: Import Administration Exchange Rate Methodology, we have used daily noon buying rates to establish the Indian rupee exchange rates used in these investigations. The daily noon buying rates are based on the rates in New York for cable transfers, which are certified by the New York Federal Reserve Bank for customs purposes, as required by section 522 of the Act. This information has been downloaded from an electronic bulletin board maintained by the Chicago Federal Reserve Bank. (See ''Currency Conversion'' section of this notice for further discussion).

Comment 12: Currency Conversion

The eight respondents urge the Department to round to the nearest one-thousandth of a dollar when converting Indian rupee values to U.S. dollars, because rounding to the nearest one-hundredth of a dollar often can cause significant distortions.

The petitioner did not comment on this issue.

DOC Position

We disagree with the respondents. In converting values from Indian rupees to U.S. dollars, we have derived U.S. values and rounded those values to the nearest one-hundredth, not one-thousandth, of a dollar because we do not find their use to have a significant effect on the margins.

Company-Specific Issues

Qingdao

Comment 13: Calculation of Total Material Cost

The petitioner claims that the Department did not include the cost of wire rod scrap when it calculated the total material cost for each model in the factors of production database for Changzhi Automobile Parts Factory (Changzhi), Qingdao's supplier. The petitioner urges the Department to include this factor in its calculation of total material cost.

Changzhi states that the Department correctly did not separately value wire rod scrap.

DOC Position

We agree with the petitioner. We verified that Changzhi reported a separate factor amount for wire rod scrap in the factors of production database. Therefore, for the final determination, we have valued this factor accordingly.

Shenyang/Laizhou/MAT

Comment 14: EP vs. CEP Sales Classification

Shenyang/Laizhou maintains that the Department incorrectly classified U.S. sales made prior to importation through its U.S. affiliate, MAT, as CEP transactions, and requests that the sales be reclassified as EP transactions.

The petitioner maintains that the Department should continue to treat these sales as CEP transactions.

DOC Position

We agree with the petitioner that these sales are properly treated as CEP sales. With respect to EP sales, section 772 (a) of the Act states that:

> The term ''export price'' means 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 outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . .

Based on Department practice, we examine several criteria for determining whether sales made prior to importation through an affiliated sales agent to an unaffiliated customer in the United States are EP sales, including: (1) Whether the merchandise was shipped directly from the manufacturer to the unaffiliated U.S. customer; (2) whether the sales follow customary commercial channels between the parties involved; and (3) whether the function of the U.S. selling agent is limited to that of a ''processor of sales-related documentation'' and a ''communications link'' with the unrelated U.S. buyer. Where all criteria are met, the Department has regarded the routine selling functions of the exporter as ''merely having been relocated geographically from the country of exportation to the United States,'' and has determined the sales to be EP sales. Where all conditions are not met, the Department has classified the sales in question as CEP sales. See, e.g., Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany (LNPP from Germany), 61 FR 38166, 38174 (July 23, 1996).

In this case, the sales through MAT meet the first two criteria described above. However, with respect to the third criterion, the record evidence in this case indicates that MAT is not merely a processor of sales-related documentation nor a ministerial communication link between the factories and their unaffiliated customers. On the contrary, MAT is instrumental in determining the terms of sale. In the questionnaire responses and at verification, company officials repeatedly stated that the U.S.-based president of MAT and owner of the Shenyang and Laizhou factories is solely responsible for all production, distribution, and sales decisions. Indeed, the case brief submitted by Shenyang/Laizhou concedes that instructions regarding pricing are sent from MAT's office in the United States. See case brief at 20. We are not persuaded by the argument that the U.S.-based president of MAT directs sales activities in his role as owner of the factories rather than as president of MAT, nor by the argument that his U.S. sales activities are ''simply the consequence of (the U.S.-based president of MAT) being a U.S. citizen and resident.'' *Id.* The fact is that the U.S.-based president of MAT operationally controls both the factories and MAT from his U.S. office, with the result that MAT directs the factories, not the opposite. Therefore, the sales through MAT are properly classified as CEP sales.

Comment 15: Surrogate Value for Purchased Unfinished Castings

Shenyang/Laizhou argues that the Department should use Laizhou's casting-related factors of production to calculate a surrogate value for castings purchased by Shenyang from unaffiliated PRC suppliers because Laizhou's valued factors for castings are more reflective of Shenyang's costs for castings if it had produced the castings itself. Alternatively, the respondent argues that the Department should derive a casting value based on the financial statements of Indian casting producers Nagpur and Jayaswals. According to the respondent, these financial statements are the only sources on the record that provide data for purchases or consumption of unfinished gray cast iron castings by producers of brake rotors.

The petitioner maintains that the Department should not value castings using the Laizhou factors of production given that there is reliable public information on the record regarding the price of input castings in India. The petitioner requests that the Department continue to use the inventory value for castings in Shivaji's financial statements as it did in the preliminary determination.

DOC Position

We disagree with the respondent that the unfinished castings purchased by Shenyang should be valued using the casting-related factors of production reported by Laizhou because, in NME cases, we value a respondent's factors based on its actual production experience during the POI. In this case, Shenyang purchased its unfinished castings during the POI and did not produce them, and thus we have valued these factors accordingly (see Notice of Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China (PRC), 59 FR 66895, (Comments 4 and 5) (December 28, 1994). The Department values inputs purchased in an NME using surrogate values derived from publicly available information in a market economy of a similar stage of development. The record of this investigation includes financial statements of Indian producers of brake rotors which provide reliable surrogate values for the purchase price of input castings, and there is therefore no need to build up a casting purchase value using the factors of production reported by Laizhou.

In identifying appropriate Indian financial statements for valuation of castings, we have excluded the statements of producers which did not manufacture rotors during the POI, since castings for rotors may have significantly different prices from castings for other products. Also, we have sought data on purchases of castings from casting suppliers, since it is reasonable to assume that such castings are unfinished or at most semi-finished. We believe that purchased casting data are more reliable than casting inventoried values, which may reflect large quantities of finished castings, and also more reliable than casting consumption values, which may include large quantities of castings produced internally rather than purchased from outside suppliers. Given these criteria, the Jayaswals financial statements provide the only appropriate Indian surrogate value for unfinished castings on the record, and we have relied on that value. For a more extensive discussion of our valuation of unfinished castings, please refer to the final factors valuation memorandum.

Southwest/MMB

Comment 16: EP vs. CEP Sales Classification

The respondent maintains that sales made by its U.S. affiliate (MMB) should be considered EP and not CEP transactions because (1) the price of the merchandise is set by Southwest, not by MMB, prior to importation; (2) the customary commercial channel is to ship the merchandise directly to the customer; and (3) MMB maintains no inventory in the United States. Southwest cites to The Final Determination of Sales at Less Than Fair Value: Certain Stainless Steel Rod from France, 58 FR 68865 (December 29, 1993) (*Stainless Steel Rod*) in support of its argument.

The petitioner asserts that the Department should continue to treat these sales as CEP.

DOC Position

We disagree with Southwest. Our verification findings indicate that Southwest's sales through MMB were properly classified as CEP sales. When we requested at verification evidence that Southwest sets U.S. prices, rather than MMB, Southwest was only able to provide negotiation and sales correspondence for one customer purchase order (which covered an insufficient number of the total POI invoices of subject merchandise). Further, the only documentation Southwest provided at verification to

support its claim was documentation that it had been requested to prepare prior to verification. We find this failure to be significant, especially given that the respondent originally stated in its response that MMB is ''not a mere conduit of sales by Southwest'' and that MMB's salesman ''negotiates the final prices with MMB's customers.'' (see Southwest's supplementary sales response, dated August 27, 1996, at A–2). With regard to Southwest's reference to Stainless Steel Rod, we note that unlike the U.S. affiliate in that case, MMB's sales of brake rotors do not involve a situation in which the U.S. affiliate had no flexibility to set the price (*i.e.*, price is set by the parent company). Therefore, we find no compelling evidence in Southwest's responses or in our verification findings to treat these sales as EP sales.

Comment 17: Treatment of Bartered Scrap

The petitioner argues that no adjustment for bartered steel scrap should be made because the respondent did not provide a surrogate value to the Department.

Yangtze, Southwest's supplier, claims that the Department should grant it a credit for the scrap (*i.e.*, turnings and shavings) sold or bartered by it and that a surrogate value for steel scrap is already on the record.

DOC Position

We agree with Yangtze. It is Department practice to subtract the sales revenue of by-products such as steel scrap from the production costs of the subject merchandise (see Notice of Final Determination of Sales at Less Than Fair Value: Sebacic Acid from the People's Republic of China, 59 FR 28053 (May 31, 1994). Moreover, we have a surrogate value for steel scrap on the record. Therefore, we have granted Yangtze a credit for the turnings and shavings it sold or bartered during the POI.

Comment 18: Credit Expense

Southwest maintains that if credit expenses are deducted from CEP, then the Department should use the date of the U.S. affiliate's invoice and not the date when Southwest shipped the subject merchandise from the PRC.

The petitioner maintains that the Department should use the PRC date of shipment to calculate this expense.

DOC Position

We disagree with Southwest that the Department should use the date of the U.S. affiliate's invoice to calculate credit expenses. When merchandise produced by the foreign-based exporter's affiliated factory (Yangtze) is shipped from the factory through the foreign-based exporter (Southwest) and then directly to an unaffiliated U.S. customer without entering the inventory of a U.S. affiliate (MMB), then it is the Department's standard practice to calculate credit expenses based on the date of shipment from the factory to the U.S. customer. Therefore, we have based credit expenses for this respondent on the number of days between the date of shipment to the U.S. customer and the date of payment. See Final Determination of Sales at Less Than Fair Value: Hot-Rolled Carbon Steel Flat Products from Italy, 58 FR 37152 (July 9, 1993).

Comment 19: Misreported Weights for Unfinished Castings

The petitioner maintains that Yangtze incorrectly reported the weights for all of its unfinished casting models listed in the sales and factors of production databases, and the factors for those unfinished castings.

The respondent maintains that it did not misreport the weights of its unfinished castings in the factors of production database. The respondent argues that the Department should use the reported standard weights for unfinished castings rather than the actual weights because the reported weights are reflected in its accounting records and those weights were used to allocate raw materials used in making all castings (*i.e.*, unfinished castings and finished castings). Respondent further maintains that using the actual weights rather than the standard weights would be distortive because they overstate the constructed value for each unfinished casting. Respondent cites To Notice of Final Determination of Sales at Less Than Fair Value: Minivans from Japan, 57 FR 21937 (1992) in support of its argument.

DOC Position

We disagree with the respondent. At verification, we found that the difference in weight of an unfinished casting compared to a finished casting for the same model is large in magnitude. We know that using the standard weights for allocating inputs for unfinished castings from Yangtze's accounting records distorts the actual production costs of the subject merchandise. Using the standard weights will also undervalue the factors used to produce unfinished castings and distort the actual production cost of the brake rotors, because the standard weights are lower than the actual weights. Therefore, the reasons for using standard weights in the Minivans case do not apply in this case.

If we do not take into account the actual weight of the unfinished brake rotor, then we would not be considering that there is a yield loss between a finished and unfinished product. However, in actuality, the yield loss is not as high for an unfinished product as a finished product, and therefore, the cost allocations are inaccurate as reported. Yangtze has not offered any alternative allocation methodology to account for these distortions. Furthermore, Yangtze did not even realize that its reported weights for unfinished brake rotors were based on its standard accounting system until Department officials found that the weights for unfinished brake rotors were incorrectly reported at verification.

In sum, in light of the distortive effects which would result from using Yangtze's theoretical standard weights, which bear no resemblance to the actual weights of unfinished castings, we are using the actual weights as the basis for allocation for those castings.

Comment 20: Welfare Fund

The petitioner alleges that Southwest failed to establish an absence of *de facto* or *de jure* government control because verification demonstrated that Southwest places a portion of its profits in a fund called ''the public welfare fund'' and claims that this fund is set up for payment of profits to the PRC government. For these reasons, the petitioner urges the Department to resort to facts available and deny Southwest a separate rate.

Southwest maintains that the Department found at verification that ''the public welfare fund'' is an employee welfare fund retained by the respondent.

DOC Position

We disagree with the petitioner. Southwest, like all the other respondents, is required to maintain an accounting system based on current PRC accounting standards. Included in the standard chart of accounts is an account entitled ''public welfare fund.'' We examined the activity in this account during the POI and found that no payments were made to the PRC government. In addition, Southwest has demonstrated both a *de jure* and *de facto* absence of government control. (See ''Separate Rates'' section, above). Therefore, the Department sees no reason to deny Southwest a separate rate.

Yantai

Comment 21: Misreported Factors

The petitioner maintains that Laizhou Magnetic Iron Powder (MIP) Factory incorrectly reported its usage of five packing material factors for all models in the factors of production database. As a result of these errors, the petitioner urges the Department to resort to facts available for these materials.

Respondent maintains that the petitioner's request for use of facts available for Laizhou MIP's packing costs is misplaced. According to the respondent, of the six types of packing materials used by Laizhou MIP, the factory consistently and conservatively over-reported usage for five of the materials. For the sixth material, plastic bags, Laizhou MIP maintains that the magnitude of its under-reporting was less than one gram per bag.

DOC Position

We disagree for the most part with the petitioner's request that the Department utilize facts available in determining Laizhou MIP's usage of packing materials. For five of the six materials in question—cartons, nails, steel strap, pallet wood, and tape—the usages reported were found to be significantly overstated by the respondent. With respect to one packing material, plastic bags, the samples examined at verification indicate that Laizhou MIP did underreport usage by a relatively minor amount. We have corrected all of these usages using the verification findings as non-adverse facts available.

Currency Conversion

We made currency conversions into U.S. dollars based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Section 773A(a) of the Act directs the Department to convert foreign currencies based on the dollar exchange rate in effect on the date of sale of the subject merchandise, unless it is established that a currency transaction on forward markets is directly linked to an export sale. When a company demonstrates that a sale on forward markets is directly linked to a particular export sale, the Department will use the rate of exchange in the forward currency sale agreement.

Section 773A(a) also directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars unless the daily rate involves a fluctuation. It is the Department's practice to find that a fluctuation exists when the daily exchange rate differs from the benchmark rate by 2.25 percent. The benchmark is defined as the moving average of rates for the past 40 business days. When we determine a fluctuation to have existed, we substitute the benchmark rate for the daily rate, in accordance with established practice. Further, section 773A(b) directs the Department to allow a 60-day adjustment period when a currency has undergone a sustained movement. A sustained movement has occurred when the weekly average of actual daily rates exceeds the weekly average of benchmark rates by more than five percent for eight consecutive weeks. (For an explanation of this method, see Policy Bulletin 96–1: Currency Conversions, 61 FR 9434 (March 8, 1996).) Such an adjustment period is required only when a foreign currency is appreciating against the U.S. dollar. The use of an adjustment period was not warranted in this case because the Indian rupee did not undergo a sustained movement.

Continuation, and Termination in Part, of Suspension of Liquidation

Brake Drums

In accordance with section 735(c) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of brake drums from the PRC, except for the exporter/producer combinations listed below, that are entered, or withdrawn from warehouse, for consumption on or after October 10, 1996, which is the date of publication of our notice of preliminary determination in the Federal Register:

Exporter(s)	Producer(s)
CMC	Xinchangyuan
Qingdao	Changzhi
Xinchangyuan	Xinchangyuan
Yantai	Longkou Bohai; Laizhou MIP.

With respect to the above companies, the suspension of liquidation ordered on or after October 10, 1996, will be terminated and any cash deposit or bonds will be released.

Under the Department's NME methodology, the zero rate for each exporter is based on a comparison of the exporter's U.S. price and NV based on the factors of production of a specific producer (which may be a different party). Therefore, the exclusion of the above-mentioned companies from an antidumping duty order (should one be issued) applies only to subject merchandise sold through the exporter/producer combinations noted above. Merchandise that is sold by an above-mentioned exporter but manufactured by producers not noted above for that exporter will be subject to the order, if one is issued (see Notice of Final Determination of Sales At Less Than Fair Value: Cased Pencils from the People's Republic of China, 59 FR 55625 (November 8, 1994) and Drawer Slides). Entries of such merchandise will be subject to the ''China-wide'' rate.

For imports of brake drums that are sold by CAIEC/Laizhou CAPCO, Hebei Metals and Machinery Import & Export Corporation, Jiuyang Enterprise Corporation, Longjing Walking Tractor Works Foreign Trade Import & Export Corporation and Shanxi Machinery and Equipment Import & Export Corporation, we are directing the Customs Service to suspend liquidation at a rate indicated below.

As stated in the preliminary determination, it would be inappropriate to assign these fully cooperative respondents a rate based on ''facts available'' that would also apply to PRC exporters who refused to cooperate. However, for this final determination, all of the rates determined for the selected brake drum respondents were either zero or entirely based on facts available.

We note that the Act is silent with respect to a situation in an NME investigation in which all of the rates determined for the selected respondents are either zero, *de minimis* or based on facts available. However, section 735(c)(5)(B) of the Act, which deals with the analogous ''all others'' determination, allows us to ''use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.'' The SAA at 873 explicitly recognizes that if the latter approach ''results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.'' CNIGC, the only one of the five examined companies which did not receive a *de minimis* or zero rate, became subject to a rate based on facts available because it was found not to be entitled to a separate rate, rather than due to a failure to provide data on its sales practices. Furthermore, this company's volume of sales of brake drums to the U.S. market is one of the largest in the investigation. Given the unique circumstances of this case, we do not consider that a weighted-average which includes that company's adverse facts available rate is reasonably reflective of potential

dumping margins for cooperative non-investigated exporters or producers who submitted full questionnaire responses. Therefore, in order not to give undue weight to CNIGC in determining a rate for non-examined companies which is reasonably reflective of potential dumping margins, we have assigned to these companies a rate which is the *simple* average of the dumping margins determined for the exporters and producers individually investigated.

We are also directing the Customs Service to continue to suspend liquidation of entries sold by the PRC brake drum companies subject to the China-wide rate, that are entered, or withdrawn from warehouse, for consumption on or after October 10, 1996.

The Customs Service will require a cash deposit or posting of a bond equal to the estimated duty margins by which the normal value exceeds the USP, as shown below. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

BRAKE DRUMS

Manufacturer/Producer/Exporter	Weighted-average margin percentage
CMC/Xinchangyuan ..	0.00 (Excluded).
Qingdao/Changzhi	0.00 (Excluded).
Xinchangyuan/ Xinchangyuan.	0.00 (Excluded).
Yantai/Longkou Botai Machinery Company or Laizhou MIP.	0.00 (Excluded).
CAIEC/Laizhou CAPCO.	17.20.*
Hebei Metals and Machinery Import & Export Corporation.	17.20.*
Jiuyang Enterprise Corporation.	17.20.*
Longjing Walking Tractor Works Foreign Trade.	17.20.*
Import & Export Corporation Shanxi Machinery and Equipment Import & Export Corporation.	17.20.*
China-Wide Rate	86.02.

*Rate is based on the simple average of rates determined for the selected respondents.

Brake Rotors

In accordance with section 735(c) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of brake rotors from the PRC except for the exporter/producer combinations listed below, that are entered, or withdrawn from warehouse, for consumption on or after October 10, 1996:

Exporter(s)	Producer(s)
CAIEC or Laizhou CAPCO.	Laizhou CAPCO.
Shenyang or Laizhou	Shenyang or Laizhou.
Xinjiang	Zibo Botai Manufacturing Co., Ltd.

With respect to the above companies, the suspension of liquidation ordered on or after October 10, 1996, is to be terminated and any cash deposit or bonds are to be released. However, if any of the above-referenced companies sell subject merchandise which is not manufactured by the producers noted above for those companies, then those entries will be subject to the ''China-wide'' rate (for a full explanation, see the ''Brake Drums'' section above).

For imports of brake rotors that are sold by Hebei Metals and Machinery Import & Export Corporation, Jilin Provincial Machinery & Equipment Import & Export Corporation, Jiuyang Enterprise Corporation, Longjing Walking Tractor Works Foreign Trade Import & Export Corporation, Qingdao Metals, Minerals & Machinery Import & Export Corporation, Shanxi Machinery and Equipment Import & Export Corporation, Xianghe Zichen Casting Corporation and Yenhere Corporation, we have assigned these companies a weighted-average dumping margin based on the calculated margins of the selected brake rotors respondents, excluding margins which were zero, *de minimis* or based on facts available (*see* Preliminary Determinations).

Because we have determined that critical circumstances exist with respect to the PRC brake rotor companies which have received the China-wide rate, we are directing the Customs Service to continue to suspend liquidation of entries sold by these companies, that are entered, or withdrawn from warehouse, for consumption on or after July 12, 1996, which is 90 days prior to the date of publication of our notice of preliminary determination in the Federal Register.

The Customs Service will require a cash deposit or posting of a bond equal to the estimated duty margins by which the normal value exceeds the USP, as shown below. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

BRAKE ROTORS

Manufacturer/producer/exporter	Weighted-average margin percentage
CAIEC and Laizhou CAPCO/Laizhou CAPCO.	0.00 (Excluded).
Shenyang and Laizhou/Shenyang or Laizhou.	0.00 (Excluded).
Xinjiang/Zibo Botai Manufacturing Co. Ltd.	0.00 (Excluded).
Yantai Import & Export Corporation.	3.56.
Southwest Technical Import & Export Corporation, Yangtze Machinery Corporation, and MMB International, Inc.	16.35.
.....	
Hebei Metals and Machinery Import & Export Corporation.	8.63.*
Jilin Provincial Machinery & Equipment Import & Export Corp.	8.63.*
Jiuyang Enterprise Corporation.	8.63.*
Longjing Walking Tractor Works Foreign Trade Import & Export Corporation.	8.63.*
Qingdao Metals, Minerals & Machinery Import & Export Corp..	8.63.*
Shanxi Machinery and Equipment Import & Export Corporation.	8.63.*
Xianghe Zichen Casting Corporation.	8.63.*
Yenhere Corporation	8.63.*
China-Wide Rate	43.32.

*Rate is based on the weighted-average of calculated rates that are not zero or based on facts available.

China-Wide Rate

China-Wide Rates have been assigned to brake drums and brake rotors exporters based on the revised highest petition rates. The China-Wide rate applies to all entries of subject merchandise except for entries from exporters/factories that are identified individually above under each product type.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determinations. As our final determinations are affirmative, the ITC will determine, within 45 days, whether these imports are causing material injury, or threat of material injury, to an

industry in the United States. If the ITC determines that material injury, or threat of material injury, does not exist, for one or both proceedings, that proceeding or both proceedings will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist in both proceedings, the Department will issue antidumping duty orders directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

These determinations are published pursuant to section 735(d) of the Act.

Dated: February 24, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–5029 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–DS–P

[A–301–602]

Certain Fresh Cut Flowers From Colombia; Notice of Final Court Decision and Amended Final Results of Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final court decision and amended final results of administrative review.

SUMMARY: On September 28, 1995, the U.S. Court of Appeals for the Federal Circuit upheld the Department of Commerce's (the Department's) use of constructed value (CV) instead of third-country prices, for the purpose of determining foreign market value, and the Department's use of monthly average U.S. prices (USPs), instead of annual average USPs for the purpose of determining dumping margins. See *Floral Trade Council* v. *United States*, Slip Op., Ct. Nos. 94–1019, 94–1020 (Fed. Cir. Sept. 28, 1995). As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs Service to liquidate entries subject to this review.

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Mark Ross or Richard Rimlinger, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–4733.

SUPPLEMENTARY INFORMATION:

Background

On May 17, 1990, the Department published its final results of administrative review of certain fresh cut flowers from Colombia for the period March 1, 1988 through February 28, 1989. See Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Review, 55 FR 20491 (May 17, 1990). Subsequently, a domestic association and a number of reviewed companies filed lawsuits with the United States Court of International Trade (CIT) challenging the final results. Thereafter, the CIT issued an order and opinion, remanding several issues to the Department. See *Floral Trade Council* v. *United States*, 775 F. Supp. 1492 (CIT 1991). The CIT instructed the Department to: (1) Collect actual cost data from eleven companies for which the Department had not previously requested cost data for purpose of calculating CV; (2) make a credit adjustment to CV for five companies; (3) include street vendor sales in the inland freight calculation for Floral Ltda. Exportaciones Bochica; (4) adjust USP for Dianticola Colombiana to include revenues deposited by the firm's consignment agent into a United States bank on Dianticola Colombiana's behalf; (5) correct a clerical error concerning calculation of CV for Flores el Trentino, and (6) normalize costs to account for low yields suffered by Florandia/Herrera-Camacho. The Department filed its remand results on May 5, 1992.

On April 22, 1993, the CIT issued a second remand to the Department to allow preproduction expenses incurred by Flores Condor de Colombia to be amortized. See *Floral Trade Council* v. *United States*, Slip Op. 93–57 (CIT Apr. 23, 1993). The Department filed the results of this second remand on June 14, 1993. On July 22, 1993, the CIT rendered its final judgment. See *Floral Trade Council* v. *United States*, Slip Op. 93–135 (CIT July 23, 1993). Subsequently, appeals were filed by both domestic and foreign parties.

On September 28, 1995, the U.S. Court of Appeals for the Federal Circuit upheld the Department's use of CV, instead of third-country prices, for purpose of determining foreign market value, and the Department's use of monthly average USPs, instead of annual average USPs, for purpose of determining antidumping margins. See *Floral Trade Council* v. *United States*, Slip Op., Ct. Nos. 94–1019, 94–1020 (Fed. Cir. Sept. 28, 1995).

As there is now a final and conclusive court decision in this action, we are amending our final results of review in this matter and we will subsequently instruct the U.S. Customs Service to liquidate entries subject to this review.

Amendment to Final Result of Review

Pursuant to 19 U.S.C. 1516a(e), we are now amending the final results of administrative review for certain fresh cut flowers from Colombia for the period March 1, 1988 through February 28, 1989. The revised weighted-average margins are as follows:

Company	Margin (percent)
Agricola Los Arboles	0.38
Claveles Colombianos	0.20
Combiflor	0.19
Dianticola Colombiana	2.47
Floral Ltda./Exportaciones Bochica	0.13
Florania/Herrera-Camacho	12.51
Flores Bachue	7.97
Flores Colombianas	0.13
Flores Condor de Colombia	0.00
Flores dos Hectareas	3.90
Flores el Puente	0.70
Flores de Serrezuela	0.48
Flores el Trentino	6.53
Flores la Valvanera	8.71
Jardines del Muna	16.85
Pompones Limitada	0.11
Universal Flowers	0.53

The above rates affected the weighted-average sample group margin, which will be applied to the one hundred twenty-nine firms requested only by the domestic interested party and not selected in the random sample. The new sample group rate is 3.50 percent.

Accordingly, the Department will determine and the Customs Service will assess appropriate antidumping duties on entries of the subject merchandise made by firms covered by this review of the period March 1, 1988 through February 28, 1989. Individual differences between USP and foreign market value may vary from the percentages listed above. The Department will issue appraisement instructions directly to the Customs Service.

Dated: February 20, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–5033 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–DS–M

[A–588–005]

High Power Microwave Amplifiers and Components Thereof From Japan: Final Results of Changed-Circumstances Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce

ACTION: Notice of final results of changed-circumstances antidumping duty administrative review and revocation in part of antidumping duty order.

SUMMARY: On November 1, 1996, the Department of Commerce (the Department) initiated a changed circumstances antidumping administrative review of the antidumping duty order on high power microwave amplifiers (HPMAs) from Japan and issued the preliminary results of this review expressing an intent to revoke the order in part (61 FR 56512). We received no comments regarding the preliminary results. We are now revoking the order, in part, with regard to traveling wave tubes (TWTs) and klystron tubes, two components of HPMAs, based on the fact that this portion of the order is no longer of interest to domestic interested parties.

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla or Kris Campbell, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–3477.

SUPPLEMENTARY INFORMATION:

Background

On June 28, 1996, respondent NEC Corporation and NEC America, Inc. (NEC), requested that the Department conduct a changed-circumstances administrative review to determine whether to revoke the order partially with regard to TWTs and klystron tubes. In addition, on August 26, 1996, MCL Inc. (MCL), the petitioner in this proceeding, submitted a letter supporting NEC's request for a review and partial revocation of the order. On October 22, 1996, MCL submitted a letter requesting that the partial revocation be effective July 1, 1996.

We preliminarily determined that MCL's affirmative statement of no interest constitutes good cause for conducting a changed-circumstances review. Consequently, on November 1, 1996, we published a notice of initiation and preliminary results of changed-circumstances antidumping duty administrative review (61 FR 56512), in which we preliminarily determined to revoke this order in part. We gave interested parties an opportunity to comment on the preliminary results of this changed-circumstances review. We received no comments.

Scope of Review

The products covered by this changed-circumstances review are imports of TWTs and klystron tubes, which are components of HPMAs.

The products covered by the order are HPMAs and components thereof. High power microwave amplifiers are radio-frequency power amplifier assemblies, and components thereof, specifically designed for uplink transmission in C, X, and Ku bands from fixed earth stations to communications satellites and having a power output of one kilowatt or more. High power microwave amplifiers may be imported in subassembly form, as complete amplifiers, or as a component of higher level assemblies (generally earth stations). This merchandise is currently classifiable under item 8525.10.80 of the Harmonized Tariff Schedule (HTS). The HTS item number is provided for convenience and customs purposes. The written description remains dispositive.

Final Results of Review; Partial Revocation of Antidumping Duty Order

The lack of further interest by domestic interested parties constitutes changed circumstances sufficient to warrant partial revocation of this order. Therefore, we are partially revoking the order on HPMAs from Japan with regard to TWTs and klystron tubes, in accordance with sections 751(b) and (d) and 782(h) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 353.25 (d)(1). The revocation is effective as of July 1, 1996, consistent with MCL's request.

The Department will instruct the U.S. Customs Service (Customs) to proceed with liquidation, without regard to antidumping duties, of all unliquidated entries of TWTs and klystron tubes from Japan entered, or withdrawn from warehouse, for consumption on or after July 1, 1996, in accordance with 19 CFR 353.25(d)(5). The Department will further instruct Customs to refund with interest any estimated duties collected with respect to unliquidated entries of TWTs and klystron tubes entered, or withdrawn from warehouse, for consumption on or after July 1, 1996, in accordance with section 778 of the Act.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). 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 terms of an APO is a sanctionable violation.

This changed-circumstances administrative review, partial revocation of the antidumping duty order, and notice are in accordance with sections 751(b) and (d) and 782(h) of the Act and sections 353.22(f) and 353.25(d) of the Department's regulations.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

Dated: February 20, 1997.

[FR Doc. 97–5032 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–DS–P

Notice of Scope Rulings

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of scope rulings and anticircumvention inquiries.

SUMMARY: The Department of Commerce (the Department) hereby publishes a list of scope rulings and anticircumvention inquiries completed by Import Administration, between October 1, 1996, and December 31, 1996. In conjunction with this list, the Department is also publishing a list of pending requests for scope clarifications and anticircumvention inquiries. The Department intends to publish future lists within 30 days of the end of each quarter.

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Ronald M. Trentham, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230; telephone: (202) 482–4793.

Background

The Department's regulations (19 CFR 353.29(d)(8) and 355.29(d)(8)) provide that on a quarterly basis the Secretary will publish in the Federal Register a list of scope rulings completed within the last three months.

This notice lists scope rulings and anticircumvention inquiries completed by Import Administration, between October 1, 1996, and December 31, 1996, and pending scope clarification

and anticircumvention inquiry requests. The Department intends to publish in April 1997 a notice of scope rulings and anticircumvention inquiries completed between January 1, 1997, and March 31, 1997, as well as pending scope clarification and anticircumvention inquiry requests.

The following lists provide the country, case reference number, requester(s), and a brief description of either the ruling or product subject to the request.

I. Scope Rulings Completed Between October 1, 1996 and December 31, 1996

Country: United Kingdom

A–412–602 *Certain Forged Steel Crankshafts*
Clarkes Crankshaft Ltd.—Open die, hand forged steel crankshafts, produced in the United Kingdom, are outside the scope of order. 10/8/96.

Country: People's Republic of China

A–570–504 *Petroleum Wax Candles*
Mervyn's, Enesco Corporation, and Midwest of Cannon Falls—Cube or square shaped candles are within the scope of the order. 12/9/96.
Enesco Corporation—A disk shaped candle (style number 9540717) and holiday novelty candles (style numbers 9180966 and style 9540237) are outside the scope of the order. 11/8/96.
Midwest of Cannon Falls—Article number 16073–2 in the shape of a pillar is outside the scope of the order. A taper (article number 16057–2) and 3 pillar candles (article #s H061141, 16105–0 and 17257–5) are within the scope of the order. 11/8/96.
Russ Berrie Company, Inc.—Wax-filled terracotta heart shaped candles are within the scope of the order. 10/24/96.

A–570–808 *Chrome-Plated Lug Nuts*
Consolidated International Automotive, Inc.—Certain decorative nickel-plated lug nuts are within the scope of the order. 12/12/96.

Country: Taiwan

A–583–508 *Porcelain-on-Steel Cooking Ware*
Cost Plus, Inc.—10 piece porcelain-on-steel fondue set is within the scope of the order. 10/30/96.

A–583–810 *Chrome-Plated Lug Nuts*
Consolidated International Automotive, Inc.—Certain decorative nickel-plated lug nuts are within the scope of the order. 12/12/96.

A–583–824 *Polyvinyl Alcohol*
E.I. du Pont de Nemours & Co.—Polyvinyl alcohol produced with U.S. origin vinyl acetate monomer is within the scope of the order. 12/19/96.

Country: Japan

A–588–055 *Acrylic Sheet from Japan*
Sumitomo Chemical Co., Ltd.—Sumielec, an acrylic based antistatic, is outside the scope of the order. 10/23/96.

A–588–056 *Melamine*
Taiyo America, Inc.—Melamine with special physical characteristics (100% of the particles are smaller than 10 microns) is within the scope of the order. 10/9/96.

A–588–802 *3½'' Micro disks*
Certain web roll media are outside the scope of the order. 10/23/96.

A–588–810 *Mechanical Transfer Presses*
Combats Ltd.—Certain mechanical transfer press parts exported from Japan are outside the scope of the order. 10/1/96.

A–588–837 *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled*
Mawkish America Company, Limited—Components for presses not built or designed to print newspapers and which cannot manipulate a roll of paper more than two pages across, are outside the scope of the order. 10/28/96.

II. Anticircumvention Rulings Completed Between October 1, 1996 and December 31, 1996

None.

III. Scope Inquiries Terminated Between October 1, 1996 and December 31, 1996

Country: People's Republic of China

A–570–504 *Petroleum Wax Candles*
Cost Plus, Inc.—Clarification to determine whether certain ''beeswax candles'' are within the scope of the order. Scope inquiry terminated on 12/3/96.

Country: Korea

A–580–601 *Certain Stainless Steel Cookware from the Republic of Korea*
Peregrine Outfitters Inc.—Clarification to determine whether stainless steel cooking ware is within the scope of the order. Scope inquiry terminated on 12/9/96.

Country: Japan

A–588–824 *Gray Portland Cement and Clinker*
Surecrete, Inc.—Clarification to determine whether New Superfine Cement manufactured by Nittetsu Cement Co., Ltd., is within the scope of the order. Scope inquiry terminated on 11/14/96.

IV. Anticircumvention Inquiries Terminated Between October 1, 1996 and December 31, 1996

None.

V. Pending Scope Clarification Requests as of December 31, 1996

Country: Brazil

A–351–817; C–351–818 *Certain Cut-to-Length Carbon Steel Plate*
Wirth Limited—Clarification to determine whether profile slabs produced by Companhia Siderurgica de Tubarao and imported by Wirth Limited are within the scope of the order.

Country: Germany

A–428–801 *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof*
Enkotec Company, Inc.—Clarification to determine whether the ''main bearings'' imported for incorporation into Enkotec Rotary Nail Machines are slewing rings and, therefore, outside the scope of the order.

Country: Singapore

A–559–801 *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof*
Rockwell International Corporation—Clarification to determine whether an automotive component known as a cushion suspension unit (or cushion assembly unit or bearing assembly) is within the scope of the order.

Country: People's Republic of China

A–570–501 *Natural Bristle Paint Brushes and Brush Heads*
Kwick Clean and Green Ltd.—Clarification to determine whether a group of bristles held together at the base with glue, which are to be used as replacable parts within the cavity of the paintbrush body, is within the scope of the order.

A–570–504 *Petroleum Wax Candles*
Enesco Corporation—Clarification to determine whether a birthday candle (style # 9500340) is within the scope of the order.
Institutional Financing Services—Clarification to determine whether red/white candles packaged as peppermint candles are holiday novelty candles and, thus, outside the scope of the order.

Sun-It Corporation—Clarification to determine whether taper candles containing oil of citronella are within the scope of the order.

Ocean State Jobbers—Clarification to determine whether taper candles consisting of a blend of petroleum wax and beeswax are within the scope of the order.

Fritz Companies, Inc.—Clarification to determine whether a taper with a design depicting a painted ''Christmas scene'' of holly ivy and berries, item #416750, is within the scope of the order.

Hallmark Cards, Inc.—Clarification to determine whether the 399FMB5503 Formed Wax Peppermint Candy Candle is within the scope of the order.

A–570–808 *Chrome-Plated Lug Nuts*

Wheel Plus, Inc.—Clarification to determine whether imported zinc-plated lug nuts which are chrome-plated in the United States are within the scope of the order.

A–570–822 *Helical Spring Lock Washers (HSLWs)*

Shakeproof Industrial Products Division of Illinois Tool Works (SIP)—Clarification to determine whether HSLWs which are imported to the U.S. in an uncut, coil form are within the scope of the order.

Country: Taiwan

A–583–810 *Chrome-Plated Lug Nuts*

Wheel Plus, Inc.—Clarification to determine whether imported zinc-plated lug nuts which are then chrome-plated in the United States are within the scope of the order.

A–583–820 *Helical Spring Lock Washers (HSLWs)*

Shakeproof Industrial Products Division of Illinois Tool Works (SIP)—Clarification to determine whether HSLWs imported into the U.S. in an uncut, coil form are within the scope of the order.

Country: Japan

A–588–804 *Antifriction Bearings (Other Than Tapered Roller Bearings), and Parts Thereof*

Rockwell International Corporation—Clarification to determine whether an automotive component known as a cushion suspension unit (or cushion assembly unit or center bearing assembly) is within the scope of the order.

Koyo Seiko Co., Ltd.—Clarification to determine whether a cylindrical roller bearing, supposedly without a precision rating, for use as an axle bearing in cars and trucks, is within the scope of the orders.

A–588–807 *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured*

Honda Power Equipment Manufacturing Inc. (HPE)—Clarification to determine whether certain belts HPE imports from Japan for use in manufacturing lawn tractors and riding lawn mowers are within the scope of the order.

American Honda Motor Co., Inc.(AHM)—Clarification to determine whether certain v-belts imported from Japan by AHM are within the scope of the order.

A–588–813 *Light-Scattering Instruments and Parts Thereof from Japan*

Thermo Capillary Electrophoresis, Inc.—Clarification to determine whether diode array detectors and cell flow units are within the scope of the order.

A–588–824 *Corrosion Resistant Carbon Steel Flat Products*

Drive Automotive Industries—Clarification to determine whether 2000 millimeter wide, made to order, corrosion resistant carbon steel coils are within the scope of the order.

Country: Russia

A–821–803 *Titanium Sponge*

Waldron Pacific, Inc.—Clarification to determine whether titanium tablets produced by electrolytic reduction are within the scope of the order.

VI. Pending Anticircumvention Inquiries as of September 30, 1996

Country: Kore

A–580–008 *Color Television Receivers from Korea*

International Brotherhood of Electrical Workers, the International Union of Electronic Electrical, Salaried, Machine & Furniture Workers, and the Industrial Union Department (the Unions)—Anticircumvention inquiry to determine whether Samsung Electronics Co., L.G. Electronics Inc., and Daewoo Electronics Co., are circumventing the order by shipping Korean-origin color picture tubes, printed circuit boards, color television kits, chassis, and other materials, parts and components to plants operated by related parties in Mexico where the parts are then assembled in CTVs and shipped to the U.S. Additionally, an anticircumvention inquiry to determine whether Samsung by shipping Korean-origin color picture tubes and other CTV parts to a related party in Thailand for assembly into complete CTVs prior to exportation to the U.S. is circumventing the order.

Interested parties are invited to comment on the accuracy of the list of pending scope clarification requests. Any comments should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room B–099, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230.

Dated: February 21, 1997.

Joseph A. Spetrini,

Deputy Assistant Secretary, Enforcement Group III.

[FR Doc. 97–5030 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–DS–P

National Oceanic and Atmospheric Administration

[I.D. 022497C]

Endangered Species; Permits

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

ACTION: Receipt of applications for a scientific research permit (P770#72), modification 4 to research permit 900 (P770#66), and modification 2 to research permit 914 (P770#67).

SUMMARY: Notice is hereby given that the Coastal Zone and Estuarine Studies Division, Northwest Fisheries Science Center, NMFS in Seattle, WA (CZESD) has applied in due form for a permit and modifications to two permits authorizing takes of endangered and threatened species for scientific research purposes.

DATES: Written comments or requests for a public hearing on any of these applications must be received on or before March 31, 1997.

ADDRESSES: The applications and related documents are available for review in the following offices, by appointment:

Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3226 (301–713–1401); and

Environmental and Technical Services Division, 525 NE Oregon Street, Suite 500, Portland, OR 97232–4169 (503–230–5400).

Written comments or requests for a public hearing should be submitted to the Chief, Environmental and Technical Services Division, Portland.

SUPPLEMENTARY INFORMATION: CZESD requests a permit and modifications to two permits under the authority of section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing ESA-listed fish and wildlife permits (50 CFR parts 217–227).

CZESD (P770#72) requests a permit for takes of juvenile, threatened, naturally-produced and artificially-propagated, Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*); juvenile, threatened, Snake River fall chinook salmon (*Oncorhynchus tshawytscha*); and juvenile, endangered, Snake River sockeye salmon (*Oncorhynchus nerka*) associated with two juvenile fish bypass studies at McNary Dam on the Columbia River. Study 1 proposes an evaluation of vertical barrier screens and outlet flow-control devices. Study 2 proposes to establish design criteria for improved wet-separator efficiency and high-velocity flume development. Based on the results from these bypass studies, guidance devices and bypass system components can be redesigned, modified, or deployed using specific configurations to enhance juvenile fish passage at hydroelectric powerhouses and subsequently, a potential improvement in downstream survival and adult returns. ESA-listed juvenile fish are proposed to be captured, anesthetized, handled, allowed to recover from the anesthetic, and released. Indirect mortalities are also requested. The permit is requested to be valid in 1997 only.

For modification 4 to permit 900 (P770#66), CZESD requests to extend the duration of the take authorization for Study 8, the Trestle Bay habitat restoration study, through December 31, 1997. Although the authorization for takes of ESA-listed species associated with this study expired on December 31, 1996, permit 900 is not due to expire until December 31, 1998. No change in the type or number of ESA-listed species to be taken for the research is requested.

For modification 2 to permit 914 (P770#67), CZESD requests an increase in the take of juvenile, threatened, Snake River spring/summer chinook salmon (*Oncorhynchus tshawytscha*) associated with the evaluation of the effects of dissolved gas supersaturation on fish and invertebrates in Priest Rapids Reservoir and downstream from Bonneville Dam on the Columbia River and Ice Harbor Dam on the Snake River. A larger sample of ESA-listed juvenile fish is proposed to be captured, anesthetized, and examined for signs of gas bubble disease to evaluate the potential mortality of juvenile salmonids migrating through these river reaches. Associated indirect mortalities is also requested to be increased. Modification 2 to permit 914 is requested for the duration of the permit. Permit 914 expires on December 31, 1998.

Those individuals requesting a hearing on the request for a permit or any of the two permit modification requests should set out the specific reasons why a hearing would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the above application summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Dated: February 24, 1997.

Robert C. Ziobro,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97–5046 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–22–F

[I.D. 022497B]

Endangered Species; Permits

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

ACTION: Receipt of an application for modification 8 to enhancement permit 795 (P503A).

SUMMARY: Notice is hereby given that the Idaho Department of Fish and Game in Boise, ID (IDFG) has applied in due form for modification 8 to permit 795 authorizing takes of an endangered species for enhancement purposes.

DATES: Written comments or requests for a public hearing on the modification application must be received on or before April 29, 1997.

ADDRESSES: The application and related documents are available for review in the following offices, by appointment:

Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3226 (301–713–1401); and

Environmental and Technical Services Division, 525 NE Oregon Street, Suite 500, Portland, OR 97232–4169 (503–230–5400).

Written comments or requests for a public hearing should be submitted to the Chief, Environmental and Technical Services Division, Portland.

SUPPLEMENTARY INFORMATION: IDFG requests modification 8 to permit 795 under the authority of section 10 of the Endangered Species Act of 1973 (ESA) (16 U.S.C. 1531–1543) and the NMFS regulations governing ESA-listed fish and wildlife permits (50 CFR parts 217–227).

For modification 8 to permit 795, IDFG (P503A) requests to release juvenile, endangered, artificially-propagated, Snake River sockeye salmon (*Oncorhynchus nerka*) from their captive propagation program into Alturas Lake in 1997. The request is consistent with the recommendations of the Stanley Basin Sockeye Technical Oversight Committee. Currently, releases of juvenile sockeye salmon from the captive propagation program is authorized in Redfish and Pettit Lakes each year. Using a third lake for juvenile sockeye salmon releases will help offset stocking limitations brought on by the natural variability of zooplankton abundance and species composition, and increase the viability of the program by providing additional spawning and rearing habitat. IDFG also request an extension of permit 795 through December 31, 1997 so that the permit may coincide with the captive propagation program annual production cycle. Permit 795 is currently set to expire on July 31, 1997. The modification is requested for the duration of the permit.

Those individuals requesting a hearing on the permit modification request should set out the specific reasons why a hearing would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the above application summary are those of the applicant and do not necessarily reflect the views of NMFS.

Dated: February 24, 1997.

Robert C. Ziobro,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 97–5047 Filed 2–27–97; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF DEFENSE

Department of the Army

Armed Forces Epidemiological Board (AFEB)

AGENCY: Office of The Surgeon General.

ACTION: Notice of meeting.

SUMMARY: In accordance with section 10(a) (2) of Public Law 92–463, The Federal Advisory Committee Act, this

announces the forthcoming AFEB Meeting. The meeting will be held from 0800–1630, Thursday and Friday, April 10–11, 1997. The purpose of the meeting is to complete pending Board issues, introduce recruit training/ medical issues, and to conduct an executive working session. The meeting location will be at the U.S. Marine Corps Base, Parris Island, Beaufort, South Carolina. The meeting will be open to the public, but limited by space accommodations. Any interested person may attend, appear before or file statements with the committee at the time and in the manner permitted by the committee.

FOR FURTHER INFORMATION CONTACT: COL Vicky Fogelman, AFEB Executive Secretary, Armed Forces Epidemiological Board, Skyline Six, 5109 Leesburg Pike, Room 693, Falls Church, Virginia 22041–3258, (703) 681–8012/3.

SUPPLEMENTARY INFORMATION: None.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 97–4991 Filed 2–27–97; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER96–3105–000]

Boston Edison Company; Notice of Filing

February 24, 1997.

Take notice that on January 6, 1997, Boston Edison Company tendered for filing an amendment in the above-referenced docket.

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 March 3, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–4971 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ES97–23–000]

Constellation Energy Corporation; Notice of Application

February 24, 1997.

Take notice that on February 14, 1997, Constellation Energy Corporation filed an application, under § 204 of the Federal Power Act, seeking the following authorizations in connection with the proposed merger for which authority is being sought separately in Docket No. EC96–10–000:

(1) To issue short-term unsecured promissory notes, commercial paper notes, and/or medium-term notes, from time to time, in an aggregate principal amount of not more than $1 billion outstanding at any one time, on or before December 31, 1998 with maturities not more than 12 months after the date of issuance; and

(2) To assume existing short-term debt obligations of Baltimore Gas and Electric Company and Potomac Electric Power Company.

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 385.214). All such motions or protests should be filed on or before March 13, 1997. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–4974 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. QF81–7–005]

ESI Calistoga GP, Inc. and Caithness Geysers, Inc.; Notice of Amendment to Filing

February 24, 1997.

On February 21, 1997, ESI Calistoga GP, Inc. and Caithness Geysers, Inc. tendered for filing an amendment to its January 31, 1997, filing in this docket.

The amendment pertains to the ownership aspects and steam purchase agreement of the geothermal small power production facility. No determination has been made that the submittal constitutes a complete filing.

Any person desiring to be heard or objecting to the granting of qualifying status 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. All such motions or protests must be filed by March 7, 1997, and must be served on the applicants. 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 petition to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–4970 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–251–000]

Tennessee Gas Pipeline Company; Notice of Request Under Blanket Authorization

February 24, 1997.

Take notice that on February 18, 1997, Tennessee Gas Pipeline Company, P.O. Box 2511, Houston, Texas 77252, filed in Docket No. CP97–251–000, a request pursuant to Section 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 18 CFR 157.212) for authorization to modify an existing receipt point to include delivery capabilities for Bridgeline Gas Distribution L.L.C. (Bridgeline), an interstate pipeline company, under Tennessee's blanket certificate issued in Docket No. CP82–413–000, pursuant to 18 CFR Part 157, Subpart F of the Natural Gas Act, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Tennessee proposes to modify an existing point located on its system at approximately Mile Post 526A–2701–0.01 in Plaquemines Parish, Louisiana, to include delivery capabilities in order to effectuate the delivery of up to 5,000 dekatherms of natural gas per day for Bridgeline. It is stated that to establish

this bi-directional point Tennessee will install, own, operate and maintain a 4-inch restriction plate and electronic gas measurement and will inspect Bridgeline's installation of measurement facilities. It is further stated that Bridgeline will reimburse Tennessee for the cost of this project which is approximately $18,600.

Tennessee states that the service at the bi-directional point would be provided on an interruptible basis and that: (i) volumes delivered to Bridgeline after the modification of this receipt point would not exceed the total volumes authorized prior to this request to modify the receipt point; (ii) that establishing the proposed bi-directional point is not prohibited by Tennessee's existing tariff; and, (iii) that Tennessee has sufficient capacity to accomplish receipt and deliveries at the proposed point without detriment or disadvantage to its other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 97–4972 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP97–244–000]

Williams Natural Gas Company; Notice of Application

February 24, 1997.

Take notice that on February 13, 1997, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101 filed in Docket No. CP97–244–000, an application pursuant to Section 7(b) of the Natural Gas Act for an order granting permission and approval to abandon by reclamation a 4,250 horsepower skid-mounted compressor and appurtenant facilities at the Perry Compressor Station located in Noble County, Oklahoma, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, WNG seeks authority to abandon by reclaim the Perry turbine. WNG states that it will retain the station site since other facilities, which also will occupy the site, will remain in operation. WNG asserts that the cost of the proposed abandonment is $150,420 with an estimated salvage value of $1,309,303.

Any person desiring to be heard or to make any protest with reference to said application should on or before March 17, 1997, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for WNG to appear or be represented at the hearing.

Lois D. Cashell,

Secretary.

[FR Doc. 97–4983 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. ER96–2884–000, et al.];

Northeast Utilities Service Company, et al.; Electric Rate and Corporate Regulation Filings

February 24, 1997.

Take notice that the following filings have been made with the Commission:

1. Northeast Utilities Service Company

[Docket No. ER96–2884–000]

Take notice that on August 26, 1996, Northeast Utilities Service Company tendered for filing its summary of activity for the quarter ending June 30, 1996.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

2. Florida Power Corporation

[Docket No. ER96–2903–000]

Take notice that on February 11, 1997, Florida Power Corporation (''FPC'') tendered for filing a contract for the provision of interchange service between itself and PanEnergy Trading and Market Services, L.L.C. (''PanEnergy''). The contract provides for service under Schedule J, Negotiated Interchange Service and OS, Opportunity Sales.

FPC requests Commission waiver of the 60-day notice requirement in order to allow the contract to become effective as a rate schedule on February 12, 1997. Waiver is consistent with Commission policies because it will allow voluntary economic transactions to go forward.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

3. New York State Electric and Gas Corporation

[Docket No. ER96–3037–000]

Take notice that on February 14, 1997, New York State Electric and Gas Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

4. Midwest Energy, Inc.

[Docket No. ER97–638–000]

Take notice that on January 21, 1997, Midwest Energy, Inc. tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

5. UtiliCorp United, Inc.

[Docket No. ER97–667–000]

Take notice that on February 13, 1997, UtiliCorp United, Inc. tendered for filing further amendments to its filing in this docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

6. New England Power Company

[Docket No. ER97–855–000]

Take notice that on February 13, 1997, New England Power Company submitted an amendment to its filing in this docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

7. South Carolina Electric & Gas Company

[Docket No. ER97–947–000]

Take notice that on February 10, 1997, South Carolina Electric & Gas Company tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

8. Florida Power Corporation

[Docket No. ER97–1233–000]

Take notice that on February 10, 1997, Florida Power Corporation (''Florida Power'') tendered for filing an amendment to its filing of January 14, 1997, in Docket No. ER97–1233–000. The amendment requests Commission waiver of its notice requirement and requests an effective date of January 15, 1997, for agreements providing for the construction and operation of facilities for the City of Bartow, Florida.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

9. Central Hudson Gas & Electric Corporation

[Docket No. ER97–1289–000]

Take notice that on February 7, 1997, Central Hudson Gas & Electric Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

10. Central Hudson Gas & Electric Corporation

[Docket No. ER97–1290–000]

Take notice that on February 7, 1997, Central Hudson Gas & Electric Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

11. Central Hudson Gas & Electric Corporation

[Docket No. ER97–1291–000]

Take notice that on February 7, 1997, Central Hudson Gas & Electric Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

12. Central Hudson Gas & Electric Corporation

[Docket No. ER97–1292–000]

Take notice that on February 7, 1997, Central Hudson Gas & Electric Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

13. Central Hudson Gas & Electric Corporation

[Docket No. ER97–1293–000]

Take notice that on February 7, 1997, Central Hudson Gas & Electric Corporation tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

14. Baltimore Gas & Electric Company

[Docket No. ER97–1355–000]

Take notice that on February 14, 1997, Baltimore Gas & Electric Company tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

15. Montana Power Company

[Docket No. ER97–1474–000]

Take notice that on February 5, 1997, Montana Power Company tendered for filing an amendment in the above-referenced docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

16. Florida Power & Light Company

[Docket No. ER97–1588–000]

On February 10, 1997, Florida Power & Light Company, filed Service Agreements with Electric Clearinghouse, Inc., Federal Energy Sales, Inc., South Carolina Electric & Gas Company, TransCanada Energy Ltd., The Power Company of America, L.P., Utilities Commission, City of New Smyrna Beach, Florida, Enron Power Marketing, Inc., Jacksonville Electric Authority, Orlando Utilities Commission and City of Vero Beach, Florida for service pursuant to Tariff No. 1 for Sales of Power and Energy by Florida Power & Light. FPL requests that each Service Agreement be made effective on January 10, 1997.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

17. Pennsylvania Power & Light Company

[Docket No. ER97–1595–000]

Take notice that on February 10, 1997, Pennsylvania Power & Light Company (PP&L), filed a Service Agreement dated February 3, 1997, with Plum Street Energy Marketing, Inc. (Plum Street) under PP&L's FERC Electric Tariff, Original Volume No. 1. The Service Agreement adds Plum Street as an eligible customer under the Tariff.

PP&L requests an effective date of February 10, 1997, for the Service Agreement.

PP&L states that copies of this filing have been supplied to Plum Street and to the Pennsylvania Public Utility Commission.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

18. Pennsylvania Power & Light Company

[Docket No. ER97–1596–000]

Take notice that on February 10, 1997, Pennsylvania Power & Light Company (PP&L), filed a Service Agreement dated February 6, 1997 with Tosco Power, Inc. (Tosco) under PP&L's FERC Electric Tariff, Original Volume No. 1. The Service Agreement adds Tosco as an eligible customer under the Tariff.

PP&L requests an effective date of February 10, 1997, for the Service Agreement.

PP&L states that copies of this filing have been supplied to Tosco and to the Pennsylvania Public Utility Commission.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

19. Arizona Public Service Company

[Docket No. ER97–1597–000]

Take notice that on February 11, 1997, Arizona Public Service Company (APS), tendered for filing a Service Agreement to provide Non-Firm Point-to-Point Transmission Service under APS' Open Access Transmission Tariff filed in

Compliance with FERC Order No. 888 with UtiliCorp United Inc. (UtiliCorp), Illinova Power Marketing, Inc. (Illinova) and Citizens Lehman Power Sales (Citizens).

A copy of this filing has been served on UtiliCorp, Illinova, Citizens and the Arizona Corporation Commission.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

20. Illinois Power Company

[Docket No. ER97–1598–000]

Take notice that on February 10, 1997, Illinois Power Company (''Illinois Power''), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing a Power Sales Tariff, Service Agreement under which Northern Indiana Public Service Company will take service under Illinois Power Company's Power Sales Tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Illinois Power has requested an effective date of February 1, 1997.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

21. Illinois Power Company

[Docket No. ER97–1599–000]

Take notice that on February 10, 1997, Illinois Power Company (''Illinois Power''), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing a Power Sales Tariff, Service Agreement under which CNG Power Services Corporation will take service under Illinois Power Company's Power Sales Tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Illinois Power has requested an effective date of February 1, 1997.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

22. Illinois Power Company

[Docket No. ER97–1600–000]

Take notice that on February 10, 1997, Illinois Power Company (''Illinois Power''), 500 South 27th Street, Decatur, Illinois 62526, tendered for filing a Power Sales Tariff, Service Agreement under which WPS Energy Services, Inc. will take service under Illinois Power Company's Power Sales Tariff. The agreements are based on the Form of Service Agreement in Illinois Power's tariff.

Illinois Power has requested an effective date of February 1, 1997.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

23. Interstate Power Company

[Docket No. ER97–1601–000]

Take notice that on February 10, 1997, Interstate Power Company (IPW), tendered for filing a Power Sales Service Agreement between IPW Federal Energy Sales, Inc. Under the Agreement, IPW will sell Capacity & Energy to Federal Energy Sales, Inc., as agreed to by both companies.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

24. Interstate Power Company

[Docket No. ER97–1602–000]

Take notice that on February 10, 1997, Interstate Power Company (IPW), tendered for filing a Power Sales Service Agreement between IPW and The Power Company of America, L.P. Under the Agreement, IPW will sell Capacity & Energy to The Power Company of America, L.P., as agreed to by both companies.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

25. Wisconsin Public Service Corporation

[Docket No. ER97–1603–000]

Take notice that on February 10, 1997, Wisconsin Public Service Corporation, tendered for filing an executed service agreement with American Electric Power Service Corp. under its CS–1 Coordination Sales Tariff.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

26. Niagara Mohawk Power Corporation

[Docket No. ER97–1604–000]

Take notice that on February 10, 1997, Niagara Mohawk Power Corporation (NMPC), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between NMPC and Virginia Electric and Power Company. This Transmission Service Agreement specifies that Virginia Electric and Power Company has signed on to and has agreed to the terms and conditions of NMPC's Open Access Transmission Tariff as filed in Docket No. OA96–194–000. This Tariff filed with FERC on July 9, 1996, will allow NMPC and Virginia Electric and Power Company to enter into separately scheduled transactions under which NMPC will provide transmission service for Virginia Electric and Power Company as the parties may mutually agree.

NMPC requests an effective date of January 29, 1997. NMPC has requested waiver of the notice requirements for good cause shown.

NMPC has served copies of the filing upon the New York State Public Service Commission and Virginia Electric and Power Company.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

27. Boston Edison Company

[Docket No. ER97–1605–000]

Take notice that on February 10, 1997, Boston Edison Company (Boston Edison), tendered for filing a Service Agreement under Original Volume No. 8, FERC Order No. 888 Tariff (Tariff) for Pittsfield Generating Company (Pittsfield). Boston Edison requests that the Service Agreement become effective as of February 1, 1997.

Edison states that it has served a copy of this filing on Pittsfield and the Massachusetts Department of Public Utilities.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

28. South Carolina Electric & Gas Company

[Docket No. ER97–1606–000]

Take notice that on February 10, 1997, South Carolina Electric & Gas Company (SCE&G), submitted service agreements establishing Florida Power & Light Company (FPL) and WPS Energy Services, Inc. (WPS) as customers under the terms of SCE&G's Open Access Transmission Tariff.

SCE&G requests an effective date of one day subsequent to the filing of the service agreements. Accordingly, SCE&G requests waiver of the Commission's notice requirements. Copies of this filing were served upon FPL, WPS, and the South Carolina Public Service Commission.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

29. Kansas City Power & Light Company

[Docket No. ER97–1607–000]

Take notice that on February 10, 1997, Kansas City Power & Light Company (KCPL), tendered for filing a Service Agreement dated January 13, 1997, between KCPL and Southern Energy Trading and Marketing, Inc. (Southern). KCPL proposes an effective date of January 13, 1997, and requests waiver of the Commission's notice requirement. This Agreement provides for the rates and charges for Non-Firm Transmission service between KCPL and Southern.

In its filing, KCPL states that the rates included in the above-mentioned

Service Agreement are KCPL's rates and charges in the compliance filing to FERC Order No. 888 in Docket No. OA96–4–000.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

30. Louisville Gas and Electric Company

[Docket No. ER97–1608–000]

Take notice that on February 10, 1997, Louisville Gas and Electric Company (LG&E), tendered for filing a Non-Firm Point-to-Point Transmission Service Agreement between LG&E and MidCon Power Services Corp. under LG&E's Open Access Transmission Tariff.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

31. South Carolina Electric & Gas Company

[Docket No. ER97–1609–000]

Take notice that on February 10, 1997, South Carolina Electric & Gas Company (SCE&G), submitted a service agreement, dated January 24, 1997, establishing The Power Company of America, L.P. (PCA) as a customer under the terms of SCE&G's Open Access Transmission Tariff.

SCE&G requests an effective date of one day subsequent to the filing of the service agreement. Accordingly, SCE&G requests waiver of the Commission's notice requirements. Copies of this filing were served upon PCA and the South Carolina Public Service Commission.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

32. Louisville Gas and Electric Company

[Docket No. ER97–1610–000]

Take notice that on February 6, 1997, Louisville Gas and Electric Company (LG&E), tendered for filing an executed Service Agreement between LG&E and Jacksonville Electric Authority under LG&E's Rate Schedule GSS. LG&E had previously filed an unexecuted Service Agreement in this docket.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

33. Koch Energy Trading, Inc.

[Docket No. ER97–1611–000]

Take notice that on February 10, 1997, Koch Energy Trading, Inc. tendered for filing a Notice of Succession to FERC Rate Schedule No. 1 regarding name change of Koch Power Services, Inc. to Koch Energy Trading Inc.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

34. Southern California Edison Company

[Docket No. ER97–1612–000]

Take notice that on February 7, 1997, Southern California Edison Company (Edison), tendered for filing Service Agreements (Service Agreements) with Enron Power Marketing, Inc. for Firm Point-to-Point Transmission Service under Edison's Open Access Transmission Tariff (Tariff) filed in compliance with FERC Order No. 888.

Edison filed the executed Service Agreements with the Commission in compliance with applicable commission regulations. Edison also submitted a revised Sheet No. 152 (Attachment E) to the Tariff, which is an updated list of all current subscribers. Edison requests waiver of the Commission's notice requirement to permit an effective date of February 8, 1997 for Attachment E, and to allow the Service Agreements to become effective according to their terms.

Copies of this filing were served upon the Public Utilities Commission of the State of California and all interested parties.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

35. Portland General Electric Company

[Docket No. ER97–1613–000]

Take notice that on February 7, 1997, Portland General Electric Company (PGE), tendered for filing under PGE's Final Rule pro forma tariff (FERC Electric Tariff Original Volume No. 8, Docket No. OA96–137–000), an executed Service Agreement for Non-firm Point-to-Point Transmission Service with Arizona Public Service.

Pursuant to 18 CFR 35.11, and the Commission's Order in Docket No. PL93–2–002 issued July 30, 1993, PGE respectfully requests that the Commission grant a waiver of the notice requirements of 18 CFR 35.3 to allow the Service Agreement to become effective January 27, 1997.

A copy of this filing was caused to be served upon Arizona Public Service as noted in the filing letter.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

36. Portland General Electric Company

[Docket No. ER97–1614–000]

Take notice that on February 7, 1997, Portland General Electric Company (PGE), tendered for filing under PGE's Final Rule pro forma tariff (FERC Electric Tariff Original Volume No. 8, Docket No. OA96–137–000), an executed Service Agreement for Non-firm Point-to-Point Transmission Service with Enron Power Marketing, Inc.

Pursuant to 18 CFR 35.11, and the Commission's Order in Docket No. PL93–2–002 issued July 30, 1993, PGE respectfully requests that the Commission grant a waiver of the notice requirements of 18 CFR 35.3 to allow the Service Agreement to become effective January 31, 1997.

A copy of this filing was caused to be served upon Enron Power Marketing, Inc. as noted in the filing letter.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

37. Brennan Power Inc.

[Docket No. ER97–1630–000]

Take notice that on February 7, 1997, Brennan Power Inc. tendered for filing an application for Blanket Authorizations, Certain Waivers, and Order Approving Rate Schedule.

Comment date: March 10, 1997, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 97–5007 Filed 2–27–97; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5697–7]

California State Motor Vehicle Pollution Control Standards; Opportunity for Public Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of opportunity for public hearing and public comment.

SUMMARY: The California Air Resources Board (CARB) has notified EPA that it has approved amendments to its evaporative emission standards and testing procedures for passenger cars, light-duty trucks, medium-duty vehicles, and heavy-duty vehicles and engines, for all fuels except diesel fuel and natural gas, for 1996 through 1998 model years. By letter dated October 16, 1996, California requested EPA to grant a waiver of Federal preemption for these amendments pursuant to section 209(b) of the Clean Air Act (Act), 42 U.S.C. 7543(b). This notice announces that EPA has tentatively scheduled a public hearing for March 26, 1997 to consider CARB's request and to hear comments from the general public concerning CARB's request. In addition, EPA is requesting that interested parties submit written comments. Any party desiring to present oral testimony for the record at the public hearing, instead of or in addition to submitting written comments, must notify EPA by March 20, 1997. If no party notifies EPA that it wishes to testify, then no hearing will be held and EPA will consider CARB's request based on written submissions to the record.

It should be noted that these amendments are limited to California's evaporative emission test standards and testing procedures for the 1996 through 1998 model years. EPA anticipates a separate waiver request and proceeding regarding CARB's evaporative emission test procedures and standards for the 1999 model year and thereafter. Therefore, parties wishing to comment should confine the scope of their comments to issues pertaining to the 1996 through 1998 model years.

DATES: EPA has tentatively scheduled a public hearing for March 26, 1997, beginning at 10:00 a..m., if any party notifies EPA by March 20, 1997, that it wishes to present oral testimony regarding CARB's requests. By March 21, 1997, any person who plans to attend the hearing should call Mr. David Dickinson of EPA's Vehicle Programs and Compliance Division at (202) 233–9256 to determine if a hearing will be held. Any party may submit written comments regarding CARB's request by April 30, 1997.

ADDRESSES: If EPA receives a request for a public hearing, EPA will hold the public hearing announced in this notice in the first floor conference room at 501 3rd Street, NW., Washington, D.C. Parties wishing to present oral testimony at the public hearing should provide written notice to Mr. Dickinson, Vehicles Programs and Compliance Division, 401 M St., S.W. (6405J), Washington, DC 20460. In addition, written comments regarding the waiver request should be sent, in duplicate, to Mr. Dickinson at the address noted above. Copies of material relevant to the waiver request (Docket No. A–95–39) will be available for public inspection during the working hours of 8:00 a.m. to 5:30 p.m. Monday through Friday, at the U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center, Room M1500, First Floor Waterside Mall, 401 M St., S.W., Washington, DC 20460, Telephone: (202) 260–7548.

FOR FURTHER INFORMATION CONTACT: Mr. David Dickinson, Attorney/Advisor, Vehicles Programs and Compliance Division, U.S. Environmental Protection Agency, 401 M St., S.W. (6405J), Washington, DC 20460. Telephone: (202) 233–9256. E-Mail address: Dickinson.David@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Discussion

Section 209(a) of the Act as amended, 42 U.S.C. 7543(a), provides in part: ''No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part * * * [or] require certification, inspection, or any other approval relating to the control of emissions * * * as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.''

The State of California may be exempted from the prohibitions of section 209(a) of the Act. Section 209(b) of the Act provides in part that the Administrator shall, after notice and opportunity for public hearing, waive application of the prohibitions of section 209(a) for California ''if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—(A) the determination of the State is arbitrary and capricious, (B) [California] does not need such * * * standards to meet compelling and extraordinary conditions, or (C) [its] standards and accompanying enforcement procedures are not consistent with section 202(a) of (the Act).''

Once California has been granted a waiver of the application of the prohibitions of section 209(a) for its standards and accompanying enforcement procedures for a class of vehicles, it may adopt other conditions precedent to initial retail sale, titling or registration of the subject class of vehicles without the necessity of receiving further waiver of Federal preemption.

By letter dated August 21, 1995, CARB submitted to EPA a request for waiver of Federal preemption for amendments to its evaporative emission standards and test procedures. By letter dated October 16, 1996, CARB submitted a revised request for waiver of Federal preemption limiting the applicability of these amendments to the 1996 through 1998 model years. These amendments which apply to all classes of passenger cars, light-duty trucks, medium-duty vehicles, and heavy-duty vehicles and engines, except petroleum-fueled diesel vehicles and vehicles fueled by natural gas:

a. Incorporate a supplemental test procedure to help assure adequate evaporative canister purge.

b. Further align CARB's enhanced test procedures with the federal test procedures by conforming most of the differences between the two test procedures.

c. Make the enhanced test procedure applicable to the complete heavy medium-duty vehicle class (8,501–14,000 lbs., gross weight vehicle rating (GVWR)).

d. Amend the evaporative emission standard for the hot soak plus the diurnal emissions test for medium-duty vehicles which have a GVWR of 6,001–8,500 lbs. and fuel tanks equal or greater than 30 gallons from 2.0 to 2.5 grams per test.

EPA finalized its evaporative standards and test procedures on March 24, 1993 (see 58 FR 16002). EPA's new standards and test procedures are being phased-in with full compliance by 1999. In addition, on July 6, 1995, EPA issued a direct final rule designed to harmonize federal test procedures with CARB test procedures. EPA's present waiver consideration will only consider CARB's request for model years 1996–1998. Therefore, in the context of the waiver criteria set forth in section 209(b), CARB's amended standards and test procedures will be compared to

EPA's standards and test procedures for model years 1996 through 1998.

California states in its October 16, 1996 letter, referencing both its August 21, 1995 letter and recent developments, that it has determined that its amended standards are, in the aggregate, at least as protective of the public health and welfare as the applicable federal standards. Further, California, referencing its August 21, 1995 waiver request letter, states that it continues to need separate standards to meet compelling and extraordinary conditions. Finally, California, referencing its August 21, 1995 letter and its Manufacturers Advisory Correspondence (MAC) ι96–05, states that its amendments are consistent with section 202(a) of the Act. Section 202(a) requires that the procedures provide sufficient lead time to permit the development and application of requisite technology, giving appropriate consideration to the cost of compliance within such period. In addition, EPA has held that section 202(a) prohibits the procedures from imposing inconsistent certification requirements such that manufacturers would be unable to demonstrate compliance with both the California and Federal requirements with the same test vehicle and using a single test sequence.

California's request will be considered according to the procedures for a waiver determination, thus an opportunity for a public hearing is being provided. Any party wishing to present testimony at the hearing and/or to submit written comments should address the following issues:

(1) Whether California's determination that its standards are at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious;

(2) Whether California needs separate standards to meet compelling and extraordinary conditions; and,

(3) Whether California's standards and accompanying enforcement procedures are consistent with section 202(a) of the Act.

II. Procedures for Public Participation

Any party desiring to make an oral statement on the record should submit ten (10) copies, if feasible, of its proposed testimony and other relevant material to Mr. Dickinson of EPA's Vehicles Programs and Compliance Division at the address listed above not later than March 24, 1997. In addition, the party should submit 25 copies, if feasible, of the planned statement to the presiding officer at the time of the hearing.

In recognition that a public hearing is designed to give interested parties an opportunity to participate in this proceeding, there are no adverse parties as such. Statements by participants will not be subject to cross-examination by other participants without special approval by the presiding officer. The presiding officer is authorized to strike from the record statements which he or she deems irrelevant or repetitious and to impose reasonable limits on the duration of the statement of any participant.

If a hearing is held, the Agency will make a verbatim record of the proceedings. Interested parties may arrange with the reporter at the hearing to obtain a copy of the transcript at their own expense. Regardless of whether a public hearing is held, EPA will keep the record open until April 30, 1997. Upon expiration of the comment period, the Administrator will render a decision on CARB's request based on the record of the public hearing, if any, relevant written submissions and other information which she deems pertinent.

Persons with comments containing proprietary information must distinguish such information from other comments to the greatest possible extent and label it as ''Confidential Business Information'' (CBI).

If a person making comments wants EPA to base its waiver decision in part on a submission labeled as CBI, then a nonconfidential version of the document which summarizes the key data or information should be submitted for the public docket. To ensure that proprietary information is not inadvertently placed in the docket, submissions containing such information should be sent directly to the contact person listed above and not to the public docket. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent allowed and by the procedures set forth in 40 CFR part 2. If no claim of confidentiality accompanies the submission when it is received by EPA, it may be made available to the public without further notice to the person making comments.

Dated: February 24, 1997.

Mary D. Nichols,

Assistant Administrator for Air and Radiation.

[FR Doc. 97–5034 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

[ER-FRL–5477–8]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 OR (202) 564–7153.

Weekly receipt of Environmental Impact Statements Filed February 17, 1997 Through February 21, 1997 Pursuant to 40 CFR 1506.9.

EIS No. 970060, Final EIS, AFS, ID, Priest Lake Ranger District Noxious Weed Control Project, Implementation, Idaho Panhandle National Forest, Bonner County, ID and Pend Oreille County, WA, Due: March 31, 1997, Contact: Tim Layser (208) 443–2512.

EIS No. 970061, Draft EIS, AFS, SD, Anchor Hill Mine Expansion Project in Gilt Edge Mine, Plan-of-Operations, Black Hills National Forest, SD, Due: April 14, 1997, Contact: Don Murray (605) 578–2744.

EIS No. 970062, Draft EIS, DOI, UT, Uintah Unit Replacement Project, Implementation, Central Utah Water Conservancy District, Approval of Permits, Duchesne and Uintah Counties, UT, Due: April 29, 1997, Contact: R. Terry Holzworth (801) 226–7100.

EIS No. 970063, Draft EIS, COE, CA, Upper Guadalupe River Flood Control Project, Construction, Santa Clara Valley Water District, Santa Clara County, CA, Due: April 14, 1997, Contact: Robert F. Smith (415) 977–8450.

EIS No. 970064, Final EIS, AFS, WA, Taneum/Peaches Road Access Project, Issuance of Two Temporary Permits to Plum Creek for Road Construction, Wenatchee National Forest, Cle Elum Ranger District, Kittitas County, WA, Due: March 31, 1997, Contact: Douglas Campbell (509) 674–4411.

Amended Notices

EIS No. 960576, Final EIS, AFS, WA, Huckleberry Land Exchange Consolidate Ownership and Enhance Future Conservation and Management, Federal Land and Non Federal Land, Mt. Baker-Snoqualmie National Forest, Skagit, Snohomish, King, Pierce, Kittitas and Lewis Counties, WA, Contact: Doug Schrenk (206) 888–1421. Review Period was erroneously extended to –21–97 in Published FR—02–07–97. Review Period Official ended on 1–21–97.

EIS No. 960586, Draft EIS, AFS, MT, Basin Creek Drainage, Salvage Timber and Watershed Rehabilitation, Kootenai National Forest, Three Rivers Ranger District, Lincoln

County, MT, Due: March 24, 1997, Contact: Jeanne Higgins (406) 295–4693. Published FR—08–23–96—Review Period Reopened.

Dated: February 25, 1997

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 97–5074 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–U

[ER–FRL–5477–9]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared February 10, 1997 Through February 14, 1997 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 564–7167.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 5, 1996 (61 FR 15251).

Draft EISs

ERP No. D–BLM–K67040–CA Rating EC2, Imperial Open-Pit Heap Leach Precious Metal Mine Project, Plan of Operation, Right-of-Way Approval, Conditional-Use-Permit and Reclamation Program Approval, Imperial County, CA.

Summary: EPA expressed environmental concerns based on potential impacts to surface waters and recommendations for improved facilities design, and requested additional information regarding avoidance and mitigation of impacts to waters of the U.S., reduction of PM10 emissions, and facilities design.

ERP No. D–COE–C36074–NJ Rating EC2, Townsends Inlet to Cape May Inlet Feasbility Study, New Jersey Shore Protection Study, Storm Damage Reduction and Ecosystem Restoration, with in the Communities of Avalon, Stone Harbor and North Wildwood, Cape May County, NJ.

Summary: EPA expressed environmental concerns over the alternatives analysis, potential impacts to benthic communities and water quality from beach nourishment activities, and the potential impacts associated with this and other erosion/storm damage protection projects in New Jersey. Additional information is requested in the final EIS to address these issues.

ERP No. D–COE–G39031–LA Rating LO, Mississippi River—Gulf Outlet (MRGO) New Lock and Connecting Channels Replacement and Construction for Connection to the Mississippi River, Implementation, Orleans and St. Bernard Parishes, LA.

Summary: EPA has no objection to the selection of the Tentatively Selected Plan provided that the described mitigation measures are implemented.

ERP No. D–FHW–L40201–WA Rating EC2, US 101 Highway Aberdeen-Hoquian Corridor Project, Improvements, US Coast Guard and COE Section 404 Permit, Grays Harbor County, WA.

Summary: EPA expressed environmental concerns based on unavoidable impacts to wetlands and potential impacts to other waters of the US. Additional information is needed to clarify design specifications resulting from certain flood frequency data, and to ensure that proper stormwater management practices will be implemented to protect receiving-water quality appropriately.

ERP No. D–FTA–D54038–MD Rating EC2, Metrorail Extension—Addison Road Station to the Largo Town Center, Transportation Improvements, Prince George's County, MD.

Summary: EPA expressed environmental concerns that environmental issues have not been adequately addressed. The alternatives analysis does not adequately compare alternatives. Secondary and cumulative impacts were not fully addressed as well. Information regarding environmental justices issues was not clearly documented.

ERP No. D–IBR–K29000–CA Rating EO2, Interim South Delta Program (ISDP), Construction and Operation, Sacramento/San Joaquin Delta, Implementation, COE Section 404 Permit, Alameda, Contra Costa and San Joaquin Counties, CA.

Summary: EPA expressed environmental objections and is concerned that all of the alternatives analyzed could have significant adverse impacts on fish and aquatic resources and that, generally, the proposed project does not advance that long-term objectives of ecosystem restoration as expressed through the CALFED Long-Term Bay-Delta Program. EPA asked that alternatives be redesigned and evaluated in the context of the Long-Term Program.

ERP No. D–NAS–E12005–00 Rating EC2, Engine Technology Support, Implementation, With Emphases on Liquid Oxygen and Kerosene, Advanced Space Transportation Program, Test Sites: Marshall Space Flight Center (MSFC) in Huntsville, AL; Stennis Space Center (SSC) near Bay St. Louis, MS and Phillips Laboratory, Edwards Air Force Base, CA.

Summary: EPA expressed environmental concerns regarding wetlands, groundwater and other unresolved issues; however, these can be addressed by the requested additional information.

ERP No. DS–FHW–K40099–HI Rating EC2, Makai Boulevard Concept/Nimitz Highway Improvements, Updated Information, Construction from Keehi Interchange to Pier 16 (AWA Street) in the Kalihi-Palama District, Funding, US Coast Guard and COE Section 404 Permits, City of Honolulu and Honolulu County, HI

Summary: EPA expressed environmental concerns with the project and asked FHA to provide more information regarding the sole source aquifer, erosion and stormwater impacts to water quality, and the alternative analysis.

Final EISs

ERP No. F–BLM–K67038–NV Ruby Hill Gold Mining Operations Project, Implementation, Battle Mountain District, Plan of Operations and COE Section 404 Permit, Eureka County, NV.

Summary: EPA's concerns regarding the project's air emissions have been addressed in the FEIS, however mitigation measures remain vague. EPA supports BLM's decision to add partial backfilling to the preferred alternative and EPA urged BLM to reduce project disturbance by 120 acres.

ERP No. F–FHW–E40757–AL Eastern Pleasure Island Hurricane Evacuation Route Construction, AL–182 in Orange Beach to CR–95 near CR–20 (on the mainland) and CR–95 near CR–20 to I–10, Funding and US Coast Guard Bridge and COE Section 404 Permits Issuance, Baldwin County, AL.

Summary: EPA's review found that impacts to wetlands were of concern and that additional wetland mitigation and agency coordination was needed.

ERP No. F–FHW–E40767–FL Tampa Interstate Project, Funding, I–275 to just north of Cypress Street and I–275 from the Howard Frankland Bridge/Kennedy Boulevard ramps north to Dr. Martin Luther King, Jr. Boulevard and I–4 from I–275, Hillsborough County, FL.

Summary: EPA's review found that noise impacts to urban residents were of concern and that the affected communities and housing developments should be allowed to participate in noise abatement plans.

ERP No. F–FRC–L05206–WA Snoqualmie Falls Hydroelectric Project

(FERC Project No. 2493), Relicensing, Snoqualmie River, King County, WA.

Summary: Review of the final EIS has been completed and the project found to be satisfactory. No formal comment letter was sent to the preparing agency.

ERP No. F–NPS–L61211–AK Denali National Park and Reserve, ''Frontcountry'' Entrance Area and Road Corridor, Development Concept Plan, AK.

Summary: Review of the Final EIS was not deemed necessary. No formal comment letter was sent to the preparing agency.

Dated: February 25, 1997.

B. Katherine Biggs,

Associate Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 97–5075 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–M

[FRL–5697–5]

Guidance for the Implementation of EPA's Radiation Protection Standards for Management and Storage of Transuranic Waste at the Waste Isolation Pilot Plant (''WIPP Subpart A Guidance'')

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: Pursuant to the amended Waste Isolation Pilot Plant Land Withdrawal Act (WIPP LWA), Pub. L. 102–579 as amended by Public Law 104–201, EPA is required to determine, on a biennial basis, whether the Waste Isolation Pilot Plant (WIPP) complies with 40 CFR Part 191, Subpart A, the standards for management and storage of radioactive waste. EPA has developed guidance for the implementation of the generally applicable standards of Subpart A at the WIPP to evaluate the facility's compliance with radiation dose limits to the public during the receipt and emplacement of waste, and associated activities, if the WIPP is approved for use as a disposal system. EPA is hereby announcing that a revised guidance document, known as the WIPP Subpart A Guidance, is available to the public. In developing the guidance, EPA requested and considered public comments on the draft WIPP Subpart A Guidance that was previously announced on September 5, 1996. (61 FR 46804.)

ADDRESSES: Copies of the revised WIPP Subpart A Guidance are available to the public by calling EPA's WIPP Information Line at 1–800–331–WIPP. Copies of the WIPP Subpart A Guidance and supporting materials are also available for review at EPA's Office of Radiation and Indoor Air located at 501 3rd Street, N.W., Washington, D.C. 20001; and at the following addresses in New Mexico where EPA maintains public information files for the guidance: (1) Government Publications Department of the Zimmerman Library of the University of New Mexico in Albuquerque, New Mexico (open from 8:00 a.m. to 9:00 p.m. on Monday through Thursday, 8:00 a.m. to 5:00 p.m. on Friday, 9:00 a.m. to 5:00 p.m. on Saturday, and 1:00 p.m. to 9:00 p.m. on Sunday); (2) The Fogelson Library of the College of Santa Fe, located at 1600 St. Michael's Drive, Santa Fe, New Mexico (open from 8:00 a.m. to 12:00 midnight on Monday through Thursday, 8:00 a.m. to 5:00 p.m. on Friday, 9:00 a.m. to 5:00 p.m. on Saturday, and 1:00 p.m. to 9:00 p.m. on Sunday); and (3) The Municipal Library of Carlsbad, New Mexico, located at 101 South Halegueno (open from 10:00 a.m. to 9:00 p.m. on Monday through Thursday, 10:00 a.m. to 6:00 p.m. on Friday and Saturday, and 1:00 p.m. to 5:00 p.m. on Sunday). Citizens wishing to review these materials should request to see the EPA ''WIPP Subpart A Guidance File.''

FOR FURTHER INFORMATION CONTACT: Betsy Forinash, U.S. Environmental Protection Agency, Office of Radiation and Indoor Air (6602J), 401 M Street, S.W., Washington, D.C. 20460; (202) 233–9310.

SUPPLEMENTARY INFORMATION: The guidance document pertains to the requirements established in the amended WIPP LWA [1] and the federal regulations at 40 CFR Part 191, Subpart A. The document does not establish new binding requirements but will guide EPA's implementation of 40 CFR Part 191, Subpart A at the WIPP. Subpart A is a generally applicable radiation protection standard that limits radiation doses to the public from management of transuranic radioactive waste at disposal facilities operated by the Department of Energy (DOE). The DOE is proposing to use the WIPP, located in Eddy County, New Mexico, as a deep geologic repository for the disposal of transuranic radioactive waste generated by nuclear defense activities. The Subpart A regulations apply to activities associated with receiving and emplacing the waste in the disposal system. (Limitations on radiation doses which may occur after closure of the disposal system are separately addressed by EPA's disposal regulations at Subparts B and C of 40 CFR Part 191, and by WIPP compliance criteria at 40 CFR Part 194.) The amended WIPP LWA requires EPA to determine, on a biennial basis, whether WIPP complies with Subpart A of 40 CFR Part 191. EPA may also conduct this determination at any other time. If EPA determines that the WIPP does not comply with the Subpart A dose standards at any time after emplacement of waste has begun, the WIPP LWA requires the DOE to submit a remedial plan to EPA describing the actions DOE will take to comply with Subpart A.

This guidance describes the application of Subpart A to activities associated with the approximately 35-year period during which packaged waste would be received at the above ground portion of the WIPP; unloaded and prepared for emplacement in the underground repository; lowered down a mechanical hoist and emplaced in the mined-out repository; and managed during the closure and decommissioning of the facility, if the WIPP is approved for use as a disposal system. During this period, the annual doses from radiation received by members of the public must not exceed the limits specified by Subpart A. The WIPP Subpart A Guidance interprets Subpart A for the WIPP and provides the Agency's recommendations for methods used to demonstrate and document compliance with the standards. The guidance also describes information DOE should report to EPA for the Agency's evaluation of the WIPP's compliance with the Subpart A dose limits.

The guidance does not establish a new radiation dose standard and does not establish binding rights or duties, but will be a non-binding guide for EPA's evaluation of the WIPP's compliance with Subpart A. In a September 5, 1996 Federal Register notice (61 FR 46804), EPA solicited public comment on draft WIPP Subpart A Guidance. The WIPP Subpart A Guidance now available incorporates revisions made in light of those comments. EPA will update the guidance as needed in the future to reflect changes in policy, in radiation science or in the operation of the WIPP site, or as appropriate to respond to issues raised by the public.

Dated: February 20, 1997.

Mary Nichols,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 97–5035 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

[1] The 1992 WIPP Land Withdrawal Act, Pub. L. 102–579, was amended by the ''Waste Isolation Pilot Plant Land Withdrawal Act Amendments,'' Pub. L. 104–201. The 1996 amendments were part of the National Defense Authorization Act for fiscal year 1997.

[FRL–5695–3]

Peer Review of CASTNet

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency announces the meeting of a peer review panel which is constituted to review and analyze the EPA draft report, Examination of CASTNet: Data, Results, Costs, and Implications and the accompanying Recommendations on Changes to Operational Monitoring in CASTNet and Directions for Future Atmospheric Deposition Monitoring Research. The meeting will be held on Wednesday, March 26, 1997, at the Holiday Inn Arlington at Ballston, 4610 N. Fairfax Drive, Arlington, VA 22203. The meeting will begin at 9 a.m. and adjourn by 5 p.m. The meeting is open to the public. Any member of the public who would like to comment on the draft report should contact Dr. Robert E. Menzer, Office of Research and Development (8701), USEPA, 401 M Street, SW, Washington, DC 20460, telephone 202–260–5779, Email: menzer.robert@epamail.epa.gov, for a copy of the report. Written comments should be submitted to Dr. Menzer. Members of the public who choose to make brief comments on the report at the meeting should also contact Dr. Menzer.

SUPPLEMENTARY INFORMATION: In 1986, EPA's Office of Research and Development began to operate the National Dry Deposition Network, consisting of 39 monitoring sites designed to assess the status and trends in dry deposition of sulfur and nitrogen species, primarily in the high-deposition regions in the eastern U.S. Following passage of the Clean Air Act Amendments (CAAA) of 1990, the NDDN was expanded and renamed the Clean Air Status and Trends Network (CASTNet). As of 1996, there are 51 operational sites in the network. Each site collects weekly filter pack samples which are analyzed for SO_X, NO_X, and sulfate, nitrate, and ammonium ions, as well as micrometeorological and other data.

The first systematic analyses of the resulting monitoring data were conducted beginning in the fall of 1996 by scientists at ORD's National Exposure Research Laboratory. This timing allowed the first access to quality-assured data from 1995, during which SO_X emissions decreased by 13% in response to Phase I reductions in sulfur emissions called for in the CAAA. The purpose of the analyses was to examine the performance of the monitors and to seek opportunities to increase the cost-effectiveness of the network. The analyses included reviews of the quality of the database and the costs of the individual data collection components; comparisons between deposition velocities derived from the multi-layer model using meteorological data collected on site with deposition velocities measured using an eddy correlation technique; evaluation of alternative methods of calculating deposition velocities that do not require on-site data collection; analysis of factors affecting variability in deposition velocity at two different spatial scales; exploration of the effect of reducing the number of sites on apparent regional patterns of ambient sulfur dioxide concentrations; evaluation of the ability to detect trends in ambient concentrations and deposition velocities at individual sites and groups of geographically contiguous sites; and comparisons of dry deposition estimates with wet deposition estimates from nearby wet deposition sites. The results of the analyses are presented in a draft report, Examination of CASTNet: Data, Results, Costs, and Implications. The purpose of this review is to examine the soundness of the underlying science and the appropriateness of the analytical approaches described in this document.

Beginning in FY 1998, EPA is proposing to transfer operation of CASTNet from the Office of Research and Development (ORD) to the Office of Air and Radiation (OAR). The transition from a research-oriented effort to an operational monitoring program presents an opportunity to make changes in current network operations and to assess alternative directions for future acid deposition research. The Recommendations on Changes to Operational Monitoring in CASTNet and Directions for Future Atmospheric Deposition Monitoring Research makes such recommendations to OAR and ORD, based on policy questions provided by OAR and informed by the analyses in the accompanying draft report. The other purpose of the peer review is to solicit the reviewers'' advice on the reasonableness of the various proposed modifications to the CASTNet and future research directions, given the current state of data analysis and interpretation.

Dated: February 19, 1997.

Joseph K. Alexander,

Acting Assistant Administrator for Research and Development.

[FR Doc. 97–4967 Filed 2–27–97; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:15 a.m. on Tuesday, February 25, 1997, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's corporate, supervisory and administrative enforcement activities.

In calling the meeting, the Board determined, on motion of Vice Chairman Andrew C. Hove, Jr., seconded by Director Joseph H. Neely (Appointive), concurred in by Director Nicolas P. Retsinas (Director, Office of Thrift Supervision), Director Eugene A. Ludwig (Comptroller of the Currency), and Chairman Ricki Helfer, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(2), (c)(4), (c)(6), (c)(8) and (c)(9(A)(ii) of the ''Government in the Sunshine Act'' (5 U.S.C. 552b (c)(2), (c)(4), (c)(6), (c)(8) and (c)(9)(A)(ii)).

The meeting was held in the Board Room of the FDIC Building located at 550—17th Street, NW., Washington, DC.

Dated: February 25, 1997.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 97–5146 Filed 2–26–97; 11:18 am]

BILLING CODE 6714–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984.

Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800

North Capitol Street, N.W., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the Federal Register.

Agreement No.: 202–010689–064.

Title: Transpacific Westbound Rate Agreement.

Parties: American President Lines, Ltd.; Hapag-Lloyd Container Linie GmbH; Kawasaki Kisen Kaisha, Ltd.; A.P. Moller-Maersk Line; Mitsui O.S.K. Lines, Ltd.; P&O Nedlloyd B.V.; P&O Nedlloyd Limited; Neptune Orient Container Line, Inc.; Nippon Yusen Kaisha, Ltd.; Orient Overseas Container Lin, Inc.; Sea-Land Service, Inc.

Synopsis: The proposed amendment would permit the parties to caucus and reach informal consensual agreements before or during the course of formal Agreement meetings for the purpose of reaching or presenting common positions with regard to matters brought up before the Agreement's membership.

Agreement No.: 202–011456–020.

Title: South Europe American Conference.

Parties: DSR-Senator Lines GmbH; Evergreen Marine Corporation (Taiwan) Ltd.; Italia di Navigazione, S.p.A.; A.P. Moller-Maersk Line; P&O Nedlloyd B.V.; P&O Nedlloyd Limited; Sea-Land Service, Inc.; Zim Israel Navigation Company, Ltd.; Contship Container Lines Ltd.; Lykes Bros. Steamship Co., Inc.; Transportacion Maritima Mexicana, S.A. de C.V.; Tecomar S.A. de C.V.

Synopsis: The proposed amendment would permit the parties to caucus and reach informal consensual agreements before or during the course of formal Agreement meetings for the purpose of reaching or presenting common positions with regard to matters brought up before the Agreement's membership.

Agreement No.: 232–011567.

Title: Iceland Steamship/Samskip Slot Charter Agreement.

Parties: Iceland Steamship Company Ltd. (''ISC''); Samskip hf. (''Samskip'').

Synopsis: The proposed Agreement would permit Samskip to charter space aboard ISC's vessels in the trade between North Atlantic ports of the United States and Reykjavik, Iceland. The parties would also be permitted to agree upon ISC's schedule of port calls in the Agreement trade.

Dated: February 25, 1997.

By order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–5012 Filed 2–27–97; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. Once the notices have been accepted for processing, they will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than March 14, 1997.

A. Federal Reserve Bank of Kansas City (John E. Yorke, Senior Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. Randall J. Hendricks, Elsie, Nebraska, and Warren Orr, North Platte, Nebraska; each to acquire an additional 26.92 percent, for a total of 50 percenteach, of the voting shares of Elsie, Inc., Elsie, Nebraska, and thereby indirectly acquire Commercial State Bank, Elsie, Nebraska.

B. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Mary Lois Whittenburg Lockhart, as Trustee of the Grace and Roy Whittenburg Trusts, Amarillo, Texas; to acquire an additional 63.51 percent, for a total of 64.16 percent of the voting shares of Amarillo Western Bancshares, Inc., Amarillo, Texas, and thereby indirectly acquire Western National Bank, Amarillo, Texas.

Board of Governors of the Federal Reserve System, February 24, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–4990 Filed 2-27-97; 8:45 am]

BILLING CODE 6210-01-F

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 24, 1997.

A. Federal Reserve Bank of Cleveland (R. Chris Moore, Senior Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. CB Bancorp, Inc., Higginsport, Ohio; to become a bank holding company by acquiring 100 percent of the voting shares of The Citizens Bank, Higginsport, Ohio.

2. Commercial Bancshares Savings and Employee Stock Ownership Plan, West Liberty, Kentucky; to become a bank holding company by acquiring 32 percent of the voting shares of Commercial Bancshares, Inc., West Liberty, Kentucky, and thereby indirectly acquire Commercial Bank, West Liberty, Kentucky.

B. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Senior Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Guaranty Financial Corporation, Charlottesville, Virginia; to become a bank holding company by acquiring 100 percent of the voting shares of Guaranty Bank, Charlottesville, Virginia, the

proposed successor by merger to Guaranty Savings & Loan, F.A., Charlottesville, Virginia.

C. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. Illinois Community Bank, Inc., Effingham, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Illinois Community Bank, Effingham, Illinois, which will convert from Guarantee Savings Bank, FSB.

In connection with this Illinois Community Bancorp, Effingham, Illinois, has also applied to acquire Illinois Leasing Corporation, Inc., Effingham, Illinois, and thereby engage in leasing programs, pursuant to § 225.25 (b)(5)(i) ofthe Board's Regulation Y.

D. Federal Reserve Bank of Dallas (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. Eden Financial Corporation, San Angelo, Texas; to acquire 100 percent of the voting shares of The First State Bank of Rankin, Rankin, Texas.

E. Federal Reserve Bank of San Francisco (Kenneth R. Binning, Director, Bank Holding Company) 101 Market Street, San Francisco, California 94105-1579:

1. Castle Creek Capital Partners Fund-I, L.P., Castle Creek Capital, L.L.C., and Eggemeyer Advisory Corporation, all of San Diego, California; to acquire up to 14.9 percent of the voting shares of Rancho Santa Fe National Bank, Rancho Santa Fe, California, and up to 14.9 percent of the voting shares of First Community Bank of Desert, Yucca Valley, California.

Board of Governors of the Federal Reserve System, February 24, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–4989 Filed 2-27-97; 8:45 am]

BILLING CODE 6210-01-F

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 10:00 a.m., Wednesday, March 5, 1997.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.

2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: February 26, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–5121 Filed 2–26–97; 10:10 am]

BILLING CODE 6210–01–P

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 62 FR 8017, February 21, 1997.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, February 26, 1997.

CHANGES IN THE MEETING: The open meeting has been canceled.

1. The item regarding proposed technical and clarifying amendments to Regulation CC (Availability of Funds and Collection of Checks) (proposed earlier for public comment; Docket No. R–0926) was handled via notation vote.

2. The item regarding proposals concerning (a) guidelines for the use of volume-based pricing for Federal Reserve priced services and (b) volume-based fees for the automated clearing house (ACH) service was deleted from the meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: February 26, 1997.

Jennifer J. Johnson,

Deputy Secretary of the Board.

[FR Doc. 97–5148 Filed 2–26–97; 11:56 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the Federal Register.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 020397 AND 021497

Name of acquiring person, name of acquired person, name of acquired entity	PMN No.	Date terminated
KCSN Management, L.P., Tom E. Turner, Lone Star Growers Co., G.P	97–0978	02/04/97
Cott Corporation, Mr. Stephen L. Hixon, Texas Beverage Packers, Inc	97–0990	02/04/97
TCA Cable TV, Inc., Tele-Communications, Inc., East Arkansas Cablevision, Inc	97–1036	02/04/97
Fortis AMEV N.V., Stichting Administratiekantoor ABN AMRO Holding, MeesPierson N.V	97–1044	02/04/97
Fortis AG S.A., Stichting Administratiekantoor ABN AMRO Holding, MeesPierson N.V	97–1045	02/04/97
George G. Beasley, Greenwich Street Capital Partners, L.P., WWDB (FM)	97–1046	02/04/97
Avenor, Inc., Repap Enterprises, Inc., Repap Enterprises, Inc	97–1052	02/04/97
Selfcare, Inc., American Home Products Corporation, American Cyanamid Company; A.H. Robins Company, Inc	97–1054	02/04/97
Joseph M. Field, Deseret Management Corporation, Bonneville International Corporation	97–1064	02/04/97
Deseret Management Corporation, Joseph M. Field, Entertainment Communications, Inc	97–1065	02/04/97

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 020397 AND 021497—Continued

Name of acquiring person, name of acquired person, name of acquired entity	PMN No.	Date terminated
Peter C. Rossin, Carpenter Technology Corporation, Carpenter Technology Corporation	97–1066	02/04/97
Carpenter Technology Corporation, Peter C. Rossin, Dynamet Incorporated	97–1067	02/04/97
United States Filter Corporation, WMX Technologies, Inc., Wheelabrator EOS Inc., Wheelabrator EOS of Ohio Inc	97–1071	02/04/97
American Heritage Life Investment Corporation, Columbia Universal Corporation, Columbia Universal Corporation	97–1079	02/04/97
Harry H. Baker, Atlantic Cellular Company, L.P., Mountain Cellular, L.P	97–1084	02/04/97
Wajax Limited, Matthew G. Norton Co., Pacific North Equipment Company	97–1085	02/04/97
Western Atlas, Inc., Norand Corporation, Norand Corporation	97–1098	02/04/97
BBA Group PLC, International Aviation Teterboro, Inc., International Aviation Teterboro, Inc./IA Hangar C–1	97–2301	02/05/97
BBA Group PLC, Harvey Bennet, International Aviation Palm Beach, Inc	97–2302	02/05/97
C.H. Boehringer Sohn (a German company), Pro-Edge, Ltd., Pro-Edge, Ltd	97–0883	02/05/97
Scudder Family Voting Trust for ANI, Inc., Kenneth R. Thomson, Thomson Newspapers Inc	97–1004	02/05/97
United States Filter Corporation, United States Water Company, Inc., United States Water Company, Inc	97–1055	02/05/97
Gianluigi Aponte, Viad Corp, Premier Cruise Lines Ltd	97–1068	02/05/97
Dimon Inc., Nicholas J. McKisack, Intabex Holdings Worldwide S.A	97–1090	02/05/97
Dimon Incorporated, Tabacalera S.A., Intabex Holdings Worldwide, S.A	97–1091	02/05/97
General Electric Company, ICS Holding, Inc., ICS Holding, Inc	97–1109	02/05/97
Gleason Corporation, Hermann Pfauter GmbH & Co. KG, Hermann Pfauter GmbH & Co. KG et al	97–0528	02/06/97
Centex Corporation, Eagle Investment Group Limited Partnership, Centex Eagle Gypsum Company, LLC	97–0951	02/06/97
Cleveland Clinic Foundation, The, Lakewood Hospital Association, Lakewood Hospital Association	97–1001	02/06/97
Cleveland Clinic Foundation, The, Fairview Health System, Fairview Health System	97–1002	02/06/97
Synopsys, Inc., EPIC Design Technology, Inc., EPIC Design Technology, Inc	97–1093	02/06/97
Fry's Electronics, Inc., Tandy Corporation, Tandy Corporation	97–0904	02/07/97
Keystone Automotive Industries, Inc., Ronald G. Brown, North Star Plating Company	97–0930	02/07/97
Ronald G. Brown, Keystone Automotive Industries, Keystone Automotive Industries	97–0931	02/07/97
DAN-LOC Corporation, T&N plc (a British company), T&N Industries Inc	97–1031	02/07/97
Key Plastics, Inc., Trinova Corporation, Aeroquip Corporation	97–1057	02/07/97
CUC International, Inc., Estate of Dennis B. Haslinger, Numa Corporation	97–1058	02/07/97
PNC Bank Corp., Code, Hennessy & Simmons II, L.P., Cerex Advanced Fabrics, L.P	97–1092	02/07/97
Tower Automotive, Inc., Smith Investment Company, A.O. Smith Corporation	97–1102	02/07/97
WMX Technologies, Inc., Joseph Pezza, Planet Waste Management, Inc	97–1103	02/07/97
Ball Corporation, Harold Honickman, Brunswick Container Corporation	97–1104	02/07/97
H.I.G. Investment Group, L.P., David H. Weis, Thermal Industries, Inc	97–1115	02/07/97
Sears, Roebuck and Co., Charles P. Steinmetz, All America Holding Group, Inc	97–1117	02/07/97
Total Health Care, Inc., PacificCare Health Systems, Inc., PacificCare of Florida, Inc	97–1122	02/07/97
Worthington Industries, Inc., The McConnell Family Trust, The Gerstenslager Company	97–1123	02/07/97
The McConnell Family Trust, Worthington Industries, Inc., Worthington Industries, Inc	97–1124	02/07/97
Trelleborg AB (a Swedish Corporation), Terrence A. Friedman, Yale-South Haven, Inc.	97–1126	02/07/97
Alliance Forest Products, Inc., Kimberly-Clark Corporation, Kimberly-Clark Corporation	97–1128	02/07/97
FPL Group, Inc., Kuwait Petroleum Corporation (A Kuwait Co.), Santa Fe Geothermal, Inc	97–1129	02/07/97
James D. Bishop, Sr., Kuwait Petroleum Corporation (A Kuwait Co.), Santa Fe Geothermal, Inc	97–1130	02/07/97
Omnicon Group Inc., Clyde P. Davis, Cline, Davis & Mann, Inc	97–1131	02/07/97
Omnicon Group Inc., Morgan E. Cline, Cline, Davis & Mann, Inc	97–1132	02/07/97
Crown Cork & Seal Company, ACX Technologies, Golden Aluminum Company	97–1135	02/07/97
McKesson Corporation, Kelso Investment Associated IV, L.P., General Medical, Inc	97–1140	02/07/97
Republic Industries, Inc., Albert E. and Katherine C. Maroone, Maroone Dodge, Inc., Al Marrone Ford, Inc	97–1149	02/07/97
Republic Industries, Inc., Michael E. Maroone, Maroone Chevrolet, Inc., Maroone Isuzu, Inc	97–1150	02/07/97
Michael E. Maroone, Republic Industries, Inc., Republic Industries, Inc	97–1151	02/07/97
Leonard I. Green, Rite Aid Corporation, Rite Aid Corporation	97–1157	02/07/97
The Williams Companies, Inc., The Williams Companies, Inc., Kern River Gas Transmission Company	97–1168	02/07/97
Stewart Enterprises, Inc., John S. Dunbar, III, Dunbar Funeral Home, Inc	97–1172	02/07/97
BTR plc, Henry Burnett and Lovetta Burnett (husband-wife), Burco Utility and Railroad Supply Corporation	97–1041	02/10/97
Bank of Boston Corporation, Papa Gino's Holdings Corp., Papa Gino's Holdings Corp	97–1069	02/10/97
Fenway Partners Capital Fund, L.P., O.R.A. Corporation d/b/a Delimex, Delimix Holdings, Inc	97–1070	02/10/97
Cox Enterprises, Inc., Gaylord Entertainment Company, Gaylord Broadcasting Company, L.P	97–1146	02/10/97
Barry L. MacLean, American Acquisition Partners, Maynard Holdings, Inc	97–0979	02/11/97
Children's Hospital, Inc., Alton Ochsner Medical Foundation, New Ochsner Medical Foundation	97–1136	02/11/97
Children's Hospital, Inc., Methodist Health System Foundation, Inc., Pendleton Memorial Methodist Hospital	97–1137	02/11/97
Children's Hospital, Inc., Touro Infirmary, Touro Infirmary Hospital	97–1138	02/11/97
Hoechst Aktiengesellschaft, Cell Genesys, Inc., Cell Genesys, Inc	97–1013	02/12/97
Allegheny Health, Education and Research Foundation, Allegheny Valley Health System, Allegheny Valley Health System	97–1075	02/13/97
Loews Corporation, Capsure Holdings Corporation, Western Surety Company, Surety Bonding Company of Ameri	97–1154	02/13/97
Equity Capsure, L.P., Loews Corporation, CNA Surety Corporation	97–1155	02/13/97
Cortec Group Fund II, L.P., ATCO Products, Inc., ATCO Products, Inc	97–1165	02/13/97
Scotsman Industries, Inc., Kysor Industrial Corporation, Kysor Industrial Corporation	97–1176	02/13/97
Kuhlman Corporation, Kysor Industrial Corp. or Scotsman Industries, Inc., Kysor Industrial Corp. (Transportation Products Group)	97–1182	02/13/97
Clear Channel Communications, Inc., Hicks, Muse, Tate & Furst Equity Fund II, L.P., Chancellor Radio Broadcasting Company and Chancellor	97–0980	02/14/97
Laidlaw Inc. (A Canadian Company), Mr. John Van Der Aa, Vancom, Inc., Vancom Holding, Inc. Vancom Transportati	97–1101	02/14/97

TRANSACTIONS GRANTED EARLY TERMINATION BETWEEN: 020397 AND 021497—Continued

Name of acquiring person, name of acquired person, name of acquired entity	PMN No.	Date terminated
Columbia/HCA Healthcare Corporation, Saint Luke's Hospital Association of Cleveland, Ohio, Saint Luke's Medical Center	97–1106	02/14/97
Paxton Media Group, Inc., Kenneth R. Thomson (a Canadian national), The Monroe Enquirer Journal and The Griffin Daily News	97–1112	02/14/97
Investor AB, Tessera, Inc., Tessera, Inc	97–1113	02/14/97
Franklin Quest Co., Premier Holding Company, Premier Agendas, Inc	97–1120	02/14/97
Robert R. Dyson, Aluminum Company of America, Arctek Corporation and Norcold, Inc	97–1139	02/14/97
Media General, Inc., Raycom Media, Inc., Raycom Media, Inc	97–1147	02/14/97
Raycom Media, Inc., Media General, Inc., Media General Broadcasting, Inc	97–1148	02/14/97
Mr. Jerry Whitlock, Coca-Cola Company, The, Coca-Cola Company, The	97–1160	02/14/97
Bollinger Shipyards, Inc., McDermott International, Inc., McDermott Shipbuilding, Inc	97–1161	02/14/97
Richard M. Scaife, Kenneth R. Thomson, Thomson Newspapers Inc	97–1163	02/14/97
FIMALAC et Cie, Alan Widra, Intersearch Corp., Intersearch Corp. of New York	97–1173	02/14/97
Habasit Holding AG, Globe International Inc., Globe International Inc	97–1174	02/14/97
Intel Corporation, Xircom, Inc., Xircom, Inc	97–1194	02/14/97
R. Bruce Grover/Carol Grover, Merrill Lynch & Co., Inc., American Mirrex Corporation	97–1205	02/14/97
King Pharmaceuticals, Inc., Glaxo Wellcome plc (a British company), Glaxo Wellcome plc	97–1209	02/14/97
Republic Industries, Inc., Scott R. Wagner, York Waste Disposal, Inc	97–1211	02/14/97
Scott R. Wagner, Republic Industries, Inc., Republic Industries, Inc	97–1212	02/14/97
Harbour Group Investments III, L.P., Century Spring Corporation, Century Spring Corporation	97–1214	02/14/97
The Micky Arison 1994 "B" Trust, Costa Crociere S.p.A., Costa Crociere S.p.A	97–1224	02/14/97

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay or Parcellena P. Fielding, Contact Representatives, Federal Trade Commission, Premerger Notification Office, Bureau of Competition, Room 303, Washington, DC 20580, (202) 326–3100.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 97–5018 Filed 2–27–97; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Recordkeeping/Reporting Requirements Under Emergency Review by the Office of Management and Budget (OMB)

Title: Order/Notice to Withhold Income for Child Support.

OMB No.: New.

Description: PRWORA '96 (Pub. L. 104–193), section 324, requires the Secretary of DHHS to promulgate a standardized form for use by State and Local Child Support Enforcement agencies for collection child support payments through income withholding.

Respondents: States, Puerto Rico, Guam and the District of Columbia.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Order/Notice	54	1,620	.1666	14,580

Estimated Total Annual Burden Hours: 14,580.

Additional Information

ACF is requesting that OMB grant a 180 day approval for this information collection under procedures for emergency processing by March 1, 1997. A copy of this information collection, with applicable supporting documentation, may be obtained by calling the Administration for Children and Families, Reports Clearance Officer, Larry Guerrero at (202) 401–6465.

Comments and questions about the information collection described above should be directed to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for ACF, Office of Management and Budget, Paperwork Reduction Project, 725 17th Street NW., Washington, DC 20503, (202) 395–7316.

Dated: February 20, 1997.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 97–4952 Filed 2–27–97; 8:45 am]

BILLING CODE 4184–01–M

Submission for OMB Review; Comment Request

Title: Provision of Services in Interstate Child Support Enforcement: Standards Forms.

OMB No.: Reinstatement.

Description: Regulation at 45 CFR 303.7 require a State child support enforcement agency to transmit child support case information on standard interstate forms when referring a case to another State for processing. The forms promote uniformity and standardization. The existing standard interstate forms are based upon interstate child support enforcement actions filed under the Uniform Reciprocal Enforcement of Support Act (URESA). The forms associated with this information collection have been revised to be consistent with the Uniform Interstate Family Support Act (UIFSA). UIFSA is the new interstate child support enforcement model law, intended to replace URESA. UIFSA is the new interstate child support enforcement model law, intended to replace URESA. UIFSA has already replace URESA in 34 States, and under the Personal Responsibility and Work

Opportunity Reconciliation Act of 1996, Federal law mandate that all States enact UIFSA by January 1, 1998. The standard interstate forms in this information collection will assist the States in making the transition from URESA to UIFSA.

Respondents: State governments, Guam, Virgin Islands, Puerto Rico and the District of Columbia.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Transmittal No. 1	54	11,947	25 minutes	268,805.4
Transmittal No. 2	54	2,987	5 minutes	13,440.2
Transmittal No. 3	54	597	10 minutes	5,376.1
Uniform Petition	54	5,973.5	7 minutes	37,632.8
General Testimony	54	7,168	20 minutes	129,026.6
Affidavit/Paternity	54	2,987	15 minutes	40,320.8
Locate Data Sheet	54	358	5 minutes	1,612.8
Notice/Cntrl Order	54	8,960	10 minutes	80,641.7
Registration Statement	54	7,885	10 minutes	70,964.6
Estimated Total Annual Burden Hours: 647,821.				

Additional Information

Copies of the proposed collection may be obtained by writing to The Administration for Children and Families, Office of Information Services, Division of Information Resource Management Services, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447, Attn: ACF Reports Clearance Officer.

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, N.W., Washington, D.C. 20503, Attn: Ms. Wendy Taylor.

Dated: February 24, 1997.

Bob Sargis,

Acting Reports Clearance Officer.

[FR Doc. 97–4953 Filed 2–27–97; 8:45 am]

BILLING CODE 4184–01–M

Food and Drug Administration

[Docket No. 97N–0040]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995, Federal agencies are required to publish notice in the Federal Register concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on a survey of the food safety practices of food processors.

DATES: Submit written comments on the collection of information by April 29, 1997.

ADDRESSES: Submit written comments on the collection of information to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Margaret R. Wolff, Office of Information Resources Management (HFA–250), Food and Drug Administration, 5600 Fishers Lane, rm. 16B–19, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the Federal Register concerning each proposed collection of information. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c). To comply with this requirement, FDA is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Survey of Food Safety Practices of Food Processing Firms—New Collection

FDA is evaluating the marginal costs of requiring food processors to use Hazard Analysis and Critical Control Point (HACCP) systems. HACCP is already required for seafood processors, and FDA is considering whether to issue regulations requiring HACCP for processors of other foods under the agency's jurisdiction. The analysis of marginal costs requires information about the prevalence of specific HACCP systems and practices among food manufacturers and repackers. FDA will collect this information through an anonymous voluntary survey of a random sample of food processors. Additionally, through a series of on-site visits to selected processors, a contractor will collect information on the marginal cost of various procedures required to operate a HACCP system. The information will help the Center for Food Safety and Applied Nutrition determine the baseline level of HACCP

use from which to estimate the economic costs to the industry of mandatory HACCP regulations for foods other than seafood. FDA will use this information in tailoring any HACCP regulations that may issue so that costs and benefits of such regulations are appropriately considered.

FDA estimates the burden of this survey as follows:

ESTIMATED ANNUAL REPORTING BURDEN

Burden Element	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
Part 1—Computer Assisted Telephone Interview (CATI)					
Respond to initial recruitment telephone call	1,231	1	1,231	0.2	246.2
Receive and read introductory letter, key term definitions	1,231	1	1,231	0.25	307.75
Obtain data to prepare for the telephone interview	1,231	1	1,231	0.35	430.85
Respond to telephone interview	1,231	1	1,231	0.5	615.50
Totals		1			1,600.3
Part 2—On-Site Cost Interview					
Receive initial recruitment telephone call	17	1	17	0.2	3.4
Receive and read introductory letter and materials	17	1	17	0.25	4.25
Obtain data to prepare for the site visit	17	1	17	0.5	8.5
Respond to questions during site visit	17	1	17	3.0	51.0
Followup questions	17	1	17	0.25	4.25
Total burden hours, on-site interviews					71.4

There are no capital costs or operating and maintenance costs associated with this collection of information.

The total burden hours for Part 1—CATI and Part 2—On-Site Cost Interview are 1,671.7.

The burden hour estimates are based on a pretest conducted with three focus groups.

Dated: February 20, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–4955 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96E–0269]

Determination of Regulatory Review Period for Purposes of Patent Extension; EXCENEL® Sterile Suspension

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for EXCENEL® Sterile Suspension and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that animal drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For animal drug products, the testing phase begins on the earlier date when either a major environmental effects test was initiated for the drug or when an exemption under section 512(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(j)) became effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the animal drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for an animal drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(4)(B).

FDA recently approved for marketing the animal drug product EXCENEL® Sterile Suspension (ceftiofur hydrochloride). EXCENEL® Sterile Suspension is indicated for the treatment and control of swine bacterial respiratory disease (swine bacterial pneumonia) associated with *Actinobacillus (Haemophilus) pleuropneumoniae, Pastureruella multocida, Salmonella choleraesuis,* and *Streptococcus suis* Type 2. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for EXCENEL® Sterile Suspension (U.S. Patent No. 4,902,683) from Pharmacia & Upjohn Co. and requested FDA's assistance in determining the patent's eligibility for patent term restoration. In a letter dated November 21, 1996, FDA advised the Patent and Trademark Office that this animal drug product had undergone a regulatory review period and that the approval of EXCENEL® Sterile Suspension represented the first

commercial marketing of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for EXCENEL® Sterile Suspension is 900 days. Of this time, 881 days occurred during the testing phase of the regulatory review period, while 19 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 512(j) of the Federal Food, Drug, and Cosmetic Act became effective*: November 10, 1993. FDA has verified the applicant's claim that November 10, 1993, was the date that the investigational new animal drug application became effective.

2. *The date the application was initially submitted with respect to the animal drug product under section 512(b) of the Federal Food, Drug, and Cosmetic Act*: April 8, 1996. The applicant claims April 3, 1996, as the date the new animal drug application (NADA) for EXCENEL® Sterile Suspension (NADA 140–890) was initially submitted. However, a review of FDA records reveals that FDA's official acknowledgment that the NADA was sufficiently complete to begin review was a telephone call requesting that certain additional information be added to the NADA on April 8, 1996, which is considered to be the initially submitted date for the NADA.

3. *The date the application was approved*: April 26, 1996. FDA has verified the applicant's claim that NADA 140–890 was approved on April 26, 1996.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,151 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before April 29, 1997, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before August 27, 1997, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 20, 1997.

Allen B. Duncan,

Acting Associate Commissioner for Health Affairs.

[FR Doc. 97–4954 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 94D–0259]

''Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use (1997);'' Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a points to consider (PTC) document entitled ''Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use (1997).'' This PTC document is intended to assist sponsors and investigators engaged in monoclonal antibody product development and it includes information to submit when filing investigational new drug applications and product license applications. The document revises a 1994 document entitled ''Draft Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use.''

DATES: Written comments may be submitted at any time.

ADDRESSES: Submit written requests for single copies of the document entitled ''Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use (1997)'' to the Manufacturers Assistance and Communication Staff (HFM–42), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your requests. The document may also be obtained by mail or fax by calling the CBER Fax Information System at 1–888–CBER–FAX or 301–827–3844.

Persons with access to the Internet may obtain the document using the World Wide Web (WWW) or bounce-back e-mail. For WWW access, connect to CBER at ''http://www.fda.gov/cber/cberftp.html.'' For bounce back e-mail send a message to ''ptc__mab@al.cber.fda.gov.''

Submit written comments on the PTC document to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857. Two copies of any comments are to be submitted, except that individuals may submit one copy. Requests and comments should be identified with the docket number found in brackets in the heading of this document. A copy of the PTC document and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Sharon A. Carayiannis, Center for Biologics Evaluation and Research (HFM–630), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–594–3074.

SUPPLEMENTARY INFORMATION: FDA is announcing the availability of a PTC document entitled ''Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use (1997).'' This PTC document supersedes the document entitled ''Draft Points to Consider in the Manufacture and Testing of Monoclonal Antibody Products for Human Use'' announced in the Federal Register of August 3, 1994 (59 FR 39571), and is designed to assist sponsors and investigators engaged in monoclonal antibody product development.

The PTC revision was undertaken for reasons that include but are not limited to: (1) Facilitating initial development of monoclonal antibodies for serious and immediately life-threatening indications; (2) updating and streamlining information from the 1994 PTC document; and (3) assuring consistency with current CBER policy and International Conference on Harmonisation documents dealing with this category of products. In the revision of this document, CBER reviewed and considered all comments submitted to the docket.

The PTC document details an approach for sponsors and investigators to follow in product manufacturing and testing, preclinical and clinical studies, and the information to be provided for

review and evaluation of clinical testing and licensing. This document applies to monoclonal antibodies made by traditional hybridoma technology as well as by recombinant technologies. Some of the major changes in the revised PTC document include: (1) An updated definition of a monoclonal antibody; (2) modification of the quality control, product testing, and product comparability sections; and (3) clarification of the techniques for and necessity of retrovirus testing. The section of the draft 1994 PTC document dealing with changes to be reported after product approval is not included in the 1997 PTC document because this subject is addressed in a separate rulemaking (61 FR 2739, January 29, 1996).

A new section of the document discusses abbreviated product testing for feasibility trials in serious and immediately life-threatening conditions. Other important new concepts contained in the revised PTC document are those of generic and modular virus clearance studies and the acceptability of demonstrating the removal of some contaminants by means of clearance studies, as opposed to routine testing. The concepts of generic and modular virus clearance studies and of clearance studies for some contaminants apply not only to monoclonal antibodies but also to recombinant products, as appropriate. CBER intends to update other guidance documents to reflect these studies. New concepts on abbreviated product testing for feasibility trials in serious and immediately life-threatening conditions and on generic and modular virus clearance studies do not apply to products of entirely human origin or to products that have the potential to be contaminated by human pathogens.

As with other guidance documents, FDA does not intend the PTC document to be all inclusive and cautions that not all information may be applicable to all situations. The document is intended to provide information and does not set forth requirements. Manufacturers may follow the document or may choose to use alternative procedures that are not provided in this document. If a manufacturer chooses to use alternative procedures, that manufacturer may wish to discuss the matter further with FDA to prevent expenditure of resources to generate data on activities that FDA may later determine to be unacceptable. Although this document does not create or confer any rights for or on any person and does not operate to bind FDA or the public, it does represent the agency's current thinking on the manufacture and testing of monoclonal antibody products for human use.

Interested persons may, at any time, submit to the Dockets Management Branch (address above) written comments on the PTC document. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Received comments will be considered in determining whether further revision of the PTC document in warranted. Any revised version of the PTC document will be announced in the Federal Register.

Dated: February 20, 1997.

William K. Hubbard,

Associate Commissioner for Policy Coordination.

[FR Doc. 97–5006 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 97F–0062]

General Electric Co.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that General Electric Co. has filed a petition proposing that the food additive regulations be amended to provide for the expanded safe use of triisopropanolamine as a component of phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-*tert*-butylphenyl ester, a stabilizer for olefin polymers intended for use in contact with food.

DATES: Written comments on the petitioner's environmental assessment by March 31, 1997.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Vir D. Anand, Center for Food Safety and Applied Nutrition (HFS–216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3081.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a food additive petition (FAP 7B4535) has been filed by General Electric Co., 1 Lexan Lane, Mt. Vernon, IN 47620–9364. The petition proposes to amend the food additive regulations in § 178.2010 *Antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) to provide for the safe use of triisopropanolamine as a component of phosphorous acid, cyclic butylethyl propanediol, 2,4,6-tri-tert-butylphenyl ester, a stabilizer for olefin polymers intended for use in contact with food.

The potential environmental impact of this action is being reviewed. To encourage public participation consistent with regulations promulgated under the National Environmental Policy Act (40 CFR 1501.4(b)), the agency is placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Dockets Management Branch (address above) for public review and comment. Interested persons may, on or before March 31, 1997, submit to the Dockets Management Branch (address above) written comments. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday. FDA will also place on public display any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the Federal Register. If, based on its review, the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the Federal Register in accordance with 21 CFR 25.40(c).

Dated: February 11, 1997.

George H. Pauli,

Acting Director, Office of Premarket Approval, Center for Food Safety and Applied Nutrition.

[FR Doc. 97–4962 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96E–0080]

Determination of Regulatory Review Period for Purposes of Patent Extension; Olean; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the Federal Register of January 6, 1997 (62 FR 763).

The document announced FDA's determination of the regulatory review period for purposes of patent extension for Olean (olestra). The document was published with an error. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

In FR Doc. 97–138, appearing on page 763 in the Federal Register of Monday, January 6, 1997, the following correction is made: On page 763, in the third column, beginning in line 6, ''Olean (U.S. Patent No. 4,005,196)'' is corrected to read ''Olean (U.S. Patent No. Re. 34,617)''.

Dated: February 20, 1997.

Allen B. Duncan,

Acting Associate Commissioner for Health Affairs.

[FR Doc. 97–4960 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

[Docket No. 96E–0265]

Determination of Regulatory Review Period for Purposes of Patent Extension; REDUX™

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined the regulatory review period for REDUX™ and is publishing this notice of that determination as required by law. FDA has made the determination because of the submission of an application to the Commissioner of Patents and Trademarks, Department of Commerce, for the extension of a patent which claims that human drug product.

ADDRESSES: Written comments and petitions should be directed to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Brian J. Malkin, Office of Health Affairs (HFY–20), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–1382.

SUPPLEMENTARY INFORMATION: The Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) and the Generic Animal Drug and Patent Term Restoration Act (Pub. L. 100–670) generally provide that a patent may be extended for a period of up to 5 years so long as the patented item (human drug product, animal drug product, medical device, food additive, or color additive) was subject to regulatory review by FDA before the item was marketed. Under these acts, a product's regulatory review period forms the basis for determining the amount of extension an applicant may receive.

A regulatory review period consists of two periods of time: A testing phase and an approval phase. For human drug products, the testing phase begins when the exemption to permit the clinical investigations of the drug becomes effective and runs until the approval phase begins. The approval phase starts with the initial submission of an application to market the human drug product and continues until FDA grants permission to market the drug product. Although only a portion of a regulatory review period may count toward the actual amount of extension that the Commissioner of Patents and Trademarks may award (for example, half the testing phase must be subtracted as well as any time that may have occurred before the patent was issued), FDA's determination of the length of a regulatory review period for a human drug product will include all of the testing phase and approval phase as specified in 35 U.S.C. 156(g)(1)(B).

FDA recently approved for marketing the human drug product REDUX™ (dexfenfluramine hydrochloride). REDUX™ is indicated for the management of obesity including weight loss and maintenance of weight loss in patients on a reduced calorie diet. Subsequent to this approval, the Patent and Trademark Office received a patent term restoration application for REDUX™ (U.S. Patent No. 4,309,445) from Interneuron Pharmaceuticals, Inc., and the Patent and Trademark Office requested FDA's assistance in determining this patent's eligibility for patent term restoration. In a letter dated November 21, 1996, FDA advised the Patent and Trademark Office that this human drug product had undergone a regulatory review period and that the approval of REDUX™ represented the first permitted commercial marketing or use of the product. Shortly thereafter, the Patent and Trademark Office requested that FDA determine the product's regulatory review period.

FDA has determined that the applicable regulatory review period for REDUX™ is 1,613 days. Of this time, 541 days occurred during the testing phase of the regulatory review period, while 1,072 days occurred during the approval phase. These periods of time were derived from the following dates:

1. *The date an exemption under section 505(i) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(i)) became effective*: December 1, 1991. The applicant claims January 13, 1992, as the date the investigational new drug application (IND) for REDUX™ (IND 38,108) became effective. However, FDA records indicate that the effective date for IND 38,108 was December 1, 1991, which was 30 days after FDA receipt of the IND on November 1, 1991.

2. *The date the application was initially submitted with respect to the human drug product under section 505(b) of the Federal Food, Drug, and Cosmetic Act*: May 24, 1993. The applicant claims May 23, 1993, as the date the new drug application (NDA) for REDUX™ (NDA 20–344) was initially submitted. However, FDA records indicate that NDA 20–344 was submitted on May 24, 1993.

3. *The date the application was approved*: April 29, 1996. FDA has verified the applicant's claim that NDA 20–344 was approved on April 29, 1996.

This determination of the regulatory review period establishes the maximum potential length of a patent extension. However, the U.S. Patent and Trademark Office applies several statutory limitations in its calculations of the actual period for patent extension. In its application for patent extension, this applicant seeks 1,322 days of patent term extension.

Anyone with knowledge that any of the dates as published is incorrect may, on or before April 29, 1997, submit to the Dockets Management Branch (address above) written comments and ask for a redetermination. Furthermore, any interested person may petition FDA, on or before August 27, 1997, for a determination regarding whether the applicant for extension acted with due diligence during the regulatory review period. To meet its burden, the petition must contain sufficient facts to merit an FDA investigation. (See H. Rept. 857, part 1, 98th Cong., 2d sess., pp. 41–42, 1984.) Petitions should be in the format specified in 21 CFR 10.30.

Comments and petitions should be submitted to the Dockets Management Branch (address above) in three copies (except that individuals may submit single copies) and identified with the docket number found in brackets in the heading of this document. Comments and petitions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: February 18, 1997.

Stuart L. Nightingale,

Associate Commissioner for Health Affairs.

[FR Doc. 97–4961 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–01–F

Advisory Committees; Notice of Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

FDA has established an Advisory Committee Information Hotline (the hotline) using a voice-mail telephone system. The hotline provides the public with access to the most current information on FDA advisory committee meetings. The advisory committee hotline, which will disseminate current information and information updates, can be accessed by dialing 1–800–741–8138 or 301–443–0572. Each advisory committee is assigned a 5-digit number. This 5-digit number will appear in each individual notice of meeting. The hotline will enable the public to obtain information about a particular advisory committee by using the committee's 5-digit number. Information in the hotline is preliminary and may change before a meeting is actually held. The hotline will be updated when such changes are made.

MEETINGS: The following advisory committee meetings are announced:

Orthopedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. March 6, 1997, 8:30 a.m., and March 7, 1997, 9 a.m., Holiday Inn—Gaithersburg, Ballroom, Two Montgomery Village Ave., Gaithersburg, MD. A limited number of overnight accommodations have been reserved at the hotel. Attendees requiring overnight accommodations may contact the hotel at 301–948–8900 and reference the FDA Panel meeting block. Reservations will be confirmed at the group rate based on availability. Attendees with a disability requiring special accommodations should contact Soo Bae, KRA Corp., 301–495–1591, ext. 227. The availability of appropriate accommodations cannot be assured unless prior notification is received.

Type of meeting and contact person. Open public hearing, March 6, 1997, 8:30 a.m. to 9:30 a.m., unless public participation does not last that long; open committee discussion, 9:30 a.m. to 2 p.m.; closed presentation of data, 2 p.m. to 2:30 p.m.; open committee discussion, 2:30 p.m. to 5:30 p.m.; open public hearing, March 7, 1997, 9 a.m. to 10 a.m., unless public participation does not last that long; open committee discussion, 10 a.m. to 2 p.m.; William Freas or Sheila D. Langford, Center for Biologics Evaluation and Research (HFM–21), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–1289, or Jodi H. Nashman, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2036, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Orthopedic and Rehabilitation Devices Panel, code 12521. Please call the hotline for information concerning any possible changes.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before March 3, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. On March 6, 1997, at the request of, and in conjunction with the Center for Biologics Evaluation and Research, the committee will discuss CARTICEL (autologous chondrocytes manipulated ex-vivo for structural repair, Genzyme Corp.) intended for treatment and repair of clinically significant, articular cartilage defects in the knee. On March 7, 1997, the committee will have a general discussion of study design and efficacy endpoints for clinical trials utilizing bone void fillers.

Closed presentation of data. On March 6, 1997, the sponsor will present to the committee trade secret and/or confidential commercial information relevant to the pending biologics licensing application (BLA). This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

FDA regrets that it was unable to publish this notice 15 days prior to the March 6 and 7, 1997, Orthopedic and Rehabilitation Devices Panel of the Medical Devices Advisory Committee meeting. Because the agency believes there is some urgency to bring this issue to public discussion and qualified members of the Orthopedic and Rehabilitation Devices Panel were available at this time, the Commissioner concluded that it was in the public interest to hold this meeting even if there was not sufficient time for the customary 15-day public notice.

Neurological Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. March 14, 1997, 9:30 a.m., Corporate Bldg., conference room 020B, 9200 Corporate Blvd., Rockville, MD. A limited number of overnight accommodations have been reserved at the Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Blvd., Gaithersburg, MD. Attendees requiring overnight accommodations may contact the hotel at 800–228–9290 or 301–590–0044 and reference the FDA Panel meeting block. Reservations will be confirmed at the group rate based on availability. Attendees with a disability requiring special accommodations should contact Soo Bae, KRA Corp., 301–495–1591, ext. 227. The availability of appropriate accommodations cannot be assured unless prior notification is received.

Type of meeting and contact person. Open public hearing, 9:30 a.m. to 10:45 a.m., unless public participation does not last that long; open committee discussion, 10:45 a.m. to 3:30 p.m.; closed committee deliberations, 3:30 p.m. to 4:30 p.m.; G. Levering Keely, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8517, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Neurological Devices Panel, code 12513. Please call the hotline for information concerning any possible changes.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before March 3, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the

names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss and vote on a premarket approval application for a deep brain stimulator for the treatment of tremor due to Parkinson's disease and Essential Tremor.

Closed committee deliberations. FDA staff will present to the committee trade secret and/or confidential commercial information regarding present and future FDA issues. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

FDA regrets that it was unable to publish this notice 15 days prior to the March 14, 1997, Neurological Devices Panel of the Medical Devices Advisory Committee meeting. Because the agency believes there is some urgency to bring this issue to public discussion and qualified members of the Neurological Devices Panel were available at this time, the Commissioner concluded that it was in the public interest to hold this meeting even if there was not sufficient time for the customary 15-day public notice.

Clinical Chemistry and Clinical Toxicology Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. March 20 and 21, 1997, 8 a.m., Holiday Inn—Gaithersburg, Ballroom, Two Montgomery Village Ave., Gaithersburg, MD. A limited number of overnight accommodations have been reserved at the hotel. Attendees requiring overnight accommodations may contact the hotel at 301– 948–8900 and reference the FDA Panel meeting block. Reservations will be confirmed at the group rate based on availability. Attendees with a disability requiring special accommodations should contact Christie Wyatt, KRA Corp., 301–495–1591, ext. 267. The availability of appropriate accommodations cannot be assured unless prior notification is received.

Type of meeting and contact person. Open public hearing, March 20, 1997, 8 a.m. to 8:30 a.m., unless public participation does not last that long; open committee discussion, 8:30 a.m. to 9 a.m; closed presentation of data, 9 a.m. to 9:30 a.m.; open committee discussion, 9:30 a.m. to 1:30 p.m.; open public hearing, 1:30 p.m. to 2:30 p.m., unless public participation does not last that long; open committee discussion, 2:30 p.m. to 6 p.m.; open public hearing, March 21, 1997, 8 a.m. to 9:15 a.m., unless public participation does not last that long; open committee discussion, 9:15 a.m. to 6 p.m.; Sharon K. Lappalainen, Center for Devices and Radiological Health (HFZ–440), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301–594–1243, or FDA Advisory Committee Information Hotline, 1–800–741–8138 (301–443–0572 in the Washington, DC area), Clinical Chemistry and Clinical Toxicology Devices Panel, code 12514. Please call the hotline for information concerning any possible changes.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before March 7, 1997, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments. The Docket will remain open until April 3, 1997, to allow written comment from the public.

Open committee discussion. On March 20, 1997, the committee will discuss a premarket notification submission, 510(k), for an over-the-counter device for measuring fructosamine. On March 20 and 21, 1997, the committee will discuss self-monitoring and management by diabetic patients including noninvasive and invasive self-monitoring blood glucose (SMBG) systems, glucose meters and test strips. The invasive systems have revolutionized modern diabetic management. Improvements in technology and increased understanding of the benefits of tight control have been substantial during the past few years. FDA is interested in identifying mechanisms to help minimize problems associated with SMBG systems. The goal of the meeting is to solicit information and suggestions from the FDA advisory panel, professional organizations, industry, and consumers that will help: (1) Identify how patients are currently being managed; (2) determine what goals are appropriate for different groups of patients and different treatment regimens; (3) determine what device performance is needed for support of these goals; (4) discuss current technology and its performance capabilities and limitations; and (5) identify areas in which the agency, professional groups, patients, and manufacturers can work together to help achieve the various goals of glucose monitoring and contribute to increased quality patient outcomes.

Invasive SMBG systems are used by individuals to monitor their own blood glucose levels. These devices allow individuals to monitor their status on a daily basis and, if necessary, modify therapy to obtain near normal glucose homeostasis. The use of SMBG systems has, therefore, become a cornerstone for modern diabetic therapy of significant importance to many of the 13 million diabetics in the United States. Reports in the medical literature have suggested that meter and strip performance claims made by manufacturers based on premarket testing may not reflect actual use by consumers. Topics of discussion will include:

(1) Improvements which can be made in the premarket review of these products including changes, if warranted, in review criteria and their application;

(2) Identification of realistic expectations for the physician and user of these devices based on current technology, and determination of testing needed to assure product quality. Discussion will include consideration of both existing technical limitations and the potentials for changes in glucose measuring technology in the future;

(3) Improvements which could be made in premarket product testing to provide a more realistic evaluation of actual performance in the field;

(4) Possible improvements in the labeling of these devices to better reflect the expected performance in the home setting;

(5) Steps that could be taken to improve the use of quality control measures in the home setting; and

(6) Other mechanisms available to FDA or other organizations to improve the practice of blood glucose monitoring in the home.

(7) Improvements that could be made to FDA's existing guidance document entitled ''Review Criteria for Assessment of Portable Blood Glucose Monitoring In Vitro Diagnostic Devices Using Glucose Oxidase, Dehydrogenase, or Hexokinase Methodology''—Draft 2/14/96. This guidance document is available through the Division of Small Manufacturer's Assistance (DSMA) at 301–443–6597, its toll free number 800–638–2041, or through DSMA Facts on Demand at 800–899–0381, DSMA Shelf Number 604.

FDA welcomes other input that will contribute to minimizing SMBG related problems.

Closed presentation of data. On March 20, 1997, the sponsor may present to the committee trade secret and/or confidential commercial information regarding the premarket notification submission. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of the meeting(s) shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants.

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this Federal Register notice. Changes in the agenda will be announced at the beginning of the open portion of a meeting.

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m., Monday through Friday. Summary minutes of the open portion of the meeting may be requested in writing from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, deliberation to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a)(1) and (a)(2) of the Federal Advisory Committee Act (5 U.S.C. app. 2), and FDA's regulations (21 CFR part 14) on advisory committees.

Dated: February 25, 1997.

Michael A. Friedman,

Deputy Commissioner for Operations.

[FR Doc. 97–5129 Filed 2–26–97; 11:04 am]

BILLING CODE 4160–01–F

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget, in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Application for Certification as a Federally Qualified Health Center (FQHC) (OMB No. 0915–0142); Extension and Revision

The Federally Qualified Health Center (FQHC) Look-Alike application package (OMB No. 0915–0142) was developed to certify entities as FQHC providers under Medicaid and Medicare. FQHCs receive

reasonable cost-related reimbursement under Medicaid and Medicare for a full range of primary health care services. The application for FQHC certification is divided into four components: (1) Need and Community Impact, (2) Health Services, (3) Management and Finance, and (4) Governance. Certified FQHC Look-Alikes must submit an annual recertification document with updated exhibits to retain designation as an FQHC.

In an effort to improve the procedures for certifying FQHCs, HRSA is considering revising the FQHC Look-Alike application (with parallel changes made to the recertification requirements). The revised version would update the application guidelines and exhibits to reflect current law, regulations, and practice. A revised application may also include more specific guidance on how applicants should document existing unmet need in the community.

These revisions will be developed during the next year and submitted for OMB approval in 1998. In the interim, a request for a two-year extension of OMB approval of the current forms is being submitted. Only minor technical changes have been made to the forms. Estimates of annualized hour burden are as follows:

Form name	Number of respondents	Responses per respondent	Hours per response	Total burden hours
Application	70	1	120	8,400
Recertification	231	1	20	4,620
Total	301	1	43	13,020

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: Virginia Huth, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: February 10, 1997.

J. Henry Montes,

Director, Office of Policy and Information Coordination.

[FR Doc. 97–4957 Filed 2–27–97; 8:45 am]

BILLING CODE 4160–15–P

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a list of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–0525.

Alcohol and Drug Services Study (ADSS) Phase II/III—New—Phases II and III of the ADSS will continue the collection of linked information on substance abuse treatment begun in the Phase I facility level survey. Phase II involves on-site interviews with administrators at 270 treatment facilities and a a record abstraction of client-level data on 8,800 treatment clients. Phase III consists of client followup interviews to determine post-discharge substance abuse, criminal activity, employment, and other social functioning. ADSS will provide researchers, policy makers, and providers with detailed national data on the current substance abuse treatment delivery system and clients in the system. The annualized burden is shown below.

	No. of respondents	No. of responses/respondent	Avg. burden/response	Total study burden	Annualized burden
Treatment Facilities	270	1.33	1.755 hours	630 hours	126 hours
Clients	8,800	3.38	1.125 hours	29,700 hours	5,940 hours.

Drug Abuse Warning Network (DAWN)—Extension of a currently approved collection—The Drug Abuse Warning Network (DAWN) collects data on drug-related medical emergencies and deaths as reported from about 650 hospitals and medical examiners nationwide. Used by Federal, State and local agencies, this on-going data system supports efforts to identify drug abuse trends; assesses health hazards associated with substance abuse; and schedules substances under the Controlled Substances Act. The annual burden estimate is 15,972 hours as shown below:

	No.of respondents	No.of responses per respondent	Average burden per response	Gross burden hours	IR [1] reporting hours	Total adjusted burden hours
Hospitals	500	368	0.133 hrs.	24,480	10,282	14,198
Medical Examiners	150	123	0.160 hrs.	2,957	1,183	1,774

[1] There is no burden associated with reporting by Independent Reporters (IRs), therefore these hours are not included in the Total Adjusted Burden Hours.

Written comments and recommendations concerning the proposed information collections should be sent within 30 days of this notice to: Virginia Huth, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10236, Washington, D.C. 20503.

Dated: February 21, 1997.
Richard Kopanda,
Executive Officer, SAMHSA.
[FR Doc. 97–4994 Filed 2–27–97; 8:45 am]
BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4200–N–32]

Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Chief Financial Officer, 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:* April 29, 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: Erie T. Davis, Jr., CFO Management Staff, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2102, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Patrick Wallis, Telephone number (202) 708–0313 (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 interested persons regarding the burden estimated or any other aspect of this collection of information, including any of the following subject: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

This Notice also lists the following information:

Title of Proposal: HUD–27053, Request for Grant Payment, HUD–27053A, Request for Homeless Grant Payment, HUD–27054 LOCCS Voice Response Access Authorization.

OMB Control Number: 2535–0102.

Description of the need for the information and the proposed use: HUD/CFO decided to process requests for payments to its grant recipients through a Voice Response System after the Department of Treasury closed down its Treasury Financial Communications System—Letter of Credit (TRCS–LOC) at the end of calendar year 1990. Under Voice Response, a caller submits a payment request directly to HUD using a touch tone telephone. The caller is greeted by a ''DEC–TALK Simulator'' prompting the caller to enter numbers and symbols from the touch tone keypad. The above mentioned forms will be used in lieu of the SF–270, Request for Advance or Reimbursement or the TFS–5805, Request for Funds, or the FMS–5401, Payment Voucher on Letter of Credit pursuant to the requirements of Circular A–102, A–110, and TFM 6–2000. These forms impose no additional burden on the recipient except for filling out the access authorization form. Recipients will fill out these forms in order to request payment of grant funds or to designate the appropriate officials who can have access to the HUD voice activated payment system. The request for payment forms have been specially designed to help the recipient when calling in for a request of funds. These forms will be used in lieu of the SF–270, Request for Advance or Reimbursement or the SF–5805, Request for Funds. In addition, these forms will be used as an internal control feature instituted to support and safeguard Federal funds, as well as provide a service to the recipients. The voice activated payment concept is the latest in technology and provides a recipient a fast, reliable method to obtain Federal funding. This method should improve the payment process because the recipient will know before he/she hangs up the phone whether their request will be paid or who to call if there is a problem and the request was not processed by the system. All requests processed by the system will be paid by ACH within 48 hours. No duplication is involved with these forms since HUD will not require the SF–270, Request for Advance or Reimbursement. HUD is not using the SF–270, Request for Advance or Reimbursement because we wanted a custom designed form to prompt the caller to enter numbers and symbols from a touch tone keypad. The SF–270, Request for Advance or Reimbursement would not easily facilitate this type of payment method. The associated burden is the minimum needed to request payment of funds. The Voice Response System will accept request of funds from a recipient on a daily basis. However, a recipient should be using good cash management practices and request payment of HUD funds administratively close to when they have to pay their bills. Therefore, the frequency a recipient requests funds will depend upon the types of activities he or she is managing. We [HUD] do not violate the guidelines of 5 CFR 1320.6. We consulted only with the Department of Health and Human Services in February 1990, concerning their system and the costs associated with using it. This payment system will require that the latest security features be installed to deter excessive fraudulent payments. Only a limited number of authorized officials will have access to the system for updating purposes. No sensitive questions are asked. Cost to the Federal Government is based on approximately $.03 a copy for the form HUD–27054 and $.08 a copy for forms HUD–27053 and HUD–27053A to be printed and distributed (including overhead) to recipients; *Frequency:* Annually; *Affected Public: Number of Respondents:* 2,000; *Total Annual Responses:* 237,200; *Total Annual Hours:* 41,133.

Agency form numbers: HUD–27053, HUD–27053A, HUD–27054.

Members of affected public: State, Local or Tribal Governments, not-for-profit institutions.

An estimation of the total number of hours needed to prepare the information collection is 41,133, number of respondents is 2,000, frequency of response is annually and the total annual responses is 237,200.

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: February 21, 1997.
William H. Eargle, Jr.,
Deputy Chief Financial Officer for Accounting.
[FR Doc. 97–5015 Filed 2–27–97; 8:45 am]
BILLING CODE 4210–01–M

[Docket No. FR–4124–N–27]

Federal Property Suitable as Facilities to Assist the Homeless

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

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, Department of Housing and Urban Development, Room 7256, 451 Seventh Street SW, Washington, DC 20410; telephone (202) 708–1226; TDD number for the hearing- and speech-impaired (202) 708–2575, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: February 21, 1997.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

[FR Doc. 97–4792 Filed 2–27–97; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Western Water Policy Review Advisory Commission Meeting

AGENCY: Department of the Interior.

ACTION: Notice of open meeting.

SUMMARY: As required by the Federal Advisory Committee Act, notice is hereby given that the Western Water Policy Review Advisory Commission (Commission), established by the Secretary of the Interior under the Reclamation Projects Authorization and Adjustment Act of 1992, will hold a public water issues forum, ''Indian Water 1997: Trends and Directions in Federal Water Policy'' and business meeting. The purpose of this meeting is for the Commission to receive American Indian community testimony regarding water issues impacting American Indians in the 19 Western States and to meet on other Commission business.

DATES: Monday, March 17, 1997, 9:00 a.m.–5:00 p.m.; Tuesday, March 18, 1997, 8:00 a.m.–5:00 p.m.

ADDRESSES: Location: Hyatt Regency Hotel, 122 N. Second Street, Phoenix, Arizona. Copies of the agenda are available from the Western Water Policy Review Office, D–5001; P.O. Box 25007; Denver, CO 80225–0007.

FOR FURTHER INFORMATION CONTACT: The Commission Office at telephone 303–236–6211, FAX 303–236–4286, or email to rgunnarson@do.usbr.gov.

SUPPLEMENTARY INFORMATION: The seminar is being organized and hosted by the American Indian Resources Institute of Oakland, California. Room locations will be posted in the hotel lobby.

Public Participation

Seating for observers will be limited and reservations are strongly recommended. Seating may be reserved by contacting the Commission Office. Written statements may be provided in advance to the Western Water Policy Review Office, address cited under the **ADDRESSES** caption of this notice, or submitted directly at the meeting. Statements will be provided to the members prior to the meeting if received by no later than March 7, 1997. The Commission's schedule will not allow time for formal presentations by the public during the meeting.

Dated: February 24, 1997

Larry Schulz,

Administrative Officer.

[FR Doc. 97–5020 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–10–M

Fish and Wildlife Service

Notice of Receipt of Application for Endangered Species Permit

The following applicant has applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*):

Applicant: Roy S. DeLotelle, DeLotelle and Guthrie, Inc., Gainesville, Florida, PRT–825431.

The applicant requests a permit to take (capture and harass for banding, and translocation) the endangered red-cockaded woodpecker, *Picoides borealis*, throughout the species range in North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Tennessee, Arkansas, Texas, Oklahoma, Virginia, and Missouri for the purpose of enhancement of survival of the species.

Written data or comments on these applications should be submitted to: Regional Permit Biologist, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345. All data and comments must be received by March 31, 1997.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act*, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, 1875 Century Boulevard, Suite 200, Atlanta, Georgia 30345 (Attn: David Dell, Permit Biologist). Telephone: 404/679–7313; Fax: 404/679–7081.

Dated: February 20, 1997.

Noreen K. Clough,

Regional Director.

[FR Doc. 97–5019 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–55–P

Availability of Draft Environmental Assessment, Receipt of Application for, and Intent to Issue, Incidental Take Permit for Development of Church Facility in Cedar City, Iron County, UT

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability, receipt of application for, and intent to issue permit.

SUMMARY: The Church of Jesus Christ of Latter-Day Saints (Applicant) has applied to the Fish and Wildlife Service for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended. The Applicant has been assigned permit number PRT–825570. The requested permit, which is for a period of 2 years, would authorize incidental take of the threatened Utah Prairie Dog (*Cynomys parvidens*). The proposed take would occur as a result of development of church facilities on a 6.3-acre privately-owned parcel located within Cedar City, Iron County, Utah.

The Service has prepared the Environmental Assessment for issuance of the incidental take permit. The Applicant has prepared a habitat conservation plan as part of the incidental take permit application. A determination of whether jeopardy to the species will occur, or a Finding of No Significant Impact, and/or issuance of the incidental take permit, will not be made before 30 days from the date of publication of this notice. This notice is provided pursuant to section 10(c) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the permit application must be received on or before March 31, 1997.

ADDRESSES: Persons wishing to review the permit application may obtain a copy by writing to the Assistant Field Supervisor, Utah Ecological Services Field Office, U.S. Fish and Wildlife Service, 145 East 1300 South Street, Suite 404, Salt Lake City, Utah 84115. Documents will be available for public inspection by written request, or by appointment only, during business hours (8:00 AM to 4:30 PM) at the above address.

Written data or comments concerning the permit application should be submitted to the Assistant Field Supervisor, Utah Ecological Services Field Office, U.S. Fish and Wildlife Service, Salt Lake City, Utah (see **ADDRESSES** above). Please refer to permit number PRT–825570 in all correspondence regarding these documents.

FOR FURTHER INFORMATION CONTACT: Robert D. Williams, Assistant Field Supervisor or Marilet A. Zablan, Wildlife Biologist, at the above U.S. Fish and Wildlife Service office in Salt Lake City, Utah (see **ADDRESSES** above) (telephone: (801) 524–5001, facsimile: (801) 524–5021).

SUPPLEMENTARY INFORMATION: Section 9 of the Act prohibits the ''taking'' of any threatened or endangered species, such as the threatened Utah Prairie Dog. However, the Service, under limited circumstances, may issue permits to take threatened or endangered wildlife species when such taking is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for threatened and endangered species are at 50 CFR 17.22.

Applicant

The Applicant plans to develop a 6.3-acre church facility, located in section 35 in Township 35 South, Range 11 West, Salt Lake Base and Meridian, within Cedar City, Iron County, Utah. Development is planned to include a meeting house, seminary building, parking area, and installation of associated infrastructure such as natural gas, sewer, water, electrical power, and telephone service. The construction will impact 6.3 acres of Utah Prairie Dog habitat, and the Applicant foresees an incidental take of a maximum of 22 Utah Prairie Dogs through trapping and relocation and the potential incidental take of no more than two Utah Prairie Dogs as a result of direct mortality during construction. The Applicant proposes to compensate for this habitat loss by payment of $900 per acre for each acre developed, to be used for public land management actions for Utah Prairie Dog conservation and to implement recovery actions for conservation of the Utah Prairie Dog, through contribution to the Utah Prairie Dog Conservation Fund.

A no-action alternative to the proposed action was considered, consisting of foregoing the development of the 6.3-acre area of Utah Prairie Dog habitat. The no-action alternative was rejected for reasons including loss of use of the private property, resulting in significant economic loss to the Applicant.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et. seq.)* and the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et. seq.*)

Dated: February 24, 1997.

Terry Terrell,

Deputy Regional Director, Region 6, Denver, Colorado.

[FR Doc. 97–4995 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–55–M

Bureau of Land Management

[AK–962–1410–00-P; AA–9299]

Notice for Publication; Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of Section 14(h)(1) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(h)(1), will be issued to Calista Corporation for approximately 36.8 acres. The lands involved are in the vicinity of Nunivak Island, Alaska.

Seward Meridian, Alaska

T. 2 N., R. 104 W.,
Sec. 36.

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the Anchorage Daily News. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7599 ((907) 271–5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until March 31, 1997 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR Part 4, Subpart E, shall be deemed to have waived their rights.

Patricia A. Baker,

Land Law Examiner, ANCSA Team, Branch of 962 Adjudication.

[FR Doc. 97–5008 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–$$–P

[OR–030–07–1120–00: GP7–0107]

National Historic Oregon Trail Interpretive Center Advisory Board; Notice

AGENCY: Vale District, Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The purpose of this notice is to solicit public nominations for seven seats on the Bureau of Land Management (BLM) National Historic Oregon Trail Interpretative Center Advisory Board. The Advisory Board, created in 1997 by the Secretary of the Interior, provides advice to BLM on matters pertinent to the Bureau of Land Management's responsibilities for the management of the National Historic Oregon Trail Interpretive Center. Nominations should be received 45 days from the publication date of this notice. In making appointments to the Advisory Board, the Secretary will also consider nominations made by the Governor of Oregon. The Federal Land Policy and Management Act (FLPMA) directs the Secretary of the Interior to establish advisory councils to provide advice on land use planning and issues related to management of lands administered by BLM. In order to reflect a fair balance of viewpoints, the membership of the National Historic Oregon Trail Interpretive Center Advisory Board must represent various interests concerned with the management of the National Historic Oregon Trail Interpretive Center. These include:

1. The Wallowa Whitman Forest Supervisor or his designee.
2. A representative from Trail Tenders, Inc.
3. A representative from the Oregon Trail Preservation Trust.
4. A representative from the business community.
5. A representative of county or local elected office.
6. Two members of public-at-large.

Individuals may nominate themselves or other but nominees must be residents of Oregon. Nominees will be evaluated

based on their demonstrated ability to analyze and interpret data and information, evaluate proposals, identify problems, and promote the use of collaborative management techniques. These include long-term planning and further development of the Interpretive Center, interagency coordination, management across jurisdictional boundaries, data sharing, information exchange, and partnerships. All nominations must be accompanied by letters of reference from represented interests or organizations, a completed background information nomination form, as well as any other information that speaks to the nominee's qualifications. The nomination period will also be announced through news releases issued by the BLM Vale District, Oregon office. Nominations for the Advisory Board should be sent to National Historic Oregon Trail Interpretive Center Advisory Board, Attention: Jonne Hower, BLM, 100 Oregon St., Vale, Oregon 97918.

DATES: All nominations should be received on or before April 15, 1997.

FOR FURTHER INFORMATION AND APPLICATION FORMS CONTACT: Jonne Hower, Bureau of Land Management, Vale District, 100 Oregon Street, Vale, OR 97918, (Telephone 541 473–3144).

Completed Nominations/Background Forms should be obtained from and returned to the same addresses listed above.

Edwin J. Singleton,

District Manager.

[FR Doc. 97–4975 Filed 2–21–97; 8:45 am]

BILLING CODE 4310–33–M

[MT–962–1020–00]

Notice of Availability for the Montana/Dakotas Standards for Rangeland Health and Guidelines for Livestock Grazing Management Supplement to the Draft Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Supplement to the Draft Environmental Impact Statement (EIS) includes additional information and documents the effects of adopting regional standards for rangeland health and guidelines for livestock grazing management on BLM-administered lands west of the Continental Divide, in Montana. The supplement discloses additional impacts not already covered in the Draft EIS from implementing the proposed alternatives on lands west of the Continental Divide. This action is proposed in accordance with revised regulations for livestock grazing on BLM-administered lands (43 CFR 4100). The proposed standards and guidelines were developed in partnership with the Butte Resource Advisory Council (RAC), and with other public input. There will be a 60-day comment period on the Draft EIS Supplement. The comment period will begin the day the EPA Notice appears in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Sandy Brooks, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107–6800, or 406–255–2929.

SUPPLEMENTARY INFORMATION: When the Montana/Dakotas Draft EIS for Standards for Rangeland Health and Guidelines for Livestock Grazing Management was issued, lands west of the Continental Divide were not included in the analysis because they are being considered as part of the Interior Columbia Basin Ecosystem Management Project (ICBEMP). However, the schedule to complete the ICBEMP has been extended, which would cause the Fallback Standards and Guidelines to automatically go into effect on August 12, 1997. By supplementing the Montana/Dakotas Draft EIS, these lands would be subject to the same consideration and analysis of alternatives as other lands in Montana/Dakotas. The record of decision signed on the Montana/Dakotas Standards and Guidelines Final EIS, will apply to lands west of the Continental Divide, in Montana. The ICBEMP decision will supersede the Montana/Dakotas Standards and Guidelines decision, for these lands, when the ICBEMP is complete. The supplement to the DEIS revises information and analysis in the Draft EIS to include BLM-administered lands west of the Continental Divide. There will be a 60-day comment period. Comments must be received by May 3, 1997. An open house will be held to exchange information with the public about the standards and guidelines supplement to the Draft EIS. The open house will be held on March 20, 1997, at the Garnet Resource Area Office, 3255 Fort Missoula Road, Missoula, Montana, from 4 p.m. to 7 p.m.

Dated: February 21, 1997.

Thomas P. Lonnie,

Deputy State Director, Division of Resources.

[FR Doc. 97–4996 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–DN–P

[CO–010–07–1020–00–241A]

Northwest Colorado Resource Advisory Council Meetings

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that the next meetings of the Northwest Colorado Resource Advisory Council will be held on Friday, March 14, 1997, in Grand Junction, Colorado; and Wednesday, May 14, 1997, in Steamboat Springs, Colorado.

DATES: Meetings are scheduled for Friday, March 14, 1997, and Wednesday, May 14, 1997.

ADDRESS: For further information, contact Joann Graham, Bureau of Land Management (BLM), Grand Junction District Office, 2815 H Road, Grand Junction, Colorado 81506; Telephone (970) 244–3000; TDD (970) 244–3037.

SUPPLEMENTARY INFORMATION:

Friday, March 14, 1997

This meeting will be held in the BLM District Office Conference Room, 2815 H Road, Grand Junction, Colorado.

Wednesday, May 14, 1997

This meeting will be held at the Yampa Valley Rural Electrification Building, 32 Tenth Street, Steamboat Springs, Colorado.

All meetings are scheduled to begin at 9 a.m. The March 14 meeting in Grand Junction will focus on general Council business, Council subcommittee reports, and Area Manager reports on the following topics: (1) The status of the Bang's Canyon Management Plan, (2) possible acquisition of the Naval Oil Shale Reserve, and (3) resource management conflicts in new areas proposed for wilderness designation by a group of 47 conservationists.

The agenda for the May 14 meeting in Steamboat Springs will focus on general Council business and subcommittee reports.

All Resource Advisory Council meetings are open to the public. Interested persons may make oral statements at the meetings or submit written statements following the meetings. The Grand Junction/Craig District Manager may set per-person time limits for oral statements, if needed, to allow all interested persons an opportunity to speak.

Summary minutes for the Council meeting will be maintained in the Grand Junction and Craig District Offices and will be available for public inspection and reproduction during regular

business hours within thirty (30) days following the meeting.

Dated: February 24, 1997.

Richard Arcand,

Acting Grand Junction/Craig District Manager.

[FR Doc. 97–5011 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–70–P

[NM–930–1310–01; NMNM 95616]

New Mexico: Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease NMNM 95616 for lands in Rio Arriba County, New Mexico, was timely filed and was accompanied by all required rentals and royalties accruing from September 1, 1996, the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $10.00 per acre or fraction thereof and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and has reimbursed the Bureau of Land Management for the cost of this Federal Register notice.

The Lessee has met all the requirements for reinstatement of the lease as set out in Sections 31 (d) and (e) of the Mineral Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate the lease effective September 1, 1996, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

For further information contact: Gloria S. Baca, BLM, New Mexico State Office, (505) 438–7566.

Dated: February 20, 1997.

Gloria S. Baca,

Land Law Examiner.

[FR Doc. 97–5010 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–FB–M

[ID–957–1430–00]

Idaho: Filing of Plats of Survey; Idaho

The plat of the following described land was officially filed in the Idaho State office, Bureau of Land Management, Boise, Idaho, effective 9:00 a.m. February 11, 1997.

The plat representing the dependent resurvey of portions of the north boundary and of the subdivisional lines, the subdivision of sections 5 and 8, and the survey of lot 2 in section 5, T. 9 S., R. 29 E., Boise Meridian, Idaho, Group No. 931, was accepted February 11, 1997.

This plat was prepared to meet certain administrative needs of the Bureau of Land Management. All inquiries concerning the survey of the above described land must be sent to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 1387 S. Vinnell Way, Boise, Idaho, 83709–1657.

Dated: February 11, 1997.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 97–4977 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–GG–M

[ID–957–1430–00]

Idaho: Filing of Plats of Survey; Idaho

The plat of the following described land was officially filed in the Idaho State Office, Bureau of Land Management, Boise, Idaho, effective 9:00 a.m. February 11, 1997.

The plat representing the dependent resurvey of portions of the subdivisional lines and the subdivision of sections 15 and 22, T. 12 S., R. 25 E., Boise Meridian, Idaho, Group No. 964, was accepted February 11, 1997.

This plat was prepared to meet certain administrative needs of the Bureau of Land Management. All inquiries concerning the survey of the above described land must be sent to the Chief, Cadastral Survey, Idaho State Office, Bureau of Land Management, 1387 S. Vinnell Way, Boise, Idaho, 83709–1657.

Dated: February 11, 1997.

Duane E. Olsen,

Chief Cadastral Surveyor for Idaho.

[FR Doc. 97–4978 Filed 2–27–97; 8:45 am]

BILLING CODE 4310–GG–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

February 25, 1997.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (P.L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Departmental Clearance Officer, Theresa M. O'Malley ({202} 219–5096 ext. 143). Individuals who use a telecommunications device for the deaf (TTY/TDD) may call {202} 219–4720 between 1:00 p.m. and 4:00 p.m. Eastern time, Monday through Friday.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, DM, ESA, ETA, MSHA, OSHA, PWBA, or VETS, Office of Management and Budget, Room 10235, Washington, DC 20503 ({202} 395–7316) by March 31, 1997.

The OMB is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Pension Welfare Benefits Administration.

Title: Prohibited Transaction Exemption 77–10.

OMB Number: 1210–0081.

Frequency: On occasion.

Affected Public: Individuals or households; business or other for-profit.

Number of Respondents: 1.

Estimated Time Per Respondent: 1 hour.

Total Burden Hours: 1.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: This class exemption complements class exemption 76–1. It permits employers, unions, or another plan to lease office space from or to obtain administrative services or goods from a multiple employer plan or multiemployer plan.

Agency: Pension Welfare Benefits Administration.

Title: Prohibited Transaction Exemption 91–38.

OMB Number: 1210–0082.

Frequency: On occasion.

Affected Public: Individuals or households; business or other for-profit.

Number of Respondents: 1.

Estimated Time Per Respondent: 1 hour.

Total Burden Hours: 1.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: This class exemption exempts from the prohibited transaction provisions of ERISA certain transactions between a bank collective investment fund and persons who are parties in interest with respect to a plan as long as the plan's participation in the collective investment funds does not exceed a specified percentage of the total assets in the collective investment fund.

Agency: Pension Welfare Benefits Administration.

Title: Prohibited Transaction Exemption 90–1.

OMB Number: 1210–0083.

Frequency: On occasion.

Affected Public: Individuals or households; business or other for-profit.

Number of Respondents: 1.

Estimated Time Per Respondent: 1 hour.

Total Burden Hours: 1.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: This class exemption allows parties in interest of an employee benefit plan that invests in an insured pool separate account to engage in transactions with the separate account if the plan's participation in the separate account does not exceed certain limits.

Agency: Occupational Safety and Health Administration.

Title: Personal Protective Equipment for Shipyard Employment (29 CFR 1915, Subpart 1).

OMB Number: 1218–0 new.

Frequency: As needed.

Affected Public: Business or other for-profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 500.

Estimated Time Per Respondent: varies (1 hour to 17.8 hours).

Total Burden Hours: 1,540.

Total Annualized capital/startup costs: 0.

Total annual costs (operating/maintaining systems or purchasing services): 0.

Description: These requirements are intended to reduce hazards to employees through the use of personal protective equipment (PPE). They establish procedures for assessing the workplace to identify where PPE is needed, provide for training in PPE, and set minimum requirements for PPE.

Theresa M. O'Malley,

Departmental Clearance Officer.

[FR Doc. 97–5004 Filed 2–27–97; 8:45 am]

BILLING CODE 4510–23–M

Employment and Training Administration

Federal-State Unemployment Compensation Program: Unemployment Insurance Program Letters Interpreting Federal Unemployment Insurance Law

The Employment and Training Administration interprets Federal law requirements pertaining to unemployment compensation as part of its role in the administration of the Federal-State unemployment compensation program. These interpretations are issued in Unemployment Insurance Program Letters (UIPLs) to the State Employment Security Agencies (SESAs). The UIPLs described below are published in the Federal Register in order to inform the public.

UIPL 05–97

The Department's interpretation of several Federal requirements in a remote claimstaking environment was issued in UIPL 35–95, dated June 28, 1995 (published at 60 FR 55604, 11/1/96). Additional questions have been raised about the impact of remote initial claimstaking procedures on claims filed under the Interstate Arrangement for Combining Employment and Wages, the Unemployment Compensation for Ex-Servicemembers program, and the Extended Benefits program. Questions have also been raised regarding how States can comply with the requirement that non-citizen claimants present documentation of a satisfactory immigration status in a remote claimstaking environment. This UIPL contains information on each of these areas.

UIPL 16–97

This UIPL is being issued to correct several technical errors which the Department of Labor has identified in UIPLs 45–92, 17–95, 30–96, and 37–96. None of the changes make any change to the Department's interpretation of Federal law.

Dated: February 21, 1997.

Timothy M. Barnicle,

Assistant Secretary of Labor.

U.S. Department of Labor

Employment and Training Administration

Washington, D.C. 20210

Classification UI

Correspondence Symbol TEUPDI

Date: December 2, 1996.

Directive: Unemployment Insurance Program Letter No. 05–97
To: All State Employment Security Agencies
From: Mary Ann Wyrsch, Director, Unemployment Insurance Service
Subject: The Department of Labor's Position on Issues and Concerns Associated With the Utilization of Telephone and Other Electronic Methods of Claimstaking in the Unemployment Insurance (UI) Program.

1. *Purpose.* To advise State Employment Security Agencies (SESAs) of the Department's interpretation of Federal statues and regulations relating to telephone and other electronic methods of claimstaking.

2. *References.* Section 1137, Social Security Act (SSA); Federal-State Extended Unemployment Compensation Act; ETA Handbooks Nos. 384, 392, and 399; 20 CFR 614; 20 CFR 616; and Unemployment Insurance Program Letter (UIPL) No. 35–95.

3. *Background.* The Department's interpretation of several Federal requirements in a remote claimstaking environment was issued in UIPL No. 35–95, dated June 28, 1995. However, additional questions have been raised about the impact of remote initial claimstaking procedures on claims filed under the Interstate Arrangement for Combining Employment and Wages (Combined Wage Claims), the Unemployment Compensation for Ex-Servicemembers (UCX) program and the Extended Benefits program. Questions also have been raised regarding how States can comply with the requirement that non-citizen claimants present documentation of a satisfactory immigration status in a remote claimstaking environment. This directive includes information on each of these areas.

4. *Presentation of Alien Documentation.* Section 1137(d)(2), SSA, provides the following:

If such an individual is not a citizen or national of the United States, there must be presented either—

(A) Alien registration documentation or other proof of immigration registration from the Immigration and Naturalization Service that contains the individual's alien admission umber or alien file number * * *, or

(B) such other documents as the State determines constitutes reasonable evidence indicating a satisfactory immigration status.

UIPL No. 35–95, Section 3.A.(5) stated that ''neither sections 1137(d)(2)(A) or (B), SSA, may be satisfied by information obtained by telephone (orally or IVR/VRS) or entry via a computer keyboard or touchscreen.''

Upon reconsideration, the Department concludes that the requirement to present documentation from the Immigration and

Naturalization Service (INS), under Section 1137(d)(2)(A), SSA, can be satisfied by having the claimant ''present'' the documentation over the telephone by either using the keypad to enter data, or by reading the admission or file number from the document. This conclusion was made because it is unnecessary for a claims taker/examiner to personally inspect the INS documentation in order to obtain from the document the alien admission or file number for verification through the INS.

This change only affects how the claimant is allowed to present INS alien documentation in accordance with Section 1137(d)(2)(A), SSA. It does not otherwise affect the requirement that the SESA must require that each claimant, who has indicated noncitizenship status, establish a satisfactory immigration status in accordance with Section 1137(d)(2)(A), SSA. This change does not affect the Department's interpretation of Section 1137(d)(2)(A), SSA, as permitting a State to allow a claimant to submit a photostatic copy of the INS document(s) (containing the alien admission or file number) by mail or facsimile (FAX) transmission in lieu of viewing the original INS document(s). A photocopy or FAX of documentation *not* containing the alien admission or file number will *not* satisfy the requirements of Section 1137(d)(2)(b), SSA, because such documents cannot be verified through the INS. Such documents must be presented in person. Thus, there are three ways for a non-citizen claimant to ''present'' alien documentation: (1) by personally bringing to the claims office the original of the INS document containing the alien or admission numnber or other documents that the State determines constitutes reasonable evidence of a satisfactory immigration status; (2) by mailing a photocopy of, or FAXING, the INS document containing the admission or file number to the claims office; or (3) by telephoning the claims office and using the keypad to enter (or reading) the admission or file number from the INS document.

5. *Combined Wage Claim (CWC) Paying State/ UCX Wage Assignment.* Under 20 CFR 616.6(e), the paying State for a CWC is required to be the State ''in which'' the claim is filed, unless the claimant is ineligible on the basis of combining, in which case the paying State is the State in which the claimant was last employed in covered employment and qualifies for benefits. This provision was promulgated in 1974, 39 Federal Register 45214 (December 31, 1974), in order to change the definition of the paying State to require that most CWC claims be filed under the intrastate program. Among other reasons, this change was intended to result in greater promptness in the payment of benefits, and cost savings (because it costs more to file through the Interstate Benefit Payment Plan (IBPP) rather than intrastate), while not adversely affecting the amount of benefits for which combined wage claimants qualify.

Under 20 CFR 614.8(b)(1), UCX wages are required to be assigned to the State ''in which'' a first claim is filed. Thus UCX requirement is derived from 5 U.S.C. Section 8522, and, as noted in the legislative history to Public Law No. 85–848 (H.R. Rep. No. 1887, 85th Congress, 2nd Session 7; S. Rep. No. 2375, 85th Congress, 2nd Session 15), is designed to keep interstate claims to a minimum. This assures that such claims are filed as intrastate claims under the law of the State in which the claimant is filing. This prevents claimants, in an attempt to qualify for greater benefit amounts or avoid potential disqualifications, from filing their claims under the IBPP and having wages assigned or transferred to any State of their choice.

In developing remote claimstaking procedures, States have requested an interpretation of the phrase ''in which'', for purposes of establishing the ''paying State'' for CWC claims and in determining the State of UCX wage assignment, when intrastate initial claims are allowed to be filed remotely by commuters from locations outside the State. (An intrastate claim is a claim filed in a State under the law of that State.) The issue, with regard to remote intrastate claims, is whether a remote CWC or UCX claim filed by a commuter is filed in the State ''in which'' the claimant is physically present or the State ''in which'' the claims office is located.

Historically, intrastate CWC and UCX claims have been only those claims filed by individuals filing in-person in a facility in the liable/paying State. Generally, these claims are filed by individuals who reside, and have worked, in the State, and by individuals who, while residing in another State, have established a pattern of regularly commuting to work in the State. this latter category of individuals is precluded from filing against the liable State under the IBPP, except in cases where the State of residence finds that requiring such claimants to file intrastate claims in the State to which they normally commute to work would cause an undue hardship. (The use of remote claimstaking removes the hardship and allows all commuters to file directly with the State to which they normally commute.) Additionally, there are cases where some intrastate CWC and UCX claims are filed by individuals who neither reside, nor have worked, in the liable/paying State, but file their claims in-person in a facility in that State.

It is the Department's position that the procedural change from in-person to remote claimstaking should have no effect on the historical treatment of intrastate claims in the determination of benefit eligibility or for reporting purposes. Thus, where intrastate claimstaking procedures require or permit a commuter to remotely file a CWC claim, and/or a ''first claim'' for UCX wage assignment purposes, with a State to which (s)he commuted, that State is the State ''in which'' the claim is filed. Further, an intrastate CWC, or intrastate ''first claim,'' that causes UCX wages to be assigned to the liable/paying State, may only be filed remotely from another State by individuals who have established a pattern of commuting to work in the liable/paying State.

Additionally, to ensure that remote claimstaking procedures do not adversely affect other non-resident claimants who may wish to file a claim while in another State, UCX wages are to be assigned in accordance with 20 CFR 614.8(b)(1) for UCX, and the paying State determined in accordance with 20 CFR 616.6(e) for CWC, for any claimant who is physically present in the filing State at the time the claim is filed, without regard to the claimant's State of residence or mailing address. States are not authorized to impose a residency requirement in the application of the above-referenced regulations.

6. *Application of Extended Benefits (EB) Two-Week Denial Provision.* Except for the first two weeks for which benefits are otherwise payable, 20 CFR 615.9(c) prohibits the payment of benefits pursuant to a claim filed under the IBPP from a State that is not in an EB period. Since this provision applies to interstate claims filed by individuals who reside outside the liable State, a question has been raised about whether or not the prohibition also applies to intrastate claims filed under remote claimstaking procedures by individuals residing outside the liable State.

This prohibition is specific to interstate claims filed under the IBPP. It does not apply to any intrastate claims whether the claimant is a resident or non-resident of the State. Thus, a claimant who remotely files an intrastate claim in a State that is in an EB period, regardless of whether he or she resides in that State, is not limited to two weeks of EB under 20 CFR 615.9(c).

7. *Action Required.* SESA administrators should inform appropriate staff of the Department's position as set forth in this program letter and ensure that the handling of claims filed under remote claimstaking procedures is consistent with this position.

8. *Inquiries.* Questions should be directed to the appropriate Regional Office.

U.S. Department of Labor

Employment and Training Administration

Washington, D.C. 20210

Classification UI

Correspondence Symbol TEUL

Date: February 10, 1997.

Directive: Unemployment Insurance Program Letter No. 16–97

To: All State Employment Security Agencies

From: Grace A. Kilbane, Director, Unemployment Insurance Service

Subject: Technical Changes to Unemployment Insurance Program Letters (UIPLs).

1. *Purpose.* To provide several technical changes to previously issued UIPLs.

2. *References.* UIPL 45–92, dated August 20, 1992; UIPL 17–95, dated February 28, 1995; UIPL 30–96, dated August 8, 1996; and UIPL 37–96, dated August 8, 1996.

3. *Background.* The Department of Labor interprets Federal law requirements pertaining to UI as part of its role in the administration of the Federal-State UI program. These interpretations are issued in UIPLs. This UIPL is issued to correct several technical errors which the Department has identified in four UIPLs. No Departmental interpretation of Federal law is changed by this UIPL.

4. *Technical Changes.*

a. *UIPL 45–92.* On page 23 of the Attachment I to the UIPL, in the first sentence of the third full paragraph, ''new

subsection (t) of Section 3306, FUTA'' is changed to ''Section 401(d)(1) of P.L. 102–318''.

b *UIPL 17–95.* In Item 4.b. on page 2 of the UIPL, the word ''voluntarily'' is substituted for ''voluntary'' in the quote of Section 3304(a)(18), FUTA.

In item 4.g. on page 7, first paragraph, the phrase ''must be permitting the withholding Federal income tax'' is changed to read ''and the States must be permitting the withholding of Federal income tax''. Also in item 4.g., the words ''voluntary holding'' in the second sentence of the third paragraph are changed to ''voluntary withholding'' and the words ''as for payments'' are changed to ''for payments''.

c. *UIPL 30–96.* In the second sentence of the footnote on page 2 of the UIPL, ''two cases involving UC'' is changed to ''two cases involving UC law.'' This change is made because characterizing the court cases in question as ''involving UC'' may imply that they addressed the payment of UC. Instead, they addressed the taxing provisions of Federal UC law. These taxing provisions are, however, entwined with the issue of coverage which UIPL 30–96 addresses.

d. *UIPL 37–96.* Two changes are made to the draft language on page 13 of the UIPL relating to the intercept of food stamp overissuances. In Section 1(a) the words ''child support obligations'' are changed to ''an uncollected overissuance of food stamps''. In Section (1)(c), the word ''of'' is changed to ''to''. Also, on page 14, in the last sentence of item 10 of the UIPL, the first of the two appearances of the word ''is'' is deleted.

5. *Action Required.* Please alert appropriate staff of these technical changes. Pen and ink changes should be made to the above referenced UIPLs as indicated.

6 *Inquiries.* Please direct inquiries to the appropriate Regional Office.

[FR Doc. 97–5002 Filed 2–27–97; 8:45 am]

BILLING CODE 4510–30–M

Employment Standards Administration

Wage and Hour Division

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions

General wage determination decisions of the Secretary of Labor are issued in accordance with applicable law and are based on the information obtained by the Department of Labor from its study of local wage conditions and data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR Part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR Part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the Federal Register, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR Parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR Part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon and Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

New general Wage Determination Decisions

The number of the decisions added to the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' are listed by Volume and States:

Volume III

South Carolina
SC970035 (Feb. 28, 1997)
SC970036 (Feb. 28, 1997)

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts'' being modified are listed by Volume and State. Dates of publications in the Federal Register are in parentheses following the decisions being modified.

Volume I

New Jersey
NJ970002 (Feb. 14, 1997)
NJ970003 (Feb. 14, 1997)
NJ970004 (Feb. 14, 1997)
NJ970005 (Feb. 14, 1997)
NJ970007 (Feb. 14, 1997)
NJ970011 (Feb. 14, 1997)
NJ970013 (Feb. 14, 1997)
NJ970015 (Feb. 14, 1997)

Volume II

None

Volume III

Alabama
AL970007 (Feb. 14, 1997)
AL970008 (Feb. 14, 1997)
AL970052 (Feb. 14, 1997)

Volume IV

Illinois
IL970001 (Feb. 14, 1997)
IL970002 (Feb. 14, 1997)
IL970003 (Feb. 14, 1997)
IL970006 (Feb. 14, 1997)
IL970008 (Feb. 14, 1997)
IL970009 (Feb. 14, 1997)
IL970010 (Feb. 14, 1997)
IL970012 (Feb. 14, 1997)
IL970016 (Feb. 14, 1997)
IL970023 (Feb. 14, 1997)
IL970026 (Feb. 14, 1997)
IL970053 (Feb. 14, 1997)
IL970055 (Feb. 14, 1997)
IL970065 (Feb. 14, 1997)

Indiana
IN970001 (Feb. 14, 1997)
IN970002 (Feb. 14, 1997)
IN970003 (Feb. 14, 1997)
IN970004 (Feb. 14, 1997)

IN970005 (Feb. 14, 1997)
IN970006 (Feb. 14, 1997)
IN970060 (Feb. 14, 1997)
Michigan
MI970007 (Feb. 14, 1997)
Minnesota
MN970007 (Feb. 14, 1997)
MN970008 (Feb. 14, 1997)
MN970015 (Feb. 14, 1997)
MN970027 (Feb. 14, 1997)
MN970031 (Feb. 14, 1997)
MN970035 (Feb. 14, 1997)
MN970039 (Feb. 14, 1997)
MN970061 (Feb. 14, 1997)

Volume V

Arkansas
AR970027 (Feb. 14, 1997)
Louisiana
LA970004 (Feb. 14, 1997)
LA970005 (Feb. 14, 1997)
LA970009 (Feb. 14, 1997)
LA970015 (Feb. 14, 1997)
LA970018 (Feb. 14, 1997)

Volume VI

North Dakota
ND970002 (Feb. 14, 1997)
ND970019 (Feb. 14, 1997)
ND970024 (Feb. 14, 1997)
ND970027 (Feb. 14, 1997)

Volume VII

California
CA970030 (Feb. 14, 1997)
CA970049 (Feb. 14, 1997)
CA970051 (Feb. 14, 1997)
CA970052 (Feb. 14, 1997)
CA970053 (Feb. 14, 1997)
CA970058 (Feb. 14, 1997)
CA970065 (Feb. 14, 1997)
CA970068 (Feb. 14, 1997)
CA970069 (Feb. 14, 1997)
CA970071 (Feb. 14, 1997)
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CA970090 (Feb. 14, 1997)
CA970091 (Feb. 14, 1997)
CA970092 (Feb. 14, 1997)
CA970093 (Feb. 14, 1997)
CA970100 (Feb. 14, 1997)
CA970105 (Feb. 14, 1997)
CA970107 (Feb. 14, 1997)
CA970109 (Feb. 14, 1997)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under the Davis-Bacon and Related Acts.'' This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the county.

The general wage determinations issued udner the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at (703) 487–4630.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the seven separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the State covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, D.C. this 21st day of February 1997.

John Frank,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 97–4763 Filed 2–27–97; 8:45 am]

BILLING CODE 4510–27–M

Occupational Safety and Health Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [U.S.C. 3506 (c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently the Occupational Safety and Health Administration is soliciting comments concerning the proposed extension of the information collection request for the Ethylene Oxide Standard 29 CFR 1910.1047. A copy of the proposed information collection request (ICR) can be obtained by contacting the employee listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before April 29, 1997. The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

* Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

ADDRESSES: Comments are to be submitted to the Docket Office, Docket No. ICR–97–4, U.S. Department of Labor, Room N–2625, 200 Constitution Ave. NW., Washington, D.C. 20210, telephone (202) 219–7894.

Written comments limited to 10 pages or fewer may also be transmitted by facsimile to (202) 219–5046.

FOR FURTHER INFORMATION: Bonnie Friedman, Director, OSHA Office of Information and Public Affairs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3647, 200 Constitution Ave., NW., Washington, DC 20210. Telephone: (202) 219–8148. Copies of the referenced information collection request are available for inspection and copying in the Docket Office and will be mailed to persons who request copies by telephoning Vivian Allen at (202) 219–8076. For electronic copies of the Ethylene Oxide Information Collection Request contact OSHA's WebPage on Internet at http://www.osha.gov/.

SUPPLEMENTARY INFORMATION:

I. Background

The Ethylene Oxide Standard and its information collection is designed to provide protection for employees from the adverse health effects associated

with occupational exposure to ethylene oxide.

The Standard requires employers to monitor employee exposure to ethylene oxide (EtO) and provide notification to employees of their exposure to ethylene oxide. If monitoring indicates exposure above the 8-hour time weight average of one part EtO per million parts of air, or in excess of five parts of EtO per million part of air as average over sampling period of 15 minutes, then the employer is required to develop a compliance plan to reduce the exposures above these levels. Employers are required to make available medical exams to employees who are or may be exposed to EtO at or above the action level (.5 parts per million calculated as an eight hour time-weight average), without regard to the use of respirators, for at least 30 days a year. Exposure monitoring and medical records are to be retained for prescribed amounts of time, and under certain circumstances such records may be transferred to the National Institute for Occupational Safety and Health. Employers are also required to communicate the hazards associated with exposure to EtO through signs, labels, material safety data sheets and training.

II. Current Actions

This notice requests an extension of the current OMB approval of the paperwork requirements in the Ethylene Oxide Standard. Extension is necessary to provide continued protection to employees from the health effects asociated with occupational exposure to ethylene oxide.

Type of Review: Extension.

Agency: Occupational Safety and Health Administration.

Title: Ethylene Oxide.

OMB Number: 1218–0108.

Agency Number: Docket Number ICR–97–4.

Affected Public: Business or other for-profit, Federal government and State, Local or Tribal governments.

Total Respondents: 52,546.

Frequency: On occasion.

Total Responses: 166,566.

Average Time per Response: Time per response ranges from five minutes to maintain records to two hours for employee medical exams.

Estimated Total Burden Hours: 50,300.

Estimated Capital, Operation/Maintenance Burden Cost: The total cost for employers to conduct exposure monitoring, to provide medical exams, and when necessary transfer records to the National Institute of Occupational Safety and Health is $1,500,593.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: February 21, 1997.

Adam M. Finkel,

Director, Directorate of Health Standards Programs.

[FR Doc. 97–5003 Filed 2–27–97; 8:45 am]

BILLING CODE 4510–26–M

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 96–3 CARP SRA]

Adjustment of Rates for the Satellite Carrier Compulsory License

AGENCY: Copyright Office, Library of Congress.

ACTION: Initiation of arbitration.

SUMMARY: The Library of Congress is announcing initiation of the 180-day arbitration period for adjustment of the rates for the satellite carrier compulsory license.

EFFECTIVE DATE: March 3, 1997.

ADDRESSES: All hearings and meetings for the satellite carrier compulsory license rate adjustment shall take place in the James Madison Memorial Building, Room 414, First and Independence Avenue, S.E., Washington, D.C. 20540.

FOR FURTHER INFORMATION CONTACT: William Roberts, Senior Attorney, or Tanya Sandros, Attorney Advisor, P.O. Box 70977, Southwest Station, Washington, D.C. 20024. Telephone (202) 707–8380. Telefax (202) 707–8366.

SUPPLEMENTARY INFORMATION:

Background

Section 251.64 of the CARP rules, 37 C.F.R., provides that, after conclusion of the 45-day precontroversy discovery period and after the Librarian has ruled on all motions and objections filed under section 251.45, the Librarian will declare that a controversy exists regarding the adjustment of the satellite carrier compulsory license rates and announce the initiation of an arbitration proceeding. This notice fulfills the requirement of section 251.64.

By notice dated June 11, 1996, the Library announced the precontroversy discovery period for this docket and requested interested parties to file Notices of Intent to Participate. 61 FR 29573 (June 11, 1996). Subsequently, the Library adjusted the schedule, and informed the participating parties that the 180-day arbitration period would begin on March 3, 1997. Order in Docket No. 96–3 CARP SRA (October 29, 1996). The precontroversy discovery period ended on January 15, 1997, and the Library has ruled upon all motions and objections filed under section 251.45 of the CARP rules.

In accordance with section 251.6 of the CARP rules, the arbitrators have been selected for this proceeding. They are:

The Honorable John W. Cooley
The Honorable Lewis Hall Griffith, Chair
The Honorable Jeffrey S. Gulin

Initiation of Proceeding

Pursuant to section 251.64 of the CARP rules, the Library is formally announcing the existence of a controversy as to the adjustment of the satellite carrier compulsory license royalty rates, 17 U.S.C. 119(c)(3), and is initiating an arbitration proceeding under chapter 8 of title 17 to resolve adjustment of the rates. The arbitration proceeding commences on March 3, 1997, and runs for a period of 180 days; the 180 day period ends on August 29, 1997. During that time, the arbitrators shall file their written report with the Librarian in accordance with section 251.53 of the rules.

Dated: February 25, 1997.

Marybeth Peters,

Register of Copyrights.

[FR Doc. 97–5050 Filed 2–27–97; 8:45 am]

BILLING CODE 1410–33–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 97–023]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

Copies of patent applications cited are available from the Office of Patent Counsel, Marshall Space Flight Center. Claims are deleted from the patent applications to avoid premature disclosure.

DATE: February 28, 1997.

FOR FURTHER INFORMATION CONTACT: Robert L. Broad, Jr., Patent Counsel, Marshall Space Flight Center, Mail Code

CC01, Huntsville, AL 35812; telephone (205) 544–0021.

NASA Case No. MFS–30119–1: Enhanced Vacuum Arc Vapor Deposition Electrode (Vapor Directional Device).

Dated: February 21, 1997.

Edward A. Frankle,

General Counsel.

[FR Doc. 97–5005 Filed 2–27–97; 8:45 am]

BILLING CODE 7510–01–M

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Thursday, March 6, 1997.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

BOARD BRIEFING:

1. Insurance Fund Report.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Requests from Federal Credit Unions to Convert to a Community Charter.
3. Charter Application from the Proposed First Combined Community Federal Credit Union.
4. Request from a Corporate Federal Credit Union for a Field of Membership amendment.
5. Final Rule: Part 704, NCUA's Rules and Regulations, Corporate Credit Unions.
6. Proposed Rule: Request for Comments on Federal Credit Union Bylaws.
7. Advance Notice of Proposed Rulemaking: Request for Comments on Interpretive Rulings and Policy Statements (IRPS).
8. Proposed Rule: Amendments to Section 701.26(b), 701.27, and 740.3(c), and addition of Part 712, NCUA's Rules and Regulations, Credit Union Service Contracts, Credit Union Service Organizations, and Advertising.

RECESS: 11:15 a.m.

TIME AND DATE: 11:30 a.m., Thursday, March 6, 1997.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Closed Meeting.
2. Administrative Actions under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (5), (7), (8), (9)(A)(ii), and (9)(B).
3. Personal Action(s). Closed pursuant to exemptions (2) and (6).

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (703) 518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 97–5194 Filed 2–26–97; 2:35 pm]

BILLING CODE 7535–01–M

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

National Endowment for the Arts

President's Committee on the Arts and the Humanities: Meeting XXXVII and Press Conference With Honorary Chair, Hillary Rodham Clinton

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the President's Committee on the Arts and the Humanities will be held on February 25, 1997 from 1:30 a.m. to 4:00 p.m. This meeting will convene in conjunction with a press conference at which the Honorary Chair of the President's Committee, Hillary Rodham Clinton, will release Creative America, the report to the President on the state of support for arts and culture in the United States. The press conference will take place before the meeting. Both will be held at the Library of Congress, at the Northwest Curtain and Pavilion in the Jefferson Building, 10 First Street, SE, Washington, DC. The President's Committee Meeting will be open to the public and begin at 1:30 with a statement by the Chairman regarding the Committee's objectives for 1997.

The President's Committee on the Arts and the Humanities was created by Executive Order in 1982 to advise the President, the two Endowments, and the IMS on measures to encourage private sector support for the nation's cultural institutions and to promote public understanding of the arts and the humanities.

If, in the course of discussion, it becomes necessary for the Committee to discuss non-public commercial or financial information of intrinsic value, the Committee will go into closed session pursuant to subsection (c)(4) of the Government in the Sunshine Act, 5 U.S.C. 552b.

Any interested persons may attend as observers, on a space available basis, but seating is limited in meeting rooms and staff of the Library of Congress will need to know who will be attending.

Therefore, for this meeting, individuals wishing to attend are required to notify the staff of the President's Committee in advance at (202) 682–5409 or write to the Committee at 1100 Pennsylvania Avenue, NW, Suite 526, Washington, DC 20506.

Dated: February 24, 1997.

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. 97–4980 Filed 2–27–97; 8:45 am]

BILLING CODE 7537–01–M

NATIONAL INSTITUTE FOR LITERACY

Proposed Agency Information Collection Activities; Comment Request

AGENCY: National Institute for Literacy.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 et.Seq.), this notice announces an information Collection Request (ICR) by the NIFL. The ICR describes the nature of the information collection and its expected cost and burden.

DATES: Comments must be submitted on or before April 29, 1997.

ADDRESSES: Submit written comments to: National Institute for Literacy, 800 Connecticut Avenue, NW, Suite 200, Washington, DC 20006, Attention: Susan Green. Copies of the complete ICR and accompanying appendixes may be obtained from the above address or by contacting Susan Green at (202) 632–1509. Comments may also be submitted electronically by sending electronic mail (e-mail) to: Sgreen@nifl.gov.

All written comments will be available for public inspection at from 8:00 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays.

SUPPLEMENTARY INFORMATION:

Title

''Learning Disabilities Training and Dissemination Project.'' Application for Award to States or other entities to develop and implement methods for incorporating the products of the National Adult Literacy and Learning Disabilities (ALLD) Center into existing literacy service delivery systems for the purpose of improving services to adults with learning disabilities.

Abstract

The National Literacy Act of 1991 established the National Institute for Literacy and required that the Institute conduct basic and applied research and

demonstration on literacy; collect and disseminate information to Federal, State and local entities with respect to literacy; and improve and expand the system for delivery of literacy services. In 1993, the NIFL funded the National ALLD Center to enhance awareness about the implications of learning disabilities for literacy efforts, and to develop tools and resources to assist literacy providers better identify and serve adults with learning disabilities. The NIFL will consider applications from states and other entities to develop and implement methods for incorporating the products and services of the National ALLD Center into existing literacy service delivery systems for the purpose of improving services to adults with learning disabilities. Evaluations to determine successful applicants will be made by a panel of literacy experts using the published criteria. The Institute will use this information to make a minimum of one cooperative agreement award for a period of up to 2 years.

Burden Statement: The burden for this collection of information is estimated at 40 hours per response. This estimate includes the time needed to review instructions, complete the form, and review the collection of information.

Respondents: Governors of States and Trust Territories, State Departments of Adult Education, other public and non-profit entities.

Estimated Number of Respondents: 20.

Estimated Number of Responses Per Respondent: 1.

Estimated Total Annual Burden on Respondents: 152 hours.

Frequency of Collection: One time. Send comments regarding the burden estimate or any other aspect of the information collection, including suggestions for reducing the burden to: Susan Green, National Institute for Literacy, 800 Connecticut Ave., NW, Suite 200, Washington, DC 20006.

Request for Comments: NIFL solicits comments to: (i) 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. (ii) Evaluate the accuracy of the agency's estimates of the burden of the proposed collection of information. (iii) Enhance the quality, utility, and clarity of the information to be collected. (iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated or electronic collection technologies of other forms of information technology, e.g., permitting electronic submission of responses.

Dated: February 25, 1997.

Andrew J. Hartman,

Director, NIFL.

[FR Doc. 97–5021 Filed 2–27–97; 8:45 am]

BILLING CODE 6055–01–M

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting; Corporate Culture and Transportation: A Symposium

A symposium on the effect that corporate management philosophies and practices have on transportation safety will be conducted by the National Transportation Safety Board. The symposium will be held on April 24 and 25, 1997, at the Hyatt Regency Hotel in Crystal City, Virginia. For more information, contact Julie Beal at (202) 314–6000 or fax (202) 314–6293.

February 25, 1997.

Bea Hardesty,

Federal Register Liaison Officer.

[FR Doc. 97–5088 Filed 2–25–97; 4:27 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–302]

Florida Power Corporation; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed no Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR–72 issued to Florida Power Corporation, et al. (the licensee) for operation of the Crystal River Nuclear Generating Plant, Unit No. 3, located in Citrus County, Florida.

The proposed amendment would change the Crystal River Unit 3 Technical Specifications (TS) to implement 10 CFR 50, Appendix J, ''Primary Reactor Containment Leakage Testing for Water-Cooled Reactors,'' Option B. This option allows to change from prescriptive testing requirements to performance-based testing requirements based on the leakage rate testing history of the containment and components. The proposed TS changes include revision to TS 3.6.1, 3.6.3, and addition of ''Containment Leakage Rate Testing Program'' to TS 5.0. The licensee did not propose any deviations from methods approved by the Commission and endorsed in the applicable regulatory guide.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

(1) Does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The TS amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to the TS are to implement Option B of 10 CFR 50, Appendix J, at CR–3. The proposed changes will result in increased intervals between containment leakage tests based on the leakage rate testing history. The proposed changes do not involve a change to the plant design or operation and does not change the testing methodology.

NUREG–1493, ''Performance-Based Containment Leak-Test Program,'' provides the technical basis of 10 CFR 50, Appendix J, Option B. NUREG–1493 contains a detailed evaluation of the expected leakage from containment and the associated consequences. The increased risk due to increasing the intervals between containment leakage tests was also evaluated. The NUREG used a statistical approach to determine that the increase in the expected dose to the public due to decreasing the testing frequency is extremely low. NUREG–1493 also concluded that a small increase is justifiable in comparison to the benefits from decreasing the testing frequency. The primary benefit is in the reduction in occupational radiation exposure.

(2) Does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The TS amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed TS amendment incorporates the performance-based testing approach

authorized by 10 CFR 50 Appendix, J, Option B. Decreasing the testing frequency allowed by this change does not involve a change to plant design or operation. Safety related equipment and safety functions are not altered as a result of this change. Decreasing the testing frequency does not affect testing methodology. As a result, the proposed change does not affect any of the parameters or conditions that could contribute to the initiation of any accidents.

(3) Does not involve a significant reduction in the margin of safety.

This TS amendment does not involve a significant reduction in the margin of safety.

The proposed TS amendment does not change the methodology of the containment leakage rate testing program or program acceptance criteria. The proposed TS change does affect the frequency of containment leakage rate testing. With an increased interval between tests, a small possibility exists that an increase in leakage could go undetected for a longer period of time. Based on the operational experience at CR–3, it has been demonstrated that the leak-tightness of the containment building has consistently been significantly below the allowable leakage limit. Adequate controls are in place to ensure that required maintenance and modifications are performed.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the Federal Register a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By March 31, 1997, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Coastal Region Library, 8619 W. Crystal Street, Crystal River, Florida 32629. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a

hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, by the above date. Where petitions are filed during the last 10 days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1–(800) 248–5100 (in Missouri 1–(800) 342–6700). The Western Union operator should be given Datagram Identification Number N1023 and the following message addressed to Frederick J. Hebdon: petitioner's name and telephone number, date petition was mailed, plant name, and publication date and page number of this Federal Register notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to A. H. Stephens, General Counsel, Florida Power Corporation, MAC–A5D, P.O. Box 14042, St. Petersburg, Florida 33733, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i)–(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated February 17, 1997, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Coastal Region Library, 8619 W. Crystal Street, Crystal River, Florida 32629.

Dated at Rockville, Maryland, this 24th day of February 1997.

For the Nuclear Regulatory Commission.

L. Raghavan,

Project Manager, Project Directorate II–3, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 97–4997 Filed 2–27–97; 8:45 am]

BILLING CODE 7590–01–P

[IA 97–011]

In the Matter of Krishna Kumar; Order Prohibiting Involvement in NRC-Licensed Activities; (Effective Immediately)

I

Krishna Kumar (Mr. Kumar) was President of Power Inspection, Inc. (PI or Licensee). PI is the holder of Byproduct License No. 37–21428–01 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Parts 30 and 34. The License authorizes the Licensee to use iridium-192 and cobalt-60 sealed sources for the performance of industrial radiography at its facility in Wexford, Pennsylvania, as well as at temporary job sites. The License was most recently renewed on January 31, 1989, and expired on January 31, 1994. In addition, the Licensee submitted a request, dated December 30, 1993, that the license be terminated. Action on that request has been held in abeyance pending further NRC review.

In addition, PI acted as a vendor supplying services to nuclear power plants, including the performance of nondestructive testing services, such as eddy current testing. Such services were provided to the Perry and Cooper nuclear power plants in 1993.

II

On December 2 and 3, 1993, the NRC performed an inspection at the Licensee's Wexford facility of activities conducted under the License. During the inspection, the NRC found numerous violations of NRC requirements. The violations included: the failure of the Radiation Safety Officer (RSO) named on the License to perform required duties; the failure to conduct quarterly audits of all radiographers; the failure to provide the required annual refresher training to the radiographers; the failure to perform, at the required frequency, the required inspection and maintenance on the exposure device (camera) containing an iridium-192 source; the failure to perform leak tests of the sealed sources at the required frequency; the failure to promptly collect and submit film badges for processing; and the failure to maintain radiography utilization logs.

Furthermore, the NRC found during the December 1993 inspection that the utilization logs for the iridium-192 source, covering the period of July through November 1993, as well as the utilization logs for the cobalt-60 source, covering the period of July through October 1993, were also unavailable for inspection at the time of the NRC inspection on December 2, 1993.

On December 2, 1993, an NRC investigation was also initiated by the NRC Office of Investigations (OI). During its investigation, OI concluded that:

a. With respect to the vendor-related activities: (1) False Eddy Current Testing (ET) qualification certifications were deliberately generated by PI for at least three employees who performed ET examinations at Perry and Cooper nuclear power plants during 1993 and false ET qualification certification examination results and Personnel Certification Summaries were deliberately generated for four employees, and these falsifications were condoned or directed by the former President (i.e., Mr. Kumar), the former Vice President/RSO, and the former Quality Assurance Manager; and (2) three PI employees tested positive for illegal drug use prior to working at Perry and Cooper in 1993, and the former President of PI was aware of this and did not notify Perry and Cooper.

b. With respect to the materials License: (1) A minimum of 38 source utilization logs (for radiography performed) were falsely created by PI employees to satisfy questions asked during an April 1993 NRC inspection regarding the lack of utilization logs, and this activity was undertaken at the direction of the former President of PI; (2) the former President of PI knowingly failed to notify the NRC of a change of radiation safety officer in approximately August 1993; and (3) responses in PI's letter, dated July 14, 1993, to the NRC, were deliberately incomplete and inaccurate, and the former President and individual identified on PI's NRC license as the RSO were responsible for knowingly providing this false information to the NRC.

The inaccurate information provided to the NRC in the letter dated July 14, 1993, was in response to a previous Notice of Violation issued to the Licensee on June 16, 1993, for numerous violations identified during an inspection conducted in April 1993. One of the violations identified during the April 1993 inspection involved the failure to maintain personnel monitoring records for the radiographers at the facility. In the July response, signed by the former RSO (i.e., the

individual identified on PI's NRC license as the RSO), the Licensee stated that records of such personnel monitoring had been misplaced at the time of the April inspection. In fact, the NRC learned, during the December 2 and 3, 1993 inspection, that Mr. Kumar knew that those records alluded to in the licensee's July 1993 response did not even exist at the time of the April inspection, since the film badges had not been processed until after the April inspection was completed.

III

Based on the above, Mr. Kumar, former President of PI, a contractor to licensees of the NRC, engaged in deliberate misconduct, a violation of 10 CFR 30.10(a)(2), by deliberately submitting in March and in October 1993 to the Cleveland Electric Illuminating Company (CEIC) and Nebraska Public Power District (NPPD), both licensees of the NRC, ET qualification certification examination results and Personnel Certification Summaries which were inaccurate. Mr. Kumar also violated 10 CFR 30.10(a)(2) by submitting on March 5, 1993, and on October 6, 1993, to each NPPD and CEIC, respectively, three inaccurate letters stating that the trustworthiness and reliability of two individuals had been established by an investigation, when Mr. Kumar knew that the individuals had used illegal substances.

In addition, Mr. Kumar, an employee of PI, a licensee of the NRC, engaged in deliberate misconduct, a violation of 10 CFR 30.10(a)(1), which caused PI to be in violation of 10 CFR 30.9(a) and 10 CFR 34.27. Specifically:

a. As a result of Mr. Kumar's direction to fabricate source utilization logs, PI violated 10 CFR 30.9(a) and 10 CFR 34.27 by maintaining a minimum of 38 inaccurate logs for radiography performed by PI; and

b. As a result of Mr. Kumar's direction, PI violated 10 CFR 30.9(a) by providing to the NRC a letter dated July 14, 1993, which contained inaccurate information relating to whether corrective actions had been taken in response to violations listed in an NRC Notice of Violation dated June 16, 1993.

The NRC must be able to rely on its licensees and their employees to comply with NRC requirements, including the requirement to provide information and maintain records that are complete and accurate in all material respects. Mr. Kumar's actions in deliberately violating NRC requirements and in causing the Licensee to be in violation of NRC requirements have raised serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to both the NRC and NRC licensees. Moreover, given Mr. Kumar's indictment on April 28, 1988,[1] there is a pattern of record falsification which raises further doubt about Mr. Kumar's integrity and whether he can be relied upon to comply with NRC requirements.

Consequently, I lack the requisite reasonable assurance that information provided to the NRC by Mr. Kumar, or records required to be maintained by the Licensee, will be complete and accurate in all material respects if Mr. Kumar were permitted to be involved in any NRC-licensed activities. I also lack the requisite assurance that NRC-licensed activities will be conducted safely or in accordance with NRC requirements or that the health and safety of the public will be protected if Mr. Kumar were involved in NRC-licensed activities. In addition, I find that Mr. Kumar is either unable or unwilling to assure that NRC requirements are being and will be followed.

Therefore, I find that the public health, safety, and interest require that Mr. Kumar be prohibited from involvement in NRC-licensed activities for ten years from the date of this Order, and if he is currently engaged in NRC-licensed activities with another NRC licensee, he must immediately cease such activities, and inform the NRC of the name, address and telephone number of the employer. In addition, for a period of five years commencing after the ten-year period of prohibition, Mr. Kumar must notify the NRC of his employment or involvement in NRC-licensed activities to ensure that the NRC can monitor the status of Mr. Kumar's compliance with the Commission's requirements and his understanding of his commitment to compliance. Furthermore, pursuant to 10 CFR 2.202, I find that the significance of the misconduct described above is such that the public health, safety, and interest require that this Order be immediately effective.

IV

Accordingly, pursuant to sections 57, 62, 81, 103, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 30.10, 50.5, and 150.20, *It is hereby ordered, effective immediately, that*:

A. Mr. Krishna Kumar is prohibited for ten years from the date of this Order from any involvement in NRC-licensed activities. For purposes of this Order, licensed activities include the licensed activities of: (1) an NRC licensee; (2) an Agreement State licensee conducting licensed activities in NRC jurisdiction pursuant to 10 CFR 150.20; and (3) an Agreement State licensee involved in the distribution of products that are subject to NRC jurisdiction. In addition, if Mr. Kumar is currently engaged in NRC-licensed activities with another NRC licensee, he must immediately cease such activities, and inform the NRC of the name, address and telephone number of the employer.

B. For a period of five years, after the above ten-year period of prohibition has expired, Mr. Kumar shall, within 20 days of his acceptance of each employment offer involving NRC-licensed activities or his becoming involved in NRC-licensed activities, as defined in Paragraph IV.A above, provide notice to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, DC 20555, of the name, address, and telephone number of the employer or the entity where he is, or will be, involved in the NRC-licensed activities. In the first such notification, Mr. Kumar shall include a statement of his commitment to compliance with regulatory requirements and the basis as to why the Commission should have confidence that he will now comply with applicable NRC requirements.

The Director, Office of Enforcement (OE), may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Kumar of good cause.

V

In accordance with 10 CFR 2.202, Mr. Kumar must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, D. C. 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this

[1] Mr. Kumar and PI were indicted by the United States Attorney in the Western District of Pennsylvania for fraud and false statements in connection with testing that was to be performed at the Duquesne Light Company, a licensee of the NRC. In this case, Mr. Kumar admitted that he directed falsification of eddy current test equipment calibration certifications to save PI time and money, and subsequently provided the false certificates to Duquesne Light Company.

Order, and shall set forth the matters of fact and law on which Mr. Kumar or other person adversely affected relies, and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Attn: Chief, Docketing and Service Section, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406, and to Mr. Kumar if the answer or hearing request is by a person other than Mr. Kumar. If a person other than Mr. Kumar requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by Mr. Kumar or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), Mr. Kumar or any other person adversely affected by this Order, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

Dated at Rockville, Maryland this 18th day of February 1997.

For the Nuclear Regulatory Commission.

Edward L. Jordan,

Deputy Executive Director for Regulatory Effectiveness, Program Oversight, Investigations and Enforcement.

[FR Doc. 97–4999 Filed 2–27–97; 8:45 am]

BILLING CODE 7590–01–P

[IA–97–012]

In the Matter of James L. Mulkey; Order Prohibiting Involvement in NRC-Licensed Activities; (Effective Immediately)

I

James L. Mulkey (Mr. Mulkey) was employed as Vice President by Power Inspection, Inc. (PI or Licensee), and was identified on PI's NRC license as the Radiation Safety Officer (RSO) for PI. PI is the holder of Byproduct License No. 37–21428–01 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Parts 30 and 34. The License authorizes the Licensee to use iridium-192 and cobalt-60 sealed sources for the performance of industrial radiography at its facility in Wexford, Pennsylvania, as well as at temporary job sites. The License was most recently renewed on January 31, 1989, and expired on January 31, 1994. In addition, the Licensee submitted a request, dated December 30, 1993, that the license be terminated. Action on that request has been held in abeyance pending further NRC review.

In addition, PI acted as a vendor supplying services to licensees of nuclear power plants, including the performance of nondestructive testing services, such as eddy current testing (ET). Such services were provided to the licensees of Perry and Cooper nuclear power plants in 1993.

II

On December 2 and 3, 1993, the NRC performed an inspection at the Licensee's Wexford facility of activities conducted under the License. During that inspection, the NRC found numerous violations of NRC requirements. The violations included: the failure of the RSO named on the License to perform required duties; the failure to conduct quarterly audits of all radiographers; the failure to provide the required annual refresher training to the radiographers; the failure to perform, at the required frequency, the required inspection and maintenance on the exposure device (camera) containing an iridium-192 source; the failure to perform leak tests of the sealed sources at the required frequency; the failure to promptly collect and submit film badges for processing; and the failure to maintain radiography utilization logs.

On December 2, 1993, an NRC investigation was also initiated by the NRC Office of Investigations (OI). During its investigation, OI concluded that:

a. With respect to the materials license, responses in PI's response letter dated July 14, 1993, to the NRC were deliberately incomplete and inaccurate, and the President and former RSO were responsible for providing this false information to the NRC. Specifically, the inaccurate information provided to the NRC was in response to a previous Notice of Violation issued to the Licensee on June 16, 1993, for numerous violations identified during an NRC inspection conducted in April 1993.

In a response, signed by Mr. Mulkey, to the violations listed in the June 16, 1993 Notice of Violation, the licensee stated that: (1) observations of the licensee's radiographers had been made when, in fact, the observations had not been made; (2) a ratemeter had been sent for calibration, when, in fact, the ratemeter had not been sent; (3) pocket dosimeters had been calibrated, when, in fact, the dosimeters had not been calibrated; (4) source utilization logs had been maintained, when, in fact, the logs had not been maintained; (5) personnel monitoring reports were available, when, in fact, the reports had not been available.

b. With respect to the vendor-related activities, false ET qualification certifications were deliberately generated by PI for at least three employees who performed ET examinations at Perry and Cooper nuclear power plants during 1993 and ET qualification certification examination results and Personnel Certification Summaries were generated for four employees, and these falsifications were condoned or directed by the former President, former Vice President/RSO (i.e., Mr. Mulkey), and the former Quality Assurance Manager.

In addition, Mr. Mulkey deliberately provided false information to the NRC during a December 2, 1993 telephone discussion with a representative of the NRC in that Mr. Mulkey stated he was the RSO, and that in September of 1993 he had visited the Wexford office and executed the duties of an RSO. These statements were false in that: (1) Interviews with PI employees established that Mr. Mulkey had not visited the Wexford office during 1993, and they were not aware of Mr. Mulkey performing any audits related to radiographic operations out of the Wexford office; and (2) Mr. Mulkey

indicated during the predecisional enforcement conference on October 2, 1996, that he left the position of RSO for the Wexford facility at the end of 1992 to work in Florida. However, during the conference, Mr. Mulkey also indicated that at the time he responded to the NRC in the July 14, 1993 letter, he was the RSO and was responsible for compliance with the license.

III

Based on the above, Mr. Mulkey, former Vice President and RSO of PI, a licensee of the NRC, engaged in deliberate misconduct, a violation of 10 CFR 30.10(a)(1), which caused PI to be in violation of 10 CFR 30.9(a). Specifically, as a result of Mr. Mulkey's actions, PI violated 10 CFR 30.9(a) by providing to the NRC a letter dated July 14, 1993, which contained inaccurate information relating to whether corrective actions had been taken in response to violations listed in an NRC Notice of Violation dated June 16, 1993. Mr. Mulkey also engaged in deliberate misconduct, a violation of 10 CFR 30.10(a)(2) by deliberately providing false information to the NRC during the December 2, 1993 telephone discussion with a representative of the NRC. Specifically, Mr. Mulkey stated he was the RSO, and that in September of 1993 he had visited the Wexford office and executed the duties of an RSO.

Moreover, Mr. Mulkey, an employee of PI, a contractor to licensees of the NRC, engaged in deliberate misconduct, a violation of 10 CFR 30.10(a)(2), by deliberately submitting in March and in October 1993 to the Cleveland Electric Illuminating Company (CEIC) and Nebraska Public Power District (NPPD), both licensees of the NRC, ET qualification certification examination results and Personnel Certification Summaries which were inaccurate.

The NRC must be able to rely on its licensees and their employees to comply with NRC requirements, including the requirement to provide information and maintain records that are complete and accurate in all material respects. Mr. Mulkey's actions in causing the Licensee to be in violation of NRC requirements and in deliberately violating NRC requirements have raised serious doubt as to whether he can be relied upon to comply with NRC requirements and to provide complete and accurate information to both the NRC and NRC licensees.

Consequently, I lack the requisite reasonable assurance that information provided to the NRC by Mr. Mulkey, or records required to be maintained by the Licensee, will be complete and accurate in all material respects if Mr. Mulkey were permitted to be involved in any NRC-licensed activities. I also lack the requisite assurance that NRC-licensed activities will be conducted safely or in accordance with NRC requirements or that the health and safety of the public will be protected if Mr. Mulkey were involved in NRC-licensed activities. In addition, I find that Mr. Mulkey is either unable or unwilling to assure that NRC requirements are being and will be followed.

Therefore, I find that the public health, safety, and interest require that Mr. Mulkey be prohibited from involvement in NRC-licensed activities for five years from the date of this Order, and if he is currently engaged in NRC-licensed activities with another NRC licensee, he must immediately cease such activities, and inform the NRC of the name, address and telephone number of the employer. Furthermore, pursuant to 10 CFR 2.202, I find that the significance of the misconduct described above is such that the public health, safety, and interest require that this Order be immediately effective.

IV

Accordingly, pursuant to sections 57, 62, 81, 103, 161b, 161i, 161o, 182, and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202, 30.10, 50.5, and 150.20, *It is hereby ordered, effective immediately, that:*

A. Mr. James L. Mulkey is prohibited for five years from the date of this Order from any involvement in NRC-licensed activities. For purposes of this Order, licensed activities include the licensed activities of: (1) an NRC licensee; (2) an Agreement State licensee conducting licensed activities in NRC jurisdiction pursuant to 10 CFR 150.20; and (3) an Agreement State licensee involved in the distribution of products that are subject to NRC jurisdiction. In addition, if Mr. Mulkey is currently engaged in NRC-licensed activities with another NRC licensee, he must immediately cease such activities, and inform the NRC of the name, address and telephone number of the employer.

B. The first time that Mr. Mulkey engages in an NRC-licensed activity following the five year prohibition, he shall notify the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, at least five days prior to the performance of the licensed activity or his being employed to perform NRC-licensed activities (as described in A. above). The notice shall include the name, address, and telephone number of the employer or the entity where he will be involved in the NRC-licensed activity. In the notification, Mr. Mulkey shall include a statement of his commitment to compliance with regulatory requirements and the basis as to why the Commission should have confidence that he will now comply with applicable NRC requirements.

The Director, Office of Enforcement (OE), may, in writing, relax or rescind any of the above conditions upon demonstration by Mr. Mulkey of good cause.

V

In accordance with 10 CFR 2.202, Mr. Mulkey must, and any other person adversely affected by this Order may, submit an answer to this Order, and may request a hearing on this Order, within 20 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U. S. Nuclear Regulatory Commission, Washington, D.C. 20555, and include a statement of good cause for the extension. The answer may consent to this Order. Unless the answer consents to this Order, the answer shall, in writing and under oath or affirmation, specifically admit or deny each allegation or charge made in this Order, and shall set forth the matters of fact and law on which Mr. Mulkey or other person adversely affected relies, and the reasons as to why the Order should not have been issued. Any answer or request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Attn: Chief, Docketing and Service Section, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Assistant General Counsel for Hearings and Enforcement at the same address, to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, Pennsylvania 19406, and to Mr. Mulkey if the answer or hearing request is by a person other than Mr. Mulkey. If a person other than Mr. Mulkey requests a hearing, that person shall set forth with particularity the manner in which his or her interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by Mr. Mulkey or a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Order should be sustained.

Pursuant to 10 CFR 2.202(c)(2)(i), Mr. Mulkey or any other person adversely affected by this Order, may, in addition to demanding a hearing, at the time the answer is filed or sooner, move the presiding officer to set aside the immediate effectiveness of the Order on the ground that the Order, including the need for immediate effectiveness, is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. AN ANSWER OR A REQUEST FOR HEARING SHALL NOT STAY THE IMMEDIATE EFFECTIVENESS OF THIS ORDER.

Dated at Rockville, Maryland this 18th day of February 1997.

For the Nuclear Regulatory Commission.

Edward L. Jordan,

Deputy Executive Director for Regulatory Effectiveness, Program Oversight, Investigations and Enforcement.

[FR Doc. 97–4998 Filed 2–27–97; 8:45 am]

BILLING CODE 7590–01–P

[Docket No. 50–397; License No. NPF–21 EA 96–327]

In the Matter of Washington Public Power Supply System Washington Nuclear Project-2; Order Imposing Civil Monetary Penalty

I

Washington Public Power Supply System (Supply System or Licensee) is the holder of reactor operating license NPF–21 issued by the Nuclear Regulatory Commission (NRC or Commission) on April 13, 1984. The license authorizes the Licensee to operate Washington Nuclear Project 2 (WNP–2) in accordance with the conditions specified therein.

II

An inspection of the Licensee's activities was conducted June 28 through September 4, 1996. The results of this inspection indicated that the Licensee had not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was served upon the Licensee by letter dated November 26, 1996. The Notice described the violations, including the provisions of the NRC's requirements that the Licensee had violated, and the amount of the civil penalty proposed for the violations.

The Licensee responded to the Notice in a letter dated December 23, 1996. In its response, the Licensee admitted that the violations had occurred but requested reconsideration of the proposed civil penalty, citing the following reasons: (1) A penalty of $50,000 would be more consistent with the purposes of the NRC's enforcement policy; (2) there was no systemic breakdown in operational activities at WNP–2; (3) additional credit should be given for corrective actions; and (4) the enforcement action placed too much emphasis on a previous surveillance-related violation.

III

After consideration of the Licensee's response and the statements of fact, explanation, and argument for mitigation contained therein, the NRC staff has determined, as set forth in the Appendix to this Order, that the Licensee has not provided a basis for mitigation of the civil penalty and that the penalty proposed for the violations in the Notice should be imposed.

IV

In view of the foregoing and pursuant to Section 234 of the Atomic Energy Act of 1954, as amended (Act), 42 U.S.C. 2282, and 10 CFR 2.205, It is hereby ordered that:

The Licensee pay a civil penalty in the amount of $100,000 within 30 days of the date of this Order, by check, draft, money order, or electronic transfer, payable to the Treasurer of the United States and mailed to James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738.

V

The Licensee may request a hearing within 30 days of the date of this Order. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission Washington, DC 20555, and include a statement of good cause for the extension. A request for a hearing should be clearly marked as a ''Request for an Enforcement Hearing'' and shall be addressed to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission Washington, DC 20555, with a copy to the Commission's Document Control Desk, Washington, DC 20555. Copies also shall be sent to the Assistant General Counsel for Hearings and Enforcement at the same address and to the Regional Administrator, NRC Region IV, 611 Ryan Plaza Drive, Suite 400, Arlington, TX 76055.

If a hearing is requested, the Commission will issue an Order designating the time and place of the hearing. If the Licensee fails to request a hearing within 30 days of the date of this Order (or if written approval of an extension of time in which to request a hearing has not been granted), the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the Licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

Whether, on the basis of the violations admitted by the Licensee, this Order should be sustained.

Dated at Rockville, Maryland this 14th day of February 1997.

For the Nuclear Regulatory Commission.

James Lieberman,

Director, Office of Enforcement.

Appendix—Evaluation and Conclusion

On November 26, 1996 a Notice of Violation and Proposed Imposition of Civil Penalty (Notice) was issued for violations identified during an NRC inspection. The Washington Public Power Supply System (Supply System or Licensee) responded to the Notice on December 23, 1996. The Supply System admitted the violations but requested reconsideration of the amount of the civil penalty. A summary of the Licensee's reasons for a reduction in the amount of the civil penalty and the NRC's evaluation of those reasons follow:

Summary of Licensee's Request for Reconsideration and NRC Evaluation

1. The Supply System stated that, given the NRC's recognition of the Supply System's identification of most of the violations and its prompt and comprehensive corrective actions, a more appropriate regulatory message would be a penalty at the base amount of $50,000. The Supply System cited the intent of the NRC's Enforcement Policy (General Statement of Policy and Procedures for NRC Enforcement Actions, NUREG–1600) to encourage prompt identification and prompt, comprehensive correction of violations.

NRC Response: The NRC recognized that the Supply System identified most of the violations and that its corrective actions were prompt and comprehensive. In fact, as the Supply System noted in its response, the NRC characterized this as a sign of improved performance. Had the NRC considered no

additional information, no civil penalty would have been assessed for these violations, in accordance with the civil penalty assessment process described in VI.B.2 of the Enforcement Policy. However, the NRC utilized its enforcement discretion, as described in Section VII.A.1 of the Enforcement Policy, to assess a civil penalty in the amount of $100,000. This section of the policy permits the NRC to assess a penalty where none might otherwise be proposed, or to increase the amount of a civil penalty, to reflect the safety or regulatory significance of the violations. In this case, the NRC utilized its discretion to propose a $100,000 civil penalty for two primary reasons. First, the Supply System had been cited in August 1995, for violations in the Supply System's surveillance requirements program as part of an escalated enforcement action (EA 95–096). The number of similar violations that occurred over a relatively short period of time in 1996 demonstrated serious weaknesses in the Supply System's surveillance requirements program and showed that the Supply System's 1995 corrective actions had not gone far enough to address these weaknesses. Secondly, the NRC utilized discretion to emphasize the fundamental importance of the surveillance program and to express its concern that, at this stage in the operation of this facility, weaknesses would exist as serious as those evidenced by the numerous violations forming the basis of this enforcement action. The NRC determined that a civil penalty larger than the $50,000 civil penalty assessed in 1995 was warranted in these circumstances and proposed a $100,000 civil penalty for this matter.

2. The Supply System stated that there was no systemic breakdown in operational activities.

NRC Response: The NRC accepts this statement, but it has little relevance to the current enforcement action. The NRC based its action on the serious weaknesses in the surveillance program at WNP–2, as evidenced by several surveillance-related violations occurring over a relatively short period of time, and the ineffectiveness of previous corrective actions to preclude recurrence. These violations were considered collectively as a Severity Level III problem in accordance with Supplement I of the Enforcement Policy. The Supply System's assertion that these violations did not represent a ''systemic breakdown'' in operational activities does not affect the NRC's perspective or the enforcement action. There was clearly a programmatic issue.

3. The Supply System stated that additional credit should be given for its prompt and comprehensive corrective actions.

NRC Response: As stated above, the NRC recognized that the Supply System took prompt and comprehensive corrective actions. The penalty was not based on any perceived shortcomings in the Supply System's corrective actions for the current (1996) violations. The NRC's concern about corrective actions was based on the aforementioned 1995 enforcement action (EA 95–096), in which surveillance-related violations made up part of a Severity Level III problem that resulted in a $50,000 civil penalty being assessed. In EA 95–096, issued on August 17, 1995, nine violations were considered in the aggregate as a Severity Level III problem. Violations E(1), E(2) and F of EA 95–096 involved changing operational conditions (modes) with equipment inoperable, a violation of the Technical Specifications. In the current enforcement action, the violations involved changing modes with equipment inoperable and changing modes without having conducted required surveillances. All of these violations involved the programs and processes in place to assure that equipment was operable and that required surveillances had been conducted prior to changing modes. In taking its action in 1995, the NRC specifically stated that it had limited the civil penalty to $50,000 ''in recognition of the fact that you have proposed comprehensive corrective actions.'' Since those actions were not effective with respect to surveillance-related problems that form the basis for this enforcement action, as well as to emphasize the fundamental importance of surveillance program compliance, the NRC proposed a civil penalty ($100,000) that was larger than the civil penalty proposed for EA 95–096 ($50,000). The NRC notes that the Supply System's corrective actions for the 1995 enforcement action did not extend to its processes for assuring compliance with surveillance requirements and that, as of the occurrence of the violations in 1996, no checklist or other verification method existed to ensure that surveillances had been completed prior to changing modes, a commonly used method of verifying compliance.

4. The Supply System stated in its response that the enforcement action placed too much emphasis on the prior surveillance-related violation, noting that only one current violation was similar to a previous violation only in that it involved errors in LCO tracking prior to plant mode changes.

NRC Response: The NRC does not agree that the similarities between the 1995 and 1996 enforcement actions are limited to one example. As noted above, Violations E(1), E(2) and F in the 1995 enforcement action involved making mode changes with required equipment inoperable. In the current enforcement action, Violations A, B (with 3 examples) and C involved changing modes without having conducted required surveillances to show equipment operable. The NRC placed emphasis on this similarity, and in fact relied upon it as one of the primary reasons for utilizing enforcement discretion, to emphasize that escalated enforcement action had been taken in August 1995, less than one year prior to the current violations occurring. The NRC's expectation is that licensees who receive escalated enforcement action will take corrective action that is broad and comprehensive such that a recurrence of the violations is precluded or minimized. In this case, it was apparent that the Supply System's previous corrective actions did not address weaknesses in WNP–2's programs for assuring that surveillances were conducted and that equipment was operable prior to changing plant modes. Thus, the NRC does not agree that too much emphasis was placed on the similarities between the 1995 and 1996 enforcement actions. In addition, as discussed in response to other arguments above, the NRC exercised discretion to emphasize its concern about serious weaknesses in such a fundamental aspect of complying with plant Technical Specifications.

NRC Conclusion

The NRC concludes that its use of enforcement discretion to propose a $100,000 civil penalty was appropriate and in accordance with the Enforcement Policy's emphasis in Section VII.A.1 of assuring that the enforcement action reflects the significance of the circumstances and conveys the appropriate regulatory message. Consequently, the proposed civil penalty in the amount of $100,000 should be imposed by order.

[FR Doc. 97–5000 Filed 2–27–97; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Discount Rates for Cost-Effectiveness Analysis of Federal Programs

AGENCY: Office of Management and Budget.

ACTION: Revisions to Appendix C of OMB Circular A–94.

SUMMARY: The Office of Management and Budget revised Circular A–94 in 1992. The revised Circular specified certain discount rates to be updated annually when the interest rate and inflation assumptions used to prepare the budget of the United States Government were changed. These discount rates are found in Appendix C of the revised Circular. The updated discount rates are shown below. The discount rates in Appendix C are to be used for cost-effectiveness analysis, including lease-purchase analysis, as specified in the revised Circular. They do not apply to regulatory analysis.

DATES: The revised discount rates are effective immediately and will be in effect through February 1998.

FOR FURTHER INFORMATION CONTACT: Robert B. Anderson, Office of Economic Policy, Office of Management and Budget, (202) 395–3381.

Joseph J. Minarik,

Associate Director for Economic Policy, Office of Management and Budget.

Appendix C

(Revised February 1997)

Discount Rates for Cost-Effectiveness, Lease Purchase, and Related Analyses

Effective Dates. This appendix is updated annually around the time of the

President's budget submission to Congress. This version of the appendix is valid through the end of February, 1998. Copies of the updated appendix and the Circular can be obtained from the OMB Publications Office (202–395–7332) or in an electronic form through the OMB home page on the world-wide WEB, http://www.whitehouse.gov/WH/EOP/omb. Updates of this appendix are also available upon request from OMB's Office of Economic Policy (202–395–3381), as is a table of past years' rates.

Nominal Discount Rates. Nominal interest rates based on the economic assumptions from the budget are presented below. These nominal rates are to be used for discounting nominal flows, which are often encountered in lease-purchase analysis.

NOMINAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[In percent]

3-year	5-year	7-year	10-year	30-year
5.8	5.9	6.0	6.1	6.3

Real Discount Rates. Real interest rates based on the economic assumptions from the budget are presented below. These real rates are to be used for discounting real (constant-dollar) flows, as is often required in cost-effectiveness analysis.

REAL INTEREST RATES ON TREASURY NOTES AND BONDS OF SPECIFIED MATURITIES

[In percent]

3-year	5-year	7-year	10-year	30-year
3.2	3.3	3.4	3.5	3.6

Analyses of programs with terms different from those presented above may use a linear interpolation. For example, a four-year project can be evaluated with a rate equal to the average of the three-year and five-year rates. Programs with durations longer than 30 years may use the 30-year interest rate.

[FR Doc. 97–4992 Filed 2–27–97; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38329; International Series Release No. 1059; File No. 600–29]

Self-Regulatory Organizations; Cedel Bank, Notice of Filing To Amend Order Exempting Cedel Bank From Registration as a Clearing Agency

February 24, 1997.

Introduction

On August 31, 1995, Cedel Bank, société anonyme, Luxembourg (''Cedel'')[1] filed with the Securities and Exchange Commission (''Commission'') an application on Form CA–2[2] for exemption from registration as a clearing agency pursuant to Section 17A of the Securities Exchange Act of 1934 (''Exchange Act'')[3] and Rule 17Ab2–1 thereunder.[4] Notice of Cedel's application was published in the Federal Register on June 19, 1996.[5] On February 24, 1997, the Commission granted Cedel's application for exemption from registration as a clearing agency to permit Cedel to offer clearance, settlement, and credit support services to U.S. entities for transactions in eligible U.S. government securities.[6] The exemption is subject to certain conditions and limitations which are set forth in the Cedel exemption order.

Contemporaneously with the granting of Cedel's limited exemption from registration as a clearing agency, the Commission is publishing this notice to solicit comments from interested persons on the specific issue of whether Cedel should be permitted, without registering as a clearing agency, to offer its securities processing and collateral management services to U.S. entities for U.S. debt and equity securities in addition to U.S. government securities. The Commission seeks comment on this issue because the Commission believes that the provision of clearance, settlement, and collateral management services by a non-U.S. clearing agency for U.S. entities in U.S. debt and equity securities raises issues that were not addressed sufficiently in the Cedel notice or the comments thereto.

II. Description of the Proposal

As more fully described in the Cedel notice and the Cedel exemption order, Cedel offers to its customers international clearance and settlement, trade confirmation, securities custody, and securities lending services.[7] Cedel also offers to its customers its Global Credit Support Service (''GCSS'') which is a book-entry, real-time collateral management service for cross-border securities collateralization.[8] In its application for exemption, Cedel requested that it be permitted to provide clearance and settlement, securities lending, and GCSS services for transactions involving U.S. securities, including equity and debt securities.

The comment letters regarding the Cedel notice generally indicated that the ability to provide clearance, settlement, and collateral management services for transactions involving U.S. Treasury securities (''U.S. Treasuries'') appeared to be the most critical element of Cedel's proposed services. This is especially true for GCSS because U.S. Treasuries appear to be the preferred securities for use as collateral in securing international credit obligations. Commenters did not specifically discuss any unique or additional benefits to be

[1] Cedel Bank is a wholly-owned subsidiary of Cedel International. On January 1, 1995, Cedel, which was established in 1970, was converted into Cedel Bank to perform lending, clearing, and settlement activities, and a parent company, Cedel International, was created into which Cedel transferred the nonbanking subsidiaries. Cedel Bank is licensed in Luxembourg both as a bank and as a ''professionnel du secteur financier'' (''PSF'') and is under the supervision of the Institute Monetaire Luxembourgeois (''IML''), Luxembourg's banking and securities regulatory authority. Cedel International is licensed as a non-bank PSF and also is under the supervision of the IML. The IML establishes capital and liquidity requirements, evaluates the financial condition and performance of all Luxembourg financial institutions, conducts on-site inspections, and monitors all financial institutions and their controlling companies for adherence to Luxembourg laws and regulations. On April 24, 1996, the Federal Reserve Board granted Cedel's request to establish a representative office in New York.

[2] Copies of the application for exemption are available for inspection and copying at the Commission's Public Reference Room, in File No. 600–29.

[3] 15 U.S.C. 78q–1.

[4] 17 CFR 240.17Ab2–1.

[5] Securities Exchange Act Release No. 37309 (June 12, 1996), 61 FR 31201 (Notice of filing of application for exemption from registration as a clearing agency) (''Cedel notice'').

[6] Securities Exchange Act Release No. 38328 (February 24, 1997), (order approving application for exemption from registration as a clearing agency) (''Cedel exemption order''). The definition of ''eligible U.S. government securities'' is set forth in Section II of this notice.

[7] For a more detailed description of Cedel's clearance, settlement, and credit support services, *see* the Cedel notice, 61 FR at 31201–04.

[8] GCSS became operational on a limited basis on September 30, 1996, with four institutions participating (Bank of America, Banque Paribas, Dresdner Bank, and Salomon Brothers). Pursuant to the Cedel exemption order, eligible U.S. government securities can be included in GCSS. However, the Cedel exemption order does not permit Cedel to provide securities processing services through GCSS or otherwise for other U.S. debt or equity securities transactions involving U.S. entities.

derived from permitting Cedel to provide securities processing services for U.S. equity and debt securities in addition to U.S. Treasuries, what types of equity and debt securities should be deemed to be ''U.S. debt and equity securities,'' or how the restrictions and conditions, such as volume limitations, should be applied with respect to such securities.

The Cedel exemption order permits Cedel to provide clearance, settlement, and collateral management services for Fedwire-eligible U.S. government securities [9] and mortgage backed pass-through securities that are guaranteed by the Government National Mortgage Association (''GNMAs'') [10] (collectively, ''eligible U.S. government securities''),[11] subject to certain limitations and conditions. Among other things, the Cedel exemption order limits the volume of eligible U.S. government securities that can be processed through Cedel and requires Cedel to provide the Commission with certain information to assist the Commission in ascertaining whether Cedel is in compliance with the terms of the exemption order, and information relating to the default or near default of certain Cedel customers or their affiliates.[12]

III. Proposed Modification of Exemption

A. Introduction

The Commission is further considering Cedel's request to offer its securities processing and collateral management services to U.S. entities for U.S. debt and equity securities. Accordingly, the Commission seeks comment regarding the appropriateness of permitting an unregistered non-U.S. clearing agency such as Cedel to offer clearance and settlement and other securities processing services for U.S. debt and equity securities in transactions involving U.S. entities. If it is appropriate for a non-U.S. clearing agency to provide such services, the Commission also seeks comment on the types of U.S. debt and equity securities which Cedel should be permitted to process for U.S. entities. Furthermore, the Commission seeks comment on additional conditions, such as volume limits and the methods by which such limits should be calculated, that should be included in an exemption order.

1. Appropriateness

The Commission seeks comment on whether an exemption from clearing agency registration under Section 17A of the Exchange Act is appropriate for a non-U.S. entity, and Cedel in particular, that performs clearance, settlement, and credit support services for transactions in U.S. debt and equity securities involving U.S. entities. The Commission anticipates that such an entity would substantially meet the standards established for the registration of clearing agencies [13] but cannot fully comply with all of the registration provisions because of certain organizational, operational, and jurisdictional differences.

The Commission specifically requests comment on the manner in which an unregistered non-U.S. clearing agency may be integrated into the national clearance and settlement system for U.S. equity and debt securities, and whether such integration would pose any additional or unique risks to U.S. investors or to the national clearance and settlement system. In the event a non-U.S. clearing agency may pose such risks, commenters are invited to discuss risk management controls that should be required by or for such a clearing agency. The Commission anticipates that such risk management controls would include special collateralization requirements, waivers of immunity with regard to pledged collateral, and submission to the jurisdiction of U.S. courts for such non-U.S. entity.

2. Types of Classes of Securities

If modification of Cedel's exemption order to include U.S. debt and equity securities is appropriate, the Commission seeks comment on the specific types and classes of such securities that may be encompassed by such an exemption. In particular, the Commission seeks comment as to factors to be considered in connection with such a determination. For example, should eligible securities be limited to those registered pursuant to Section 12 or Section 15(d) of the Exchange Act? Should the domicile of the issuer be a factor in such a determination? Should an exemption be limited only to those U.S. debt and equity securities for which there is a ''ready market'' or satisfy some liquidity standard? [14] If so, how should a ready market or such liquidity standard be defined? [15] Should covered securities be limited to those that are depository eligible at a U.S. registered clearing agency and, if so, should the exemption require an effective linkage between the U.S. and non-U.S. clearing agencies?

3. Volume Limitation and Other Conditions

As discussed in the Cedel exemption order, the Commission believes that volume limitations on the amount of securities that may be processed through Cedel are necessary to limit any potential negative effects on the national clearance and settlement system. Accordingly, the Commission seeks comment on whether five percent or another proportion of some defined market would be an appropriate limit with respect to U.S. debt and equity securities.[16] The Commission also seeks

[9] ''Government securities'' is defined in Section 3(a)(42) of the Exchange Act, 15 U.S.C. 78c(a)(42). Fedwire is a large-value transfer system operated cooperatively by the twelve Federal Reserve Banks that supports the electronic transfer of funds and the electronic transfer of book-entry securities.

[10] GNMAs, unlike other mortgage-backed securities such as those guaranteed by the Federal National Mortgage Association (''FNMAs'') and the Federal Home Loan Mortgage Association (''FHLMCs''), are issued in certificated form and therefore cannot be transferred over Fedwire.

[11] ''Eligible U.S. government securities'' also includes any collateralized mortgage obligation (''CMO'') whose underlying securities are Fedwire-eligible U.S. government securities or GNMA guaranteed mortgage-backed pass-through securities and which are depository eligible securities in a U.S. registered clearing agency.

[12] As more fully described in the Cedel exemption order, for purposes of the volume limitation, securities ''processed through Cedel'' means a security that is processed in GCSS, Cedel's tripartite repo service, Cedel's securities lending program, or Cedel's clearance and settlement system. The inclusion of the volume limitation reflects the Commission's determination to take a gradual approach toward permitting an unregistered, non-U.S. clearing agency such as Cedel to provide securities processing services to U.S. market participants. In this regard, the Commission notes that the eligible U.S. government securities covered by the Cedel exemption order trade in a market characterized by the highest level of liquidity.

[13] Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920. *See also* the Cedel exemption order, *supra* note 6.

[14] *See* note 12, *supra*.

[15] For example, under the Commission's net capital rule, a ready market is defined to include (i) a recognized established securities market in which there exists independent bona fide offers to buy and sell so that a price reasonably related to the last sales price or current bona fide competitive bid and offer quotations can be determined for a particular security almost instantaneously and where payment will be received in settlement of a sale at such price within a relatively short time conforming to trade custom, or (ii) where securities have been accepted as collateral for a loan by a bank as defined in section 3(a)(6) of the Securities Exchange Act of 1934 and where the broker or dealer demonstrates to its examining authority that such securities adequately secure such loans. 17 CFR 240.15c3–1(c)(11)(i) and (ii).

[16] Pursuant to the Cedel exemption order, the average daily volume of eligible U.S. government securities processed through Cedel may not exceed 5% of the total average daily dollar value of the aggregate volume in eligible U.S. government securities. The total average daily dollar value of eligible U.S. government securities volume is derived from total daily value of securities activity through Fedwire, Government Securities Clearing Corporation, MBS Clearing Corporation, Participants Trust Company, and any other source that the Division of Market Regulation deems appropriate to reflect the aggregate volume in eligible U.S. government securities. Cedel's average daily volume is derived from the value of eligible

Continued

comment on whether there should be a concentration limit whereby Cedel would be prohibited from reaching its entire volume limit for U.S. debt and equity securities by processing transactions involving the U.S. debt or equity securities of only one or a limited number of issuers.

The Commission invites commenters to discuss any other issues that may arise or restrictions that should be imposed in connection with any modification of Cedel's exemption order to permit Cedel to offer securities processing services for U.S. debt and equity securities that have not been discussed in this notice or adequately addressed in the Cedel exemption order.

B. Fair Competition

As discussed in the Cedel notice, Section 17A of the Exchange Act requires the Commission in exercising its authority under that section to have due regard for the maintenance of fair competition among clearing agencies.[17] Therefore, the Commission invites commenters to address what the likely effect on competition and on the U.S. securities markets would be if the Commission modifies Cedel's exemption from registration as a clearing agency to permit Cedel to process U.S. debt and equity securities transactions involving U.S. entities.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing application by March 31, 1997. Such written data, views, and arguments will be considered by the Commission in deciding whether to expand Cedel's exemption from registration to include processing U.S. debt and equity securities. Persons desiring to make written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Reference should be made to File No. 600–29. Copies of the application and copying at the Commission's Public Reference Room 450 Fifth Street, N.W., Washington, D.C. 20549.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–5026 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–M

U.S. government securities that are processed through Cedel involving a U.S. counterparty or its affiliate.

[17] 15 U.S.C. 781q–1(a)(2).

[18] 17 CFR 200.30–3(a)(16).

[Release No. 34–38324; File No. SR–Amex–97–07]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the American Stock Exchange, Inc., Relating to the Disclaimer Provisions of Amex Rule 902C

February 24, 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 January 29, 1997, 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 and II below, which Items have been prepared by the self-regulatory organization. The Exchange has requested accelerated approval for the proposal. This order approves the Amex's proposal on an accelerated basis and solicits comments from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex is proposing to amend Exchange Rule 902C to include the de Jager Year 2000 Index (''Index'') in the disclaimer provisions of the Rule.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III 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

In conjunction with a proposal to list and trade options on the de Jager Year 2000 Index, the Amex is proposing to amend Exchange Rule 902C to provide a disclaimer for de Jager & Company, a consulting company active in promoting awareness of the ''Year 2000'' problem. The Exchange's proposal to list and trade options on the Index has been given summary effectiveness treatment pursuant to Section 19(b)(3)(A) of the Act.[3]

The Amex and de Jager & Company have developed a new index called The de Jager Year 2000 Index, based entirely on shares of widely-held companies whose business is expected to benefit from the need of companies, governments, and others to address and resolve the ''Year 2000'' problem.[4] The ''Year 2000'' problem arises because most business application software programs (mainframe, client/server, and personal computer) written over the past twenty years use only two digits to specify the year, rather than four.

Therefore, on January 1, 2000, unless the software is corrected, most computers with time-sensitive software programs will recognize the year as ''00'' and may assume that the year is ''1900.'' This could either force the computer to shut down or lead to incorrect calculations. The Index will be calculated and maintained by the Amex. A representative of de Jager & Company will be available to advise the Exchange when, pursuant to Exchange Rule 901C(b), the Amex substitutes stocks, or adjusts the number of stocks included in the Index, based on changing conditions in the ''Year 2000'' industry or in the event of certain types of corporate actions. It is anticipated that the Amex will consult with de Jager & Company on a quarterly basis to review possible candidates for removal from or inclusion in the Index.

The disclaimer, identical in content to disclaimers currently in place for Standard & Poor's Corporation (''S&P''),[5] Morgan Stanley & Co. Incorporated,[6] and Inter@ctive Enterprises L.L.C.,[7] states that de Jager & Company does not guarantee the accuracy or completeness of the Index, makes no express or implied warranties with respect to the Index, and will have no liability for any damages, claims, losses, or expenses caused by errors in the Index calculation.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act in general and

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4.

[3] See Securities Exchange Act Release No. 38307 (February 19, 1997) (Amex–97–04).

[4] The industries represented by these companies include: packaged software providers; computer programming consulting firms; and computer outsourcing services.

[5] See Exchange Rule 902C(c).

[6] See Exchange Rule 902C(d).

[7] See Exchange Rule 902C(e).

furthers the objectives of Section 6(b)(5) in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of change, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The self-regulatory organization 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

Comments were neither solicited nor received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of such filings also will be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–97–05 and should be submitted by March 21, 1997.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, the requirements of Section 6(b)(5) thereunder.

The Commission believes that it is reasonable for de Jager & Company to be released from liability for any damages, claims, losses, or expenses related to the accuracy or completeness of the Index or caused by errors in the Index calculation. The Commission notes that de Jager & Company will not be involved, except in the limited advisory capacity described above, in the calculation or maintenance of the Index.

The Commission finds good cause to approve the proposal prior to the thirtieth day after the date of publication of notice of filing thereof in the Federal Register in that this rule filing is being filed in connection with the Exchange's proposal to list and trade options on the Index, which has been given summary effectiveness treatment pursuant to Section 19(b)(3) of the Act.[8] In addition, this proposal raises no new issues as the Commission has previously approved similar proposals by the Amex to release various entities from certain liability for damages resulting from the use of their products where these entities have no active role in the trading and calculation of the index value.[9] Accordingly, the Commission believes that it is consistent with Sections 6(b)(5) and 19(b)(2) of the Act to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2)[10] of the Act, that the proposed rule change (File No. SR–Amex–97–05) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

[FR Doc. 97–5028 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–M

[8] See *supra* note 3.

[9] See Exchange Rules 902C(c), (d), and (e).

[10] 15 U.S.C. § 78s(b)(2) (1988).

[11] 17 CFR 200.30–3(a)(12).

[Release No. 34–38328; International Series Release No. 1058; File No. 600–29]

Self-Regulatory Organizations; Cedel Bank; Order Approving Application for Exemption From Registration as a Clearing Agency

February 24, 1997.

On August 31, 1995, Cedel Bank, société anonyme, Luxembourg ("Cedel")[1] filed with the Securities and Exchange Commission ("Commission") an application on Form CA–1[2] for exemption from registration as a clearing agency pursuant to Section 17A of the Securities Exchange Act of 1934 ("Exchange Act")[3] and Rule 17Ab2–1 thereunder.[4] Notice of Cedel's application was published in the Federal Register on June 19, 1996.[5] Eleven comment letters were received in response to the notice of filing of the Cedel application.[6] This Order grants Cedel's application for exemption from registration as a clearing agency to permit Cedel to offer clearance, settlement, and credit support services to U.S. and non-U.S. entities for transactions in U.S. government securities subject to the conditions and limitations that are set forth below.

[1] Cedel, société anonyme (formerly the Centrale de Livaison de Valeurs Mobilières) was established in 1970. On January 1, 1995, Cedel, société anonyme was converted into Cedel Bank to perform lending, clearing, and settlement activities, and a parent company, Cedel International, was created into which Cedel transferred the nonbanking subsidiaries. Cedel Bank is a wholly-owned subsidiary of Cedel International. Cedel Bank is licensed in Luxembourg both as a bank and as a "professionnel du secteur financier" ("PSF") and is under the supervision of the Institut Monetaire Luxembourgeois ("IML"), Luxembourg's banking and securities regulatory authority. Cedel International is licensed as a non-bank PSF and also is under the supervision of the IML. The IML establishes capital and liquidity requirements, evaluates the financial condition and performance of all Luxembourg financial institutions, conducts on-site inspections, and monitors all financial institutions and their controlling companies for adherence to Luxembourg laws and regulations. On April 24, 1996, the Federal Reserve Board granted Cedel Bank's request to establish a representative office in New York.

[2] Copies of the application for exemption are available for inspection and copying at the Commission's Public Reference Room.

[3] 15 U.S.C. 78q–1.

[4] 17 CFR 240.17Ab2–1.

[5] Securities Exchange Act Release No. 37309 (June 12, 1996), 61 FR 31201 (notice of filing of application for exemption from registration as a clearing agency) ("Cedel Notice").

[6] Letters from John H. Huffstutler, Senior Vice President and Chief Regulatory Counsel, Bank of America National Trust and Savings Association (July 17, 1996); Guillaume de Beaufort, Administration Head, Paribas Capital Markets (July 18, 1996); Pierre Vermenouze, Senior Vice President, Banque et Finance Internationales (July 17, 1996); Thomson Ng, Executive Director of Operations, Fuji International Finance (HK) Limited (July 18, 1996); John Macfarlane, Managing Director, Salomon Brothers Inc (July 19, 1996); Monroe R. Sonnenborn, Managing Director, Morgan Stanley & Co. Incorporated (July 22, 1996); Jean-Marie Grenet, Operations Head, and Jimmy Hew, Deputy Operations Head, Paribas Merchant Banking Asia Limited (July 23, 1996); Lo Kit-sang, Manager, Sin Hua Bank Ltd. (July 22, 1996); Fan Jian Hua, Manager, and Zhu Wen Xiang, Chief Dealer, The Investment Company of The People's Republic of China (Singapore) Pte Ltd (July 26, 1996); Gilbert Lee and Richard Yiu Tak Shing, Bannque Nationale de Paris (July 29, 1996); and Augustine Chua, Deputy Manager, Rapobank (August 1, 1996) to Jonathan Katz, Secretary, Commission. These comment letters for File No. 600–29 are available for inspection and copying in the Commission's Public Reference Room.

I. Description of Cedel's Proposed Services [7]

A. Clearance and Settlement

Cedel currently offers to its customers international clearance and settlement of securities transactions in primary and secondary markets, trade confirmation, securities custody, and securities lending services. Cedel processes fixed income bonds such as Eurobonds, domestic and convertible bonds, money market instruments, short and medium term notes, equities, and warrants.

Cedel provides delivery-versus-payment (''DVP'') settlement for securities transactions.[8] DVP settlement is made possible by the legal environment for securities custody and transfer in Luxembourg.[9] Liquidity facilities are negotiated with financial institutions to permit Cedel to extend financing to customers to meet their settlement requirements in local currencies.[10]

Cedel's presettlement trade matching service consists of a trade comparison system that allows customers in both Cedel and Euroclear [11] to compare their trade data. Incoming trade data is compared in one of four daily matching runs. Information on the status of a transaction is made available to the counterparties ninety minutes after processing of the trade data for each matching run.

Cedel operates two securities processing systems, overnight settlement processing and daytime settlement processing.[12] Overnight processing is possible because of the bridge agreement established between Cedel and Euroclear.[13] The bridge agreement facilitates the two-way exchange of counterparty data, enabling both Cedel and Euroclear to settle overnight and to provide early morning position statements. With multiple overnight processing, Cedel's customers can settle trades with Euroclear participants for same day value. Multiple overnight processing also allows ''chaining'' of securities transactions in and between Cedel and Euroclear.[14]

Each settlement within the overnight and daytime processing systems is distinguished by whether it is an ''internal'' or ''external'' settlement at Cedel.[15] Settlement services are performed at Cedel without notifying or instructing its securities depositories. Funds transfers necessary to settle transactions may be made to or from an account maintained at Cedel or to or from one of its correspondent banks. Because transfers or securities accepted at both Euroclear and Cedel may be settled and cleared through the bridge, Cedel treats settlements between customers of Cedel and Euroclear involving such securities as internal.

Transactions for settlement on a given day are matched at Cedel and are settled if the delivering party has unencumbered securities sufficient to make delivery [16] and the receiving party has sufficient cash and facilities to pay for the securities.[17] If either condition is not met, the transaction will fail. If securities are delivered against uncollected or borrowed funds, a collateral interest is taken in the receiving participant's securities holding within the system to secure the creditor.[18]

B. Global Credit Support Service

One of the primary reasons for Cedel's request for exemption from registration as a clearing agency is the implementation of the Global Credit Support Service (''GCSS'').[19] GCSS is a book-entry, real-time collateral management service for cross-border securities collateralization. GCSS is intended to enable GSCC customers to reduce the credit risk associated with their financial exposures to counterparties by offering an efficient and safe means of monitoring exposure and by providing credit support for GCSS customers using a variety of bilateral credit support legal arrangements.[20] GCSS functions include the standard functions of an agent, such as exposure recording, asset valuation and movement, safekeeping, and reporting. GCSS interposes itself as an operational agent but does not assume any principal or decision-making role in the event of disputes between parties.

All cash and securities in GCSS are held in an omnibus account within the Cedel core clearance and settlement system. Transfers into and out of GCSS are made by book-entry transfer of securities from a GCSS customer's account or from a GCSS customer's correspondent account at Cedel to GCSS's omnibus account at Cedel.[21]

GCSS customers will inform GCSS of the level of exposure from their net counterparty positions to be covered by GCSS. This exposure level will be the

[7] A more complete description of Cedel's clearance, settlement, and credit support services, is contained in the Cedel Notice *supra* note 5.

[8] In 1995, Cedel settled over US$10 trillion worth of securities. At that time, over 75,000 instruments were eligible for settlement in the Cedel system.

[9] The Luxembourg legal framework provides for the finality of settlements on Cedel's books and the fungibility of securities deposited with Cedel.

[10] To enable it to extend such financing, Cedel maintains a US$10 billion committed revolving credit facility with a syndicate of major banks, a US$500 million commercial paper facility and approximately US$8 billion of uncommitted lines of credit available. Cedel also has a US$1.8 billion letter of credit guaranteeing transmissions across the bridge established between Cedel and the Euroclear System (''Euroclear''). In addition, Cedel can access uncommitted lines of credit with domestic lenders in each of the thirty countries where Cedel has established a settlement link to provide its customers with foreign currency settlement capabilities.

[11] Similar to Cedel, Euroclear provides clearance and settlement services for internationally traded debt and equity securities. Euroclear is operated under contract with the Euroclear Clearance System, société coopérative (''Euroclear Cooperative''), by Morgan Guaranty Trust Company of New York through its Euroclear Operations Centre in Brussels. The Euroclear Cooperatives is a Belgian cooperative corporation whose participants include international banks, brokers, and other securities professionals. See *infra* note 13.

[12] Daytime and overnight settlement processing are the same except that securities lending and borrowing services are not available to customers on an automatic basis in overnight settlement processing.

[13] The electronic bridge enables trades to be processed on a book-entry basis between Cedel and Euroclear rather than by the physical delivery of securities.

[14] Cedel's chaining system allows securities to be bought and sold many times during the day. Cedel's chaining program scans open transactions until all cash and securities resulting from same-day settlement are reemployed to settle further transactions of same-day value. Therefore, back-to-back transfers for equivalent funds may not create net payment obligations because customers can use proceeds from sales to settle purchases.

[15] An internal settlement is the settlement of a transaction between two Cedel customers where the securities being transferred are maintained by book-entry at Cedel. An external settlement is the settlement of a transaction where one of the counterparties to a transaction is not a Cedel (or Euroclear) customers or where a Cedel customer is transferring securities that are not maintained by book-entry at Cedel.

[16] The securities may be owned outright or borrowed.

[17] Acceptable cash and credit facilities for a customer include cash in its account, pre-advices of funds to be received that day, and any predetermined borrowing capacity.

[18] Because Cedel does not interpose itself between counterparties or otherwise guarantee settlement of securities transactions in its clearance and settlement system, Cedel believes its operations are essentially devoid of settlement risk to Cedel and therefore Cedel does not rely on a clearing fund or the resources of its customers.

[19] GCSS became operational on September 30, 1996 with four institutions, including Bank of America, Banque Paribas, Dresdner Bank, and Salomon Brothers.

[20] Each GCSS customer can establish the parameters of their bilateral arrangements, which are captured by GCSS. A pair of GCSS customers generally will have one agreement although GCSS can provide for multiple agreements. Each agreement will define such things as the eligible collateral, haircuts, rehypothecation authorization, frequency of exposure entry and securities valuation, and minimum transfer amounts. Eligible collateral can be selected from any of the securities or currencies accepted by Cedel. GCSS customers also may establish counterparty-specific eligibility tables to either restrict or broaden their eligibility criteria and/or haircuts.

[21] There is no requirement that a GCSS customer have an account at Cedel in order to utilize the services provided by GCSS.

basis on which GCSS will compute credit support requirements for the period.[22] Based on the size of the net exposure and the terms of the bilateral agreement between two GCSS customers, GCSS moves free of payment securities and/or cash between the parties' accounts. GCSS reports to each GCSS customer their available positions (*i.e.*, the customer's own securities and cash it has in the system that are not in use), the amounts delivered out, the amounts received, the amounts ''on-transferred,'' [23] new credit support amounts expected in from counterparties, and new credit support amounts required.[24]

One of the more important services offered by GCSS allows customers to reuse the securities held as credit support. For those GCSS customers permitted by their counterparties to reuse assets, GCSS will enable ''on-transfer'' of securities. GCSS will track and value assets subjected to on-transfers and will keep records of the original and all subsequent transferrers and transferees of the asset. Where on-transfers are permitted, a position may be subdivided and on-transferred to multiple counterparites.

U.S. Treasury securities (''U.S. Treasuries'') are the preferred securities for use as collateral in securing international credit obligations arising from derivatives activities or otherwise. Therefore, Cedel believes it is essential that it be able to accept U.S. Treasuries in GCSS if it is to efficiently facilitate cross-border collateralization. In part, it is the ''on-transfer'' or rehypothecation of U.S. government securities by or for U.S. entities in GCSS that subjects Cedel to the clearing agency registration requirements of Section 17A.[25] As a condition of the no-action position provided to Cedel in 1993, Cedel agreed not to act as an agent in facilitating repurchase agreements between Cedel customers and others with regard to U.S. Treasuries and agreed that none of the collateral services performed by Cedel would be such that the services could be interpreted as authorizing the purchase and sale of U.S. Treasuries, including repurchase agreement transactions, by Cedel's customers or affiliates using Cedel's systems.

C. Securities Lending and Borrowing Services

Under Cedel's lending and borrowing service, all customers are required to act as principal and Cedel's role is to effect the transfers for the lending or borrowing transactions by book-entry movement in the Cedel system and to monitor the associated collateral. Customers elect to participate as either ''automatic'' [26] or ''case by case'' [27] lenders or borrowers.[28] A syndicate of banks guarantees borrower performance and each borrower is required to post and maintain collateral sufficient to secure the guarantee obligation of the guarantor syndicate.[29]

D. Credit Facilities

Cedel provides four main types of credit facilities to its customers: pre-advices, technical overdraft facilities (''TOF's''), tripartite financing arrangements (''TFA's''), and unconfirmed funds facilities (''UFF''). Customers can obtain short term credit through the use of pre-advices.[30] TOFs are short-term financing facilities used to facilitate clearance of securities transactions against payment.[31] Cedel also acts as collateral agent in specifically negotiated TFAs, which provide longer term financing for

[22] GCSS will operate two main daily processing cycles to provide credit support and to generate reports. GCSS customers will select which of the two cycles they will use. The cycle will provide assessments of existing credit support and required additional assets which counterparties may satisfy in the next cycle or at the latest in the same cycle on the next day.

[23] GCSS customers will indicate in their GCSS agreement whether they will permit counterparties to reuse assets. If so permitted, counterparties may then transfer within GCSS the securities they have received as credit support (''on-transfer'') or remove the securities from GCSS and enter into repurchase or reverse repurchase agreements.

[24] GCSS may notify a GCSS customer of the need to bring more assets into the system to meet a shortfall in the value of credit support assets at GCSS. GCSS customers will be able to move assets to their GCSS account in several ways: by transferring eligible assets from a clearing and settlement account in Cedel during the next available Cedel processing cycle, by providing GCSS with a power of attorney to transfer assets from its clearing and settlement account at Cedel to its GCSS omnibus account at Cedel, by entering into a securities borrowing arrangement within a Cedel clearing and settlement account to obtain a loan of the required securities, or by moving eligible securities over a cross-border link into Cedel.

[25] In 1993, Cedel requested a no-action position from the Division relating to Cedel's providing clearance, settlement, and other services to participants in U.S. government securities. The Division issued a no-action letter to Cedel on September 15, 1993, stating that the staff of the Division would not recommend to the Commission that it take enforcement action if Cedel accepts U.S. Treasury debt securities maintained in book-entry form as collateral for certain obligations of Cedel's customers without registering as a clearing agency pursuant to Section 17A of the Exchange Act. The no-action letter did not extend to clearance and settlement services for Cedel customers in U.S. government securities. *Letter regarding Cedel S.A.* (September 15, 1993).

Under Section 3(a)(23) of the Exchange Act, the term ''clearing agency'' is defined to mean, among other things, any person, such as a securities depository, who permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates. Cedel's proposal for the implementation of GCSS places Cedel within the scope of the activities of a clearing agency because GCSS could be deemed to permit or facilitate the hypothecation or lending of U.S. securities in a book-entry environment. However, the activities of GCSS are not the sole basis for considering Cedel's proposed activities to be those of a clearing agency. Cedel's proposal, which originally included the clearance and settlement of all U.S. securities involving U.S. entities, also places Cedel within the definition of clearing agency for purposes of Section 17A of the Exchange Act. Although this Order limits the exemptive relief sought by Cedel to U.S. government securities and will not include all U.S. equity and debt securities, the classification of Cedel as a clearing agency for purposes of Section 17A is not affected.

[26] As either an automatic lender or automatic borrower, a customer authorizes Cedel to lend or borrow securities upon the identification of an excess of securities in a lender's account or an insufficiency in a borrower's account.

Automatic borrowings only may occur when there is an adequate volume of eligible securities available from a lender participating in the program and the borrower is eligible to borrow under the terms of the program.

[27] Case by case borrowings are handled by Cedel in chronological sequence of receipt of instructions. As a case by case lender or as a case by case borrower, a customer is required to authorize each loan or borrowing.

[28] Cedel effects loans and borrowings for automatic lenders and automatic borrowers before it effects loans and borrowings for case by case lenders and case by case borrowers.

[29] The collateral, which can be qualifying securities or cash, is blocked in the borrower's account by Cedel for the benefit of the guarantors. Cedel monitors the collateral daily to ensure that the collateral value of the securities or cash is at all times greater than or equal to the market value of the securities loaned plus an additional percentage of the market value.

[30] Under the pre-advice service, a customer notifies Cedel that funds will be received in the customer's account on that day or the next day. On the basis of this pre-advice, Cedel will credit the amount of funds to the customer's account prior to actual receipt up to the maximum pre-advice line of credit established for the customer. During any business day, Cedel will not advance an amount that exceeds the amount of the line of credit or the collateral value of qualifying securities held in the customer's account.

[31] Under the TOF service, Cedel pays the selling customer in advance of receipt of payment by the purchasing customer. To protect itself from market and credit risk, Cedel blocks the securities in the purchasing customer's account to ensure that the purchasing customer does not remove the securities until it clears its net debit position. If the purchasing customer fails to clear its net debit position within forty-eight hours, Cedel can liquidate the customer's assets to satisfy the net debit position. In addition, Cedel is granted a lien on all securities and other assets in a participating customer's account with Cedel pursuant to a TOF agreement between Cedel and its customer to cover any additional losses which may be incurred.

customers than pre-advices and TOFs.[32] Use of a customer's UFF to finance settlements is allowed only at Cedel's discretion. If a customer's TOF or TFA is insufficient to settle all securities transactions on its account in a given settlement processing, Cedel may permit the customer to use its UFF for settlement purposes.[33]

II. Comment Letters

The Commission received eleven comment letters in response to the notice of filing of the Cedel application.[34] All were favorable towards granting Cedel an exemption from registration as a clearing agency. Each of the commenters discussed the importance of allowing U.S. Treasuries to be accepted into the Cedel system and the utility of GCSS in providing an efficient global credit risk management tool for over-the-counter collateralized derivatives activities. With regard to Cedel's proposal to offer clearance and settlement services, commenters pointed to the increased access to U.S. markets and a standardization of clearance and settlement formats that would be afforded to Cedel's customers under the exemption. Commenters also favored an exemption from registration as a means to preserve the existing commercial relationships that exist among Cedel and its customers under Luxembourg law.

Furthermore, commenters stressed that because U.S. Treasuries are the dominant and preferred class of collateral for derivatives transactions, inclusion of these securities in GCSS will increase the effectiveness and utilization of GCSS,[35] which in turn could reduce the exposure associated with under- or non-collateralized derivatives transactions conducted by U.S. and non-U.S. entities. Commenters believed that GCSS will solve many of the legal complexities and will reduce the legal uncertainties associated with cross-border collateralization. Commenters did not specifically discuss the unique or additional benefits to be derived from permitting Cedel to provide securities processing services for U.S. securities other than U.S. Treasuries.

III. Discussion

A. Statutory Standards

Section 17A of the Exchange Act directs the Commission to promote Congressional objectives to facilitate the development of a national clearance and settlement system for securities transactions.[36] Registration of clearing agencies [37] is a key element of the regulation of clearing agencies in promoting these statutory objectives. Before granting registration to a clearing agency, Section 17A(b)(3) of the Exchange Act requires that the Commission make a number of determinations with respect to the clearing agency's organization, capacity, and rules.[38] The Commission has published the standards applied by its Division of Market Regulation in evaluating applications for clearing agency registration.[39] These requirements are designed to assure the safety and soundness of the clearance and settlement system.

Section 17A(b)(1), moreover, provides that the Commission:

> * * * may conditionally or unconditionally exempt any clearing agency or security or any class of clearing agencies or securities from any provisions of [Section 17A] or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of [Section 17A], including the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds.[40]

The Commission reviews every application for exemption against the standards for clearing agency registration.[41]

B. Evaluation of Cedel's Application for Exemption

The Commission has evaluated Cedel's application and the comments received under the above standards. In this context, the Commission recognized that certain organizational, operational, and jurisdictional differences would prevent Cedel from being able to comply fully with all of the registration provisions. The evaluation also is made in the context of the conditions that the Commission will include in the exception granted in this Order.

1. Safeguarding of Securities and Funds

Sections 17A(b)(3)(A) and (F) of the Exchange Act require a clearing agency be organized and its rules be designed

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[32] Generally, the TFA is an agreement between three parties, the borrower (Cedel customer), the lender (the financing bank), and the collateral agent (Cedel). Cedel may introduce lenders to borrowers but does not play a substantial role in the negotiations of TFAs. After a TFA has been negotiated, Cedel acts solely as collateral agent whereby Cedel determines the adequacy of and monitors the pledged collateral which is blocked in the borrowing customer's account with Cedel. Cedel bears no credit exposure with regard to TFAs.

[33] A customer's UFF limit is dependent to a large extent upon the financial standing of the institution. The UFF also must be collateralized. By blocking collateral against unconfirmed funds, Cedel believes that it covers the contingent risk that anticipated funds may not be received. As with TOFs and TFAs, only the actual amount of credit drawn under the UFF must be collateralized.

[34] *Supra* note 6.

[35] One commenter pointed out that the inclusion of U.S. Treasuries in Cedel's processing systems would benefit U.S. banks in their management of derivatives exposure because such banks could utilize commonly held U.S. Treasuries in GCSS rather than non-U.S. securities which would have to be purchased by U.S. banks in the market. Letter from John H. Huffstutler, Senior Vice President and Chief Regulatory Counsel, Bank of America National Trust and Savings Association, to Jonathan Katz, Secretary, Commission (July 17, 1996).

[36] 15 U.S.C. 78q–1. Section 17A(a)(1) provides:

(1) The Congress finds that—

(A) The prompt and accurate clearance and settlement of securities transactions, including the transfer of record ownership and the safeguarding of securities and funds related thereto, are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.

(B) Inefficient procedures for clearance and settlement impose unnecessary costs on investors and persons facilitating transactions by and acting on behalf of investors.

(C) New data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

(D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

For legislative history concerning Section 17A, see, e.g., Report of Senate Comm. on Housing and Urban Affairs, Securities Acts Amendments of 1975: Report to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 4 (1975); Conference Comm. Report to Accompany S. 249, Joint Explanatory Statement of Comm. of Conference, H.R. Rep. No. 229, 94th Cong., 1st Sess., 102 (1975).

[37] ''Clearing agency'' is defined in Section 3(a)923) of the Exchange Act. 15 U.S.C. 78c(a)(23).

[38] 15 U.S.C. 78q–1(b)(3). See also Section 19 of the Exchange Act, 15 U.S.C. 78s, and Rule 19b–4, 17 CFR 240.19b–4, setting forth procedural requirements for registration and continuing Commission oversight of clearing agencies and other self-regulatory organizations.

[39] Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 41920 (''Standards Release''). See also, Securities Exchange Act Release No. 20221 (September 23, 1983), 48 FR 45167 (omnibus order granting registration as clearing agencies to The Depository Trust Company, Stock Clearing Corporation of Philadelphia, Midwest Securities Trust Company, The Options Clearing Corporation, Midwest Clearing Corporation, Pacific Securities Depository, National Securities Clearing Corporation, and Philadelphia Depository Trust Company).

[40] 15 U.S.C. 78q–1(b)(1).

[41] The first exemption from clearing agency registration was granted in 1995. Clearing Corporation for Options and Securities, Securities Exchange Act Release No. 36573 (December 12, 1995), 60 FR 65076. The Commission has granted temporary registrations that included exemptions from specific Section 17A statutory requirements in a manner designed to achieve the statutory goals of Section 17A. In granting these temporary registrations it was expected that the subject clearing agencies would eventually apply for permanent clearing agency registration. See, e.g., Securities Exchange Act Release No. 25740 (May 24, 1988), 53 FR 19839 (order approving Government Securities Clearing Corporation's temporary registration as a clearing agency with a temporary exemption from compliance with Section 17A(b)(3)(C)).

to facilitate the prompt and accurate clearance and settlement of securities transactions for which it is responsible and to safeguard securities and funds in its custody or control or for which it is responsible.[42] The Commission believes that Cedel substantially satisfies these standards. Among other things, Cedel has established an audit committee which provides oversight of Cedel operations, financial arrangements, and performance, and acts as a link between the external auditors and the Board of Directors.[43] Cedel also maintains an internal audit department that, in conjunction with its external auditors, maintains an ongoing detailed audit program for Cedel's operations. Audit reports are issued monthly to appropriate levels of management with a complete report to the chief executive officer of Cedel.[44] The internal audit department is independent of line functions and its chief audit reports directly to the chief executive officer of Cedel.

Interal accounting controls for Cedel have been designed to provide reasonable assurance that at a minimum (i) transactions are executed in accordance with proper authorization, (ii) transactions are recorded as necessary to permit the preparation of conforming financial statements and to maintain accountability for assets, (iii) access to assets or systems for recording interests in assets is restricted only to those with specific authorization by Cedel management, and (vi) recorded asset inventories are compared with actual asset inventories at regular intervals and appropriate actions are taken with respect to any differences. The adequacy of internal accounting controls is audited annually by Cedel's external auditors. In addition, the IML has the authority to instruct the external auditors to undertake reviews of any further matters of particular interest.[45]

a. Organization and Processing Capacity. A clearing agency must be organized in a manner that effectively establishes operational and audit controls while fostering director independence.[46] Cedel's Board of Directors is kept apprised of Cedel's operations through its audit committee as well as the chief auditor from the independent internal audit department.[47] Together, Cedel's audit committee, internal audit department and various internal advisory groups provide Cedel's Board with risk assessment information and are positioned to advise the Board of the impact that new or expanded services and volume may have on Cedel's processing capacity. Accordingly, the Commission is satisfied that Cedel's organizational and processing capacity substantially satisfies the requirements of the Exchange Act as explained in the Standards Release because Cedel's internal organizational structure is reasonably designed to provide the necessary flow of information to its Board of Directors which should allow the Board to oversee Cedel's operations and management's performance to assure the operational capability and integrity of Cedel.

b. Financial Reports. According to the Standards Release, clearing agency participants that have made clearing fund contributions or have money or securities in the custody or control of a clearing agency should receive timely, audited annual financial statements. Cedel has custody of customer funds and securities. Cedel provides customers and shareholders with annual audited financial statements and company reports. The financial statements of Cedel and Cedel International, its parent, are not consolidated and are presented in accordance with European Union and Luxembourg regulatory requirements for the preparation of financial statements.[48]

c. *Financial Risk Management.* The Standards Release states that a clearing agency should establish a clearing fund and promulgate rules to assure an appropriate level of contributions in accordance with, among other things, the risks to which the clearing agency is subject for the protection of clearing agency participants and for the national system for clearance and settlement.[49]

As discussed in Section I.B above, Cedel provides DVP settlement for securities transactions which are then batched for evening or morning processing depending upon when they are received. Cedel utilizes credit facilities to avoid transaction failures but does not maintain a clearing fund. Cedel does bear risk resulting from pre-advices that are not subsequently confirmed. Although according to Cedel the number of pre-advice failures is reportedly low, such failures could become more prevalent during times of market stress when the value of collateral supporting Cedel's credit facilities could decline in excess of the exposure created by the pre-advice failure.

Cedel employs financial risk management mechanisms, including its capitalization, insurance,[50] and committed credit facilities,[51] that substantially reduce the risk of financial loss by participants and Cedel. Therefore, the Commission believes that Cedel's rules and procedures and the methods by which Cedel safeguards the financial security of its clearing

[42] 15 U.S.C. 78q–1(b)(3)(A) and (F). Although Cedel does not have ''rules'' that would be subject to public comment and Commission review as contemplated by Section 19 of the Exchange Act for the purposes of governing the relationship between itself and its customers, Cedal does have various operating agreements which define the rights and responsibilities of Cedel and its customers.

[43] Clearing agencies should have an audit committee which selects or makes recommendations to the Board of Directors of the clearing agency regarding the selection of the clearing agency's external auditors. The Cedal audit committee, among other things, makes such recommendations to the Board of Directors and reviews the nature and scope of work to be performed by the external auditors and the results of such work.

[44] Managers are requested to respond to any irregularities within two weeks of receipt of the audit report. All responses must include an action plan. All unresolved audit items are regularly monitored by internal audit staff until they are closed and management is required to provide regular updates to internal audit on the progress of all open items.

[45] The IML exercised this authority in connection with the 1995 reorganization of Cedel Bank and its parent, Cedel International.

[46] Standards Release, *supra* note 39, 45 FR at 41925–26.

[47] In addition, Cedel's Credit Advisory Group, Strategic Advisory Group, and User Advisory Group advise the Cedel Board with specialized insight into Cedel's operations. The Credit Advisory Group provides information to the processing of new customers and the maintenance of appropriate credit standards and controls. The Strategic Advisory Group assists in developing corporate strategy and planning. The User Advisory Group provides feedback on Cedel services and customer ratification important to setting internal service priorities and assists in new product service and development.

[48] These financial statements are required to be provided to Cedel shareholders and customers pursuant to Luxembourg law. The Standards Release also states that unaudited quarterly financial statements should be made available to clearing agency participants upon request within thirty days following the close of each fiscal quarter. Cedel has represented to the Commission that under local custom it is uncommon for Luxembourg companies to prepare unaudited quarterly financial statements for distribution to shareholders. The Commission believes that because Cedel will be reporting to its customers according to local custom and otherwise satisfies the provisions of the Standards Release that Cedel substantially meets the requirements of the Exchange Act. Some foreign issuers are already relieved from certain Exchange Act requirements concerning the reporting of financial information. *Cf.* Exchange Act Rules 12g3–2 [17 CFR 240.12g3–2], 13a–16 [17 CFR 240.13a–16], 15d–16 [17 CFR 240.15d–16] and Form 6–K [17 CFR 249.306] (provisions which exempt certain foreign issuers from Exchange Act financial reporting requirements and instead permit such foreign issuers to provide financial and other information to the Commission in accordance with the local reporting requirements of their home domicile).

[49] *Supra* note 39, 45 FR at 41929.

[50] Cedel maintains over US $400 million in insurance to cover all risks related to its operations and facilities.

[51] *Supra,* note 10.

facilities and GCSS substantially satisfies the requirements of the Exchange Act.

2. Fair Representation

Section 17A(b)(3)(C) of the Exchange Act requires that the rules of a clearing agency provide for fair representation of the clearing agency's shareholders or members and participants in the selection of the clearing agency's directors and administration of the clearing agency's affairs. This section contemplates that users of a clearing agency have a significant voice in the direction of the affairs of the clearing agency.

Cedel is wholly-owned subsidiary of Cedel International which is a privately owned entity operated for the benefit of its shareholders. Cedel's Board of Directors is the same as the Board of Directors of Cedel International. Shares of Cedel International are held by Cedel customers and under the Cedel International by-laws no shareholder is permitted to own more than five percent of Cedel International stock. Cedel International shareholders elect Board members by casting one vote for each share held, and the ultimate composition of the Board must reflect each of the three major time zones serviced by Cedel.[52] Accordingly, the Commission believes that the method in which Cedel's directors are selected and the methods utilized for customer participation adequately meets the requirements of fair representation under Section 17A(b)(3)(C) of the Exchange Act.

3. Participation Standards

Section 17A(b)(3)(B) of the Exchange Act enumerates certain categories of persons that a clearing agency's rules must authorize as potentially eligible for access to clearing agency membership and services. Section 17A(b)(4)(B) of the Exchange Act contemplates that a registered clearing agency have financial responsibility, operational capability, experience, and competency standards that are used to accept, deny, or condition participation of any participant or any category of participants enumerated in Section 17A(b)(3)(B), but that these criteria may not be used to unfairly discriminate among applicants or participants. In addition, the Exchange Act recognizes that a clearing agency may discriminate among persons in the admission to or the use of the clearing agency if such discrimination is based on standards of financial responsibility, operational capability, experience, and competence.

Under its current admissions policy, Cedel will accept as customers financial institutions that are regulated in their home market by a financial regulatory authority. Such institutions include commercial and investment banks and broker-dealers, but do not include investment companies or insurance companies.[53] Cedel excludes investment companies and insurance companies because it believes that on an international level these entities are not subject to regulation comparable to banks or broker-dealers, and that there is great variance among nations. However, investment companies, insurance companies and other market participants are afforded an opportunity to participate in Cedel through accounts with banks, broker-dealers, or custodians that are Cedel customers. In addition, under the general terms and conditions applicable to its customers, Cedel reserves the right to deny services to any applicant without disclosing the reasons of such denial to the applicant.

Although Cedel's admissions policy is relatively inclusive, it would not meet the requirements of Section 17A(b)(3)(B) of the Exchange Act with regard to participants because the policy does not provide for membership by all of the enumerated categories of persons. Nevertheless because commercial and investment banks and broker dealers are eligible for Cedel membership and because Cedel has accepted a wide range of customers based upon its standards of financial responsibility, operational capability, experience, and competence, the Commission is satisfied that Cedel's participation standards are acceptable in light of Cedel's business and legal context.

4. Dues, Fees, and Charges

Sections 17A(b)(3) (D) and (E) of the Exchange Act provide for the equitable allocation of reasonable dues, fees, and other charges among clearing agency participants and prohibits a clearing agency from imposing or fixing prices for services rendered by its participants. Fees charged by Cedel are generally usage-based and are priced in a competitive environment with other entities that offer international clearance and settlement services. Cedel does not impose any schedule of prices or fix rates or other fees for services rendered by its customers. Accordingly, the Commission is satisfied that the method by which Cedel provides for the equitable allocation of reasonable dues, fees, and other charges among its customers and its prohibitions regarding the fixing of prices of its customers substantially satisfies the Exchange Act requirements.

5. Capacity To Enforce Rules and To Discipline Participants

Section 17A(b)(3)(A) of the Exchange Act requires that a registered clearing agency be so arranged and have the capacity to enforce compliance by its participants with its rules. Furthermore, Sections 17A(b)(3) (G) and (H) require a registered clearing agency to have in place a system to discipline its participants for violations of its rules and that the procedures for applying such rules be fair and equitable.

Cedel is organized as a bank under the laws of Luxembourg and bilaterally contracts with each of its customers to provide clearance and settlement and other securities services. Cedel is not a self-regulatory organization within the meaning of the Exchange Act. In particular, Cedel does not have any disciplinary authority over its customers other than the commercial discipline of refusing to provide services to those customers that fail to satisfy the terms of their contractual arrangements with Cedel. Cedel contends that a self-regulatory structure as envisioned under the Exchange Act is incompatible with its current legal and business structure under Luxembourg law. Specifically, Cedel believes that it would be compelled to alter its clearance and settlement arrangements from its present bilateral contractual agreements with its customers and that such a change would upset and complicate the existing legal structure of international cross-border clearance and settlement of securities transactions. Moreover, Cedel believes any rules it would promulgate as a self-regulatory entity under U.S. law would have questionable application in the home markets of Cedel's international customers outside of the United States.[54]

The Commission is sensitive to the myriad of issues which could arise in connection with requiring Cedel to comply with the self-regulatory structure and obligations of a registered clearing agency. Through its review of Cedel's operational arrangements with

[52] According to Cedel's constituency policy for the Board of Directors, three directors must be selected from North America, seven from Europe, and three Asia.

[53] Specifically, under current admissions procedures Cedel would not accept as customers investment companies or insurance companies regulated by state or federal authorities in the United States.

[54] Cedel points out in its application that conflicts of law and international comity issues would likely arise in connection with Cedel's operations where U.S. legal and regulatory requirements differ from those of Luxembourg. This situation could undermine the certainty of Cedel's operational arrangements with both U.S. and non-U.S. customers.

its customers, the Commission is satisfied that the goals of Sections 17A(b)(3) (G) and (H) requiring registered clearing agencies to have in place a system to discipline its participants for violations of their rules are substantially fulfilled under Cedel's current structure and by grant of the exemption. For example, regarding the Exchange Act requirement that registered clearing agencies assure participant compliance with the clearing agencies' rules and procedures, Cedel has a strong financial incentive to have its customers adhere to Cedel's financial and operational requirements. Additionally, although Cedel does not have formal disciplinary authority over its customers, it can influence its customers' activities by its credit extension, admissions, and termination policies. Furthermore, if Cedel fails to assure adequate compliance by its customers with Cedel's financial and operational requirements or if Cedel or its customers operate in a way that endangers the safety and soundness of U.S. markets or market participants, the Commission can alter or withdraw Cedel's exemption. This is analogous to the Commission's authority to sanction registered clearing agencies for failure to assure compliance with rules of the clearing agencies.

6. Filing of Proposed Rule Changes

Section 19(b) of the Exchange Act requires registered clearing agencies to file with the Commission copies of all proposed amendments or additions to the clearing agencies' rules prior to implementation of such rule changes.[55] the Commission is vested with the authority to approve or disapprove such rule proposals in accordance with Section 19(b) of the Exchange Act, which includes a procedure to solicit public comment on proposed rule changes. Because Cedel will not be a registered clearing agency, proposed changes to its structure or operations will not be subject to the Section 19(b) process.

The relationship between Cedel and each of its customers is governed by the General Terms and Conditions Agreement (''Customer Agreement'') and the Cedel Customer Handbook (''Customer Handbook''). Cedel must notify the customer in writing of any amendment to the Customer Agreement and the effective date of the amendment. Customers have the opportunity to object to the amendment in writing within ten business days of receipt of the notice of amendment. If a customer does not object in such a manner, it is deemed to have accepted the amendment. Similarly, customers also are notified of changes to Cedel's Customer Handbook ten days prior to the effective date of such changes. Any objection to a change must be in writing within ten business days of the receipt of notice and must be brought to the attention of the Cedel User Group or customer support personnel.

While these procedures are not consistent with the requirements and obligations of registered clearing agencies as self-regulatory entities as set forth in the Standards Release and Section 17A of the Exchange Act, the self-regulatory role is not compatible with Cedel's current structure. In this context, however, the Commission believes that it is important that Cedel's customers receive notice of changes to the Customer Agreement and Customer Handbook, and are provided a procedure to respond to such changes. Also, as discussed below in Section III.C of this Order, Cedel will be required to provide the Commission with current copies of its Customer Handbook and Customer Agreement and to notify the Commission of any changes thereto.

C. Scope of Exemption

This Order exempts Cedel from registration as a clearing agency under Section 17A of the Exchange Act subject to conditions which the Commission believes are necessary and appropriate for Cedel's present structure and operation.[56] The Commission believes that such action is consistent with the Exchange Act objective of promoting the safety and soundness of the national clearance and settlement system, including the goals of fostering cooperating and coordination among persons engaged in the clearance and settlement of securities transactions, facilitating the prompt and accurate clearance and settlement of securities transactions, and protecting investors and the public interest. The limitations in the exemption reflect the Commission's determination to take a gradual approach toward permitting an international non-registered clearing agency such as Cedel to provide securities processing services in U.S. government securities to U.S. market participants. At the same time, the exemption permits Cedel to provide clearance, settlement, and collateral management services to both U.S. and non-U.S. customers.

1. Securities Covered by the Exemption

In its application for exemption, Cedel requested that it be permitted to provide clearance and settlement, securities lending, and GCSS services for transactions involving all U.S. securities, including equity and debt securities.[57] As the comment letters generally indicated, the ability to provide clearance, settlement, and collateral management services for transactions involving U.S. Treasuries appears to be the most critical element of Cedel's proposed services, especially GCSS. In addition, at this time Cedel has linkages with U.S. entities necessary to provide services for transactions involving U.S. government securities, but has not yet developed the necessary linkages that would enable it to provide for clearance and settlement of all U.S. debt and equity securities.

Based on these considerations, this Order grants Cedel the authority to provide clearance, settlement, and collateral management services for (i) Fedwire-eligible U.S. government securities[58] and (ii) mortgage backed pass-through securities that are guaranteed by the Government National Mortgage Association (''GNMAs'')[59] (collectively, ''eligible U.S. government securities'').[60] The Commission believes that this limitation is necessary and appropriate because it will facilitate operation of the GCSS system and

[55] 15 U.S.C. 78s(b)(1).

[56] Among other things, foreign sovereignty considerations may limit the Commission's ability to carry out all of its regulatory functions outside of the United States. Accordingly, the Commission notes that it does not possess the same degree of regulatory authority and control over an exempt non-domestic clearing agency such as Cedel as the Commission has with respect to a fully registered clearing agency.

[57] The Commission is of the view that the provision of clearance, settlement, and collateral management services by a foreign clearing agency for U.S. entities in U.S. debt and equity securities raises issues that were not addressed sufficiently in the Cedel Notice. Consequently, commenters may not have focused on these issues. Therefore, the Commission today is publishing a notice relating to Cedel's original proposal to solicit comments on the specific issue as to the appropriate scope of an exemption to permit Cedel to offer its securities processing and collateral management services for U.S. debt and equity securities in addition to eligible U.S. government securities. Securities Exchange Act Release No. 38329 (February 24, 1997).

[58] ''Government securities'' is defined in Section 3(a)(42) of the Exchange Act, 15 U.S.C. 78c(a)(42). Fedwire is a large-value transfer system operated by the Federal Reserve Banks that supports the electronic transfer of funds and the electronic transfer of book-entry securities.

[59] GNMAs, unlike other mortgage-backed securities such as those guaranteed by the Federal National Mortgage Association (''FNMAs'') and the Federal Home Loan Mortgage Association (''FHLMCs''), are issued in certificated form and therefore cannot be transferred over Fedwire.

[60] ''Eligible U.S. government securities'' also includes any collateralized mortgage obligation (''CMO'') whose underlying securities are Fedwire eligible U.S. government securities or GNMA guaranteed mortgage-backed pass through securities and which are depository eligible securities.

permit Cedel to offer securities processing services for very liquid U.S. government securities, and will provide Cedel with the opportunity to request that the exemption be broadened when it develops the necessary linkages and facilities to provide securities processing services for other U.S. securities.

2. Volume Limits

The Commission is placing a limit on the volume of eligible U.S. government securities transacted by U.S. entities or their affiliates processed through Cedel. In the Cedel Notice, the Commission proposed that the exemption include a fixed volume limit of $30 billion per day in U.S. securities transacted by U.S. entities or their affiliates processed through Cedel.[61] However, based upon the comment letters and further examination of various methods of calculating transaction volume, the Commission has determined that a flexible percentage based formula is more appropriate.[62]

Specifically, the average daily volume of eligible U.S. government securities processed through Cedel[63] may not exceed five percent of the total average daily dollar value of the aggregate volume in eligible U.S. government securities. The total average daily dollar value of eligible U.S. government securities volume will be determined semi-annually as the sum of (1) the average daily transaction value of all Fedwire eligible book-entry transfers originated on Fedwire as provided to the Commission by the Board of Governors of the Federal Reserve System, (2) the average daily value of all compared trades, less the netted value of all such compared trades, in eligible U.S. government securities as provided to the Commission by the Government Securities Clearing Corporation, (3) the average daily value of all compared trades, less the netted value of all such compared trades, plus the average daily volume of all trade-for-trade transactions (*i.e.,* trades not included in the netting system), in eligible government securities as provided by MBS Clearing Corporation, (4) the average daily gross settlement value in eligible U.S. government securities as provided to the Commission by the Participants Trust Company, and (5) the average daily dollar value of compared trades in eligible U.S. government securities from any other source that the Division deems appropriate to reflect the aggregate volume in eligible U.S. government securities.

Cedel's average daily volume will be the sum of the following amounts for the previous twelve months as determined on a rolling quarterly basis: (1) All settlements, both internal and external, within Cedel's clearance and settlement system involving a U.S. customer or its affiliate and eligible U.S. government securities; (2) each movement of eligible U.S. government securities into the GCSS system involving a U.S. customer or its affiliate; (3) each delivery of eligible U.S. government securities involving a U.S. customer or its affiliate within the GCSS system; and (4) each delivery of eligible U.S. government securities involving a U.S. customer or its affiliate out of the GCSS system. In the volume calculation, only the initial movement of collateral (the ''on-leg'') of such GCSS delivery or movement will be included; the return of collateral will not.

For purposes of calculating the volume limit and for purposes of Commission access to information, ''affiliate'' means any Cedel customer having a relationship with a U.S. entity,[64] where the U.S. entity has an arrangement on file at Cedel to prevent a settlement default or credit default in respect of such customer, or Cedel knows that the U.S. entity has another arrangement to prevent a settlement default or credit default with respect to such customer. In addition, the Commission may specifically designate Cedel customers that will be deemed affiliates for purposes of calculating Cedel's volume and for information access.

The Commission believes the volume limit is appropriate in that it is large enough to allow Cedel to conduct effective operations in processing eligible U.S. government securities transactions involving U.S. entities or their affiliates, and to allow the Commission to observe the effects of Cedel's activities on the U.S. government securities market, but is sufficiently limited so that the safety and soundness of the U.S. markets should not be materially affected if Cedel experiences financial or operational difficulties. Either upon Cedel's request or by its own initiative, the Commission may review whether the current volume limit should be modified.

3. Commission Access to Information

To facilitate the monitoring of the impact of Cedel's operation under this exemption, including compliance with the volume limit, this Order requires Cedel to provide information on a monthly basis regarding (i) the aggregate volume of eligible U.S. government securities transacted by U.S. entities or their affiliates that are processed through Cedel and (ii) the aggregate volume for all Cedel customers for transactions in eligible U.S. government securities that are processed through Cedel. Under the exemption, Cedel also is required to notify the Commission regarding material adverse changes in any account maintained by Cedel for its customers that are members or affiliates of members of a U.S. registered clearing agency.[65] Cedel also is required to

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[61] A similar approach was adopted by the Commission in granting an exemption from clearing agency registration to the Clearing Corporation for Options and Securities (''CCOS''). That exemptive order contained volume limitations of US$6 billion net daily settlement for government securities and US$24 billion for repurchase agreements and reverse repurchase agreements transactions calculated on an average daily basis over a 90 day period. At that time, the CCOS volume limits were designed to limit CCOS's activity to approximately 5% of the average daily dollar value of transactions in U.S. government securities and of repurchase agreements and reverse repurchase agreements involving U.S. government securities. See note 41 *supra.*

[62] Two commenters addressed the proposed volume limitations. One commenter supported the initial conditions proposed by the Commission but urged that the Commission reassess from time to time the transaction volume limitations. The commenter believed that this would allow the Commission the opportunity to monitor the performance of Cedel while ensuring the appropriateness of the levels at which those limitations have been set. Letter from Monroe R. Sonnenborn, Managing Director, Morgan Stanley & Co. Incorporated, to Jonathan Katz, Secretary, Commission (July 22, 1996). The other commenter believed that the conditions relating to the volume limitations and Commission access to information to be ''reasonable actions by the Commission for achieving its objective of monitoring the safety and soundness of U.S. securities markets.'' Letter from John Macfarlane, Managing Director, Salomon Brothers Inc, to Jonathan Katz, Secretary, Commission (July 19, 1996).

[63] For purposes of the determination of volume limits, securities ''processed through Cedel'' means a security that is utilized by GCSS, Cedel's clearance and settlement system, Cedel's tripartite repo service, or Cedel's securities lending program.

The conditions and restrictions set forth in this Order will not apply to Cedel for the processing of transactions in eligible U.S. government securities where both counterparties to the transaction are not a U.S. customer or an affiliate. However, from the information to be made available to the Commission from Cedel and the IML, the Commission expects to receive information regarding all transactions in U.S. government securities processed by Cedel *i.e.,* whether or not a U.S. counterparty is involved) and will examine the effects such transactions may have on U.S. markets and U.S. market participants.

[64] For purposes of this Order, ''U.S. entity'' shall mean (i) any entity organized under the laws of the United States or any state or subdivision thereof that is registered or regulated pursuant to state or federal banking or securities law and shall include, without limitation, U.S. registered broker-dealers, U.S. banks (as defined by Section 3(a)(6) of the Exchange Act), and (ii) foreign branches of U.S. banks or U.S. registered broker-dealers.

[65] For purposes of the unilateral understanding with the IML discussed below, the term ''material adverse changes'' refers to a default in settlement for credit reasons in an account maintained by a Cedel member, a liquidation of collateral posted by

respond to a Commission request for information about a U.S. customer or its affiliate about whom the Commission has financial solvency concerns.[66] The exemption also is contingent upon the execution of a satisfactory unilateral understanding between the Commission and the IML, Luxembourg's banking and securities regulatory authority, to facilitate the provision of information by Cedel to the Commission.[67] In addition to the above information, the Commission will monitor Cedel through its review of information provided to the IML by Cedel [68] and its external auditors.[69]

In addition to the foregoing arrangements for access to information, Cedel will be required to file with the Commission amendments to its application for exemption on Form CA–1 prior to the implementation of any change in Cedel's stated policies, practices, or procedures that makes the information contained in the original Form CA–1 incomplete or inaccurate in any material respect.[70] This method of notifying the Commission of proposed changes at Cedel will assist the Commission on its overall review and understanding of Cedel and its operations. In addition, Cedel will be required to notify the Commission of changes to the Customer Handbook and Customer Agreement and will provide the Commission with copies of the most current Customer Agreement and Customer Handbook and any amendments or updates thereto. Cedel also will provide the Commission with copies of Cedel's annual report of its external auditor, and any other document relating to an audit, survey, or consultant's review concerning Cedel's financial position, operations, or internal control as the Commission may reasonably request.

4. Modification of Exemption

The Commission may modify by order the terms, scope, or conditions of Cedel's exemption from registration as a clearing agency if the Commission determines that such modification is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.[71] Furthermore, the Commission may limit, suspend, or revoke this exemption if the Commission finds that Cedel has violated or is unable to comply with any of the provisions set forth in this Order if such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act for the protection of investors and the public interest.

IV. Conclusion

The Commission finds that Cedel's application for exemption from registration as a clearing agency meets the standards and requirements deemed appropriate for such an exemption including those standards set forth under Section 17A of the Exchange Act.

It is therefore ordered, pursuant to Section 19(a)(1) of the Exchange Act, that the application for exemption from registration as a clearing agency filed by Cedel Bank, société anonyme (File No. 600–29) be, and hereby is, approved subject to the conditions contained in this Order.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–5027 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–M

a Cedel member in an account maintained by Cedel, or a limitation imposed by Cedel on any credit line of a Cedel member relating to any account maintained by such member.

[66] In addition, the Commission will be permitted to observe Cedel operations and to talk to Cedel personnel on-site if the Commission so requests.

[67] Cedel has represented to the Commission that its obligations to provide information to the Commission pursuant to this Order is not dependent upon the prior approval of the IML.

[68] Cedel is required to submit to the IML monthly balance sheets, foreign exchange position reports, and liquidity ratios. Cedel also is required to submit quarterly income statements and reports on large exposures and on the maturity structure of Cedel's assets and liabilities. See also *supra* note 1.

[69] Cedel's external auditors are required, among other things, to review Cedel's accounting and risk management systems and to assess the reliability of Cedel's periodic reports to the IML.

[70] Cedel will be required to amend its application for any proposed changes to its stated policies, practices, or interpretations as that phrase is defined in Rule 19b–4, 17 CFR 240.19b–4.

[71] The exemption provided by this Order is based upon representations by Cedel, facts contained in the Cedel application, and other information known to the Commission regarding the substantive aspects of Cedel's proposal (collectively, ''representations and facts''). Any changes in the representations or facts as presented to the Commission may require a modification to the exemption. Responsibility for compliance with all applicable U.S. securities laws rests with Cedel and its customers, as appropriate. Cedel also is advised that this Order does not exempt Cedel from the anti-fraud or anti-manipulation provisions of the Exchange Act or any of the rules promulgated thereunder.

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

The Social Security Administration publishes a list of information collection packages submitted to the Office of Management and Budget (OMB) for clearance in compliance with Public Law 104–13 effective October 1, 1995, The Paperwork Reduction Act of 1995. The information collections listed below have been submitted to OMB:

1. Physical Residual Functional Capacity Assessment; Mental Residual Functional Capacity Assessment—0960–0431. The information collected on forms SSA–4734–BK and SSA–4734 SUP is needed by the Social Security Administration to assist in the adjudication of disability claims involving physical and/or mental impairments. The forms assist the State Disability Determination Services (DDS) to evaluate impairment(s) by providing a standardized data collection format to present findings in a clear, concise and consistent manner. The respondents are State DDSs administering title II and title XVI disability programs.

Number of Responses: 1,693,425.

Frequency of Response: 1.

Average Burden Per Response: 20 minutes.

Estimated Annual Burden: 564,475 hours.

2. Letter to Employer Requesting Wage Information—0960–0138. The information collected on form SSA–L4201 is used by the Social Security Administration to determine eligibility and proper payment for Supplemental Security Income (SSI) applicants/recipients. The respondents are employers of applicants for and recipients of SSI payments.

Number of Respondents: 133,000.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 66,500 hours.

3. State Agency Schedule for Equipment Purchases for SSA Disability Program—0960–0406. The information collected on form SSA–871 is used by the Social Security Administration to budget and account for expenditures of funds for equipment purchases by the State Disability Determination Services that administer the disability program. The respondents are State Disability Determination Services.

Number of Respondents: 54.

Frequency of Response: Annually.

Average Burden Per Response: 1 hour.

Estimated Annual Burden: 54 hours.

To receive a copy of the forms or clearance packages, call the SSA Reports Clearance Officer on (410) 965–4125 or write to her at the address listed below. Written comments and recommendations regarding the information collection(s) should be directed within 30 days to the OMB

Desk Officer and SSA Reports Clearance Officer at the following addresses:

(OMB)

Office of Management and Budget, OIRA, Attn: Laura Oliven, New Executive Office Building, Room 10230, 725 17th St., NW., Washington, D.C. 20503

(SSA)

Social Security Administration, DCFAM, Attn: Judith T. Hasche, 1–A–21 Operations Bldg., 6401 Security Blvd., Baltimore, MD 21235

Dated: February 14, 1997

Judith T. Hasche,

SSA Reports Clearance Officer, Social Security Administration.

[FR Doc. 97–4368 Filed 2–27–97; 8:45 am]

BILLING CODE 4190–29–P

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings; Agreements Filed During the Week Ending February 21,1997

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST–97–2138.

Date filed: February 18, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC3 Telex Mail Vote 856; Special Amending Reso 010h (Hiroshima-Guam/Saipan); Intended effective date: June 5, 1997.

Docket Number: OST–97–2139.

Date filed: February 18, 1997.

Parties: Members of the International Air Transport Association.

Subject: COMP Telex Mail Vote 855; Special Amending Reso 010g from Japan; Intended effective date: March 10, 1997.

Docket Number: OST–97–2140.

Date filed: February 18, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC AFR 0006 dated February 11, 1997; Within Africa Expedited Reso 002m; Intended effective date: March 15, 1997.

Docket Number: OST–97–2142.

Date filed: February 21, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC2 EUR–AFR 0013 dated February 11, 1997 r1–2; PTC2 EUR–AFR 0014 dated February 11, 1997 r3–22; PTC2 EUR–AFR 0015 dated February 11, 1997 r23–48; PTC2 EUR–AFR 0016 dated February 11, 1997 r–49–70; PTC2 EUR–AFR 0017 dated February 11, 1997 r–71–87; PTC2 EUR–AFR 0018 dated Feb. 11, 1997 r88–105; Minutes—PTC2 EUR–AFR 0019 dated Feb. 11, 1997; Tables—PTC2 EUR–AFR Fares 0009 dated Feb.18, 1997; PTC2 EUR–AFR Fares 0010 dated February 18, 1997; PTC2 EUR–AFR Fares 0011 dated February 18, 1997; PTC2 EUR–AFR Fares 0012 dated February 18, 1997; Europe-Africa Resolutions; Intended effective date: May 1, 1997.

Paulette V. Twine,

Chief, Documentary Services.

[FR Doc. 97–5041 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–62–P

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending February 21, 1997

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et seq.*). The due date for Answers, Conforming Applications, or Motions to modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–97–2144.

Date filed: February 21, 1997.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 21, 1997.

Description: Application of Airline Management Limited, pursuant to 49 U.S.C. Section 41301 and Subpart Q of the Regulations, applies for a foreign air carrier permit to engage in charter foreign air transportation of persons and property as follows: Between any point or points in the United Kingdom and any point or points in the United States, either directly or via intermediate or beyond points in other countries, with or without stopovers; Between any point or points in the United States and any point or points not in the United Kingdom or the United States; and any other charter flights authorized pursuant to Part 212 of the Department's regulations.

Paulette V. Twine,

Chief, Documentary Services.

[FR Doc. 97–5042 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–62–P

Federal Highway Administration

Revised Filing Procedures for the FHWA Rulemaking and Adjudicatory Dockets

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of docket filing procedures.

SUMMARY: The FHWA open rulemaking and adjudicatory docket files will be temporarily relocated and available for inspection and copying in Room 2200–G on the second floor of the Nassif Building within the TASC Library at 400 Seventh Street, SW., Washington, DC 20590. This temporary relocation is necessary because there will be no access to the fourth floor of the DOT Headquarters building for approximately four weeks and because the FHWA dockets are being consolidated with the DOT Docket Management System. The DOT is consolidating its nine separate docket facilities and converting from a paper-based system to an optical imaging system for more efficient storage, management, and retrieval of docketed information in order to provide better service and access to the public and to government users. The FHWA rulemaking and adjudicatory docket files that are closed will be sent to the Federal Records Center in the near future and are unavailable for retrieval during the temporary relocation of FHWA personnel to Techworld Plaza from March 7 through April 7, 1997.

DATES: Open rulemaking and adjudicatory dockets are available for inspection and copying in Room 2200–G effective March 3, 1997, until April 7, 1997. Open dockets will be available for inspection and copying in Room PL–401 beginning on April 7, 1997. Closed rulemaking and adjudicatory dockets are temporarily unavailable for inspection and copying from March 7 through April 7, 1997.

ADDRESSES: Submit all rulemaking comments and adjudicatory dockets to the U.S. DOT Dockets, Plaza Level of the Nassif Building at the U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001 between the hours of 10 a.m. and 5 p.m., e.t.

FOR FURTHER INFORMATION CONTACT: For FHWA rulemaking information: Mr. Thomas P. Holian, HCC–10, (202) 366–1383. For FHWA adjudicatory information: Mr. Steven B. Farbman, HCC–04, (202) 366–1358. Both are in FHWA's Office of the Chief Counsel. For the U.S. DOT Dockets: Ms. Paulette

Twine, Documentary Services, Room PL–401, (202) 366–9329.

SUPPLEMENTARY INFORMATION: On March 15, 1995, at 60 FR 14050, the DOT issued a public meeting notice concerning the centralization and computerization of DOT dockets. On June 10, 1996, at 61 FR 29282, the Office of the Secretary of the DOT published a final rule revising filing procedures for OST dockets.

The FHWA docket transition to the centralized dockets begins on February 28, 1997. All open dockets will be available for inspection and copying in Room 2200–G within the TASC Library of the Nassif Building from 9 a.m. to 3:30 p.m., e.t., Monday through Friday, except for Federal holidays, from March 3 through April 7, 1997. All comments to open dockets should be clearly marked with the appropriate docket number and submitted to the U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590–0001.

At this time, the U.S. DOT Dockets will accept only paper filings for an original document.

To ensure that the highest quality image is captured during the scanning process, documents must be typed double-spaced on 8½ by 11 inch white paper with dark type (not green) to provide adequate contrast for photographic reproduction. With one exception, original documents must be unbound, without tabs, to reduce possible damage during removal of pins and staples and to facilitate the use of a high-speed mechanism for automated scanning. Documents of more than one page may be clipped with a removable clip or similar device. In cases assigned by order to an Administrative Law Judge for hearing, the filing requirements with respect to tabbing and binding and the number of copies required will be set by order of the Administrative Law Judge. Filers are requested to provide one-sided original documents to speed the physical scanning process, but the software capability to sort double-sided copies is available.

Material that cannot be scanned will be given special handling and a cross-reference to this material will be noted in the docket file.

(23 U.S.C. 315; 49 CFR 1.48)

Issued on: February 24, 1997.

Jane Garvey,

Acting Administrator.

[FR Doc. 97–5022 Filed 2–27–97; 8:45 am]

BILLING CODE 4910–22–P

Surface Transportation Board

[STB Finance Docket No. 33353]

Clarkdale Arizona Central Railroad, L.C.—Acquisition and Operation Exemption—Arizona Central Railroad, Inc.

Clarkdale Arizona Central Railroad, L.C. (CACR) has filed a verified notice of exemption under 49 CFR 1150.31 to acquire approximately 38.74 miles of rail line owned by Arizona Central Railroad, Inc. (AZCR), between milepost 0 + 15 feet at Drake, AZ, to the Phoenix Cement Plant at milepost 38 + 3940.3 feet near Clarkdale, AZ (the Clarkdale Branch).[1] CACR will become a Class III rail carrier.[2] Consummation was expected to occur on or shortly after February 7, 1997. Although this notice of exemption for acquisition and operation was filed on January 29, 1997, and the exemption thus became effective on February 5, 1997, the transition could not lawfully have been consummated until February 10, 1997, at the earliest, because the related notice of exemption for continuance in control was filed on February 3, 1997, and, as a result, that exemption did not become effective until February 10, 1997.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33353, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423[3] and served on: Walter T. Merrill, Durbano & Merrill, 3340 Harrison Boulevard, Suite 200, Ogden, UT 84403.

Decided: February 19, 1997.

[1] CACR states that the Clarkdale Branch is the only rail asset owned by AZCR, although AZCR owns other assets. For liability and accounting purposes, and as part of a restructuring of the business organizations under common control, the decision was made to transfer AZCR's only rail asset to CACR. After consummation of the transaction, AZCR will no longer be a rail carrier subject to Board jurisdiction.

[2] This proceeding is related to STB Finance Docket No. 33354, wherein David L. Durbano, a noncarrier individual, has filed a notice of exemption to continue in control of CACR upon CACR's becoming a Class III rail carrier.

[3] Due to the Board's scheduled relocation on March 16, 1997, any filings made after March 16, 1997, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1925 K Street, N.W., Washington, D.C. 20423–0001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–4866 Filed 2–27–97; 8:45 am]

BILLING CODE 4915–00–P

[STB Finance Docket No. 33354]

David L. Durbano—Continuance in Control Exemption—Clarkdale Arizona Central Railroad, L.C.

David L. Durbano (Applicant) has filed a verified notice of exemption to continue in control of Clarkdale Arizona Central Railroad, L.C. (CACR), upon CACR's becoming a Class III rail carrier.

The notice stated that Applicant expected the transaction to be consummated on or after February 7, 1997. Because this notice of exemption for continuance in control was filed on February 3, 1997, however, the 7-day effective date of this notice was February 10, 1997, which was thus the earliest date consummation could lawfully occur.

This transaction is related to STB Finance Docket No. 33353, *Clarkdale Arizona Central Railroad, L.C.—Acquisition and Operation Exemption—Arizona Central Railroad, Inc.,* wherein CACR seeks to acquire 38.74 miles of rail line owned by Arizona Central Railroad, Inc. (AZCR).

Applicant controls five existing Class III rail common carriers. In addition to controlling AZCR, operating in Arizona, applicant controls: Wyoming and Colorado Railroad Company, Inc. (WYCO), operating in Wyoming; Oregon Eastern Railroad Company, Inc. (OER), operating in Oregon; Southwestern Railroad Company, Inc. (SWR), operating in New Mexico, Oklahoma, and Texas; and Cimarron Valley Railroad, L.C. (CVR), operating in Kansas, Oklahoma, and Colorado.

Applicant states that: (i) CACR will not connect with WYCO, OER, SWR, or CVR; (ii) the continuance in control is not part of a series of anticipated transactions that would connect CACR with WYCO, OER, SWR, or CVR; and (iii) the transaction does not involve any Class I carriers. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail

carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

If the notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33354, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423.[1] In addition, a copy of each pleading must be served on: Walter T. Merrill, Durbano & Merrill, 3340 Harrison Boulevard, Suite 200, Ogden, UT 84403.

Decided: February 19, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 97–4867 Filed 2–27–97; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

February 21, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Bureau of the Public Debt (BPD)

OMB Number: 1535–0013.
Form Number: PD F 1048 and PD F 2243.
Type of Review: Extension.
Title: Application for Relief on Account of Loss, Theft or Destruction of U.S. Savings and Retirement Securities (1048); and Statement Concerning U.S. Securities (2243).
Description: PD F 1048 and PD F 2243 are used by owner(s) or others having knowledge to request substitute securities or payment of lost, stolen or destroyed securities.
Respondents: Individuals or households.
Estimated Number of Respondents: 80,000.
Estimated Burden Hours Per Response: 25 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 32,000 hours.

OMB Number: 1535–0035.
Form Number: PD F 4881.
Type of Review: Extension.
Title: Application for payment of United States Savings Bonds/Notes or Related Checks in an Amount NOT Exceeding $1,000 by the Survivor of a Deceased Owner Whose Estate is NOT Being Administered.
Description: PD F 4881 is used by survivors of deceased bond owners to apply for proceeds from bonds, or related checks.
Respondents: Individual or households.
Estimated Number of Respondents: 3,965.
Estimated Burden Hours Per Response: 25 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 991 hours.

OMB Number: 1535–0036.
Form Number: PD F 2513.
Type of Review: Extension.
Title: Application by Voluntary Guardian on Incompetent Owner of United States Savings Bonds/Notes.
Description: PD F 2513 is used by the voluntary guardian of incompetent bond owner(s) to establish the applicant's right to act on behalf of the incompetent owner.
Respondents: Individuals or households.
Estimated Number of Respondents: 7,650.
Estimated Burden Hours Per Response: 20 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 2,600 hours.

OMB Number: 1535–0064.
Form Number: PD F 1980 and PD F 2490.
Type of Review: Extension.
Title: Description of United States Savings Bonds Series HH/H (1980); and Description of United States Bonds/Notes (2490).
Description: PD F 1980 and PD F 2490 are used by an owner of United States Bonds/Notes to describe their holdings.
Respondents: Individuals or households.
Estimated Number of Respondents: 19,000.
Estimated Burden Hours Per Response: 6 minutes.
Frequency of Response: On occasion.
Estimated Total Reporting Burden: 1,900 hours.
Clearance Officer: Vicki S. Thorpe, (304) 480–6553, Bureau of the Public Debt, 200 Third Street, Parkersburg, West VA 26106–1328.
OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97–4981 Filed 2–27–97; 8:45 am]

BILLING CODE 4810–40–P

Submission for OMB Review; Comment Request

February 20, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Special Request: In order to begin the survey described below in April 1997, the Department of the Treasury is requesting that the Office of Management and Budget (OMB) review and approve this information collection by March 4, 1997. To obtain a copy of this survey, please contact the IRS Clearance Officer at the address listed below.

Internal Revenue Service (IRS)

OMB Number: 1545–1432.
Project Number: M:SP:V 97–004G.
Type of Review: Revision.
Title: 1–900 Tax Practitioner Hotline Focus Group Interviews.
Description: The IRS is conducting a series of nine (9) focus group interviews with tax practitioners. The objective of these focus groups is to determine:

- Are they willing to pay for the 1–900 hotline service?
- What services would they be willing to pay for?
- What services would they not be willing to pay for?
- Their suggestions for alternatives to a 1–900 hotline?

[1] Due to the Board's scheduled relocation on March 16, 1997, any filings made after March 16, 1997, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1925 K Street, N.W., Washington, D.C. 20423–0001.

Respondents: Businesses or other for-profit.

Estimated Number of Respondents: 81.

Estimated Burden Hours Per Respondent: 3 hours.

Frequency of Response: Other.

Estimated Total Reporting Burden: 318 hours.

Clearance Officer: Garrick Shear, (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97–4982 Filed 2–27–97; 8:45 am]

BILLING CODE 4830–01–P

Submission for OMB Review; Comment Request

February 20, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Special Request: In order to begin the survey described below in April 1997, the Department of the Treasury is requesting that the Office of Management and Budget (OMB) review and approve this information collection by March 4, 1997. To obtain a copy of this survey, please contact the IRS Clearance Officer at the address listed below.

Internal Revenue Service (IRS)

OMB Number: 1545–1432.

Project Number: M:SP:V 97–005G.

Type of Review: Revision.

Title: North Florida District Problem Resolution Office Survey.

Description: Data obtained from this survey will be used to gage taxpayers' perceptions and satisfaction with the Problem Resolution Office for the North Florida District. IRS will also use the data to analyze the impact of front-line employees in the Problem Resolution Office using conflict management tools and techniques.

Respondents: Individuals or households.

Estimated Number of Respondents: 50

Estimated Burden Hours Per Respondent: 5 minutes.

Frequency of Response: Other.

Estimated Total Reporting Burden: 4 hours.

Clearance Officer: Garrick Shear, (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97–4983 Filed 2–27–97; 8:45 am]

BILLING CODE 4830–01–P

Submission for OMB Review; Comment Request

February 20, 1997.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Special Request: In order to begin the survey described below in April 1997, the Department of the Treasury is requesting that the Office of Management and Budget (OMB) review and approve this information collection by March 4, 1997. To obtain a copy of this survey, please contact the IRS Clearance Officer at the address listed below.

Internal Revenue Service (IRS)

OMB Number: 1545–1432.

Project Number: M:SP:V 97–006G.

Type of Review: Revision.

Title: E-Mail Customer Satisfaction Survey.

Description: Data obtained from this survey will be used to continuously improve the E-Mail service to taxpayers. Information on the number of customers who would have called instead of using the E-Mail process will be tracked and used to determine if this service has had an effect on the IRS toll-free workload.

Respondents: Individuals or households, Business or other for-profit.

Estimated Number of Respondents: 20,000.

Estimated Burden Hours Per Respondent: 2 minutes.

Frequency of Response: Other.

Estimated Total Reporting Burden: 667 hours.

Clearance Officer: Garrick Shear, (202) 622–3869, Internal Revenue Service, Room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395–7860, Office of Management and Budget, Room 10226, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 97–4984 Filed 2–27–97; 8:45 am]

BILLING CODE 4830–01–P

Internal Revenue Service

Proposed Collection; Comment Request for Voluntary Customer Surveys To Implement E.O. 12862 Coordinated by the Office of Opinion Research on Behalf of All IRS Operations Functions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Voluntary Customer Surveys to Implement E.O. 12862 Coordinated by the Office of Opinion Research on Behalf of All IRS Operations Functions.

DATES: Written comments should be received on or before April 29, 1997 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Voluntary Customer Surveys to Implement E.O. 12862 Coordinated by the Office of Opinion Research on Behalf of All IRS Operations Functions.

OMB Number: 1545–1432.

Abstract: This is a generic clearance for an undefined number of customer satisfaction and opinion surveys and focus group interviews to be conducted over the next three years. Surveys and focus groups conducted under the generic clearance are used by the Internal Revenue Service to determine levels of customer satisfaction, as well as determining issues that contribute to customer burden. This information will be used to make quality improvements to products and services.

Current Actions: We will be conducting different customer satisfaction and opinion surveys and focus group interviews during the next three years than in the past. At the present time, it is not determined what these surveys and focus groups will be.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or households, business or other-for-profit organizations, and farms.

Estimated Number of Respondents: 83,841.

Estimated Time Per Respondent: 5 minutes.

Estimated Total Annual Burden Hours: 7,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 21, 1997.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 97–4950 Filed 2–27–97; 8:45 am]

BILLING CODE 4830–01–U

UNITED STATES INFORMATION AGENCY

VOA Seeks Private Sector Partners

AGENCY: United States Information Agency.

ACTION: Notice.

SUMMARY: The Voice of America (VOA) is the United States Government's world-wide broadcasting service and a major component of the U.S. Information Agency's (USIA) International Broadcasting Bureau. VOA has an unparalleled worldwide news gathering service, with more than 22 bureaus around the globe; it produces a wide variety of programming in English and 52 other languages, reaching about 92 million people around the globe; it has a 55-year worldwide reputation for accuracy and excellence, making it far and away the best known and respected American source of news and information in the world; its music programs have brought and now bring American popular culture to remote areas of the world; millions of people have learned English by listening the English teaching and Special English programs of VOA; many of its language services, such as the Spanish and Portuguese Services for Latin America (VOA Latin America) now work with hundreds of affiliate stations.

Like other major media enterprises, the VOA is now prepared to explore a variety of possible arrangements with telecommunications/broadcasting corporations. VOA is prepared to accept proposals for joint ventures, corporate underwriting, and other relationships designed to further its mission while reducing the expenditure of taxpayer dollars. The Agency is authorized, pursuant to 22 U.S.C. 1437, to encourage and utilize private agencies' participation, including existing American press, publishing, radio, et al., in carrying out its mission.

Accordingly, the U.S. Information Agency and its International Broadcasting Bureau are seeking private sector partners for its various VOA programs and program services. It is specifically interested in exploring proposals from companies that would like to provide financing for VOA Latin America and/or other components of VOA.

Expressions of interest should be submitted in writing by April 1, 1997, to John G. Busch, Office of Contracts, 301 4th St., S.W., Room M–22, Washington, DC 20547; telephone no. 202–205–5480; fax no. 202–205–5466; or Internet: JBUSCH@USIA.GOV. All correspondence will be considered.

Dated: February 21, 1997.

John G. Busch,

Senior Contracting Officer, Office of Contracts.

[FR Doc. 97–5025 Filed 2–27–97; 8:45 am]

BILLING CODE 8230–01–M

Corrections

Federal Register
Vol. 62, No. 40
Friday, February 28, 1997

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

PENSION BENEFIT GUARANTY CORPORATION

Request for Comment on Proposed Collection of Information Under the Paperwork Reduction Act; Locating and Paying Participants

Correction

In notice document 97–4344 appearing on page 8057 in the issue of Friday, February 21, 1997, make the following correction:

On page 8057, in the second column, in the first paragraph, in the last line, ''36,610'' should read ''31,610''.

BILLING CODE 1505-01-D

Federal Register

Friday
February 28, 1997

Part II

Securities and Exchange Commission

17 CFR Part 228, et al.

Revision of Holding Period Requirements in Rules 144 and 145; Revision of Rules 144 and 145 and Form 144; Offshore Offers and Sales; Delayed Pricing for Certain Registrants; Final Rule and Proposed Rules

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–7390; File No. S7–17–95]

RIN 3235–AG53

Revision of Holding Period Requirements in Rules 144 and 145

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Commission is amending the holding period requirements contained in Rule 144 to permit the resale of limited amounts of restricted securities by any person after a one-year, rather than a two-year, holding period. Also, the amendments permit unlimited resales of restricted securities held by non-affiliates of the issuer after a holding period of two years, rather than three years. These changes should reduce the cost of capital, particularly for small business issuers. Parallel changes to Rule 145 also are being adopted.

EFFECTIVE DATE: The changes to §§ 230.144 and 230.145 will be effective April 29, 1997.

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Murphy, Office of Chief Counsel, Division of Corporation Finance at (202) 942–2900, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: On June 27, 1995, the Commission published for comment a release proposing amendments to Rule 144,[1] the non-exclusive safe harbor from registration for resales of restricted securities and securities held by affiliates of the issuer, under the Securities Act of 1933 (the ''Securities Act'').[2] These proposals are being adopted today. As amended, the holding period for resales of limited amounts of restricted securities by any person has been reduced from two years to one year. The holding period for resales by non-affiliates without compliance with the provisions of the rule has been reduced from three years to two years.[3] The Commission also is adopting parallel changes to Securities Act Rule 145.[4] The revised holding periods are applicable to all securities, whether acquired before or after the effective date of the changes announced today. The Commission today also is publishing a companion release soliciting comment on additional changes to Rule 144 that would simplify the rule's operation and further modify the Rule 144 holding periods.[5]

I. Discussion

Today, for the first time since the adoption of Rule 144 in 1972,[6] the Commission is adopting amendments to shorten the holding period that must be satisfied before limited resales of restricted securities may be made by affiliates and non-affiliates in reliance upon the rule. As had been proposed, the amendments reduce that holding period from two years to one year. Also as proposed, the amendments reduce the length of the holding period that non-affiliates must hold restricted securities before making unlimited resales of such securities from three years to two years.

The Commission is adopting the shortened holding periods based on its more than 20 years of experience with Rule 144 and the favorable public comments received on the 1995 Release. Shorter holding periods should reduce the cost of capital. This particularly should benefit smaller companies, which often sell securities in private placements. A shorter holding period should lower the illiquidity discount given by companies raising capital in private placements and increase the usefulness of the Rule 144 safe harbor.

Shorter Rule 144 holding periods have been recommended by participants in the SEC Government-Business Forum on Small Business Capital Formation.[7] The Commission believes that the shorter holding periods will not diminish investor protection, since they are sufficiently long to ensure that resales under Rule 144 will not facilitate indirect public distributions of unregistered securities by issuers or affiliates.

Rule 144 provides an objective safe harbor for resales of restricted securities and control securities. Restricted securities generally are securities issued in private placements;[8] control securities are securities owned by affiliates of the issuer, however acquired. The rule provides that a person complying with its terms and conditions will not be engaged in a distribution of securities and, thus, not be an ''underwriter''[9] for purposes of the Section 4(1)[10] exemption from Securities Act registration for ordinary trading transactions.[11]

The rule includes holding periods for restricted securities to establish that the holder did not purchase with a view to an unregistered public distribution. Pursuant to the amendments adopted today, all restricted securities must be held at least one year before resale, measured from the date the securities are acquired from the issuer or an affiliate. For restricted securities held between one and two years, other provisions of the rule require that current public information be available about the issuer, that limited amounts of securities be resold, that the resales be effected in ordinary brokerage transactions or directly with a market-maker, and that a notification of the resale be filed with the Commission. Under the amendments, after a two-year holding period, restricted securities may be resold by non-affiliates without compliance with any of these provisions.

At the suggestion of commenters, the Commission also is adopting parallel changes to the holding period provisions included in Securities Act Rule 145(d),[12] which governs the resale of securities received in connection with reclassifications, mergers,

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[1] 17 CFR 230.144. Release No. 33–7187 (June 27, 1995) [60 FR 35645] (''1995 Release''). Comment letters are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Interested persons should refer to File No. S7–17–95.

[2] 15 U.S.C. 77a *et seq.*

[3] Conforming changes also have been made in paragraph (e)(3) of Rule 144 relating to determination of the limits on amounts resalable by pledgees, donees and trusts, reducing the period from two years to one year after the event of pledge, default, donation, or trust acquisition.

[4] 17 CFR 230.145.

[5] Release No. 33–7391 (February 20, 1997).

[6] Release No. 33–5223 (January 11, 1972) [37 FR 591].

[7] *See, e.g.*, Final Reports of the SEC Government-Business Forum On Small Business Capital Formation (June 1992, 1993, 1994 and February 1995). The Small Business Incentive Act of 1980 directs the Commission to host this annual meeting for the purpose of reviewing the ''current status of problems and programs relating to small business capital formation.'' Pub. L. No. 96–477, Section 503, 94 Stat. 2275, 2292–93 (1980).

[8] The term ''restricted securities'' is defined in Rule 144(a)(3) [17 CFR 230.144(a)(3)] and includes: securities acquired from the issuer or an affiliate in a transaction or chain of transactions not involving a public offering; securities acquired from the issuer and subject to resale limitations under Regulation D [17 CFR 230.501–508] or Rule 701 [17 CFR 230.701]; securities subject to the Regulation D resale limitations and acquired in a transaction or chain of transactions not involving a public offering; securities acquired in a transaction or chain of transactions meeting the requirements of Rule 144A [17 CFR 230.144A]; and securities acquired from the issuer that are subject to the resale limitations of Regulation CE (§ 230.1001). Separate releases being issued today propose to amend the term to also include securities issued pursuant to an exemption under Securities Act Section 4(6) [15 U.S.C. 77(d)(6)] as well as equity securities of domestic issuers, and of foreign issuers where the primary market for such securities is in the United States, sold under Regulation S [17 CFR 230.901–230.904 and Preliminary Notes]. Release Nos. 33–7391 and 33–7392 (February 20, 1997).

[9] *See* Section 2(11) of the Securities Act [15 U.S.C. 77b(11)].

[10] 15 U.S.C. 77(d)(1).

[11] Section 4(1) exempts transactions by persons who are not issuers, underwriters or dealers.

[12] 17 CFR 230.145(d).

consolidations and asset transfers. Rule 145(c)[13] provides that any party to a transaction covered by Rule 145 (other than the issuer), or any person who is an affiliate of such party at the time the transaction is submitted for vote or consent, who publicly resells securities of the issuer acquired in connection with that transaction will be deemed to be engaged in a distribution, and therefore to be an underwriter of those securities, except where the securities are resold in accordance with Rule 145(d). The holding period requirements of Rule 145(d) correspond to the holding periods for resales in Rule 144.

The 1995 Release also requested comment on whether the holding period or other requirements in Rule 144 should be revised to address the concern that holders utilizing certain new hedging strategies may not be economically ''at risk'' during the holding period. This issue is addressed further by the Commission in the companion release soliciting comment on additional changes to Rule 144.[14]

II. Cost-Benefit Analysis

The Commission believes, and the public comments support the view, that reduction in the Rule 144 holding periods will reduce compliance burdens and costs without significant impact on investor protection. The Commission also believes that the action being taken will promote market efficiency, investment and capital formation by reducing the liquidity costs of holding restricted securities and reducing issuers' cost of raising capital through the sale of restricted securities.

Issuers typically must offer restricted shares at a discount relative to prices at which their unrestricted shares trade in the public markets. In recent years, this discount has generally ranged from 20–50%. The discount compensates the purchasers of the restricted shares for their inability to resell the securities before completion of the requisite holding period. Since the amendments shorten the holding period, the purchasers will demand a smaller liquidity premium and issuers will be able to sell their restricted securities at higher prices.

The actual amount by which the annual volume of restricted shares privately placed and resales of restricted securities will increase cannot be reliably predicted. The actual size of these increases will depend on the response of investors and issuers to the shortened holding period requirements.

III. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with Section 604 of the Regulatory Flexibility Act,[15] and relates to the adoption of amendments to Rules 144 and 145 under the Securities Act.

Reasons for, and Objectives of, Proposed Action

Rule 144 provides a safe harbor for the resale of restricted and control securities. It sets forth conditions which, if satisfied, permit persons who hold such securities to sell them publicly without registration and without being deemed underwriters. One of the conditions is that the securities must be held for a specified period of time before any sales may be made.

Rule 145 governs the offer or sale of securities received in connection with reclassifications, mergers, consolidations and asset transfers. It provides that any party to a transaction covered by the rule (other than the issuer), or any person who is an affiliate of such party at the time the transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with such a transaction will be deemed to be engaged in a distribution, and therefore to be an underwriter of the securities, except where the securities are resold in accordance with Rule 145(d). Rule 145(d) imposes holding periods that correspond to the holding periods for resales in Rule 144.

The Commission has determined to adopt amendments to Rules 144 and 145 to shorten the holding period requirements. The amendments to Rule 144 permit the limited resale of restricted securities after a one-year, rather than a two-year, holding period. They also permit unlimited resales of restricted securities held by non-affiliates of the issuer after a holding period of two, rather than three years.

The Commission believes that shorter holding periods should reduce the costs of capital formation, particularly for smaller companies, by reducing the illiquidity discount companies must give when raising capital in private placements. Investors will also be able to recoup their capital more quickly.

The Commission believes that the shorter holding periods will not diminish investor protection, since they are sufficiently long to ensure that resales under Rule 144 will not facilitate indirect public distributions of unregistered securities by issuers or affiliates. The amendments were recommended by small business representatives participating in the SEC Government-Business Forum on Small Business Capital Formation.

Significant Issues Raised by the Public Comments

The Commission received five requests for the Initial Regulatory Flexibility Analysis prepared in connection with the 1995 Release, and no public comments specifically addressed that analysis. The Commission received public comment, however, on the amendments to the Rule 144 and 145 holding periods. The commenters agreed that shorter holding periods should reduce the costs of capital formation and be of particular benefit to small companies, which often sell securities in private placements. At the suggestion of commenters, the Commission is soliciting comment on further changes to the holding periods in the companion proposing release.

Small Entities Subject to Requirements

The reduced holding periods will affect both small entities that issue restricted or control securities and small entities that hold such securities. The term ''small business,'' when used with reference to an issuer, other than an investment company, is defined by Securities Act Rule 157 as an issuer whose total assets on the last day of its most recent fiscal year were $5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities that does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act. Exchange Act Rule 0–10[16] defines small entity when used with reference to an issuer or person, other than an investment company, to mean an issuer or person that, on the last day of its most recent fiscal year, had total assets of $5,000,000 or less.[17]

The Commission is aware of approximately 1,019 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 157 and may be affected by the reduced holding periods. The reduced holding periods also may affect small businesses that are not subject to Exchange Act reporting requirements. The Commission is unable to determine the number of such

[13] 17 CFR 230.145(c).

[14] Release No. 33–7391 (February 20, 1997).

[15] 5 U.S.C. § 604.

[16] 17 CFR 240.0–10.

[17] There is no comparable definition of ''person'' under the Securities Act.

small businesses due to the absence of filings with the Commission by such companies.

An estimated 3,800 entities, excluding natural persons, annually file Form 144 based upon a staff review of a sample of Form 144 filings. The Commission has no basis for estimating the number of these entities that are small entities under the definition of person in Exchange Act Rule 0–10, because Form 144 does not require that such information be provided and such information is not otherwise available to the Commission.

The amendments are expected to affect favorably businesses of all sizes, but particularly small businesses, by reducing the cost of capital formation through private placements of unregistered securities and allowing investors to recoup their capital more quickly. Issuers generally must sell unregistered stock at a discount; the amount of the discount should be reduced as a result of the shortening of the holding periods.

Reporting, Recordkeeping and Other Compliance Requirements

Because of the nature of the amendments, the Commission does not expect that reporting, recordkeeping and compliance burdens will increase materially as a result of the changes. Indeed, the Commission expects that compliance burdens will decrease as a result of the reduced holding periods because sellers will not have to wait as long to resell securities in reliance on Rule 144.

Nevertheless, the Commission expects the annual volume of Form 144 filings to increase as a result of the reductions in the required holding periods and the increased incentive for issuers to raise capital through sales of unregistered securities subject to Rule 144. The Commission has no basis for reliably estimating this increased volume of filings. The average cost associated with filing a Form 144 is approximately $200 based on a compensation rate of $100 per hour and a task time of two hours per filing.

Steps Taken To Minimize Significant Economic Impact on Small Entities

The amendments adopted today will benefit issuers of all sizes since a reduction in the length of the Rule 144 and 145 holding periods will reduce issuers' cost of capital. The amendments will also benefit all holders of restricted securities, who will be able to recoup their capital more quickly pursuant to the reduced holding periods. Specific consideration was given to small businesses in the formulation of these amendments; as stated above, the amendments were recommended by small business representatives.

The Commission considered a number of significant alternatives to the amendments being adopted that might minimize the significant economic impact on small entities. One alternative was to shorten the holding periods even further. Comment is being solicited on that alternative in a release proposing changes to Rules 144, 145 and Form 144.[18] The Commission intends to give further consideration to the treatment of small entities in connection with the Rule 144 proposing release.

The Commission also considered the types of alternatives set forth in section 603 of the Regulatory Flexibility Act to minimize the economic impact of the amendments on small entities: (1) the establishment of differing reporting compliance or reporting timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the amendments, or any part thereof, for small entities. Because the amendments benefit all issuers and holders of restricted securities, differing compliance timetables for small entities would not be appropriate. Neither could the compliance requirements of the amendments be clarified or simplified further for small entities. Finally, the amendments being adopted do not use design standards, and an exemption from the amendments for small entities would not be desirable or consistent with the stated objectives of the applicable statutes.

IV. Statutory Basis

The amendments to Rule 144 and 145 are being adopted pursuant to sections 2(11), 4(1) and 19(a) of the Securities Act.

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping, Securities.

Text of the Amendments

For the reasons set out above, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Section 230.144 is amended by revising paragraphs (d)(1), (e)(3)(ii), (e)(3)(iii), (e)(3)(iv) and (k) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(d) * * *

(1) *General rule.* A minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities. If the acquiror takes the securities by purchase, the one-year period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

* * * * *

(e) * * *

(3) * * *

(ii) The amount of securities sold for the account of a pledgee thereof, or for the account of a purchaser of the pledged securities, during any period of three months within one year after a default in the obligation secured by the pledge, and the amount of securities sold during the same three-month period for the account of the pledgor shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iii) The amount of securities sold for the account of a donee thereof during any period of three months within one year after the donation, and the amount of securities sold during the same three-month period for the account of the donor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

(iv) Where securities were acquired by a trust from the settlor of the trust, the amount of such securities sold for the account of the trust during any period of three months within one year after the acquisition of the securities by the trust, and the amount of securities sold during the same three-month period for the account of the settlor, shall not exceed, in the aggregate, the amount specified in paragraph (e) (1) or (2) of this section, whichever is applicable;

* * * * *

[18] Release No. 33–7391 (February 20, 1997).

(k) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e), (f) and (h) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. The two-year period shall be calculated as described in paragraph (d) of this section.

3. By amending § 230.145 by revising paragraphs (d)(2) and (d)(3) to read as follows:

§ 230.145 Reclassification of securities, mergers, consolidations and acquisitions of assets.

* * * * *

(d) * * *

(2) Such person or party is not an affiliate of the issuer, and a period of at least one year, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of § 230.144; or

(3) Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and a period of at least two years, as determined in accordance with paragraph (d) of § 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

* * * * *

By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–4665 Filed 2–27–97; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 239

[Release No. 33–7391; File No. S7–07–97]

RIN 3235–AH13

Revision of Rule 144, Rule 145 and Form 144

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Commission proposes changes to make Rule 144, a safe harbor from the Securities Act definition of the term ''underwriter,'' easier to understand and apply. The proposed amendments would revise the Preliminary Note to Rule 144 to restate the intent and effect of the rule, add a bright-line test to the Rule 144 definition of ''affiliate,'' eliminate the Rule 144 manner of sale requirements, increase the Form 144 filing thresholds, include in the definition of ''restricted securities'' securities issued pursuant to the Securities Act Section 4(6) exemption, clarify the holding period determination for securities acquired in certain exchanges with the issuer and in holding company formations, and streamline and simplify several rule provisions. The Commission also proposes to eliminate the presumptive underwriter provisions of Rule 145. Additionally, the release solicits comment on changes to the Rule 144 holding periods that differ from those being adopted today in a companion release, elimination of the trading volume tests to determine the amount of securities that can be resold under Rule 144, and several possible regulatory approaches with respect to certain hedging activities.

DATES: Comments should be received on or before April 29, 1997.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments @ sec.gov. All comment letters should refer to File No. S7–07–97; this file number should be included in the subject line if E-mail is used. Comment letters will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web Site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Murphy, Mark W. Green or Michael Hyatte, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Commission is proposing amendments to Rule 144,[1] Rule 145[2] and Form 144[3] under the Securities Act of 1933 (''Securities Act'').[4]

I. Executive Summary

Securities Act Rule 144 provides a safe harbor for the resale of restricted and control securities.[5] The rule permits persons who hold such securities to publicly sell them without registration and without being deemed underwriters, if certain conditions are satisfied. When Rule 144 was adopted in 1972, the Commission noted that it was experimental in nature and would be rescinded or amended, as necessary, based on actual experience.[6] Since its adoption, the Commission has monitored the operation of Rule 144 and has eliminated many compliance burdens where consistent with the investor protection objectives of the Securities Act.

The Commission is continuing its efforts to improve the clarity and usefulness of Rule 144 and to eliminate unnecessary compliance burdens. In June 1995, the Commission proposed to permit limited resales of restricted securities after a one-, rather than two-year holding period, and to allow unlimited resales of such securities by non-affiliates after a two-, rather than three-year holding period (''1995 Release'').[7] The proposed new holding periods are being adopted in a companion release being published today (''Adopting Release'').[8]

After reviewing the comments received on the 1995 Release, the Commission staff undertook a more comprehensive review of Rule 144 to determine whether other provisions of the rule were unnecessarily restrictive or in need of updating. This Release proposes several revisions intended to make Rule 144 easier to understand and apply.

The proposals in this release would reorganize and rewrite the text of Rule 144, including the Preliminary Note, in a more succinct and straightforward fashion. The proposals also would simplify and update the rule in three main ways.[9]

First, the proposals would make it easier to determine whether a person is not an affiliate of an issuer for purposes of Rule 144 by providing a bright-line exclusion from the Rule 144 definition of affiliate. Pursuant to the proposal, all persons not subject to the provisions of Section 16[10] of the Securities Exchange Act of 1934 (''Exchange Act'')[11] would be deemed not to be affiliates of an issuer for purposes of Rule 144.

Second, the proposals would eliminate the manner of sale requirements. [12] This would facilitate innovation in the methods used to resell restricted securities, such as the use of electronic bulletin boards.

Third, the threshold requirements for filing Form 144 would increase from the current 500 shares or $10,000 sale price test to a 1,000 shares or $40,000 sale price test.

Additionally, this Release solicits comment on other possible changes to Rule 144, including:

- Further revisions to the Rule 144 holding periods that would result in changes to either the one-or two-year holding periods being adopted today, or both;
- Elimination of the two trading volume tests that limit the amount of securities that may be sold in reliance on Rule 144, with the result that all sellers would rely on the percentage of shares outstanding test; and
- Several possible approaches to addressing the application of the Securities Act to hedging of restricted and other securities.

Finally, the Commission is proposing to amend Securities Act Rule 145, a Securities Act rule relating to certain significant transactions, such as mergers, to eliminate the resale limitations that are based on a ''presumptive underwriter'' approach.

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[1] 17 CFR 230.144.

[2] 17 CFR 230.145.

[3] 17 CFR 239.144.

[4] 15 U.S.C. 77a *et seq.*

[5] Restricted securities generally are securities issued in non-public offerings; control securities are securities owned by affiliates of the issuer.

[6] Release No. 33–5223 (January 11, 1972) [37 FR 591].

[7] Release No. 33–7187 (June 27, 1995) [60 FR 35645]. Additionally, the Commission requested comment on whether Rule 144 should be revised to address new trading strategies such as equity swaps. Comment letters on the 1995 Release are available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Interested persons should refer to File No. S7–17–95.

[8] Release No. 33–7390 (February 20, 1997).

[9] In addition, the Commission proposes to codify existing staff positions regarding determination of the holding period for securities acquired solely in exchange for other securities of the same issuer and in holding company formations, as well as the treatment of securities issued pursuant to the exemption under Section 4(6) of the Securities Act [15 U.S.C. 77(d)(6)] as restricted securities.

[10] 15 U.S.C. 78p.

[11] 15 U.S.C. 78a *et seq.*

[12] The manner of sale requirements are contained in current Rule 144(f) [17 CFR 230.144(f)]. Current Rule 144(g) [17 CFR 230.144(g)], which defines the term ''brokers' transactions'' for purposes of Rule 144, also would be rescinded.

Instead, persons who receive securities in these transactions would be treated the same as other purchasers of securities.

II. Background

The Securities Act protects investors primarily by requiring public information about issuers to be available to investors and potential investors at the time they make decisions regarding investment in an issuer's securities. The statute thus prohibits offerings unless the securities being offered are registered with the Commission or an exemption from registration is available.

The Securities Act requires registration not only of direct distributions of securities by issuers to the public, but also indirect distributions involving the transfer of unregistered securities from issuers or affiliates to persons in non-public transactions followed by large-scale public transfers of the securities by such persons. To regulate these types of indirect distributions, the Securities Act, under certain circumstances, treats even individual investors who are not securities professionals as underwriters if they act as links in the chain through which securities move from issuers to the public.

The term ''underwriter'' is defined in Section 2(11) of the Securities Act [13] to mean ''any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking.'' [14] The definition of underwriter is relevant to the ''ordinary trading'' exemption provided in Section 4(1) of the Securities Act, [15] which states that the registration provisions shall not apply to transactions by any person other than an issuer, underwriter or dealer. [16]

The statutory definition of underwriter does not provide a means to determine objectively whether a person purchased securities from the issuer or an affiliate with a view to distribution of the securities. Rule 144 was adopted as a non-exclusive safe harbor to set forth objective criteria that could be relied on by persons who wanted to resell restricted or control securities, but who were concerned whether they could be deemed to be engaged in a distribution, and therefore deemed to be underwriters under Section 2(11). The rule provides that a person who complies with its terms and conditions will not be engaged in a distribution of securities and, thus, not be an ''underwriter'' within the meaning of Section 2(11) of the Securities Act.

III. Discussion of Proposals

A. Changes to the Preliminary Note to Rule 144

The Preliminary Note to Rule 144 would be revised to better describe the two types of common transactions that raise questions as to whether a person who sells securities is acting as an underwriter (the resale of restricted securities and the resale of securities, whether or not restricted, by or on behalf of an affiliate of the issuer). It also explains that satisfaction of the criteria of Rule 144 will cause the sale of restricted or control securities to be viewed as an ordinary trading transaction rather than a ''distribution'' of such securities that would require registration under the Act.

The proposed Note states explicitly that if a sale of securities is made in accordance with all of the applicable provisions of Rule 144: (1) any person who sells restricted securities will be deemed not to be an underwriter for that transaction; (2) any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be an underwriter for that transaction; and (3) the purchaser receives unrestricted securities. The proposed Note also incorporates the statement in current Rule 144(j) [17] that Rule 144 is not an exclusive safe harbor and therefore does not eliminate or otherwise affect the availability of any other exemption for resales under the Securities Act.

Are there other matters that should be discussed in the Preliminary Note? Are there matters discussed in the Preliminary Note that should be removed?

B. Change to the Rule 144 Definition of ''Affiliate''

Rule 144 defines an affiliate of an issuer as a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.[18] This subjective ''facts and circumstances'' test presents a great deal of uncertainty regarding whether a seller is an affiliate of the issuer and introduces additional regulatory complexity that is not always necessary. Issuers and sellers of securities have, therefore, asked for greater guidance in determining who is an affiliate.

Under the proposal, the same criteria used to determine those persons that are not ''insiders'' under Exchange Act Section 16 would be used for Rule 144. Many practitioners already use the Section 16 criteria as a guide. The Commission believes it is likely that most persons who are not officers, directors or 10% holders are not in a ''control'' position.[19] Therefore, the Commission proposes to add the following to the definition of affiliate in Rule 144.

A person shall be deemed not to be an affiliate for purposes of this section if the person: (i) is not the beneficial owner, directly or indirectly, of more than 10% of any class of equity securities of the issuer; (ii) is not an officer of the issuer; and (iii) is not a director of the issuer.

A note would add:

The determination of a person's beneficial ownership and whether that person is an ''officer'' shall be made in accordance with Rule 16a–1 [20] of this chapter, regardless of whether the issuer's securities are subject to Section 16 of the Securities Exchange Act of 1934 (''Exchange Act'') and regardless of whether the class of securities is registered under Section 12 of the Exchange Act.[21]

The proposal clearly excludes from the definition persons who are not executive officers, directors or 10% holders. Members of one or more of these classes may contend, nevertheless, that they are not affiliates because they are not in a ''control'' position. For such persons, the determination of affiliate status would be a ''facts and circumstances'' test.

The need for increased certainty in the definition of affiliate also was recognized by the Advisory Committee on the Capital Formation and Regulatory Processes (''Advisory Committee''). The Advisory Committee recommended an objective test for

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[13] 15 U.S.C. 77(b)(11).

[14] Section 2(11) states that the term ''underwriter'' shall not include a person whose interest is limited to taking a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission, and uses the term ''issuer'' to include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

[15] 15 U.S.C. 77(d)(1).

[16] Sections 4(3) and 4(4) of the Securities Act [15 U.S.C. 77(d)(3) and (d)(4)] provide exemptions from the registration requirements for transactions by dealers and brokers not acting as underwriters.

[17] 17 CFR 230.144(j).

[18] Rule 144(a)(1) [17 CFR 230.144(a)(1)].

[19] Unlike Section 16, the Rule 144 safe harbor would ignore whether the company has equity securities registered under Section 12 of the Exchange Act.

[20] 17 CFR 240.16a–1. The definitions of the terms ''beneficial owner'' and ''officer'' in Rule 16a–1 would be used whether or not the securities to be resold in reliance upon the Rule 144 safe harbor are equity securities registered under Section 12 of the Exchange Act.

[21] Proposed Rule 144(a)(1).

determining affiliate status as part of an overall reform package that includes registration of most securities that, under the current system, would not be registered.[22] The Advisory Committee definition would include only the following persons as affiliates: the Chief Executive Officer; inside directors; holders of 20% of the company's voting power; and holders of 10% of the voting power with at least one director representative on the board.[23] Should this definition be adopted, instead of the one proposed, even in the absence of the other reforms recommended by the Advisory Committee?

Is there a need to provide more objective guidance as to who is an affiliate for purposes of Rule 144? Is reliance on the Section 16 insider test over-inclusive or under-inclusive? Should the exclusion from the definition of affiliate include an express presumption that those persons not so excluded are affiliates? If so, should such a presumption be rebuttable?

For affiliate status based on shareholdings, is the 10% test appropriate, or should it be higher (such as 20%), or lower (such as 5%)? Should the shareholdings test be combined, at a certain level of ownership, with the ability to place persons on the board of directors? For example, as recommended by the Advisory Committee, should the safe harbor exclude only those 10% holders that also have the ability to place at least one director on the board?

Should the definition of affiliate exclude non-employee directors? Should non-employee directors be excluded from the definition only if they have less than a specified amount of shareholdings, such as 2%, 3% or 5%? If non-employee directors should be excluded from the definition of affiliate, should the exclusion apply to non-employee directors who are securities professionals? Should the exclusion apply to non-employee directors who are representatives of controlling shareholders?

Some have argued in favor of retaining a subjective test, given the varied contractual arrangements with a control feature entered into by issuers, particularly smaller companies. Should a facts and circumstances test be retained in order to reflect the different ways a control relationship can be established with an issuer?

[22] *See Report of the Advisory Committee on the Capital Formation and Regulatory Processes* (July 24, 1996) (the ''Advisory Committee Report'') at p. 24.

[23] *See Advisory Committee Report* at p.24.

C. Manner of Sale Requirements

Rule 144(f) requires that securities be sold in ''brokers' transactions,'' [24] or in transactions directly with a ''market maker,'' as that term is defined in Section 3(a)(38) of the Exchange Act.[25] Additionally, the rule prohibits a seller from: (1) soliciting or arranging for the solicitation of orders to buy the securities in anticipation of, or in connection with, the Rule 144 transaction; or (2) making any payment in connection with the offer or sale of the securities to any person other than the broker who executes the order to sell the securities. These manner of sale restrictions do not apply to securities sold for the account of a non-affiliate of an issuer when the holding period of Rule 144(k) is met.[26]

The manner of sale requirements were intended to assure that special selling efforts and compensation arrangements usually associated with a distribution are not present in a Rule 144 sale.[27] The manner of sale requirements currently, however, appear to impose obstacles to transactions that are not distributive in nature. For example, a consequence of the manner of sale requirements is that a seller may not privately negotiate a sale of a public company's stock in reliance on Rule 144 without a broker even if the seller does not solicit the buyer's purchase of the securities, the holding period has been satisfied and the amount sold is within the volume limitations. Similarly, sellers are unable to use trading systems such as passive bulletin boards to contact potential buyers that have indicated an interest in buying the type of securities to be sold under Rule 144.[28]

When a transaction is made in accordance with the current public information, holding period, volume and notice requirements of Rule 144, the manner in which that transaction is effected does not appear to be determinative of a distribution. Therefore, it appears that the manner of sale requirements of Rule 144(f) are not necessary to satisfy the purpose of Rule 144 and are proposed to be eliminated.[29]

Removal of the manner of sale requirements would permit holders of restricted securities to solicit purchasers in a Rule 144 transaction.[30] Is it consistent with the Rule's ''non-distribution'' purpose to allow either transactions in which special selling efforts may be used or privately negotiated transactions? Should the manner of sale requirements be retained but modified to permit specific types of transactions other than brokers' and market makers' transactions, *e.g.*, passive bulletin board transactions?

Are there other purposes served by the manner of sale requirements that would justify retaining those requirements? For example, does the manner of sale requirement serve an important purpose by inserting a market professional as a ''gatekeeper'' that assures compliance with the public information, holding period, volume, and notice requirements of the rule? How will the removal of the manner of sale requirements affect participants, such as transfer agents, brokers and market makers, in Rule 144 transactions? Will transfer agents assume a greater role in determining compliance with the resale provisions?

Would the elimination of the definition of ''brokers' transactions'' in Rule 144(g) affect the ability of brokers to determine compliance with the exemption provided by Securities Act Section 4(4)? Would removal of the manner of sale requirements diminish security transaction transparency by encouraging more privately negotiated transactions? If so, would the markets be adversely affected, particularly for stocks of smaller companies and more thinly traded securities?

D. Notice of Sale Requirement

Rule 144(h) requires a person selling more than 500 shares or $10,000 of securities in reliance on the rule during any three-month period to file a notice on Form 144 with the Commission. The Report of the Commission's Task Force

[24] Current Rule 144(g) defines the term for purposes of Rule 144.

[25] 15 U.S.C. 78c(a)(38).

[26] The manner of sale requirements also do not apply to securities sold for the account of the estate of a deceased person or for the account of a beneficiary of such estate, provided the estate or beneficiary is not an affiliate of the issuer.

[27] Release No. 33–5186 (September 10, 1971) [36 FR 18586].

[28] The use of electronic bulletin boards has been the subject of recent no-action letters. *See Real Goods Trading Corp.* (June 24, 1996), *PerfectData Corp.* (August 5, 1996) and *The Flamemaster Corp.* (October 29, 1996).

[29] If this proposal is adopted, Form 144 also would be amended to eliminate references to the manner of sale requirements. Rule 144(g) defines the term ''brokers' transactions'' for purposes of Rule 144. It would also be deleted if Rule 144(f) is eliminated.

[30] Elimination of the manner of sale requirements effectively would treat resales complying with the public information, holding period, volume, and notice requirements of the rule as not constituting a ''distribution'' for Securities Act purposes. The Commission notes, however, that such resales under certain circumstances would be subject to the requirements of recently adopted Regulation M. 17 CFR 242.100 *et seq.* Regulation M was adopted in Release No. 34–38067 (December 20, 1996) [62 FR 520].

on Disclosure Simplification (''Task Force Report'')[31] recommended that the thresholds for small business issuers be raised to 500 shares or $40,000, and that the thresholds be raised to 1,000 shares or $100,000 for other issuers.

The $10,000 limit was established in 1972. This amount, adjusted for inflation, is approximately $36,000 today. The Commission therefore believes that it is appropriate to increase the $10,000 threshold. Under the proposed requirements, Form 144 would be filed if the amount of securities to be resold in reliance upon Rule 144 during any three-month period exceeds 1,000 shares or has an aggregate sales price in excess of $40,000.

Should the share number and dollar thresholds be set at a different combination of share number and dollar amount, *e.g.*, any share number ranging between 500 and 2,000 shares and any dollar amount ranging between $10,000 and $100,000 for sales of securities of all types of issuers? Should there be a single filing threshold, and if so, which threshold should be retained, the share number or dollar amount threshold? If there were a single threshold based on share number, would 500 shares, 1,000 shares or a different share number ranging between 500 and 2,000 shares be appropriate? If there were a single threshold based on dollar amount, would a different dollar value ranging between $10,000 and $100,000 be appropriate?

The Commission is not proposing to establish different filing thresholds for sales of small business issuer securities out of concern that different standards for small business issuers and other issuers would needlessly complicate the Form 144 requirements. Should the Commission establish separate thresholds for small business and non-small business issuers, and if so, are the thresholds recommended in the Task Force Report appropriate? The Commission notes that a smaller threshold for small businesses would result in more filings by persons selling small business securities. This could be justified in that a smaller transaction can have a greater impact on a small business issuer.

E. Other Proposed Amendments to Rule 144

1. Codification of Staff Interpretive Positions

The Commission is proposing to codify a variety of staff interpretive positions regarding Rule 144 in order to make it easier to comply with the rule.

a. Holding Period—Conversions and Exchanges

First, the Commission proposes to amend the Rule 144 provision on calculating the holding period for securities acquired upon conversion of other securities of the same issuer. Rule 144 generally allows holders to count the time they held securities surrendered for conversion or exchange when counting the holding period for the securities received in the conversion or exchange, what is commonly referred to as ''tacking'' the holding periods.[32] This provision of Rule 144 does not state, however, whether the surrendered securities must have been convertible by their terms in order for tacking to be permitted. This silence has led to confusion by some persons regarding how to calculate their Rule 144 holding period.

Rule 144 permits tacking of holding periods in the case of securities received in a conversion because the exchange continues the shareholder's investment in that *same* issuer. Because the significant factor in this analysis is that securities of the issuer are exchanged for other securities of that issuer, the staff has taken the interpretive position that tacking is allowed whether or not the surrendered securities are convertible by their terms. The proposed amendment would clarify the application of this provision by codifying the staff's interpretive position.[33]

b. Holding Period—Holding Company Formations

Second, the proposed revisions would codify a staff position to clarify that holders can tack the Rule 144 holding period in connection with transactions effected solely for the purpose of forming a holding company.[34] Although tacking through a holding company formation appears to be contemplated by the rule, the rule does not clearly state when and how this is allowed.[35] The proposed revisions would codify a staff interpretive position by allowing for tacking in holding company formations, subject to the following conditions:

- The holding company's securities must be issued in a transaction involving an exchange of securities as part of a reorganization of the predecessor into a holding company structure;
- Holders must receive securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor; and
- Immediately following the transaction, the holding company must have no significant assets other than securities of the predecessor and its existing subsidiaries and have substantially the same assets and liabilities on a consolidated basis as the predecessor had prior to the transaction.[36]

c. Definition of Restricted Securities

Third, the proposed revisions would codify the staff position that securities acquired from the issuer pursuant to the exemption under Section 4(6) of the Securities Act should be considered ''restricted securities.''[37] Section 4(6) provides an exemption for non-public offerings of less than $5 million that are made only to accredited investors.[38] Because the resale status of securities received in Section 4(6)-exempt transactions should be the same as securities received in other non-public offerings, the staff has taken the interpretive position that securities sold pursuant to the Section 4(6) exemption also should be deemed to be restricted securities.[39]

2. Simplification and Streamlining

The Commission is proposing a number of revisions intended to make Rule 144 more readable and easily understood. The simplifying revisions would address the conditions to be met to satisfy the rule, the current public information requirement, the volume limitations and the holding period provisions relating to trusts and estates in addition to the proposed revisions to the Preliminary Note to Rule 144 discussed above. Current paragraph (k),[40] which applies to restricted securities held by non-affiliates for more

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[31] The Task Force Report was issued in March 1996. The recommendations concerning Rule 144(h) are discussed on p. 71.

[32] Rule 144(d)(3)(ii).

[33] Proposed Rule 144(d)(3)(ii). This would codify the position taken in *Planning Research Corporation* (November 6, 1980). The provision also would state that if securities are acquired from the issuer solely in exchange (in addition to upon conversion) for other securities of the issuer, the securities so acquired are deemed to have been acquired at the same time as the securities surrendered in the exchange. This also would codify a staff interpretive position.

[34] Proposed Rule 144(d)(3)(ix).

[35] Rule 144(d)(3)(viii) [17 CFR 230.144(d)(3)(viii)].

[36] *Morgan Olmstead* (January 8, 1988).

[37] Proposed Rule 144(a)(3)(vi).

[38] The Section 4(6) exemption also requires the filing of a notice of the offering with the Commission. This notice currently is filed on Form D. In Release No. 33–7301 (June 14, 1996) [61 FR 30405], the Commission proposed to eliminate the Form D filing requirement.

[39] In Release No. 33–7392 (February 20, 1997) concerning Regulation S (''Regulation S Proposing Release''), the Commission is proposing to revise Rule 144(a)(3) [17 CFR 230.144(a)(3)] to define equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States, issued pursuant to Rule 901 or 903, as restricted securities.

[40] 17 CFR 230.144(k).

than two years, would be simplified and re-designated as paragraph (g).

Current paragraph (i)[41] requires the person filing a Form 144 to have a bona fide intention to sell the securities described in the Form 144 within a reasonable period of time after that filing. The wording of this requirement is proposed to be simplified and moved into the Form 144 filing requirement.[42]

Finally, current paragraph (j),[43] which states that Rule 144 is a non-exclusive provision that does not affect the availability of any Securities Act exemption from registration for resales of securities, would be eliminated. As discussed above, the non-exclusive nature of Rule 144 is proposed to be discussed in the Preliminary Note. This would be consistent with other Commission safe harbor provisions.[44]

F. Rule 145

Securities Act Rule 145 provides that exchanges of securities in connection with reclassifications of securities, mergers or consolidations or transfers of assets that are subject to a shareholder vote constitute sales of those securities. As a result, unless an exemption is available, the offering of securities in those transactions must be registered under the Securities Act.

The rule explicitly deems persons who were affiliates of any party to the transaction to be underwriters.[45] Therefore, the Section 4(1) resale exemption is not available to these persons for resales of securities acquired in connection with transactions described in the rule. The rule provides some relief from this ''presumptive underwriter'' provision, however, by permitting the affiliates to resell securities received in the transaction in compliance with the holding period and other requirements of Rule 145(d).[46]

Rule 145 is the only Securities Act rule that contains a presumptive underwriter provision. The Commission believes that it may no longer be appropriate to rely on a presumptive underwriter approach when addressing the resales of securities acquired in Rule 145 transactions. Rather, it appears to be more appropriate to rely on the provisions of Rule 144 and traditional considerations in determining whether the persons covered by current Rule 145(c) are underwriters in connection with resales. The presumptive underwriter and resale provisions of Rule 145(c) and (d) are, therefore, proposed to be eliminated.

Are there some persons currently presumed to be underwriters under Rule 145 that should continue to be presumed to be underwriters? If the presumptive underwriter standard is removed, should Rule 145 still include provisions addressing the underwriter issue with respect to resales of securities acquired in Rule 145 transactions? Would it be helpful to retain a resale safe harbor in the rule for those persons who are concerned that they might be determined to be underwriters with respect to their resales? Would it be unnecessary to retain a resale safe harbor in the rule because affiliates of the surviving company would be able to rely on Rule 144 for resales in any event?

IV. Solicitation of Comment

A. Other Possible Rule 144 Changes

The Commission solicits comment on additional revisions to Rule 144 in the two sections below. After review of the public comments on these possible revisions, the Commission may choose to adopt either or both without further solicitation of public comment.

1. Rule 144 Holding Periods

Under the Rule 144 amendments being adopted today in the Adopting Release, all restricted securities must be held at least one year before resale if Rule 144 is used, with the year measured from the date the securities were purchased from the issuer or an affiliate.[47] For restricted securities held between one and two years, other provisions of the rule require current information about the issuer to be available to the market, limit the amount of securities that may be resold, require resales to be made in ordinary brokerage transactions or directly with a market-maker,[48] and require filing with the Commission of a notification of the resale on Form 144, if the amount of securities sold exceeds specified thresholds. After a two-year holding period, restricted securities may be resold by non-affiliates without compliance with any of these provisions.[49]

There was a consensus among commenters that shortened holding periods would facilitate efforts to raise capital through private placements by shrinking the discount in price attributable to illiquidity of capital during the restricted period and allowing investors to recoup their capital faster. Two commenters, however, argued that the holding period for limited resales should be shorter than the proposed one year, with one commenter suggesting a six-month period and the other suggesting a three-month period.

The holding period requirement provides an objective criterion for determining that the securities are not being sold as part of a public distribution by the issuer. As such, this holding period should be long enough to prevent circumvention of the registration requirements by assuring that the securities are not still linked to the issuer's offering, but no longer than necessary to satisfy this purpose, so as to avoid imposing unnecessary costs or placing unnecessary restraints on the flow of capital.

The Commission seeks comment on whether the Rule 144(d) holding period after which limited resales are allowed should be shortened from one year to six months.[50] Would this period be long enough to ensure that the Rule 144 resales would not be part of an unregistered public distribution? Should the further shortening be tied to some other safeguard such as a prohibition on hedging during the holding period?

Commenters favoring a six-month holding period are asked to consider

[41] 17 CFR 230.144(i).

[42] Proposed Rule 144(f).

[43] 17 CFR 230.144(j).

[44] *See* Preliminary Note 3 to Regulation D and Preliminary Note 3 to Rule 701.

[45] Rule 145(c) [17 CFR 230.145(c)].

[46] 17 CFR 230.145(d). The companion Adopting Release amends Rule 145(d) by shortening the requisite holding periods from two and three years to one and two years, respectively, consistent with the amendments to the Rule 144 holding periods. Persons who are effecting resales of registered securities issued in Rule 145 transactions generally fall into four categories. Rule 145(d) applies to their resales as follows: (1) Non-affiliate of acquired company who is a non-affiliate of the acquiring company after the transactions—Rule 145 (c) and (d) not applicable and securities are unrestricted; (2) Non-affiliate of acquiring company who is an affiliate of the acquiring company after the transaction—Rule 145 (c) and (d) not applicable, but Rule 144 would be, if no other exemption could be found; (3) Affiliate of acquired company who is a non-affiliate of the acquiring company after the transaction—resale may be made under Rule 145(d)(1), (2) or (3); and (4) Affiliate of acquired company who is an affiliate of the acquiring company after the transaction—Rule 145(d)(1) applies.

[47] Rule 144(d) [17 CFR 230.144(d)].

[48] This requirement is proposed to be rescinded, as discussed above.

[49] Current Rule 144(k) and proposed Rule 144(g).

[50] Other provisions of the federal securities laws may offer support for a six-month holding period. For example, it may be useful to consider the six month anti-integration standard in Regulation D, which is comprised of several rules governing the limited offer and sale of securities without registration under the Securities Act. Rule 502 of Regulation D provides that offers and sales made more than six months before the start, or after the completion, of a Regulation D offering will not be considered part of that offering. Six months also is the test used in Exchange Act Section 16 to evidence a sufficient separation between purchase and sale to make recapture of ''short swing'' profits unnecessary.

whether the volume limitations [51] should be made more restrictive and/or hedging activities should be proscribed or further restricted if the holding period is reduced to six months. For example, if the Commission reduced the holding period to six months, should it also reduce by one-half, one-third, one quarter or some other measure the amount of securities that could be resold in any three-month period after completion of the holding period? Should there be a correlation between the Rule 144 volume limitations and the length of the holding period (for example, for resales between six months and one year the volume would be more limited than between one year and two years)? Should the volume limitations relate to the amount of securities to be sold in a monthly, rather than quarterly, period? If so, should the monthly volume test apply only during the six to twelve month period, or through the entire Rule 144 holding period? If a monthly test is used, should Form 144 also relate to monthly rather than quarterly sales?

Would it be appropriate to tie the volume limitations to the amount of restricted and control securities owned by the seller? For example, should the rule restrict Rule 144 sales in a quarterly period to ten percent of the amount of restricted and/or control securities owned by the seller on the date of the Rule 144 sale?

Should the holding period after which non-affiliates can sell without restriction be shorter than the two-year period adopted today, *e.g.*, one year or 18 months? Assuming the newly adopted one-year holding period is not shortened further, adoption of a one-year holding period after which non-affiliates can sell without restriction would significantly simplify the rule since it would include only one measurement period. Is a one-year holding period for unrestricted resales by non-affiliates sufficient to assure that the resales are not part of an unregistered public distribution? Should such a one-year period be adopted either alone or in conjunction with also adopting a six-month period for limited resales?

Alternatively, should the holding period for limited and unrestricted Rule 144 resales be set at a different but uniform period, such as 18 months? Would such a test strike an appropriate balance between simplifying the rule and restricting resales only in those situations that raise the risk of an indirect unregistered distribution?

[51] Rule 144(e) [17 CFR 230.144(e)].

Further comment is solicited on a number of other variations. Should the holding period depend on the size of the company? For example, would it be appropriate to implement a shorter holding period for securities of larger companies? If a shorter period were appropriate for larger companies, should it be limited to companies eligible to use Form S–3,[52] or to companies traded on national securities exchanges? Should the period be reduced for securities of larger companies to six months, while securities of all other companies would be subject to a longer holding period, such as one year? Moreover, should different holding periods be established for debt and equity securities, such as allowing unlimited resales of debt securities after six months?

2. Rule 144(e) Volume Limitations

The volume limitations in Rule 144(e) restrict the amount of restricted or control securities that can be sold.[53] Currently, the amount of these securities, together with all sales by the seller of restricted and control securities of the same class within the preceding three month period, cannot exceed the *greater* of the following three tests:

(1) one percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer;

(2) the average weekly volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of Form 144, or if no Form 144 is required to be filed, the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker; or

(3) the average weekly volume of trading in such securities reported through the consolidated transaction reporting system during the four week period specified in (2).

The Commission solicits comment on whether the two tests based on trading volume should be eliminated. There are two reasons why the Commission is considering this possibility. First, the trading volume tests appear to needlessly complicate the rule. Based on a review of a large number of Rule 144 transaction filings by the staff, the Commission believes that most persons selling securities under Rule 144 currently rely on the shares outstanding test because it allows sufficient shares to be sold and is easier to apply than the trading volume tests. Accordingly, it could be appropriate to simplify the rule by eliminating these tests.

Second, there is an issue as to whether the trading volume limitations are comparable between different markets because of the effect on trading volume of market structure differences between the Nasdaq market and the national securities exchanges.[54] The New York Stock Exchange has submitted a rule petition asking that this be addressed.[55] According to the New York Stock Exchange petition, these differences in market structure may mean that the Rule 144 test may not provide sufficiently comparable information to form the basis for a uniform volume test.[56]

Comment is sought on the extent to which persons use the trading volume tests to calculate the number of securities they can sell in reliance on Rule 144. If the trading volume tests are kept, should one or both of the tests be adjusted to account for differences between the Nasdaq market and the national securities exchanges to determine trading volume? Should the Nasdaq volume test be one-half of the national securities exchange volume, as the New York Stock Exchange suggested, or would some smaller adjustment serve to make the tests more comparable? Do differences in trading characteristics of securities make a simple adjustment not practicable? Commenters are asked to supply supporting data, if possible.

B. Possible Regulatory Approaches to Hedging Transactions

The 1995 Release noted that recent years have evidenced the growth of a

[52] 17 CFR 239.13.

[53] The staff has taken the interpretive position that offshore resales of securities under Regulation S need not be included in the calculation of the amount of securities sold under Rule 144. The Regulation S Proposing Release proposes to codify this interpretive position.

[54] See Deborah Lohse & Dave Kansas, *Big Board is Crying Foul to Regulators Over How Nasdaq Figures Daily Volume, Wall St. J.*, August 5, 1996 at C1 and *Big Board Seeks Volume Change, N.Y.T.*, July 16, 1996 at D7.

[55] The Petition for Rulemaking was filed on July 9, 1996 and is available in File No. 4–390 in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549.

[56] The petition asks the Commission to change Rule 144 and other rules with trading volume standards so that the standards would operate comparably in all markets. The petition asserts that dealer interpositioning on Nasdaq ''on virtually every trade approximately doubles the reported volume of trading of shares changing hands between investors, as compared with auction markets where buyers and sellers meet directly and reported volume reflects that direct interaction as a single reported trade.'' The Commission has not instituted rulemaking based on the New York Stock Exchange petition. *See* Letter to the New York Stock Exchange regarding Petition for Rulemaking, File No. 4–390 (February 19, 1997). Commenters favoring retention of a trading volume test for Rule 144 resales may wish to address the comparability issues raised by the petition.

variety of hedging strategies in both the private and public securities markets associated with separating the bundle of rights that make up a security, including voting, price appreciation and dividend rights. [57] Through the use of equity swaps [58] and similar strategies, holders of restricted securities can retain legal title to their securities, but sell some or all of the rights associated with the securities in order to decrease or eliminate the risk that the market value of their investment will decline during a specific period of time.

The 1995 Release solicited public comment on whether it is appropriate to treat the securities underlying equity swaps as ''held'' in the private markets if the economic risk of the investment has been shifted. It also stated that the Commission was examining whether it may be appropriate to revise Rule 144 to reflect the economic realities of these transactions either by reintroducing the holding period tolling concept that was deleted in 1990 for periods when the holder has entered into a hedging strategy or by prohibiting risk-shifting transactions altogether during the holding period.[59] Commenters also were asked to provide their views as to the need to have a fungibility doctrine underlie Rule 144.

Several commenters argued that hedging strategies should not be restricted or prohibited during the Rule 144 holding periods, primarily because hedging strategies do not permit holders of restricted securities to shift all of the economic risks of holding the securities to another person or the public markets and do not result in any leakage of restricted stock into the public markets. Other commenters thought that holders of restricted securities should not be engaging in hedging transactions during the holding period.

Since issuance of the 1995 Release, the Commission has given further consideration to the issue of whether the entry into equity swaps and other hedging arrangements with respect to restricted securities is inconsistent with the principles underlying the registration requirements of the Securities Act and the Rule 144 safe harbor. The Commission recognizes that arguments can be made in favor of treating ''short against the box'' transactions and equity swaps as sales of the underlying restricted securities since these transactions typically hedge fully a holder of restricted securities against any economic risk. Without risk, there is arguably no investment intent, suggesting that the holder is more of an underwriter than an investor. At the same time, it can be argued that hedging transactions do not raise Section 5 issues because the restricted securities are not being sold into the open marketplace. Instead, only freely tradeable securities are actually redistributed to the public. Proponents of this view argue that the two types of securities are not ''fungible'' or interchangeable.

The economic substance of the transactions, however, gives rise to concern. For example, it is arguable that, in economic reality, a distribution occurs when a company sells unregistered restricted stock to an investor who, in turn, hedges the market risk through an equity swap with an investment bank, which then sells an equal number of securities into the market. A staff review of industry practices found that practitioners were more concerned about the Section 5 ramifications of hedging during a short period of time following acquisition of the restricted securities (typically three months) because a disposition of risk so soon after acquisition raises questions about the nature of the investment. The industry also seems less concerned about partial hedges. Partial hedges with options may raise fewer concerns because the investment bank is less likely to sell an equal number of shares into the marketplace (thereby involving less of a distribution).

The Commission requests comment on a number of possible regulatory approaches to hedging. First, it could make the Rule 144 safe harbor unavailable for persons who hedge during the restricted period. Second, independent of Rule 144, it could promulgate a rule that would define a sale for purposes of Section 5 to include specified hedging transactions. In order to hedge, a person would need an exemption from registration for the transaction or else would have to register the transaction with the Commission. Under this approach, a hedging transaction would be treated the same as a sale of the underlying security, so hedging would be constrained in the same way (*e.g.*, if an exemption is used such as Rule 144, the Rule 144 volume restrictions would apply). Third, as a variant of the first approach, it could adopt a shorter holding period (*e.g.*, three or six months) during which hedging could not occur without losing the safe harbor. After that, hedging could occur, but the underlying restricted securities would be held the remainder of the one-year holding period adopted today. Fourth, it could reintroduce a tolling provision in Rule 144 similar to the provision that was included prior to 1990. The last approach would be to maintain the status quo with no specific prohibition against hedging, relying instead upon practitioners to apply a facts and circumstances test to determine when Section 5 is implicated. Comment is solicited generally on each of the above approaches.

For purposes of a definition, the Commission is considering defining hedging to include any sale or combination of swap, option, or short sale intended to limit or eliminate the market risk of restricted or control stock. Alternatively, the Commission could use the definition of ''put equivalent'' position in Exchange Act Rule 16a–1(h).[60] Should the definition be expanded to include futures, contracts, ''collars'' or other instruments that operate similarly to a swap or option?

If the second overall approach were adopted, should all hedging be considered a sale for purposes of Section 5? If not, should only transactions like swaps and short sales of securities of the same class as the restricted securities be deemed sales because they most closely approximate a sale of the restricted securities? If options are included, should there be a

[57] Hedging is a risk limiting device much like buying insurance. For example, a person could hedge common stock by purchasing a put option to sell the common stock at a fixed price. If the stock value increases, the holder profits. If the stock price falls, the put option can be exercised to sell the stock at a predetermined price.

[58] Equity swaps are individually negotiated contracts, the specific terms of which may vary from agreement to agreement. One form of equity swap involves an agreement by a holder of equity securities to pay, or ''swap,'' the return on the securities (which may include dividends as well as any change in market value) in exchange for the return on an equity index, basket of securities, or an interest-rate based cash flow.

[59] Deletion of the tolling provision in 1990 did not mean that holders could freely engage in hedging activities with respect to their restricted securities without consideration of the registration requirements. The Commission staff historically has viewed the question of whether a hedging transaction would toll the holding period as separate from the question of whether a hedging transaction was subject to Section 5 of the Securities Act. With respect to short sales ''against the box,'' (meaning that the person sells short even though the person owns securities that can be delivered) the Division continues to take the position expressed in the 1979 Rule 144 interpretative release (Release No. 33–6099, (August 2, 1979) [44 FR 46572]) that a person who has held restricted securities for less than one year cannot effect a short sale of securities of that class and then cover the short position with restricted securities (even after expiration of the one year holding period) since the initial short sale did not qualify under Rule 144. Similarly, exchange-traded puts and calls may be used for Rule 144 sales, but in the case of restricted securities, the one-year holding period requirement of Rule 144(d) must have been satisfied by the date the put is purchased or call is sold. *See Bear Stearns & Co., Inc.*, (April 4, 1991) and Release 33–6099.

[60] 17 CFR 240.16a–1(h).

difference between in-the-money options (which are likely to be exercised) and out-of-the-money options (which are less likely to be exercised)? For example, should transactions involving options be ignored if the options are sufficiently out-of-the-money (*e.g.*, 5%, 10%, 20%)? Should there be different treatment for hedging with cash settled derivative securities since their exercise does not result in any distribution of securities into the market? Should hedging a transaction be considered a sale of the underlying security only if it results in a sale of securities of the same class as the underlying security to a third party?

Since hedging can be a dynamic process, should there be a difference between the initial hedge and a subsequent ''maintenance'' hedge? For example, a holder of restricted securities might hedge only a portion of the market risk initially. As the value of the securities fluctuates, the holder may have to adjust the hedge by buying more put options, for example, or selling more stock short to maintain the same risk as initially envisioned. Presumably, this adjustment has less distributive aspects than the initial hedge. Should it make a difference if the security being hedged is control stock rather than restricted stock?

Should control stock be treated differently in general? It is not uncommon for individual affiliates to have a significant portion of their net worth represented by control or restricted stock. Such persons might want to diversify or limit their risk through hedging. Should the Commission adopt a rule that permits some limited hedging by these persons without raising Section 5 concerns? If such a safe harbor were crafted, should it be limited to a percentage of the affiliate's total holdings of control stock (*e.g.*, 5%, 10%, 20% or even 49%)? Is it sufficient to permit only hedging in accordance with the volume limitations of Rule 144(d)?

C. General Request for Comment

Any interested persons wishing to submit comment on any of the proposals set forth in this release are invited to do so by submitting them in triplicate to Jonathan G. Katz, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments @sec.gov. All comment letters should refer to File Number S7–07–97; this file number should be included on the subject line if e-mail is used. Comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov). Comments are solicited from the point of view of issuers, holders of restricted and control securities, investment bankers and the investing public.

V. Cost-Benefit Analysis

The proposed amendments, if adopted, should reduce the costs of complying with the Rule 144 safe harbor requirements by making the rule easier to understand and apply. Elimination of the manner of sale requirements would result in fewer brokerage commissions being paid by persons reselling securities in reliance on the Rule 144 safe harbor, since resale transactions no longer would have to involve a broker or market-maker. The proposed increase in Form 144 filing thresholds would result in fewer filings and also reduce compliance costs.

For purposes of the Small Business Regulatory Enforcement Act of 1996, the Commission also is requesting information regarding the potential impact of the proposed rules on the economy on an annual basis. Commenters should provide empirical data to support their views.

The Commission does not believe that the proposed amendments would have an adverse effect on competition, employment, investment, productivity, innovation, market efficiency, or capital formation. In fact, the Commission believes that the proposed amendments will promote capital formation and efficient, competitive markets by enhancing investors' confidence in the integrity of the securities markets. However, the Commission requests comment on these preliminary views. The Commission encourages commenters to provide empirical data or other facts to support their views.

VI. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with Section 603 of the Regulatory Flexibility Act,[61] and relates to the proposed amendments to Rules 144 and 145 and Form 144 under the Securities Act.

Reasons for, and Objectives of, Proposed Action

Rule 144 provides a safe harbor for the resale of restricted and control securities. It sets forth conditions which, if satisfied, permit persons who hold such securities to publicly sell them without registration and without being deemed underwriters.

Rule 145 governs the offer or sale of securities received in connection with reclassifications, mergers, consolidations and asset transfers. It provides that any party to a transaction covered by the rule (other than the issuer), or any person who is an affiliate of such party at the time the transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with such a transaction will be deemed to be engaged in a distribution, and therefore to be an underwriter of the securities, except where the securities are resold in accordance with Rule 145(d). Rule 145(d) requires its own holding periods that track the holding periods for resales found in Rule 144.

Form 144 is required to be filed by persons intending to sell securities in reliance on Rule 144 if the amount of securities to be sold in any three month period exceeds 500 shares or other units or the aggregate sales price exceeds $10,000. The primary purpose of the form is to publicly disclose the proposed sale of unregistered securities by persons not deemed to be engaged in the distribution of securities.

The Commission has determined to propose amendments that would make Rule 144 easier to understand and apply. The staff has reorganized and shortened the rule to make it easier to understand and apply. In addition to codifying certain staff interpretive positions, the proposals would make the following substantive changes to Rule 144:

- Provide a bright-line exclusion from the Rule 144 definition of affiliate. Pursuant to the proposal, persons who would not be subject to the provisions of Section 16, *i.e.*, persons who are not officers, directors or 10% holders of the issuer, would be deemed not to be affiliates of an issuer for purposes of Rule 144;
- Eliminate the manner of sale requirements; and
- Increase the thresholds for filing Form 144 from the current 500 shares or $10,000 sale price test to a 1000 shares or $40,000 sale price test.

The proposals also would amend Rule 145, which relates to certain significant transactions, such as mergers, to eliminate the resale limitations that are based on a ''presumptive underwriter'' approach. Instead of that approach, persons who receive securities in these transactions would be treated the same as other purchasers of securities.

[61] 5 U.S.C. § 603.

The revision to the definition of affiliate would provide more objective guidance for issuers and sellers of securities as to the types of persons that are not affiliates for purposes of Rule 144. Elimination of the manner of sale requirements would remove obstacles to transactions that are not distributive in nature. An increase in the Form 144 filing thresholds would take into account the effects of inflation since adoption of Rule 144 in 1972.

The release solicits comment on shorter Rule 144(d) and/or 144(k) holding periods. Persons holding restricted and control stock, including small entities holding such stock, and all issuers, including small business issuers, would benefit from shortened holding periods. The release also solicits comment on elimination of the trading volume limitation in Rule 144(e). It is unlikely that this change would have a significant economic impact on persons holding restricted and control stock, including small entities owning such stock.

Legal Basis

The amendments are proposed pursuant to Sections 2(11), 4(1), 4(4) and 19(a) of the Securities Act.

Small Entities Subject to Requirements

The proposed rules will affect both small entities that issue restricted or control securities and small entities that hold such securities. When used with reference to an issuer, other than an investment company, the term ''small business'' is defined by Securities Act Rule 157 as an issuer whose total assets on the last day of its most recent fiscal year were $5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities that does not exceed the dollar limitation prescribed by Section 3(b) of the Securities Act. When used with reference to an issuer or person, other than an investment company, Exchange Act Rule 0–10[62] defines small entity to mean an issuer or person that, on the last day of its most recent fiscal year, had total assets of $5,000,000 or less.[63]

The Commission is aware of approximately 1,019 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 157 and may be affected by the proposed rules. The proposed rules also may affect small businesses that are not subject to Exchange Act reporting requirements. The Commission is unable to determine the number of such small businesses due to the absence of filings with the Commission by such companies. Comment is solicited on the number of small businesses that are not subject to Exchange Act reporting requirements that may be affected by the proposed rules.

An estimated 3,800 entities, excluding natural persons, annually file Form 144 based upon a sample study of Form 144 filings by the Commission's Office of Economic Analysis. Since the form does not require disclosure of the size of entities reselling securities in reliance on Rule 144, the Commission has no basis for estimating the number of these entities that are small entities. Comment is solicited as to the number of small entities who may rely on Rule 144 in reselling restricted or control securities if the proposed rules are adopted.

The proposals would favorably affect small businesses and small entities owning restricted or control securities of issuers by improving the usefulness of the Rule 144 safe harbor and removing unnecessary and outdated requirements.

Reporting, Recordkeeping and Other Compliance Requirements

If the change to the definition of affiliate is adopted, it is expected that fewer persons, including small entities, owning restricted and control stock of all issuers, including small issuers, will file Form 144. The reduction would result from the fact that some persons who are not officers, directors or 10% holders of an issuer presumably consider themselves to be affiliates under the current Rule 144 definition. The Commission has no basis, however, for estimating the size of this expected decrease since it does not collect any information that would provide a basis for such an estimate and such information is not otherwise available to the Commission. Comment is solicited as to how to quantify the expected decrease.

If the manner of sale requirements were eliminated, persons (including small entities) owning restricted and control stock of all issuers, including small issuers, no longer would have to sell their stock in a broker's transaction or directly with a market-maker. Those choosing to sell their stock in a transaction not involving a broker or market-maker would not incur the expense of commission fees.

Adoption of increased share number and dollar amount thresholds for filing Form 144 also is expected to decrease the number of Form 144 filings required to be made by persons (including small entities) owning restricted and control stock of all issuers, including small issuers. Based on studies by the Commission's Office of Economic Analysis, the number of Form 144 filings is expected to decrease by approximately 5% (1,339 filings) if the thresholds are increased to 1,000 shares or $40,000 in market value.

The release solicits comment on whether the thresholds should be increased as high as 2,000 shares or $100,000. It is estimated that if these higher thresholds were adopted, the number of Form 144 filings would decrease by approximately 14% (3,677 filings).

Finally, some persons (including small entities) owning stock in issuers, including small issuers, that engage in the type of transactions covered by Rule 145 would benefit from the proposed revisions since there no longer would be a presumption that persons who receive securities in these transactions are underwriters. The Commission has no basis for estimating the number of persons who may be deemed to be underwriters under the current rule that would not be determined to be underwriters if the proposed change is adopted since it does not collect any information that would provide a basis for such an estimate and such information is not otherwise available to the Commission. Comment is solicited as to how to quantify such number.

Clerical skills are necessary to complete Form 144.

Overlapping or Conflicting Federal Rules

No current federal rules duplicate, overlap or conflict with the rules and forms to be proposed, except that persons subject to the reporting requirements under Section 16 of the Securities Exchange Act of 1934 may need to file reports on Form 4 as well as Form 144 under certain circumstances.

Significant Alternatives

The Commission considered the establishment of different compliance standards for small entities owning restricted and control securities, as well as for persons owning restricted and control securities of small issuers. For example, the Commission could establish shorter holding periods or more lenient Form 144 filing requirements. Such differences, however, would be inconsistent with the purposes served by the holding period and Form 144 filing requirements and would needlessly

[62] 17 CFR 240.0–10.

[63] There is no comparable definition of ''person'' under the Securities Act.

complicate the Form 144 filing requirements. The Commission also considered the other types of alternatives set forth in section 603 of the Regulatory Flexibility Act to minimize the economic impact of the amendments on small entities: (1) the clarification, consolidation, or simplification of compliance and reporting requirements for such small entities; (2) the use of performance rather than design standards; and (3) an exemption from coverage of the proposed amendments, or any part thereof, for small entities. Because the proposed amendments would benefit all issuers and holders of restricted securities, differing compliance timetables for small entities would not be appropriate. Neither could the compliance requirements of the amendments be clarified or simplified further for small entities. Finally, the proposed amendments do not use design standards, and an exemption from the amendments for small entities would not be desirable or consistent with the stated objectives of the applicable statutes.

Solicitation of Comments

Written comments are encouraged with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, the Commission seeks comment on: (i) the number of small entities that would be affected by the proposed rule; (ii) the expected impact of the proposals as discussed above; and (iii) how to quantify the number of small entities that would be affected by, and how to quantify the impact of, the proposed rules. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed revisions are adopted. Persons wishing to submit written comments should file them with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. All comments received will be available for public inspection and copying at the Commission's Public Reference Room at the same address.

VII. Paperwork Reduction Act

Form 144 contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[64] The Commission has submitted the proposed revisions to Form 144 to the Office of Management and Budget for review in accordance with PRA procedures.[65] The title for the information collection is ''Notice of Proposed Sale of Securities Pursuant to Rule 144 under the Securities Act of 1933.''

As proposed to be revised, Form 144 would be filed with the Commission by persons who intend to sell securities in reliance on Rule 144 if the amount of securities to be sold during a three-month period exceeds 1,000 shares or other units or has an aggregate sales price in excess of $40,000. The proposed thresholds for filing Form 144 would be increased from existing thresholds of 500 shares or a $10,000 sale price. Form 144 may be filed electronically using the EDGAR filing system. The information is used for the primary purpose of disclosing the proposed sale of unregistered securities by persons deemed not to be engaged in the distribution of the securities. It is made publicly available. Persons reselling securities in reliance on the Rule 144 safe harbor are the likely respondents to the information required by Form 144.

An estimated 18,096 respondents are expected to file Form 144 annually for a total burden of 36,192 hours if the proposed revisions to Form 144 are adopted. This represents a decrease of 2,678 hours from the current annual burden under existing thresholds. The information collection requirements imposed by Form 144 are mandatory. The Commission may not require Form 144 filings unless the form displays a currently valid OMB control number.

The Commission solicits comment to: (i) evaluate whether Form 144, as proposed to be revised, is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, N.W., Washington, D.C. 20549 with reference to File No. S7–07–97. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full affect if OMB receives it within 30 days of publication.

VIII. Statutory Basis

The amendments to Rules 144 and 145 and Form 144 are being proposed pursuant to sections 2(11), 4(1), 4(4) and 19(a) of the Securities Act.

List of Subjects in 17 CFR Parts 230 and 239

Reporting and recordkeeping, Securities.

Text of the Proposals

For the reasons set out above, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

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

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Section 230.144 is amended by revising the Preliminary Note, paragraphs (a)(1), (a)(3), (b), and (c), adding notes to paragraph (c), revising paragraphs (d)(3)(ii), (d)(3)(vi), (d)(3)(vii) and (d)(3)(viii), adding paragraph (d)(3)(ix), revising the introductory text of paragraph (e)(1), revising paragraph (e)(2), removing paragraphs (f) and (g), re-designating paragraph (h) as paragraph (f), removing paragraphs (i) and (j), re-designating paragraph (k) as paragraph (g) and by revising newly designated paragraphs (f) and (g) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

Preliminary Note

The Securities Act of 1933 requires that all offers and sales of securities in interstate commerce or by use of the mails must be registered with the Commission or exempt from registration. While Section 4(1) exempts most routine trading, transactions by underwriters are not exempt. Rule 144 creates safe harbor exemptions for two common situations arising from the Act's definition of ''underwriter.''

First, anyone who has taken securities directly from the issuer in an unregistered

[64] 44 U.S.C. § 3501 *et seq.*

[65] 44 U.S.C. § 3507(d) and 5 CFR § 1320.11.

transaction and who effects a public resale in the short term may be said to be a ''person who has purchased from an issuer with a view to * * * distribution,'' and thus an ''underwriter'' within the meaning of Section 2(11) of the Act. An investment banking firm that arranges with an issuer for the public sale of its securities is clearly an ''underwriter'' under that Section. Individual investors who are not professionals in the securities business may also be ''underwriters'' within the meaning of that term as used in the Act if they act as links in a chain of transactions through which securities move from an issuer to the public. Rule 144 provides an exemptive safe harbor for the resale of these ''restricted securities.''

Second, Section 2(11) treats persons in a relationship of control with the issuer (''affiliates'') as if they were the issuer for the purpose of determining which intermediaries to the public markets are ''underwriters.'' As a result, a public sale of an affiliate's securities (''control securities''), whether or not the securities are ''restricted,'' is subject to the same regulatory requirements as a public offering by the issuer. Rule 144 provides an exemptive safe harbor for the resale of control securities on behalf of an affiliate of the issuer.

Rule 144 sets forth certain conditions which are intended to distinguish between a distribution and routine trading. First, adequate current public information is required to protect investors. Second, a holding period before resale is needed to assure that persons who buy restricted securities in unregistered offerings have assumed the economic risks of investment and are not acting as conduits for the issuer in an unregistered public distribution. Third, Rule 144 requires a person relying on the Rule to sell the securities in limited quantities to further demonstrate that trading is ordinary, rather than distributive.

If a sale of securities is made in accordance with all of the provisions of Rule 144, (1) any person who sells restricted securities will be deemed not to be an underwriter for that transaction; (2) any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be an underwriter for that transaction; and (3) the purchaser receives unrestricted securities.

Rule 144 is not an exclusive safe harbor. It does not affect the availability of any other exemption for resales under the Securities Act.

(a) * * *

(1) An *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer. A person shall be deemed not to be an affiliate for purposes of this section if the person:

(i) Is not the beneficial owner, directly or indirectly, of more than 10% of any class of equity securities of the issuer;

(ii) Is not an officer of the issuer; and

(iii) Is not a director of the issuer.

Note to paragraph (a)(1): The determination of a person's beneficial ownership and whether that person is an ''officer'' shall be made in accordance with § 240.16a–1 of this chapter, regardless of whether the issuer's securities are subject to Section 16 (15 U.S.C 78(p)) of the Securities Exchange Act of 1934 (''Exchange Act'') and regardless of whether the class of securities is registered under Section 12 (15 U.S.C. 78*l*) of the Exchange Act.

* * * * *

(3) The term *restricted securities* means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D or § 230.701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of § 230.144A;

(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§ 230.1001);

(v) Equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States, acquired in a transaction or chain of transactions subject to the conditions of § 230.901 or § 230.903 under Regulation S (§§ 230.901 thru 230.905 and Preliminary Notes); or

(vi) Securities acquired from the issuer that were issued pursuant to an exemption under section 4(6) (15 U.S.C. 77(d)(6)) of the Act.

(b) *Conditions to be met.* (1) Any affiliate or other person who sells restricted securities of an issuer for such person's own account shall be deemed not to be an underwriter thereof within the meaning of section 2(11) (15 U.S.C. 77(b)(11)) of the Act if all of the conditions of this section are met.

(2) Any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities shall be deemed not to be an underwriter thereof within the meaning of Section 2(11) of the Act if all of the conditions of this section are met.

(c) *Current public information.* Adequate current public information with respect to the issuer of the securities must be available. Such information will be deemed to be available only if either of the following conditions is met:

(1) *Reporting Issuers.* The issuer is, and for at least 90 days before the sale has been, subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (15 U.S.C. 78(m) or (o)(d)) and has filed all required reports during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports); or

(2) *Non-reporting Issuers.* If the issuer is not subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act, there is publicly available the information concerning the issuer specified in paragraph (a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi) of § 240.15c2–11 of this chapter, or, if the issuer is an insurance company, the information specified in Section 12(g)(2)(G)(i) of the Exchange Act.

Notes to paragraph (c): 1. With respect to paragraph (c)(1), the seller can rely upon:

(A) A statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has filed all reports required to be filed by Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the issuer was required to file such reports) and has been subject to such filing requirements for the past 90 days; or

(B) A written statement from the issuer that it has complied with such reporting requirements. Neither type of statement may be relied upon, however, if the person knows or has reason to believe that the issuer has not complied with such requirements.

2. Rule 144(c) cannot be satisfied during the first 90 days after an issuer becomes subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act.

(d) * * *

(3) * * *

(ii) *Conversions and exchanges.* If the securities sold were acquired from the issuer solely in exchange for other securities of the same issuer, the newly acquired securities shall be deemed to have been acquired at the same time as the securities surrendered for conversion or exchange, even if the securities surrendered were not convertible or exchangeable by their terms;

* * * * *

(vi) *Trusts.* Where a trust settlor is an affiliate of the issuer, securities acquired from the settlor by the trust, or acquired from the trust by the beneficiaries, shall be deemed to have been acquired when they were acquired by the settlor.

(vii) *Estates.* Where a deceased person was an affiliate of the issuer, securities held by the estate of such person or acquired from such an estate by the beneficiaries shall be deemed to have been acquired when they were acquired by the deceased person. Regardless of whether the deceased person was an affiliate of the issuer, no further holding period is required if the estate is not an affiliate of the issuer or if the securities

are sold by a beneficiary of the estate who is not an affiliate.

(viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in § 230.145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction, except as otherwise provided in paragraphs (d)(3)(ii) and (ix) of this section.

(ix) *Holding company formations.* Securities acquired from the issuer in a transaction effected solely for the purpose of forming a holding company shall be deemed to have been acquired at the same time as the securities of the predecessor issuer exchanged in the holding company formation where:

(A) The holding company's securities were issued in a transaction involving an exchange of securities as part of a reorganization of the predecessor into a holding company structure;

(B) Holders received securities of the same class evidencing the same proportional interest in the holding company as they held in the predecessor; and

(C) Immediately following the transaction, the holding company has no significant assets other than securities of the predecessor and its existing subsidiaries and has substantially the same assets and liabilities on a consolidated basis as the predecessor had prior to the transaction.

(e) * * *

(1) *Sales by affiliates.* If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

* * * * *

(2) *Sales by persons other than affiliates.* The amount of restricted securities sold for the account of any person other than an affiliate of the issuer, together with all other sales of restricted securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of the amounts specified in paragraphs (e)(1)(i), (ii) or (iii) of this section, whichever is applicable.

* * * * *

(f) *Notice of proposed sale.* (1) If the amount of securities to be sold in reliance upon this section during any period of three months exceeds 1,000 shares or other units or has an aggregate sale price in excess of $40,000, three copies of a notice on Form 144 (§ 239.144 of this chapter) shall be filed with the Commission at its principal office in Washington, DC. If such securities are admitted to trading on any national securities exchange, one copy of such notice also shall be transmitted to the principal exchange on which such securities are admitted.

(2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the sale of securities in reliance upon this section or the placing with a broker of an order to sell securities in reliance upon this section. Neither the filing of such notice nor the failure of the Commission to comment thereon shall be deemed to preclude the Commission from taking any action it deems necessary or appropriate with respect to the sale of the securities referred to in such notice. The person filing the notice required by this paragraph shall have a bona fide intention to sell the securities referred to therein within a reasonable time after the filing of such notice.

(g) *Termination of certain restrictions on sales of restricted securities by persons other than affiliates.* The requirements of paragraphs (c), (e) and (f) of this section shall not apply to the sale of restricted securities if:

(1) The sale is for the account of a person who is not an affiliate of the issuer at the time of the sale and who has not been an affiliate of the issuer during the three months preceding the sale; and

(2) A period of at least two years has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer. The two-year period should be calculated as described in paragraph (d) of this section.

3. By amending § 230.145 by removing paragraphs (c) and (d) and re-designating paragraph (e) as paragraph (c).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78w(a), 78ll(d), 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 80a–8, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

5. By amending § 239.144 by revising paragraphs (a) and (b) to read as follows:

§ 239.144. Form 144, for notice of proposed sale of securities pursuant to § 239.144 of this chapter.

(a) Except as indicated in paragraph (b) of this section, this form shall be filed in triplicate with the Commission at its principal office in Washington, DC by each person who intends to sell securities in reliance upon § 230.144 of this chapter and shall be transmitted for filing concurrently with either the execution of a sale of securities in reliance upon § 230.144 of this chapter or the placing with a broker of an order to execute a sale of securities in reliance upon § 230.144 of this chapter.

(b) This form need not be filed if the amount of securities to be sold during any period of three months does not exceed 1,000 shares or other units and the aggregate sale price does not exceed $40,000.

* * * * *

6. By amending Form 144 (referenced in § 239.144) by revising the statement appearing under the Form title, revising the caption to Item 3(b) in the undesignated table, removing the ''s'' at the end of ''Instructions'' after Table I, removing Instruction 2 to Table I, and removing the designation number for the remaining instruction to read as follows:

Note: The text of Form 144 does not, and the amendments thereto will not, appear in the Code of Federal Regulations.

Form 144

Notice of Proposed Sale of Securities Pursuant to Rule 144 Under the Securities Act of 1933

Attention: Transmit for filing 3 copies of this form concurrently with either placing an order with a broker to execute a sale or executing a sale directly with a market maker, or at the time of executing a sale not involving a broker or market maker.

* * * * *

Item 3(b). Name and Address of Each Broker Through Whom the Securities are to be Offered or Each Market Maker who is Acquiring the Securities, if Applicable

* * * * *

Table I—Securities To Be Sold

* * * * *

Instruction if the securities were purchased and full payment therefore was not made in cash at the time of purchase, explain in the table, or in a note thereto, the nature of the consideration given. If the consideration consisted of any note or other obligation, or if payment was made in installments, describe the arrangement and state when the note or other

obligation was discharged in full or the last installment paid.

By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–4667 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 230, and 249

[Release No. 33–7392; 34–38315; File No. S7–8–97 International Series Release No. 1056]

RIN 3235–AG34

Offshore Offers and Sales

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is publishing for comment proposed amendments to the Regulation S safe harbor procedures. The proposed amendments relate to offshore sales of equity securities of U.S. issuers, and foreign issuers where the principal market for the securities is in the United States. The proposals are designed to stop abusive practices in connection with offerings of equity securities purportedly made in reliance on Regulation S.

DATES: Comments should be received on or before April 29, 1997.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6–9, Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comments@sec.gov. Comment letters should refer to File No. S7–8–97; this file number should be included in the subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Paul M. Dudek, Luise M. Welby, or Walter G. Van Dorn, Jr., Office of International Corporate Finance, Division of Corporation Finance, at (202) 942–2990.

SUPPLEMENTARY INFORMATION: The Commission is proposing to revise Rule 903 [1] of Regulation S,[2] the issuer safe harbor under the Securities Act of 1933 [3] for offshore offerings of securities, to address abusive practices under the rule. The changes would apply to offshore sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States.[4] Further, the Commission proposes amendments to Rule 144(a)(3) [5] and a new Rule 905 to deem these equity securities to be ''restricted securities,'' as defined in Rule 144 under the Securities Act.[6] New Rule 905 also would make clear that offshore resales under Rule 904 of restricted equity securities of covered issuers will not affect the status of these securities as restricted securities after the resale.[7] In addition, the Commission is proposing to eliminate the current requirement that reporting issuers disclose Regulation S sales of equity securities on a Form 8–K within 15 days of the transaction. In light of the longer restricted period proposed today, issuers would report these sales on a Form 10–Q on the same basis that issuers report their other unregistered sales of equity securities. Finally, the Commission is proposing additional technical and clarifying revisions to Regulation S, in part to make the rule more concise and understandable.

I. Executive Summary

The Commission constantly seeks to reduce burdens on capital formation as long as the deregulatory measures do not harm investor protection. When adopting safe harbors and other deregulatory measures, the Commission will include protections designed to minimize the risk that those measures will be abused. If abuses nevertheless occur, the Commission will make the necessary adjustments to prevent further abuse while, to the extent possible, preserving the original goals of the reform. Today, the Commission is proposing amendments to Regulation S to prevent continued abuse of the rule.

In 1990, the Commission adopted Regulation S to clarify the extraterritorial application of the registration requirements of the Securities Act. In the interests of both comity and the internationalization of the world's securities markets, the Commission believed that the registration provisions under U.S. law should not apply where the offshore placements were truly offshore. Instead, the laws of the foreign jurisdiction regulating the public offerings of securities would serve to protect investors in that market. Regulation S permits both foreign and domestic issuers to avail themselves of the safe harbors when conducting offshore placements of their securities.

Since the adoption of Regulation S in 1990, the Commission has become aware of uses of Regulation S that the rule not only did not contemplate, but in fact expressly prohibited. Some issuers, affiliates and others involved in the distribution process are using Regulation S as a guise for distributing securities into the U.S. markets without the protections of registration under Section 5 of the Securities Act. In June 1995, the Commission issued an interpretive release that listed certain problematic practices under Regulation S and requested comment on whether the Regulation should be amended to limit its vulnerability to abuse.[8]

As a result of the continuation of certain of these abusive practices and in response to the comment letters received on the Interpretive Release, the Commission is proposing to stop these abusive practices by amending Regulation S for placements of equity securities by domestic companies. In addition, although abusive practices involving the equity securities of foreign issuers are not as evident as with domestic issuers, there is equal potential for abuse where the principal trading market for those securities is in the United States. Therefore, the Commission also is proposing to amend the safe harbor procedures for placements of equity securities of foreign issuers where the principal market for those securities is in the United States. In general, the ''principal market'' would be in the United States if more than half of the trading in that security takes place in the United States.[9]

These Regulation S proposals would:

- classify these equity securities placed offshore under Regulation S as ''restricted securities'' within the meaning of Rule 144;
- align the Regulation S restricted period for these equity securities with the Rule 144 holding periods by lengthening from 40 days

[1] 17 CFR 230.903.

[2] 17 CFR 230.901–230.904 and Preliminary Notes.

[3] 15 U.S.C. 77a *et seq.* (the ''Securities Act'').

[4] *See* Proposed Rule 902(h) for the proposed definition of ''principal market in the United States.''

[5] 17 CFR 230.144(a)(3).

[6] Proposed Rule 905.

[7] *Id.*

[8] Securities Act Release No. 7190 (June 27, 1995) [60 FR 35663 (July 10, 1995)] (the ''Interpretive Release'').

[9] *See infra* Section III.E.1. for a further discussion of the proposed definition of ''principal market in the United States.''

(currently applicable to reporting issuers) or one year (currently applicable to non-reporting issuers) to two years the period during which persons relying on the Regulation S safe harbor may not sell these equity securities to U.S. persons (unless pursuant to registration or an exemption);

- impose certification, legending and other requirements now only applicable to sales of equity securities by non-reporting issuers;
- require purchasers of these securities to agree not to engage in hedging transactions with regard to such securities unless such transactions are in compliance with the Securities Act;
- prohibit the use of promissory notes as payment for these securities; and
- make clear that offshore resales under Rule 901 or 904 of equity securities of these issuers that are ''restricted securities,'' as defined in Rule 144, will not affect the restricted status of those securities.

The combination of these proposed amendments should prevent the sale of equity securities offshore under Regulation S in transactions that effectively result in unregistered distributions of the securities into the U.S. markets.

II. Background

Regulation S contains a general statement that the registration requirements of Section 5 of the Securities Act do not apply to offers or sales of securities that occur outside the United States, and two non-exclusive safe harbors. The first safe harbor applies to offers and sales by issuers, persons involved in the distribution process pursuant to contract (''distributors''), their affiliates, and any person acting for those persons (''issuer safe harbor'').[10] The other safe harbor applies to *offshore* resales by persons other than the issuer, distributors, their affiliates (except certain officers and directors) and persons acting for them (the ''offshore resale safe harbor'').[11] The rule considers an offer or sale of securities that satisfies all conditions of the applicable safe harbor to be outside the United States and thus not subject to the registration requirements of Section 5. Regulation S does not provide a safe harbor for resales back into the United States of any securities sold or resold offshore, whether under Regulation S or otherwise.

The issuer safe harbor distinguishes three categories of securities offerings. The categories are based upon factors such as the jurisdiction of incorporation of the company whose securities are being sold under Regulation S, the company's reporting status under the Securities Exchange Act of 1934,[12] and the degree of U.S. market interest in the issuer's securities. ''Category 1'' offerings generally encompass debt and equity offerings by foreign reporting and non-reporting issuers when there is no ''substantial U.S. market interest'' [13] in the security to be offered. ''Category 2'' offerings now encompass, among other things, offshore offerings of debt and equity securities of any domestic reporting issuer, debt and equity securities of any foreign reporting issuer where there is a ''substantial U.S. market interest,'' as well as the debt securities of any foreign non-reporting issuer where there is a ''substantial U.S. market interest.'' ''Category 3'' offerings are subject to the greatest restrictions and include offshore offerings of debt and equity securities by any domestic non-reporting issuer, as well as equity securities of any foreign non-reporting issuer where there is a ''substantial U.S. market interest.''

All offerings under the Regulation S safe harbors are subject to two general conditions: the offer and sale must be made in an offshore transaction,[14] and the offering must not involve directed selling efforts in the United States.[15] Offers and sales made in reliance on the Category 2 and Category 3 issuer safe harbors are subject to additional restrictions that the Commission anticipated would assure that the securities came to rest offshore. These restrictions include a 40-day or one-year restricted period [16] during which persons entitled to rely on the Rule 903 safe harbor (that is, the issuer, a distributor, or any of their respective affiliates or any person acting on their behalf) cannot sell the Regulation S securities to a U.S. person [17] or to a person acting for the account of a U.S. person (other than a distributor), and still rely on the safe harbor.[18] The purpose of the restricted period is to ensure that persons relying on the safe harbor are not engaged in an unregistered, non-exempt distribution into the U.S. capital markets.[19]

The Commission based many of the safe harbor procedures incorporated into Regulation S on procedures that market participants already had developed and were the subject of no-action letters issued by the Commission's staff before the adoption of Regulation S.[20] Before 1990, offshore transactions largely involved substantial global offerings of the debt or equity securities of foreign issuers, or the debt securities of domestic issuers in the Euromarkets. Since the adoption of Regulation S, these types of offshore offerings have not resulted in widespread problematic practices.

The Commission's primary area of concern has been the use of Regulation S for sales of equity securities by domestic issuers, the area in which market participants had not developed established procedures before the adoption of Regulation S. Some U.S. issuers appear to have used the Regulation S issuer safe harbor to effect unregistered distributions of their equity securities into the United States.[21]

In response, the Commission has taken enforcement action against persons who sought to evade the registration requirements of the Securities Act through purported Regulation S offerings that were in effect U.S. distributions of securities.[22] In addition, on June 27, 1995, the Commission issued the Interpretive Release to state its views concerning these abusive practices under Regulation S. The Interpretive Release

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[10] Rule 903 of Regulation S [17 CFR 230.903].

[11] Rule 904 of Regulation S [17 CFR 230.904].

[12] 15 U.S.C. 78a *et seq.* (the ''Exchange Act'').

[13] *See* Rule 902(n) of Regulation S for the definition of ''substantial U.S. market interest'' [17 CFR 230.902(n)].

[14] Rule 903(a) of Regulation S [17 CFR 230.903(a)]. *See* Rule 902(i) of Regulation S for the definition of ''offshore transaction'' [17 CFR 230.902(i)].

[15] Rule 903(b) of Regulation S [17 CFR 230.903(b)].

[16] For debt securities issued under either Category 2 or Category 3, the restricted period is 40 days. The restricted period for equity securities sold under Category 3 is one year, instead of the shorter 40-day period under Category 2.

[17] ''U.S. person'' is defined under Rule 902(*o*) of Regulation S [17 CFR 230.902(*o*)].

[18] In addition to the restricted period, ''Category 2'' and ''Category 3'' offerings also must comply with certain ''offering restrictions,'' and the requirement that distributors give certain notices when selling securities to other distributors prior to the expiration of the restricted period. *See* Rule 902(h) of Regulation S [17 CFR 230.902(h)]. In addition, offerings of equity securities under Category 3 are subject to certification, legending and other requirements that are not imposed on Category 2 offerings. *See* Rule 903(c)(2) for Category 2 offerings [17 CFR 230.903(c)(2)] and Rule 903(c)(3) for Category 3 offerings [17 CFR 230.903(c)(3)].

[19] *See* Securities Act Release No. 6863 (Apr. 24, 1990) [55 FR 18306] (the ''Adopting Release'') at Section III.B.

[20] See, *e.g.*, InfraRed Associates, Inc. (Sept. 13, 1985); Proctor & Gamble Co. (Feb. 21, 1985); Fairchild Camera and Instrument International Finance N.V. (Dec. 15, 1976); Raymond International Inc. (June 28, 1976); Pan-American World Airways, Inc. (June 30, 1975); The Singer Company (Sept. 3, 1974).

[21] *See, e.g.*, ''Pirates' Play?'', Barron's, at 17 (Jan. 7, 1997); ''Storm Brewing Offshore?'', Barron's, at 12 (Sept. 16, 1996); ''Easy Money—How Foreign Investors Profit at the Expense of Americans,'' Barron's, at 31 (Apr. 29, 1996); ''Rule Permitting Offshore Stock Sales Yields Deals that Spark SEC Concerns,'' Wall St. J., at C1 (Apr. 26, 1994); ''Foreign Stock Sales: Don't Get Blindsided,'' Worth, at 37 (Mar. 1994).

[22] *See In re: Candies, Inc., et al.*, Securities Act Release No. 7263 (Feb. 21, 1996); *SEC v. Softpoint, Inc., et al.*, Litigation Release No. 14480 (Apr. 27, 1995). *See also U.S. v Sung and Feher*, Litigation Release No. 14500 (May 15, 1995).

described a number of abusive practices in offerings purportedly made under Regulation S and stated that such abusive practices ran afoul of the ''scheme-to-evade'' prohibition in Preliminary Note 2 of Regulation S,[23] would not be covered by the safe harbors, and would not be found to be an offer and sale outside the United States for purposes of the general statement under Rule 901.[24]

The Interpretive Release also asked for comments whether the Commission should amend Regulation S to impose additional restrictions on the use of the safe harbors to impede attempts to use the Regulation to evade the registration requirements of the Securities Act. The Commission received 36 comment letters in response to the Interpretive Release.[25] There was no consensus among commenters whether Regulation S should be amended and, if so, what restrictions should be imposed.

As a complement to these initiatives, the Commission also has taken, and is currently undertaking, several other actions. To deter abusive Regulation S practices while providing important information to the markets, the Commission recently adopted amendments to the Exchange Act periodic reporting forms for domestic issuers to require disclosure of unregistered equity offerings, including a current report on Form 8–K filing requirement to disclose sales made under Regulation S.[26] At the same time, by adopting amendments to Rule 3–05 of Regulation S–X, which relaxed the financial statement requirements for acquired businesses, the Commission took another step to remove unnecessary barriers to registered offerings that may cause companies to conduct unregistered offshore offerings.[27] The Commission today also is issuing three companion releases that should help alleviate concerns that the more restrictive Regulation S procedures will cut off access to capital on a cost-effective basis for smaller companies. These releases (i) adopt amendments to the Rule 144 safe harbor governing resales of restricted securities to shorten the holding period requirements, (ii) propose further revisions to Rule 144 to simplify the rule, and (iii) propose allowing delayed pricing in registered securities offerings conducted by smaller issuers so they would have more flexibility in timing registered offerings.[28]

The increasing internationalization of global securities markets, the growing use of the Internet for securities transactions, the further integration of the European and other markets through common currencies and regulatory treatments, and other recent and ongoing developments in the securities markets may make it appropriate for the Commission to re-address many facets of the territorial approach to the Securities Act that has been adopted under Regulation S. These issues arise apart from the abusive practices addressed in today's proposals. However, the Commission encourages commenters to discuss these and other matters in order to permit the Commission to evaluate whether to propose revisions to Regulation S to reflect these developments.

III. Proposed Amendments to Issuer Safe Harbor

A. Continue Safe Harbor Protection for Equity Sales

The Commission does not believe at this time that the abuses identified to date warrant precluding domestic reporting issuers from making equity offerings under Regulation S, particularly since many smaller issuers access foreign sources of capital to satisfy their financing requirements. Indeed, some of the abusive practices, such as hedging transactions, are engaged in by purchasers, and not necessarily with the knowledge or acquiescence of the issuer. Rather than make the Regulation S safe harbor unavailable for such offerings, the proposals are designed to curtail the abusive practices that have developed, while retaining for U.S. issuers the flexibility to make an offshore offering with the certainty provided by a safe harbor. Nevertheless, would it be more appropriate to end the safe harbor entirely for offshore offerings of equity securities of domestic reporting issuers, domestic non-reporting issuers, and foreign issuers where the principal market for their equity securities is in the United States?

B. Impose New Restrictions on Equity Offerings of Domestic Issuers and of Foreign Issuers Where the Principal Market for the Securities is in the United States

In light of the continuing abuses, the Commission proposes requiring compliance with the more rigorous procedures under Category 3, including a longer restricted period, for all offshore offerings of equity securities of domestic companies, and of foreign companies where the principal market for the securities is in the United States. There are five new requirements that the proposed amendments would impose on offerings of these securities by moving those offerings from Category 2 to Category 3:

1. Longer Restricted Period

The restricted period for equity securities of domestic reporting issuers, and of foreign reporting issuers whose principal market is in the United States, would be lengthened from 40 days to two years; the restricted period for equity securities of domestic non-reporting issuers, and of foreign non-reporting issuers where the principal market for the securities is in the United States, would be lengthened from one year to two years. In order to qualify for the Regulation S safe harbor for offers and sales made during the restricted period, issuers, distributors, and their affiliates must comply with the documentation requirements discussed below and any such offers and sales during this period may not be made to a U.S. person (except pursuant to registration or an exemption). Rule 903 would be further amended to clarify that registered offers and sales, or offers and sales to a U.S. person made pursuant to an exemption such as Rule 144 or 144A, are permitted in the initial distribution and during the restricted period.

As described below, the Commission is proposing that covered equity securities be defined as ''restricted securities'' under Rule 144. The new two-year restricted period under the issuer safe harbor would track the time period during which the securities would be subject to resale restrictions as ''restricted securities'' under Rule 144.

The Commission adopted the current 40-day restricted period during which the selling restrictions are applicable to protect against an indirect unregistered

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[23] Preliminary Note 2 to Regulation S specifically states that:

In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

[24] Interpretive Release, *supra* note 8, at Section II.

[25] These comment letters, together with a Summary of Comments prepared by Commission staff, are available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Persons seeking these materials should make reference to File No. S7–20–95.

[26] Exchange Act Release No. 37801 (Oct. 10, 1996) [61 FR 54506 (Oct. 18, 1996)]. Sales of equity securities by domestic issuers under Regulation S are required to be reported on Form 8–K within 15 days of occurrence. All other unregistered sales of equity securities by domestic issuers (*e.g.,* private placements) must be reported quarterly in the issuer's Form 10–Q and in its Form 10–K (for the last fiscal quarter).

[27] Securities Act Release No. 7355 (Oct. 10, 1996) [61 FR 54509 (Oct. 18, 1996)].

[28] Securities Act Release Nos. 7390, 7391, and 7393.

public offering in the United States. The practices of some companies, distributors and their affiliates, however, demonstrate that the current 40-day restricted period is far too short to achieve this goal. In some instances, they appear to have orchestrated resales in the United States following the restricted period as part of the distribution process.

Before the adoption of Regulation S, market participants generally used a 90-day period for offshore offerings of U.S. debt securities and a one-year period for offshore offerings of equity securities of domestic non-reporting issuers.[29] When the Commission initially proposed a 90-day restricted period for offshore offerings of both debt and equity securities of domestic reporting issuers, many commenters advocated a shorter 40-day restricted period. These commenters stated that the shorter period would be sufficient to protect against use of an offshore offering to make an indirect offering into the United States.[30] In the Commission's view, however, experience has not borne out the commenters' beliefs in the area of domestic equity securities. Also, the same potential for abuse exists with foreign equity securities if the principal market for the securities is in the United States.

2. Purchaser Certifications

The new procedures would require purchasers of these new Category 3 equity securities to certify that they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person, or that they are U.S. persons who purchased securities in a transaction that did not require registration under the Securities Act. This certification procedure should help protect against some of the sham transactions noted in the Interpretive Release where issuers or distributors ''park'' securities offshore with affiliates or shell entities that are actually owned by U.S. persons.

3. Purchaser and Distributor Agreements

The new procedures would require purchasers of securities to agree to resell the securities only in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. Imposing this agreement on purchasers of the covered equity securities should help ensure that purchasers are aware of the resale restrictions applicable to the securities, particularly considering the Commission's proposal to classify these securities as restricted securities.[31]

In addition, under a new requirement proposed to be added to the current Category 3 purchaser agreement requirement,[32] purchasers of Category 3 equity securities would be required to agree not to engage in hedging transactions except in compliance with the registration or exemptive provisions of the Securities Act.[33] The proposals also would require distributors to agree to the same restrictions on hedging until the expiration of the restricted period,[34] and that all offering materials and documents used in the offering of these securities would be required, until the expiration of the restricted period, to include a statement that hedging transactions involving those securities may not be conducted except in compliance with the Securities Act.[35]

4. Legended Certificates

The proposals would require all covered issuers of equity securities to place a legend on the securities sold offshore. This legend would advise that transfer of such securities is prohibited other than in accordance with the Securities Act. Currently, the required legend for sales of equity securities of domestic non-reporting issuers is required to state that transfers of securities are prohibited except ''in accordance with the provisions of this Regulation S.'' [36] The Commission proposes amending the current legend requirement to make clear that the rule permits transfers made in accordance with the provisions under the Securities Act.

The legend requirement would provide notice to any subsequent purchasers of the resale restrictions applicable to the securities. The Commission understands that legending equity securities of domestic reporting issuers until the expiration of the current 40-day restricted period is a common practice under Regulation S. The Commission thus believes that the addition of an express legending requirement should not impose a different or new burden. In addition, the Commission proposes amending the current legend requirement to state that hedging transactions may not be conducted except in compliance with the Securities Act.

Regulation S does not require, and the Commission is not proposing, that the legend contain specific language to describe these restrictions. Issuers and distributors should prepare such legends in a form that conveys to holders the restricted nature of the securities and that they can only be resold under Regulation S, pursuant to registration under the Act, or under an exemption. Nor is the legend requirement intended to require that securities sold under Category 3 be in certificated form. Issuers whose securities are in uncertificated form may satisfy the legend requirement by any means reasonably designed to put holders and subsequent purchasers on notice of the applicable resale restrictions. The Commission requests comment whether, if covered securities are in uncertificated form, certain forms of notice would be adequate to inform holders and subsequent purchasers of the resale restrictions. Should securities covered by the Category 3 safe harbor be required to be in certificated form? Are there alternative means of notice that

[29] *See* Securities Act Release No. 6779 (June 10, 1988)[53 FR 22661 (June 17, 1988)], which proposed Regulation S (the ''Proposing Release''), at nn.10 and 11 for a discussion of the time periods that were used by market participants prior to the adoption of Regulation S.

[30] *See* Securities Act Release No. 6838 (July 11, 1989)[54 FR 30063 (July 18, 1989)], which reproposed Regulation S, at Section II.C.2.b. (the ''Reproposing Release'').

[31] Of course, issuers and distributors could not accept at face value certifications and agreements by purchasers and disclaim responsibility for investigation and consideration of relevant facts pertinent to the establishment of the Regulation S safe harbor. *See Re: Lee Petillon,* Adm. Proc. File 3–2393 (Nov. 30. 1972) (initial decision); *Re: The Crowell-Collier Publishing Company,* Securities Act Release No. 3825 (Aug. 12, 1957); *Regulation D Revisions,* Securities Act Release No. 6759 (Mar. 3, 1988) [53 FR 7870 (Mar. 10, 1988)] at Section B.

[32] This Category 3 purchaser agreement requirement currently is applicable only to sales of equity securities by non-reporting issuers. *See* Rule 903(c)(3)(iii)(B)(2) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(2)].

[33] Since the Commission also proposes that these securities will be deemed ''restricted securities,'' Commission guidance under Rule 144 with regard to hedging transactions (such as short sales, and purchases and sales of put and call options) would be applicable to these securities sold under Regulation S. *See* Securities Act Release No. 7391.

[34] Under the ''offering restrictions,'' as defined in Rule 902(h) of Regulation S, distributors are required to agree that all offers and sales prior to the expiration of the restricted period will be made either in accordance with Regulation S, pursuant to a registration of the securities under the Securities Act, or pursuant to an available exemption from registration. The proposals would expand the agreement requirement to include the proposed hedging agreement where the securities to be offered and sold are equity securities of domestic issuers, or of foreign issuers where the principal market for the security is in the United States. *See* Rule 902(h) of Regulation S [17 CFR 230.902(h)].

[35] Currently, the ''offering restrictions'' require certain statements to be included in all offering materials and documents (other than press releases) used in connection with offers and sales of certain securities prior to the expiration of the applicable restricted period. The required statements would include this additional statement regarding hedging where the securities to be offered and sold are equity securities of domestic issuers, or of foreign issuers where the principal market for the security is in the United States.

[36] Rule 903(c)(3)(iii)(B)(3) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(3)].

can be used for both certificated and uncertificated securities?

5. Stop Transfer Instructions

The proposals would require an issuer, by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of securities unless made in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. This requirement would impose on issuers a policing role similar to that which is often imposed in connection with unregistered private placements. Such a role would appear appropriate considering the abuses in this area.

Currently, the stop transfer instruction for sales of equity securities of domestic non-reporting issuers is required to state that the issuer will refuse to register any transfer of securities ''not made in accordance with the provisions of this Regulation S.'' [37] As with the legend requirement, the Commission proposes amending the current stop transfer instruction requirement to make clear that the rule permits transfers made in accordance with the provisions under the Securities Act.

6. Request for Comment on New Requirements

Should some or all of the new requirements, including the longer restricted period, not be applied as proposed to offerings of equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States? If so, which ones and why? For example, is legending equity securities of either domestic issuers or foreign issuers feasible in foreign markets? Are there other alternatives available that would achieve the same purpose? In addition to, or in lieu of, the specific documentation requirements of Category 3, should issuers be subject to an express general duty to take reasonable steps to ensure that purchasers do not resell the securities in violation of the Act, similar to that imposed by Regulation D? [38] Should satisfaction of any or all of the current specific documentation requirements of Category 3 be deemed to satisfy this express general duty?

Should the reporting status of the issuer matter, and if so, how? Should it matter whether those issuers also have a trading market for their equity securities in the United States, and if so, in what respect? Should certain classes of reporting issuers, such as those eligible for Form S–3 or F–3, be excluded from any or all of these restrictions?

Conversely, are any or all of these requirements so burdensome, either alone or with the proposals to prohibit the use of promissory notes and to classify these securities as restricted securities under Rule 144, that companies would effectively be foreclosed from relying on the Regulation S safe harbor for offshore offerings of equity securities? Would any or all of these proposed changes, either alone or with the reporting requirement for recent sales of equity securities under Regulation S (in the case of reporting companies), obviate the need for the longer restricted period? Should the restricted period be shorter than two years (*e.g.*, the current 40 days, 90 days, 180 days, 270 days or one year)? Would the classification of these securities as restricted securities within the meaning of Rule 144 eliminate the need for *any* restricted period?

7. Elimination of Form 8–K Filing Requirement

At the time the Commission adopted the existing Form 8–K 15-day reporting requirement, the Commission stated that if it extended the restricted period for sales of equity securities under Regulation S, it would consider revising the reporting requirement. As the Commission is now proposing to lengthen the restricted period for Regulation S sales, the Commission has determined to propose revising Item 701 of Regulation S–K and the relevant forms to require issuers to report Regulation S sales of equity securities only on a quarterly basis as presently required for other unregistered sales of equity securities. Comment is requested whether requiring only quarterly reporting of Regulation S sales will provide sufficiently timely disclosure if the covered equity securities are deemed ''restricted securities'' and thus not subject to resales under Rule 144 until at least one year after sale. Should the current Form 8–K filing requirement be continued because such securities may be resold in unlimited amounts either offshore or in the United States pursuant to Rule 144A (or another exemption)?

C. Revise Category 3 To Prohibit Payments With Promissory Notes for Domestic Equity Securities, and Foreign Equity Securities Where the Principal Market for the Securities is in the United States

In some sales purportedly made in reliance on Regulation S, the offshore purchaser has used a promissory note payable after the end of the restricted period to pay all or a portion of the purchase price of the securities. In some cases the notes are secured only by the Regulation S securities; in other cases the notes are unsecured. Some notes provide recourse to the buyer if the note is not repaid; others do not. The purchasers have resold the securities into the U.S. markets upon expiration of the 40-day restricted period and used the proceeds of the resale to repay the note. Under such an arrangement, the issuer and purchaser clearly expect a U.S. resale to provide the funds necessary to repay the note; in economic substance, the issuer is raising funds from the U.S. public markets. As noted in the Interpretive Release, this practice is inconsistent with an offshore distribution.

The proposals would revise the Category 3 safe harbor to make clear that the safe harbor is unavailable for transactions for equity securities of a domestic company, and for a foreign company where the principal market for the securities is in the United States, in which a purchaser delivers a promissory note as payment for some or all of the purchase price, or enters into an installment purchase contract relating to the sale. Comment is requested whether there should be any exceptions from the proposed prohibition to accommodate established international offering practices. Commenters favoring such exceptions are asked to describe the established practices and explain why they would not be likely to result in unregistered distributions of securities in the United States. Should there be a distinction between full and non-recourse promissory notes?

For example, could the Commission restrict the use of promissory notes without completely prohibiting their use by applying the Rule 144 standard for tolling [39] to permit promissory notes to be used under Regulation S as long as the promissory note or similar obligation or contract is by its terms required to be discharged by payment in full prior to resale of the securities by the obligor and satisfies the following conditions: the promissory note, obligation or contract must provide for

[37] Rule 903(c)(3)(iii)(B)(4) of Regulation S [17 CFR 230.903(c)(3)(iii)(B)(4)].

[38] Securities Act Rule 502(d)[17 CFR 230.502(d)].

[39] Rule 144(d)(2) [17 CFR 230.144(d)(2)].

full recourse against the purchaser of the securities, and must be secured by collateral (other than the securities purchased) having a fair market value at least equal to the purchase price of the securities purchased?[40] Given that the Commission proposes to classify these equity securities as ''restricted securities'' within the meaning of Rule 144, and that the holding period under Rule 144 is tolled unless promissory notes meet the above conditions, is it even necessary to amend Regulation S at all with regard to the use of promissory notes?

The Commission understands that some abusive Regulation S offerings have involved non-cash payments to the issuer other than promissory notes. Examples include the purported sale of equity securities under Regulation S in exchange for services rendered or in exchange for cancellation of a supposed pre-existing debt owed by the issuer to the offshore purchaser. The Commission requests comment on whether the Regulation S safe harbor should be available for offshore offerings of equity securities of domestic companies, and of covered foreign companies, only when cash is paid and received in the offering. Would such a requirement restrict the use of Regulation S for bona fide exchange offers? Should exchange offers be accommodated under the Regulation S safe harbor only if the securities being acquired have a readily ascertainable market value or have been outstanding for some time? Would such a requirement unnecessarily restrict the use of Regulation S for mergers and other business combination transactions?

D. Classify Domestic Equity Securities, and Foreign Equity Securities Where the Principal Market for the Securities is in the United States, as ''Restricted Securities''

Regulation S does not provide any safe harbor protection for resales by purchasers of securities placed offshore under Regulation S back into the United States. Preliminary Note 6 to Regulation S specifically states that:

> Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the [Securities] Act or an exemption from registration is available.

In the absence of guidance from the Commission or the staff,[41] some market participants appear to view the expiration of the restricted periods under Regulation S (applicable to issuers and other distribution participants entitled to rely on the Rule 903 safe harbor) as providing a safe harbor for U.S. resales by purchasers of Regulation S securities, particularly equity securities of domestic reporting issuers. This view is not correct. Instead, such purchasers must determine whether an exemption for resales into the United States is available.

Because some of the abusive practices under Regulation S have involved activities by persons other than issuers, distributors and their affiliates (that is, investors who purchased in Regulation S offerings with a view to distributing those securities into the U.S. markets at the end of the 40-day restricted period), the Commission believes that it is appropriate to clarify the legal obligations of purchasers of securities under Regulation S. Consequently, the Commission is proposing new Rule 905, and amendments to Rule 144(a)(3), to classify equity securities of domestic issuers (both reporting and non-reporting) placed offshore under Regulation S as ''restricted securities'' within the meaning of Rule 144. The Commission is also proposing to so classify as ''restricted securities'' equity securities of foreign issuers (both reporting and non-reporting) where the principal market is in the United States. While the Commission is not aware of widespread abuses involving these foreign issuers, the potential for abuse does exist since these securities are more likely to be resold into their principal market.

By expressly defining these Regulation S securities as falling within the definition of ''restricted securities'' under the Rule 144 resale safe harbor, purchasers of those securities are provided with clear guidance regarding when and how those securities may be resold in the United States without registration under the Securities Act.[42] Given the concurrent adoption of shortened holding periods under Rule 144, the Commission believes that it is appropriate to harmonize the resale restrictions for all securities sold without the benefit of registration with the Commission. For purposes of resale prohibitions, an unregistered sale offshore would be treated no differently than a private sale domestically; the burdens and benefits would be equalized. Nevertheless, are there reasons why securities sold offshore should be treated differently? Instead of applying the Rule 144 holding period, should a shorter holding period apply (for example, one year or six months)? To further integrate the requirements in this area, should the Commission craft a single regulation that would contain both the requirements applicable to offshore and to domestic unregistered offerings (for example, combine Regulation S and Regulation D)?

Currently, equity securities offered and sold to non-U.S. resident employees of the issuer through an employee benefit plan governed by non-U.S. law are Category 1 transactions and thus are not subject to a 40-day restricted period regardless of the domicile of the issuer or U.S. market interest in its securities. Under proposed Rule 905, however, those equity securities when issued by domestic or covered foreign issuers would be restricted within the meaning of Rule 144. Comment is requested whether this type of equity security should be excluded from the ''restricted security'' classification. If so, commenters are requested to address why, if such securities were not deemed restricted, problematic practices would not develop with respect to such plans and securities.

E. Application of Proposed Changes

1. Foreign Companies Where the Principal Market for the Securities is in the United States

Although abusive practices under Regulation S have not been as evident in offerings by foreign issuers, the Commission is concerned that the economic incentives for indirect distributions and resales into the United States are the same for equity offerings

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[40] These conditions are similar to those found under Rule 144 governing the computation of the Rule 144 holding period in the context of payment with promissory notes. *See* Rule 144(d)(2) [17 CFR 230.144(d)(2)].

[41] The Adopting Release did not provide further guidance in this area, other than to state in a footnote that, upon the expiration of any restricted period, the Commission would view securities sold under Regulation S (other than unsold allotments) as unrestricted. Adopting Release, *supra* note 18, at n.110. Since the adoption of Regulation S, the Commission's staff has received numerous inquiries on whether and when securities that have been sold under Regulation S may be freely resold in the United States without registration under the Securities Act. Regardless of the issuer's compliance with Regulation S when it sold the securities offshore, persons who would be considered underwriters under Section 2(11) of the Securities Act are not permitted to make unregistered public resales of these securities in the United States in reliance on the Section 4(1) exemption from registration. As the Commission stated in the Interpretive Release, *supra* note 8, at n.17:

> Public resales in the United States by persons that would be deemed underwriters under Section 2(11) of the Securities Act [15 U.S.C. 77b(11)] would not be permissible absent registration or an exemption from registration. Footnote 110 of the Adopting Release, which addresses the restricted periods, should not be read to provide otherwise.

[42] They are also put on notice that resales outside the Rule 144 safe harbor must be evaluated independently against the statutory underwriter concepts embodied in Section 2(11), regardless of the issuer's compliance with Regulation S.

of both domestic companies, and foreign companies where the principal market for the securities is in the United States (that is, the majority of the trading occurs here). Therefore, the proposed Regulation S changes would treat both similarly for each requirement. Nonetheless, is there an appropriate basis to distinguish between the two for any or all of the conditions of the proposed amendments to the safe harbors, including the ''restricted securities'' classification?

As noted above, the Commission proposes defining ''principal market in the United States'' for a security as when more than 50 percent of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation. Should the percentage be greater than 50 percent (for example, 75%) or lower (for example, 10%, 25% or 35%), so long as the United States is the largest market? Should it matter for purposes of this definition where the security is traded (for example, New York Stock Exchange, American Stock Exchange, Nasdaq-NMS, any of the regional exchanges, the OTC Bulletin Board, the ''pink sheets,'' or any private trading system such as Instinet) and whether such market is relatively liquid or active? Commenters should explain the reasons for any distinctions between or among trading markets or mechanisms for trading.

Other possible alternatives under consideration include applying the restrictions to (i) all foreign issuers, (ii) only foreign reporting issuers, (iii) only foreign reporting issuers with a ''substantial U.S. market interest'' (as currently defined in Regulation S) in the class of equity securities to be offered offshore; or (iv) only foreign reporting issuers whose only equity market is in the United States. Should a different test other than trading market be used, such as percentage (*e.g.*, 10%, 25% or 50%) of U.S. resident ownership of the company's outstanding equity securities? Should the Commission use similar percentage thresholds based on an ''Average Daily Trading Volume'' test, like that recently adopted in Regulation M [43] for purposes of defining ''principal market in the United States?'' If so, what percentage (10%, 25% or 50% of U.S. Average Daily Trading Volume as compared to total worldwide Average Daily Trading Volume), and what measurement period (three, six or 12 months, or some other period) should be used?

2. Equity Securities

As proposed, the procedures and restrictions under Category 3 and the ''restricted securities'' classification would apply only to offerings of equity securities. Rule 405 of Regulation C under the Securities Act defines the term ''equity security'' to include stock, securities convertible or exchangeable into stock, warrants, options, rights to purchase stock, and other types of equity related securities.[44] The Commission does not propose to apply the new restrictions to offerings of debt securities, since the nature of the trading markets for debt securities appear not to have facilitated abusive practices that result in a distribution of these securities into U.S. markets.

Comment is requested concerning whether any or all of the restrictions proposed for equity securities also should be applied to offerings of debt securities, and if so, whether such applicability should depend on the status of the issuer (for example, whether the issuer is foreign or domestic, reporting or non-reporting, Form S–3 or F–3 eligible)? Should it matter whether there is a trading market for any security (whether debt or equity) of the issuer in the United States, and if so, what security is traded? Are there circumstances where any such debt offering would be likely to result in an unregistered U.S. distribution? If the restrictions cover offerings of debt securities, should they be limited to certain types of debt securities, such as debt securities where the amount due is tied to the price of the issuer's common equity securities, or debt securities that are listed for trading on a U.S. securities exchange?

The Commission is aware that many Regulation S abuses have involved the use of convertible or exchangeable securities or warrants.[45] Many companies, however, legitimately offer under Regulation S either convertible or exchangeable debt securities, or warrants for common stock as a unit with other securities, to lower their costs of capital. Comment is requested as to whether all convertible or exchangeable securities or warrants of domestic issuers, and of foreign issuers where the principal market for the underlying equity securities is in the United States, should be subject to the proposed Category 3 restrictions and the ''restricted securities'' classification, as proposed. Are there certain types of convertible or exchangeable securities or warrants where there is minimal likelihood that such offerings will result in an unregistered U.S. distribution of either the convertible or exchangeable securities or warrants, or the equity securities underlying the convertible or exchangeable securities or warrants, and, therefore, the proposed restrictions may not be necessary?

Should it matter if the convertible or exchangeable debt security is not convertible or exchangeable for some period of time after the offering (for example, six months, one year, two years, three years)? Should they be excluded if, at the time of issuance, the securities had an effective conversion or exercise premium over a specified amount (for example, five percent, 10 percent, 20 percent, or more)? [46] If a specified conversion or exercise premium approach is used, should it matter whether such conversion or exercise rate is allowed to float in relation to the market price of the underlying security, or is set at some future point in time based upon a formula known when the security was issued? Does it matter whether the issuer of the convertible or exchangeable security or warrant, or the issuer of the underlying equity security, is a reporting company, and if so, how? Although many of the larger capitalization domestic companies issue convertible securities and warrants under Regulation S, does the Form S–3 eligibility of these companies render any carve out for their securities unnecessary? Commenters are asked to provide information on the likelihood that convertible or exchangeable securities or warrants containing particular conversion, exchange or exercise terms will be sold offshore under Regulation S under circumstances that are not likely to result in an unregistered distribution of equity securities in the United States.

[43] Securities Act Release No. 7375 (Dec. 20, 1996) [62 FR 520 (Jan. 3, 1997)].

[44] 17 CFR 230.405. Under the proposed changes, non-participating preferred stock and asset-backed securities would continue to be treated in the same manner as debt securities for purposes of the Regulation S safe harbors and the restricted security classification. *See* Rule 903(c)(4) [17 CFR 230.903(c)(4)], proposed to be redesignated as Rule 902(a).

[45] *See* ''Pirates' Play?'', *supra* note 21.

[46] The Commission has imposed similar standards under the Rule 144A resale safe harbor. *See* Rule 144A(d)(3)(i) [17 CFR 230.144A(d)(3)(i)]. *See also* Securities Act Release No. 6862 (Apr. 23, 1990) at nn.25 and 26 for a discussion of how the conversion or exercise premium is determined for purposes of Rule 144A. Comment is requested whether the same methods of calculations should apply under any proposed changes to Regulation S.

F. Other Possible Restrictions

1. Hedging

As discussed in the companion proposing release for Rule 144, the Commission is concerned that some hedging activity may undermine the safeguards against indirect distributions provided by Regulation S and Rule 144. If a purchaser shifts the economic risk of a transaction through short sales, swaps, or derivative securities transactions, for example, the Commission is concerned that the purchaser may not have a bona fide investment intent. This is especially true in the Regulation S area, where the Commission looks for indicia that a transaction is truly ''offshore.''

In the Interpretive Release, the Commission warned that a transaction may not be viewed as offshore if there is evidence that a substantial portion of the economic risk is left in or returned to the U.S. market during the restricted period. Based on discussions with market participants, there is reason to believe that hedging during the Regulation S restricted periods is still occurring.

The Commission is addressing this concern in two ways. First, the proposed changes include purchaser and distributor agreements and legends warning against inappropriate hedging, as discussed above. Second, by treating equity securities purchased from domestic and covered foreign companies as ''restricted'' for purposes of resale, the Commission is imposing the holding period requirement of Rule 144. Maintaining a hedge for one or two years, as opposed to 40 days, is more costly and may be impossible for many of the illiquid securities sold in abusive cases.

The companion proposing release for Rule 144 does not specifically prohibit hedging during the holding period, but asks a series of questions designed to determine whether certain types of hedging are inconsistent with the spirit of Rule 144. Should the Commission go beyond its Rule 144 approach and simply preclude any or all hedging activity during the Regulation S restricted period? Should it matter whether the hedging occurs offshore? Should specific hedging provisions apply to equity securities only? Should the size of the issuer be determinative (for example, permit more hedging with issuers eligible to file Form S–3 or F–3)? As with convertible securities, should it matter whether a derivative security is ''out of the money'' by a specified amount? Should there be a cap on the amount that could be hedged within the safe harbor? For example, should all or some hedging be permitted as long as the purchaser retains a majority or a substantial amount of economic risk?

2. Discounts

As evidenced by the offering practices described in the Interpretive Release, securities sold offshore at a discount from the U.S. market price are likely to be resold in the United States at the earliest possible date in order for the purchaser to realize a profit. In the Interpretive Release, the Commission requested comment as to whether it should limit the use of the safe harbor under Regulation S for offerings of common stock of domestic issuers to those sold at the market price or with a specified minimal discount.

The Commission is not proposing to amend Regulation S to require that sales of equity securities of reporting companies under Regulation S be made at a specified minimum price or to otherwise impose requirements or restrictions that are tied to the offering price of securities.[47] Although many of the abusive practices under Regulation S appear to involve significant discounts, the Commission believes there are other means to curtail such practices without mandating that safe harbor sales take place at a specific price or within a range of prices.

The Commission again requests comment on whether certain discounted offers (particularly by domestic reporting companies) should be excluded from the Regulation S safe harbor. Commenters addressing whether discounted sales should be accorded different treatment also should address how such discount should be measured (especially in the case of illiquid securities that trade infrequently, and convertible and exchangeable securities where other factors (such as interest rate and maturity) will affect the offering price of a security) and at what level of discount, if any, such different treatment should apply.

IV. Offshore Resales of Restricted and Affiliate Securities

The Commission is concerned that the more stringent requirements proposed for offshore offerings could lead to the development of abusive practices under the Rule 904 offshore resale safe harbor. Such practices could involve the private placement of equity securities in the United States by an issuer, the resale of those securities to a foreign purchaser under Rule 904, and the attempted resale of those securities back into the U.S. public markets without apparent restrictions. Without express guidance from the Commission, these holders of restricted equity securities (whether obtained under Regulation S, Regulation D, Rule 144A, or any other exemption from registration pursuant to which restricted status is designated) could mistakenly believe that a resale of securities to a foreign purchaser under Rule 904 results in such securities no longer being restricted securities.

In the Interpretive Release, the Commission stated that the offshore resale safe harbor under Rule 904 cannot be used for ''washing off'' resale restrictions, such as the holding period requirement for restricted securities in Rule 144. The Commission is proposing in new Rule 905 to make explicit that when restricted equity securities of any domestic issuer, or of a foreign issuer where the principal market for the equity securities is in the United States, are resold offshore under Regulation S, such securities will retain their status as restricted securities after the resale. Thus, subsequent resales of these securities by the offshore purchaser back into the United States may only take place pursuant to registration under the Securities Act, or a Securities Act exemption (for example, resales in accordance with the provisions of either Rule 144A or Rule 144).

Proposed Rule 905 would codify the Commission's view that resale restrictions applicable to equity securities of domestic issuers and foreign issuers where the principal market for the equity securities is in the United States will follow the securities in the hands of each subsequent transferee. Any purchaser of such restricted securities (including the initial sellers of such restricted securities who replace them with a repurchase of the same or fungible *restricted* securities) would be considered to have restricted securities. On the other hand, sellers of such restricted securities who replace them with a repurchase of fungible but *unrestricted* securities would not be considered to have restricted securities.[48]

Comment is requested on whether the proposed rule, either alone or with the

[47] The Commission's view as expressed in the Interpretive Release, however, remains applicable: neither the general statement under Rule 901 nor the safe harbors are intended to cover offshore offerings of such securities where the fees or discounts indicate that the transaction was intended to create a parking scheme or other scheme where the securities were merely being held offshore temporarily to evade the registration requirements of the Securities Act.

[48] This interpretation clarifies and supercedes the Commission's previous interpretation regarding ''prearranged'' repurchases of restricted securities set forth in the Interpretive Release, *supra* note 8.

Commission's other proposed and recently adopted initiatives, is sufficient to deter the improper use of the Rule 904 safe harbor. Should other types of restricted securities (such as debt securities) also expressly be considered restricted securities after a Regulation S resale, and if so, which ones? Should the applicability depend on the status of the issuer (for example, whether the issuer is foreign or domestic, reporting or non-reporting, Form S–3 or F–3 eligible)? Should it matter the extent to which there is a trading market for the security in the United States, and if so, how?

Should the proposed preservation of resale restrictions apply to resales of equity securities of (i) all foreign issuers, (ii) only foreign reporting issuers, (iii) only foreign reporting issuers with a ''substantial U.S. market interest'' (as currently defined in Regulation S) in the class of equity securities to be resold offshore; or (iv) only foreign reporting issuers whose only equity market is in the United States? Should some restricted equity securities of domestic or foreign issuers be excluded from this aspect of proposed Rule 905, such as certain types of convertible or exchangeable securities or warrants, and if so, which ones?

When restricted securities proposed to be covered by the new rule are resold under Rule 904 on a ''designated offshore securities market'' as defined under Regulation S,[49] is it practical for such securities to be identified to the subsequent purchaser as restricted securities under the U.S. federal securities laws (whether through legending or otherwise)? Commenters are requested to address the practical effect of offshore hedging activity involving these securities as well.

Any officer or director of the issuer who is an affiliate solely by virtue of holding such position may sell unrestricted securities offshore pursuant to Rule 904 without those securities becoming restricted securities, even if the sales exceed the volume limitations of Rule 144(e) (offshore resales of restricted securities pursuant to Regulation S are not subject to the volume limitations of Rule 144(e)). Any other affiliates, however, who decide to sell securities offshore are required to conduct such offerings under either Rule 901 or Rule 903, not Rule 904. Thus, if the securities to be sold are restricted or unrestricted equity securities of a domestic issuer, or of a covered foreign issuer, such securities will be considered restricted securities in the hands of any offshore purchaser, and may not be resold into the United States absent registration or a valid exemption.[50] Comment is requested whether this disparate treatment of different types of affiliates is appropriate. Should all unrestricted affiliate shares sold offshore be deemed restricted unless the offshore sales comply with Rule 144?

Alternatively, should the Rule 904 offshore resale safe harbor simply be made unavailable for restricted equity securities of domestic issuers and covered foreign issuers? Should the Commission make the Rule 904 safe harbor unavailable for all equity securities sold by any affiliate of the issuer? If the Rule 904 offshore resale safe harbor is not available, these securities would be able to be resold offshore under the general statement of Rule 901, but no safe harbor provisions under Regulation S would apply to such resale.

Proposed Rule 905 does not apply to other types of securities, such as debt securities of domestic issuers and equity securities of foreign issuers where the principal market for the equity securities is not in the United States. The Commission requests comment as to whether Rule 905 should apply to debt securities of domestic issuers, equity securities of foreign issuers where the principal market for the equity securities is not in the United States, or other types of securities or other types of issuers. Does the nature of offshore trading markets in various types of securities make it impracticable for such securities to remain restricted in the hands of offshore purchasers? Is there less need for concern in this area inasmuch as the likelihood of an unregistered distribution of such securities in the United States is diminished? Comment is requested on current practices in this area and the need for Commission guidance.

V. Technical and Clarifying Revisions

The Commission proposes mainly non-substantive technical and clarifying revisions to Regulation S to make the rule more concise and understandable. The principal changes include:

- Revising the captions of the three sections of the Rule 903 issuer safe harbor to refer to them as commonly known: ''Category 1,'' ''Category 2'' and ''Category 3'';
- Revising the Rule 903 issuer safe harbors to state clearly for each category what procedures are to be followed and what securities are eligible for each category;
- Combining some definitions within Rule 902, the definition section of Regulation S, or moving certain definitions to the Rule 903 safe harbor to make the rule easier to read and understand;
- If the same terms are already defined elsewhere in the Commission's rules and regulations, deleting those definitions from Rule 902 and adding cross references to the definitions contained elsewhere; and
- Generally editing the language in the rule to make it more understandable.

Comment is requested on each of the proposed changes. Are there any other clarifying or technical changes that the Commission could make to Regulation S to make the rule more readable and understandable?

VI. Request for Comments

Any interested persons wishing to submit written comments on the proposed revisions are requested to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comments@sec.gov. Comments are requested on the impact of the proposals on issuers, investors, and others. Comments should specifically address any possible effects on investor protection, capital formation or market efficiency resulting from the proposals. The Commission also requests comment on whether the proposed rules, if adopted, would have an adverse impact on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments will be considered by the Commission in complying with its responsibilities under Section 23(a)[51] of the Exchange Act. Comment letters should refer to File No. S7–8–97; this file number should be included in the subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public

[49] *See* Rule 902(a) of Regulation S [17 CFR 230.902(a)] for the definition of ''designated offshore securities market.''

[50] If these affiliates sell the securities offshore in compliance with the appropriate provisions applicable to affiliate or restricted shares under Rule 144, then those securities will be unrestricted in the hands of the offshore purchaser. In calculating the amount of securities that have been resold pursuant to Rule 144 for the purposes of the volume limitations of Rule 144(e), the staff has taken the position that restricted securities resold offshore pursuant to Regulation S need not be included—similar to the treatment of other non-Rule 144 exempt resales, such as those made pursuant to Rule 144A. The Commission is proposing an amendment to Rule 144(e)(vii) to codify that position.

[51] 15 U.S.C. 78w(a).

Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

VII. Cost-Benefit Analysis

To assist the Commission in its evaluation of the costs and benefits that may result from the proposals, commenters are requested to provide views and empirical data relating to any costs and benefits associated with these proposals. The proposed amendments to Regulation S would impose restrictions on purchasers of equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States. For example, issuers could not accept promissory notes as payment for the securities, and purchasers may have to wait a longer period of time before they could publicly resell the securities into the United States. Also, the new requirement that purchasers of certain types of equity securities sold under Regulation S provide certification of compliance with the Securities Act may impose additional recordkeeping burdens on issuers attempting to maintain records of such compliance. These restrictions may make it more difficult or costly for some issuers to raise funds through the sales of equity securities. At the same time, the Commission believes that such restrictions are necessary to deter abusive practices that may have defrauded investors of millions of dollars. The Commission believes that deterring abusive market practices will protect investors and, in the long run, promote capital formation and efficient, competitive markets.

The proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB relax the existing requirements to report unregistered sales of equity securities. As such, the Commission believes that these amendments would decrease reporting, recordkeeping and compliance burdens, while, at the same time, continuing to provide investors with sufficient information regarding changes in outstanding securities of public companies.

The Commission invites commenters to submit empirical data that will help it assess the costs and benefits of its proposals. The Commission also encourages commenters to suggest alternative ways of deterring the abusive practices cited in this release. It would be most helpful if commenters would state the reasons that a proposed alternative is preferable to the Commission's proposals and why the proposed alternative is more cost-effective. If possible, commenters should submit data that support their views.

Despite the possible increase in cost to issuers resulting from proposed new requirements such as purchaser certifications and purchaser and distributor agreements, the Commission does not believe that the proposed amendments would result in a major increase in costs or prices for investors, issuers, individual industries or consumers. The Commission believes that the proposed amendments relaxing the existing requirements to report unregistered sales of equity securities would serve to reduce issuer costs. Likewise, the Commission does not believe that the proposed amendments would have an adverse effect on competition, employment, investment, productivity, innovation, market efficiency, or capital formation. In fact, the Commission believes that the proposed amendments will promote capital formation and efficient, competitive markets by enhancing investors' confidence in the integrity of the securities markets. However, the Commission requests comment on these preliminary views. The Commission encourages commenters to provide empirical data or other facts to support their views.

Because some of the abusive practices under Regulation S have involved activities by persons other than issuers, distributors and their affiliates (that is, investors who purchased in Regulation S offerings with a view to distributing those securities into the U.S. markets at the end of the 40-day restricted period), the Commission believes that it is appropriate to clarify the legal obligations of purchasers of securities under Regulation S. By expressly defining these Regulation S securities as falling within the definition of ''restricted securities'' under the Rule 144 resale safe harbor, purchasers of those securities are provided with clear guidance regarding when and how those securities may be resold in the United States without violating the registration requirements of the Securities Act.[52] Given the concurrent adoption of shortened holding periods under Rule 144, as well as the ability of some purchasers in Regulation S placements to demand registration rights, the Commission does not believe that this classification will be unduly burdensome for purchasers in those offerings. To the extent that a purchaser chooses to resell the securities under the Rule 144 safe harbor, the Commission also does not believe that the requirement to file a Form 144 under certain circumstances will be unduly burdensome, particularly in light of the benefit of obtaining safe harbor protection for the resale.

The proposed amendments to Regulation S could reduce the annual amount of unregistered equity securities initially sold by issuers and the annual amount resold by the initial purchasers of those securities. The Commission requests comments on the likelihood of these effects and their size in terms of annual dollar amounts. In particular, are the proposed amendments likely to have a $100,000,000 or larger annual effect on the securities markets or the economy? If possible, commenters should provide empirical data or other facts to support their views.

VIII. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA''), pursuant to the requirements of the Regulatory Flexibility Act,[53] regarding the proposals. The proposed amendments to Regulation S are intended to stop abusive practices under Regulation S where issuers with a market for their securities in the United States conduct offshore placements of their securities pursuant to Regulation S that are in essence indirect distributions of these securities into the U.S. markets without the protections of registration under the Securities Act. Over the last several months, the Commission staff has met with numerous participants in the market for Regulation S securities. Based on the anecdotal information obtained through these discussions, it appears that many small businesses currently use Regulation S with respect to equity sales. However, there appears to be no significant alternative to the current proposals that would impose less burdens on small entities, yet forestall further abuse under Regulation S.

The proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB would relax the existing requirements to report unregistered sales of equity securities. These amendments would decrease reporting, recordkeeping and compliance burdens, while, at the same time, continuing to provide investors with sufficient information regarding

[52] They are also put on notice that resales outside the Rule 144 safe harbor must be evaluated independently against the statutory underwriter concepts embodied in Section 2(11), regardless of the issuer's compliance with Regulation S.

[53] 5 U.S.C. 603.

changes in outstanding securities of public companies.

There are new reporting, recordkeeping or other compliance requirements proposed as part of the proposed Regulation S rules. The Commission proposes to lengthen the restricted period during which persons relying on the Regulation S safe harbor may not publicly resell these equity securities (absent registration) to U.S. persons from 40 days or one year to two years. In addition, since covered equity securities placed offshore pursuant to Regulation S would be classified as ''restricted securities'' within the meaning of Rule 144, purchasers of these securities may choose to resell under the Rule 144 safe harbor, and therefore would be required to comply with the conditions of that safe harbor, including the Rule 144 holding periods. These proposals may reduce incentives to conduct equity placements under Regulation S due to a perceived reduction in the liquidity of the securities absent registration under the Securities Act or a valid exemption.

The Regulation S proposals also would impose on reporting issuers certification, legending and other requirements currently only applicable to sales of equity securities by non-reporting issuers. The purpose of these requirements is to assure that the participants in the distribution and the purchasers are aware of the restricted nature of these securities. These proposals would expand the current purchaser and distributor agreement requirements to require that they agree not to engage in hedging transactions with regard to such securities unless the transactions are in compliance with the Securities Act, and would make sure that participants in the offering are aware of and comply with these restrictions. In addition, promissory notes would be prohibited for use as payment for these securities. These last two proposals are intended to address abusive transactions involving hedging transactions and the use of promissory notes that from a practical perspective result in indirect distributions of securities into the U.S. markets without the protections of registration.[54] Although these additional purchaser requirements could increase recordkeeping and compliance burdens, in almost all instances, purchasers of securities sold pursuant to Regulation S would be non-U.S. persons. Any such additional purchaser requirements could have an indirect impact on U.S. small businesses.

Lastly, the Regulation S proposals would make clear that offshore resales under Rule 904 of equity securities of these issuers that are ''restricted securities,'' as defined in Rule 144, will not affect the restricted status of those securities. Consequently, holders of restricted securities could not attempt to remove the restrictions by selling the securities offshore.

All of these requirements are imposed on domestic issuers, and foreign issuers with the principal market for the equity securities in the United States, regardless of size. As proposed, small businesses would be able to obtain the protections of the proposed safe harbors on the same basis as larger companies. The Commission considered yet rejected alternatives applicable to small businesses, as the Commission believes that distinctions between companies based on size would negate the beneficial effects of the proposed safeguards. The Commission seeks comment on these views. Commenters are encouraged to suggest alternatives that would be appropriate and beneficial to small businesses, and data to support any alternative approach.

The IRFA notes that the proposed amendments to Regulation S, if adopted, would affect persons that are small entities, as defined by the Commission's rules. The term ''small business,'' as used in reference to a registrant for purposes of the Regulatory Flexibility Act, is defined by Rule 157[55] under the Securities Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities which does not exceed the $5 million dollar limitation prescribed by Section 3(b) of the Securities Act. When used with reference to an issuer other than an investment company, the term also is defined in Rule 0–10[56] of the Exchange Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less. When used with respect to an investment company, the term is defined under Rule 0–10 as an investment company with net assets of $50 million or less as of the end of its most recent fiscal year.

Small entities meeting these definitions would be able to rely on the Regulation S safe harbors on the same basis as larger entities. The Commission is aware of approximately 1,019 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 0–10. There is no reliable way of determining, however, how many non-reporting companies would be subject to the rule or how many small businesses may become subject to Commission registration and reporting obligations in the future. The Commission solicits comments regarding how to estimate the number of non-reporting issuers that may be affected by the proposed changes, together with data or assumptions to support such an approach.

The Commission estimates that over 500 Exchange Act reporting companies conduct over 750 sales pursuant to Regulation S per year and therefore would be affected by the proposals. The Commission further estimates that up to 160 of such reporting companies would meet the Regulatory Flexibility Act definition of small businesses. The total number of companies conducting Regulation S sales—including companies that are not Exchange Act reporting companies—undoubtedly would exceed the above numbers. Because no data are available as to non-reporting companies' sales due to the absence of any filings with the Commission regarding such sales, the exact number is impossible to determine. It is important to note that the Commission only recently began receiving data from reporting issuers regarding their placements of equity securities pursuant to Regulation S,[57] and therefore, does not have long-term data that would assist it in determining how many small businesses may actually rely on the Regulation S safe harbors, or may otherwise be impacted by the rule proposals. The Commission solicits comments regarding how to estimate the number of small businesses that may be affected by the proposed changes together with data or assumptions to support such an approach.

The proposed changes to Item 701 of Regulation S–B and Forms 8–K, 10–QSB and 10–KSB also would affect persons that are small businesses, as defined by the Commission's rules. The Commission expects, however, that the proposed changes would decrease

[54] *See* notes 21 and 22 and accompanying text, *supra*, for a discussion of the abusive transactions.

[55] 17 CFR 230.157.

[56] 17 CFR 240.0–10.

[57] Since November 18, 1996, sales of equity securities by domestic issuers under Regulation S are required to be reported on Form 8–K within 15 days of occurrence. This reporting requirement does not apply to any issuer who is not subject to the periodic reporting requirements under the Exchange Act, and in general does not apply to foreign issuers. *See* Exchange Act Release No. 37801, *supra* note 26.

reporting, recordkeeping and compliance burdens. The Commission estimates that up to 160 reporting companies qualifying as small businesses would be relieved of the burden of filing up to 300 additional Forms 8–K per year, thereby reducing the total annual record keeping burden by 1,500 hours. The analysis also indicates that there are no current federal rules that duplicate, overlap or conflict with the revised disclosure provisions.

While the Regulation S proposals may affect the ability of some small entities to access offshore capital, these restrictions should be sufficient to end the abusive practices under Regulation S, and forestall any further abuse, while not foreclosing the offshore market entirely for unregistered offshore offerings of equity securities. In addition, the concurrent adoption of shortened holding periods under Rule 144, coupled with the proposal to allow delayed pricing by smaller issuers in registered offerings, should help offset any adverse effect on small entities. No alternatives to the proposed rules consistent with their objectives and the Commission's statutory authority were found.

Comments are encouraged on any aspect of this analysis. A copy of the analysis may be obtained by contacting Walter G. Van Dorn, Jr., Office of International Corporate Finance, Division of Corporation Finance, Mail Stop 3–9, 450 Fifth Street, N.W., Washington, D.C. 20549.

IX. Paperwork Reduction Act

The staff has consulted with the Office of Management and Budget (the ''OMB'') and has submitted the proposals for review in accordance with the Paperwork Reduction Act of 1995 (the ''Act'').[58] Under the proposed amendments to Regulation S, if adopted, equity securities of domestic issuers, and of foreign issuers where the principal market for the equity securities is in the United States, that are issued offshore pursuant to Regulation S would be deemed ''restricted securities'' as defined in Rule 144 under the Securities Act. Consequently, purchasers of these securities in the offshore placement, and any subsequent purchasers, may choose to resell these securities into the U.S. markets pursuant to the conditions of the Rule 144 safe harbor for resales of restricted securities. Such conditions may include filing with the Commission a notice of proposed sale on Form 144, containing information about the issuer of the securities, the seller, the securities to be sold and the proposed manner of sale.

Prior to November 18, 1996, issuers of equity securities under Regulation S were not explicitly required to disclose such issuances in Commission filings. Since then, domestic reporting issuers of equity securities under Regulation S are required to file a Current Report on Form 8–K within 15 days of occurrence.[59] The Commission estimates that approximately 500 domestic issuers reporting under the Exchange Act conduct approximately 750 offshore offerings of equity securities pursuant to Regulation S each year. The Commission is not able to estimate the number of Regulation S sales by non-reporting companies. Assuming an average of two purchasers in each of these sales, and assuming that approximately one-half of such purchasers will choose to resell the securities under Rule 144, the Commission estimates approximately 750 additional filings on Form 144 on a yearly basis. Based on past Commission experience with Form 144 filings, the Commission estimates the total annual reporting and recordkeeping burden that will result from the collection of information to be two hours per respondent, and 1,500 hours in the aggregate on a yearly basis. Under the proposed amendments to Item 701 of Regulation S–K, Item 701 of Regulation S–B and Forms 8–K, 10–Q, 10–QSB, 10–K and 10–KSB, if adopted, the existing requirements to report unregistered sales of equity securities would be relaxed by delaying when the unregistered sale would have to be reported. Thus, the Commission believes that the proposed amendments would decrease reporting, recordkeeping and compliance burdens.

In addition, the proposed changes include the requirement that purchasers of certain types of equity securities sold under Regulation S certify that they are not U.S. persons and are not acquiring the securities for the account or benefit of a U.S. person, or that they are U.S. persons who purchased securities in a transaction that did not require registration under the Securities Act. This certification requirement also could result in a corresponding increase in recordkeeping burden on the part of issuers attempting to keep records of such certifications. The amendments also require distributors and certain purchasers of Regulation S equity securities to enter into agreements not to engage in hedging transactions with regard to those securities unless such transactions are in compliance with the Securities Act. This requirement too could result in an increase in recordkeeping burden on the part of issuers or distributors attempting to keep records of these purchase agreements. Additionally, the proposals would necessitate revised stop transfer instructions that would require an issuer, by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of securities unless made in accordance with the registration or exemptive provisions of the Securities Act, or in accordance with Regulation S. The creation and safekeeping of the necessary documentation for such stop transfer instructions would increase issuers' recordkeeping and compliance burdens.

The Commission solicits comment on (i) whether the proposed changes in collection of information are necessary, (ii) the accuracy of the Commission's estimate of the burden of the proposed changes to the collection of information, (iii) the quality, utility and clarity of the information to be collected, and (iv) whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, with reference to File No. S7–8–97. The OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

X. Statutory Bases

The amendments to Regulation S are being proposed pursuant to Sections 5 and 19 of the Securities Act, as amended, and the amendments to Rule 144 are being proposed pursuant to sections 2(11), 4, 5 and 19 of the

[58] 44 U.S.C. 3501 *et seq.*

[59] This reporting requirement does not apply to any issuer who is not subject to the periodic reporting requirements under the Exchange Act, and in general does not apply to foreign issuers. *See* Exchange Act Release No. 37801, *supra* note 26.

Securities Act, as amended.[60] The amendments to Item 701 of Regulation S-B and of Regulation S-K and to Form 8–K, Form 10–QSB, Form 10–Q, Form 10–KSB, and Form 10–K are being proposed pursuant to sections 3(b), 4A, 12, 13, 14, 15, 16 and 23 of the Securities Exchange Act.

List of Subjects in 17 CFR Parts 228, 229, 230, and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

§ 228.701 [Amended]

2. By amending paragraph (e) of § 228.701 by removing the words ''Form 8–K,'' and ''249.308,''.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.701 [Amended]

4. By amending paragraph (e) of § 229.701 by removing the words ''Form 8–K,'' and ''249.308,''.

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

5. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 78t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

[60] 15 U.S.C. 77d, 77e and 77s.

6. Section 230.144 is amended by revising paragraphs (a)(3) and (e)(3)(vii) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(a) * * *

(3) The term *restricted securities* means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of § 230.502(d) under Regulation D or § 230.701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of § 230.144A;

(iv) Securities acquired from the issuer in a transaction subject to the conditions of Regulation CE (§ 230.1001); and

(v) Equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States (as defined in § 230.902(h)), acquired in a transaction or chain of transactions subject to the conditions of § 230.901 or § 230.903 under Regulation S (§ 230.901 through § 230.905 and Preliminary Notes).

* * * * *

(e) * * *

(3) * * *

(vii) The following sales of securities need not be included in determining the amount of securities sold in reliance upon this section: securities sold pursuant to an effective registration statement under the Act; securities sold pursuant to an exemption provided by Regulation A (§ 230.251 through § 230.263) under the Act; securities sold in a transaction exempt pursuant to Section 4 of the Act (15 U.S.C. 77(e)) and not involving any public offering; and securities sold offshore pursuant to Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) under the Act.

* * * * *

7. Section 230.902 is revised to read as follows:

§ 230.902. Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Debt securities.* ''Debt securities'' of an issuer will be defined to include any security other than an equity security as defined in § 230.405, as well as the following:

(1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; or

(2) Asset-backed securities, which are defined as the securities of a type that either:

(i) Represents an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(ii) Is secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.

(3) For purposes of paragraph (a)(2) of this section, the term ''assets'' means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) *Designated offshore securities market.* ''Designated offshore securities market'' means:

(1) The Eurobond market, as regulated by the Association of International Bond Dealers; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock Exchange; and the Zurich Stock Exchange; and

(2) Any foreign securities exchange or non-exchange market designated by the

Commission. Attributes to be considered in determining whether to designate such a foreign securities market, among others, include:

(i) Organization under foreign law;

(ii) Association with a generally recognized community of brokers, dealers, banks, or other professional intermediaries with an established operating history;

(iii) Oversight by a governmental or self-regulatory body;

(iv) Oversight standards set by an existing body of law;

(v) Reporting of securities transactions on a regular basis to a governmental or self-regulatory body;

(vi) A system for exchange of price quotations through common communications media; and

(vii) An organized clearance and settlement system.

(c) *Directed selling efforts.*

(1) ''Directed selling efforts'' means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes). Such activity includes placement of an advertisement in a publication ''with a general circulation in the United States'' that refers to the offering of securities being made in reliance upon this Regulation S.

(2) Publication ''with a general circulation in the United States'':

(i) Is defined as any publication that is printed primarily for distribution in the United States, or has had, during the preceding twelve months, an average circulation in the United States of 15,000 or more copies per issue; and

(ii) Only the U.S. edition of any publication printing a separate U.S. edition will be deemed a publication ''with a general circulation in the United States'' if such publication, without consideration of its U.S. edition, would not meet the requirements of paragraph (c)(2)(i) of this section; and the U.S. edition itself meets the requirements of paragraph (c)(2)(i) of this section.

(3) The following are not ''directed selling efforts'':

(i) Placement of an advertisement required to be published under United States or foreign law, or under rules or regulations of a United States or foreign regulatory or self-regulatory authority, provided the advertisement contains no more information than legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 in § 230.903) absent registration or an applicable exemption from the registration requirements;

(ii) Contact with persons excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(i) of this section, solely in their capacities as holders of such accounts;

(iii) A tombstone advertisement in any publication with a general circulation in the United States, provided:

(A) The publication has less than 20% of its circulation, calculated by aggregating the circulation of its U.S. and comparable non-U.S. editions, in the United States;

(B) Such advertisement contains a legend to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 in § 230.903) absent registration or an applicable exemption from the registration requirements; and

(C) Such advertisement contains no more information than:

(*1*) The issuer's name;

(*2*) The amount and title of the securities being sold;

(*3*) A brief indication of the issuer's general type of business;

(*4*) The price of the securities;

(*5*) The yield of the securities, if debt securities with a fixed (non-contingent) interest provision;

(*6*) The name and address of the person placing the advertisement, and whether such person is participating in the distribution;

(*7*) The names of the managing underwriters;

(*8*) The dates, if any, upon which the sales commenced and concluded;

(*9*) Whether the securities are offered or were offered by rights issued to security holders and, if so, the class of securities that are entitled or were entitled to subscribe, the subscription ratio, the record date, the dates (if any) upon which the rights were issued and expired, and the subscription price; and

(*10*) Any legend required by law or any foreign or U.S. regulatory or self-regulatory authority;

(iv) Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of their respective affiliates or a person acting on behalf of any of the foregoing;

(v) Distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries if:

(A) Securities transactions cannot be executed between foreign broker-dealers and persons in the United States through the system; and

(B) The issuer, distributors, their respective affiliates, persons acting on behalf of any of the foregoing, foreign broker-dealers and other participants in the system do not initiate contacts with U.S. persons or persons within the United States, beyond those contacts exempted under § 240.15a–6 of this chapter; and

(vi) Publication by an issuer of a notice in accordance with § 230.135 or § 230.135c.

(d) *Distributor.* ''Distributor'' means any underwriter, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes).

(e) *Domestic issuer.* ''Domestic issuer'' means any issuer other than a foreign issuer (as defined in § 230.405).

(f) *Offering restrictions.* ''Offering restrictions'' means:

(1) Each distributor agrees in writing:

(i) That all offers and sales of the securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, shall be made only in accordance with the provisions of § 230.903 or § 230.904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

(ii) For offers and sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States, not to engage in hedging transactions with regard to such securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, unless in compliance with the Act; and

(2) All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the restricted period specified in Category 2 or 3 in § 230.903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration

requirements of the Act is available. For offers and sales of equity securities of domestic issuers, and of foreign issuers where the principal market for those securities is in the United States, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such statements shall appear:

(i) On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

(ii) In the underwriting section of any prospectus or offering circular used in connection with the offer or sale of the securities; and

(iii) In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

(g) *Offshore transaction*.

(1) An offer or sale of securities is made in an ''offshore transaction'' if:

(i) The offer is not made to a person in the United States; and

(ii) Either:

(A) At the time the buy order is originated, the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

(B) For purposes of:

(*1*) § 230.903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

(*2*) § 230.904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (a) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

(2) Notwithstanding paragraph (g)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in ''offshore transactions.''

(3) Notwithstanding paragraph (g)(1) of this section, offers and sales of securities to persons excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(vi) of this section or persons holding accounts excluded from the definition of ''U.S. person'' pursuant to paragraph (l)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in ''offshore transactions.''

(h) *Principal market in the United States.* With respect to a class of equity securities, a foreign issuer has its ''Principal market in the United States'' if more than 50 percent of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(i) *Reporting issuer.* ''Reporting issuer'' means an issuer other than an investment company registered or required to register under the 1940 Act that:

(1) Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78*l*(b) or 78*l*(g)) or is required to file reports pursuant to Section 15(d) of the Exchange Act (15 U.S.C. 78*o*(d)); and

(2) Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78*o*(d)) for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes) (or for such shorter period that the issuer was required to file such material).

(j) *Restricted period.* ''Restricted period'' means a period that commences on the later of the date upon which the securities were first offered to persons other than distributors in reliance upon this Regulation S or the date of closing of the offering, and expires a specified period of time thereafter; *provided, however,* that all offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the restricted period; *provided, further,* that in a continuous offering, the restricted period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions; *provided, further,* that in a continuous offering of non-convertible debt securities offered and sold in identifiable tranches, the restricted period for securities in a tranche shall commence upon completion of the distribution of such tranche, as determined and certified by the managing underwriter or person performing similar functions; *provided, further,* that in a continuous offering of securities to be acquired upon the exercise of warrants, the restricted period shall commence upon completion of the distribution of the warrants, as determined and certified by the managing underwriter or person performing similar functions, if requirements of § 230.903(b)(5) are satisfied.

(k) *Substantial U.S. market interest.*

(1) ''Substantial U.S. market interest'' with respect to a class of an issuer's equity securities means:

(i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or

(ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation.

(2) ''Substantial U.S. market interest'' with respect to an issuer's debt securities means:

(i) Its debt securities, in the aggregate, are held of record by 300 or more U.S. persons;

(ii) $1 billion or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons; and

(iii) 20 percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in § 230.902(a)(1), and the principal amount or principal balance of its securities described in § 230.902(a)(2), in the aggregate, is held of record by U.S. persons.

(3) Notwithstanding paragraph (k)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act (15 U.S.C. 77c(a)(3)).

(l) *U.S. person.*

(1) ''U.S. person'' means:

(i) Any natural person resident in the United States;

(ii) Any partnership or corporation organized or incorporated under the laws of the United States;

(iii) Any estate of which any executor or administrator is a U.S. person;

(iv) Any trust of which any trustee is a U.S. person;

(v) Any agency or branch of a foreign entity located in the United States;

(vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person;

(vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and

(viii) Any partnership or corporation if:

(A) Organized or incorporated under the laws of any foreign jurisdiction; and

(B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

(2) The following are not ''U.S. persons'':

(i) Any discretionary account or similar account (other than an estate or trust) held for the benefit or account of a non-U.S. person by a dealer or other professional fiduciary organized, incorporated, or (if an individual) resident in the United States;

(ii) Any estate of which any professional fiduciary acting as executor or administrator is a U.S. person if:

(A) An executor or administrator of the estate who is not a U.S. person has sole or shared investment discretion with respect to the assets of the estate; and

(B) The estate is governed by foreign law;

(iii) Any trust of which any professional fiduciary acting as trustee is a U.S. person if a trustee who is not a U.S. person has sole or shared investment discretion with respect to the trust assets, and no beneficiary of the trust (and no settlor if the trust is revocable) is a U.S. person;

(iv) An employee benefit plan established and administered in accordance with the law of a country other than the United States and customary practices and documentation of such country;

(v) Any agency or branch of a U.S. person located outside the United States if:

(A) The agency or branch operates for valid business reasons; and

(B) The agency or branch is engaged in the business of insurance or banking and is subject to substantive insurance or banking regulation, respectively, in the jurisdiction where located; and

(vi) The International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies, affiliates and pension plans, and any other similar international organizations, their agencies, affiliates and pension plans.

(m) *United States.* ''United States'' means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

8. Section 230.903 is revised to read as follows:

§ 230.903. Offers or sales of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; conditions relating to specific securities.

(a) An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if the offer or sale shall be made in an offshore transaction, and no directed selling efforts shall be made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing.

(b) *Additional conditions.*

(1) *Category 1.* Securities in this category may be offered and sold without any conditions other than those set forth in § 230.903(a) of this section. The securities eligible for this category are:

(i) The issuer is a foreign issuer that reasonably believes at the commencement of the offering that:

(A) There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

(B) There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

(C) There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

(D) There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

(ii) The securities are offered and sold in an overseas directed offering, which means:

(A) An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

(B) An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar-denominated securities.

(iii) The securities are backed by the full faith and credit of a foreign government; or

(iv) The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that:

(A) The securities are issued in compensatory circumstances for bona fide services rendered to the issuer or its affiliates in connection with their businesses and such services are not rendered in connection with the offer and sale of securities in a capital-raising transaction;

(B) Any interests in the plan are not transferable other than by will or the laws of descent or distribution;

(C) The issuer takes reasonable steps to preclude the offer and sale of interests in the plan or securities under the plan to U.S. residents other than employees on temporary assignment in the United States; and

(D) Documentation used in connection with any offer pursuant to the plan contains a statement that the securities have not been registered under the Act and may not be offered or sold in the United States unless registered or an exemption from registration is available.

(2) *Category 2.* Securities in this category may be offered and sold provided that:

(i) The following conditions are met:

(A) The conditions set forth in § 230.903(a) are met;

(B) Offering restrictions are implemented;

(C) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless

made pursuant to registration or an exemption therefrom under the Act; and

(D) Each distributor selling securities to a distributor, a dealer, as defined in section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day restricted period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor; and

(ii) The securities are equity securities of reporting foreign issuers unless the principal market for those securities is in the United States, or the securities are debt securities of a reporting issuer or of a foreign issuer.

(3) *Category 3.* Securities that are not eligible for Category 1 or 2 (paragraphs (b) (1) or (2)) in this section may be offered or sold provided that the following conditions are met:

(i) The conditions set forth in § 230.903(a) are met;

(ii) Offering restrictions are implemented;

(iii) In the case of debt securities:

(A) The offer or sale, if made prior to the expiration of a 40-day restricted period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless made pursuant to registration or an exemption therefrom under the Act; and

(B) The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day restricted period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(iv) In the case of equity securities, if made prior to the expiration of a two-year restricted period with respect to domestic issuers and foreign issuers where the principal market for the securities is in the United States, and a one-year restricted period with respect to other issuers:

(A) The offer or sale is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor), unless made pursuant to registration or an exemption therefrom under the Act; and

(B) The offer or sale is made pursuant to the following conditions:

(*1*) The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

(*2*) The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;

(*3*) The securities of a domestic issuer, or of a foreign issuer where the principal market for the securities is in the United States, contain a legend to the effect that transfer is prohibited except in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;

(*4*) The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S, pursuant to registration under the Act, or pursuant to an available exemption from registration; *provided, however,* that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iv)(B)(*3*) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and

(*5*) If the issuer is a domestic issuer, or a foreign issuer and the principal market for the equity securities is in the United States, no promissory note or other executory obligation may be received as payment for the securities, nor may an installment purchase contract be entered into; and

(v) Each distributor selling securities to a distributor, a dealer (as defined in section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day restricted period in the case of debt securities, or a two-year restricted period in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

(4) *Guaranteed securities.* Notwithstanding paragraphs (b)(1) through (b)(3) of this section, in offerings of debt securities fully and unconditionally guaranteed as to principal and interest by the parent of the issuer of the debt securities, only the requirements of paragraph (b) of this section that are applicable to the offer and sale of the guarantee need be satisfied with respect to the offer and sale of the guaranteed debt securities.

(5) *Warrants.* An offer or sale of warrants under Category 2 or 3 (paragraphs (b) (2) or (3)) of this section also must comply with the following requirements:

(i) Each warrant must bear a legend stating that the warrant and the securities to be issued upon its exercise have not been registered under the Act and that the warrant may not be exercised by or on behalf of any U.S. person unless registered under the Act or an exemption from such registration is available;

(ii) Each person exercising a warrant is required to give:

(A) Written certification that it is not a U.S. person and the warrant is not being exercised on behalf of a U.S. person; or

(B) A written opinion of counsel to the effect that the warrant and the securities delivered upon exercise thereof have been registered under the Act or are exempt from registration thereunder; and

(iii) Procedures are implemented to ensure that the warrant may not be exercised within the United States, and that the securities may not be delivered within the United States upon exercise, other than in offerings deemed to meet the definition of ''offshore transaction'' pursuant to § 230.902(g), unless registered under the Act or an exemption from such registration is available.

9. Section 230.904 is revised to read as follows:

§ 230.904. Offshore resales.

(a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of § 230.901 if the offer or sale are made in an offshore transaction, and no directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf.

(b) *Additional conditions.* In addition to the conditions set forth in paragraph

(a) of this section, the following requirements must be satisfied:

(1) *Resales by dealers and persons receiving selling concessions.* In the case of an offer or sale of securities of any issuer prior to the expiration of the restricted period specified in Category 2 or 3 (paragraphs (b) (2) or (3)) of § 230.903, as applicable, by a dealer, as defined in Section 2(12) of the Act (15 U.S.C. 77b(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on his behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(12) of the Act (15 U.S.C. 77b(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the restricted period only: in accordance with the provisions of this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by certain affiliates.* In the case of an offer or sale of securities of any issuer by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

10. By adding § 230.905 to read as follows:

§ 230.905 Resale limitations.

Equity securities of domestic issuers, and of foreign issuers where the principal market for such securities is in the United States, acquired from the issuer, a distributor, or any of their respective affiliates in an offshore transaction subject to the conditions of § 230.901 or § 230.903 are deemed to be ''restricted securities'' as defined in § 230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§ 230.901 through § 230.905, and Preliminary Notes), the registration requirements of the Act or an exemption therefrom. Any ''restricted securities'' as defined in § 230.144(a)(3) that are equity securities of domestic issuers, and of foreign issuers where the principal market for the securities is in the United States, will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to § 230.901 or § 230.904.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

12. By amending Form 8–K (referenced in § 249.308) by removing the last sentence of General Instruction B.1. and Item 9.

13. By amending Form 10–Q (referenced in § 249.308a) by revising paragraph (c) of Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10–Q does not and these amendments will not appear in the Code of Federal Regulations

Form 10–Q

* * * * *

Part II

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S–K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act.

* * * * *

14. By amending Form 10–QSB (referenced in § 249.308b) by revising paragraph (c) to Item 2 of Part II prior to the Instruction to read as follows:

Note: Form 10–QSB does not and these amendments will not appear in the Code of Federal Regulations

Form 10–QSB

* * * * *

Part II

* * * * *

Item 2. Changes in Securities.

* * * * *

(c) Furnish the information required by Item 701 of Regulation S–B (§ 228.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act.

* * * * *

15. By amending Form 10–K (referenced in § 249.310) by revising Item 5 of Part II to read as follows:

Note: Form 10–K does not and these amendments will not appear in the Code of Federal Regulations

Form 10–K

* * * * *

Part II

* * * * *

Item 5. Market for Registrant's Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S–K (§ 229.201 of this chapter) and Item 701 of Regulation S–K (§ 229.701 of this chapter) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10–Q or 10–QSB (§ 249.308a or 249.308b of this chapter) it need not be furnished.

* * * * *

16. By amending Form 10–KSB (referenced in § 249.310b) by revising Item 5 of Part II to read as follows:

Note: Form 10–K does not and these amendments will not appear in the Code of Federal Regulations

Form 10–KSB

* * * * *

Part II

* * * * *

Item 5. Market for Common Equity and Related Stockholder Matters.

Furnish the information required by Item 201 of Regulation S–B and Item 701 of Regulation S–B as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. *Provided* that if the Item 701 information previously has been included in a Quarterly Report on Form 10–Q or 10–QSB it need not be furnished.

* * * * *

Dated: February 20, 1997.

By the Commission.

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 97–4668 Filed 2–27–97; 8:45 am]

BILLING CODE 8010–01–P

17 CFR Parts 228, 229, 230

[Release No. 33–7393; S7–9–97]

RIN 3235–AG86

Delayed Pricing for Certain Registrants

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (''Commission'') is publishing for comment proposed amendments to Rule 430A under the Securities Act to permit certain smaller reporting companies to price securities on a delayed basis after effectiveness of a registration statement, if they meet specified conditions. These proposals are intended to enhance flexibility and efficiency for qualified companies, consistent with investor protection, by enabling them more easily to time their offerings to advantageous market conditions.

DATES: Comments should be submitted on or before April 29, 1997.

ADDRESSES: All comments concerning the rule proposals should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6–9, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–9–97; this file number should be included on the subject line if e-mail is used. Comment letters will be available for inspection and copying in the public reference room at the same address. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Barbara C. Jacobs, Office of Small Business, Division of Corporation Finance, at (202) 942–2950.

SUPPLEMENTARY INFORMATION: The Commission today is proposing amendments to Rules 415,[1] 424,[2] 430A,[3] and 434[4] under the Securities Act of 1933 (''Securities Act'').[5] In addition, amendments are being proposed to Items 512 and 601(b) of Regulations S–B[6] and S–K.[7]

I. Executive Summary

The Commission today is publishing for comment proposals to permit certain smaller companies, including small business issuers, to delay pricing of primary offerings after the registration statement becomes effective in order to provide them enhanced flexibility in the marketplace. By having more control over the timing of their offerings, these companies could take advantage of desired market conditions. Such flexibility could enable such companies to raise equity capital on more favorable terms or to obtain lower interest rates on debt. The proposals also would permit a company to vary certain terms of the securities being offered upon short notice,[8] in order to meet the requirements of the public securities markets. This increased flexibility could result in smaller companies raising more capital through the public markets rather than through exempt offerings conducted in the domestic and offshore markets.

There are significant regulatory constraints on the flexibility of smaller companies to time their primary offerings to avail themselves of advantageous market conditions. Under the current rules, smaller companies must coordinate the effectiveness of their registration statements with the time that they would like to offer and sell securities. They then must price the securities promptly after effectiveness, subject to the limited flexibility provided by current Rule 430A. Smaller companies may face risks associated with changing market conditions during the pendency of possible Commission staff review. Larger companies have much more flexibility because they are allowed to use ''shelf'' registration, which permits them to register in advance of offerings and take the securities ''off the shelf'' either in one offering or in segments (*i.e.*, tranches) without further staff review when market conditions are right.[9]

The Commission understands that the timing concerns of smaller companies have led some of these companies to forego registered offerings. The Commission is considering whether additional flexibility could be given to smaller companies without sacrificing investor protection. The proposals would not go so far as to extend full shelf registration to smaller companies. They would, however, permit certain smaller companies to price on a delayed basis after effectiveness, subject to important registrant and offering requirements designed to ensure that adequate company disclosure is available to the public securities markets. There would be no reduction in the information required to be disclosed or delivered to investors or in the issuer's liabilities under the federal securities laws. There would, however, be a change in the timing of delivery of information to investors, namely, information would have to be delivered to investors at least 48 hours before delivery of the confirmation of sale. This would be analogous to the preliminary prospectus delivery requirement for initial public offerings.[10]

This delayed pricing proposal is one of four Commission initiatives being issued today. Two of these releases relate to Rule 144,[11] the non-exclusive safe harbor for resales of ''restricted'' securities and securities held by affiliates of the issuer. The Commission is shortening the holding period requirements in Rule 144 to reduce the costs of private capital formation.[12] In addition, the Commission proposes to amend Rule 144 to simplify and clarify the rule and to codify staff interpretations.[13] Finally, the Commission is proposing amendments

[1] 17 CFR 230.415.

[2] 17 CFR 230.424.

[3] 17 CFR 230.430A. In the release adopting the Phase One Recommendations of the Task Force on Disclosure Simplification, the Commission rescinded the special filing rules for competitive bidding, recognizing that Rule 430A could be used for these purposes in accordance with staff interpretation. Release No. 33–7300 (May 31, 1996) [61 FR 30397]. Technical changes also are being proposed today to remove references to competitive bidding in paragraph (d) of current Rule 430A and to remove Item 512(c) of Regulation S–B [17 CFR 228.512(c)] and Item 512(d) of Regulation S–K [17 CFR 229.512(d)].

[4] 17 CFR 230.434.

[5] 15 U.S.C. 77a *et seq.*

[6] 17 CFR 228.601(b).

[7] 17 CFR 229.601(b).

[8] The securities would have to be described in the registration statement, but certain price-related and other terms could be omitted until the price was determined. See n. 16, below.

[9] Rule 415, the shelf registration rule, enumerates the types of offerings that may be offered on a delayed or continuous basis. Unless the securities fall within one of the provisions of Rule 415 detailing the various traditional shelf offerings, for example, securities to be offered and sold pursuant to a dividend or interest reinvestment plan, a company must be eligible to use short form registration statement Form S–3 [17 CFR 239.13] or F–3 [17 CFR 239.33].

For primary offerings on Form S–3, a company must: (1) be subject to the reporting requirements of Section 13 [15 U.S.C. 78m] or 15(d) [15 U.S.C. 78o(d)] of the Securities Exchange Act of 1934 (''Exchange Act'') [15 U.S.C. 78a *et seq.*]; (2) have filed all material required to be filed pursuant to Section 13, 14 [15 U.S.C. 77j(a)] or 15(d) for 12 calendar months immediately preceding the filing of the registration statement; (3) have filed in a timely manner all required reports; (4) have satisfied certain fixed obligations; and (5) have $75 million or more in public float. General Instruction I to Form S–3.

[10] Exchange Act Rule 15c2–8 [17 CFR 240.15c2–8].

[11] 17 CFR 230.144.

[12] Release No. 33–7390 (February 20, 1997). Under the amendments, the holding period for resales of limited amounts of securities by any person is reduced from two years to one year, and the holding period for resales by non-affiliates is reduced from three to two years.

[13] Release No. 33–7391 (February 20, 1997).

to Regulation S, [14] the Securities Act safe harbor for offshore offerings or resales, in order to curtail Regulation S abuses.[15]

II. Proposals

A. Proposed Rule 430A(e)

1. Overview and General Considerations

Current Rule 430A permits companies, if specified conditions are satisfied, to omit information concerning the public offering price, other price-related information and the underwriting syndicate from the prospectus contained in the registration statement at the time that the registration statement is declared effective.[16] Typically, this information is provided in a supplemented prospectus within fifteen business days after the effectiveness of the registration statement.[17]

The purpose of today's proposal is to provide pricing flexibility beyond that permitted by current Rule 430A. The rule would be amended to add a new paragraph providing an alternative procedure—a ''delayed pricing'' procedure with no fifteen day requirement.[18] To be eligible to use the new procedure, a company would have to satisfy the requirements of current Rule 430A, [19] and could omit the same information from the prospectus before pricing.[20] In addition, expanded Rule 430A would permit the company to omit the name of the managing underwriter, if any, from the registration statement that is declared effective.[21] The company ultimately would provide all omitted information in a supplemented prospectus, but would not be required to do so within any specified time period—only when it decided to price and offer the securities.[22]

To be eligible for this flexibility in timing, the company would have to satisfy the following registrant and offering requirements:

- Registrant requirements.
- The company would have to have been subject to the reporting provisions of the Exchange Act during the most recent 12 months preceding the filing of the registration statement and have filed all required reports for this period. In addition, the company would have to have filed all required reports at the time of offering and sale.
- The company would have to be a domestic issuer, except that a foreign private issuer could rely upon the rule if it had filed the same Exchange Act reports as domestic issuers.
- The company could not be an investment company registered under, or a business development company regulated under, the Investment Company Act of 1940.[23]
- The company could not be a blank check company or a company that issues penny stock.
- The company would have to have satisfied specified electronic filing provisions under the Commission's electronic filing rules.[24]
- Offering requirements
- The company would be required to file a post-effective amendment to its registration statement to: provide annual audited financial statements; furnish financial statements for probable acquisitions over the 50% materiality level and pro forma financial information; and satisfy the undertakings for updating a registration statement as required by Item 512(a) of Regulation S–K or Regulation S–B, as applicable.[25]
- Each time a prospectus was delivered, it would be accompanied by the most recent Form 10–Q [26] or 10–QSB [27] and Forms 8–K [28] (or a supplement would provide the information included in those reports). All forms of the prospectus filed with the Commission pursuant to Securities Act Rule 424 in connection with the offering as well as the Exchange Act information would be deemed part of the registration statement for liability purposes as of the date of first use. In addition, the Exchange Act information would be deemed to be a part of the prospectus as of the date of first use.
- The supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, together with any quarterly and Form 8–K information, would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. Further, the supplemented prospectus containing any updating information and all the omitted information, along with any quarterly and Form 8–K information, would accompany or precede any confirmation of sale.

These requirements are designed to assure that investors have adequate and current disclosure available to them to be able to make informed investment decisions at the time the securities are offered and sold.

The proposed new procedure would not reduce the level of liability under the Securities Act that applies to the information on which the investment decision is based; all information delivered would be deemed to be part of the registration statement for liability purposes and a part of the prospectus as of the date of first use. Informational requirements of a final prospectus meeting the requirements of Section 10(a) of the Securities Act [29] would remain the same. [30] Further, the rule

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[14] 17 CFR 230.901–904.

[15] Release No. 33–7392 (February 20, 1997).

[16] Current Rule 430A eliminates the need for pre-effective amendments to registration statements filed solely to provide this information. This information consists of information with respect to the public offering price (*e.g.*, interest rate, dividend rate, day of month of redemption), underwriting syndicate, underwriting discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date.

As with a current Rule 430A prospectus, under the proposal a prospectus used after effectiveness but prior to pricing would have to be clearly marked on the cover page to indicate that it is subject to completion or amendment. Items 501(a)(8) of Regulation S–K [17 CFR 229.501(a)(8)] and Regulation S–B [17 CFR 228.501(a)(8)].

[17] Rule 430A(a)(3). When a supplemented prospectus is not filed within the prescribed time, a post-effective amendment to the registration statement is filed. This post-effective amendment either restarts the 15-day pricing period or contains the omitted information.

[18] Proposed Rule 430A(e). For purposes of this release, Rule 430A as it stands today is referred to as ''current Rule 430A'' while this proposal is referred to as ''expanded Rule 430A'' or ''delayed pricing.'' Registrants not eligible to use expanded Rule 430A could continue to use current Rule 430A.

The genesis for this delayed pricing proposal is a recommendation from the Report of the Task Force on Disclosure Simplification, which was published on March 5, 1996.

[19] For example, current Rule 430A is limited to offerings of securities for cash and to registration statements that are declared effective.

[20] As with current Rule 430A, a complete description of securities would be required to be set forth in the prospectus contained in the registration statement declared effective. Item 202 of Regulation S–K [17 CFR 229.202].

Only S–3 eligible companies are permitted to register aggregate amounts of securities without allocation among classes. (General Instruction II.D of Form S–3 pertains to unallocated shelf registration statements.)

[21] Current Rule 430A permits a registration statement to be declared effective that contains a prospectus that omits information on the underwriting syndicate. Information on the managing underwriter must be disclosed. See Rule 430A(a) and Release No. 33–6714 (May 27, 1987) [52 FR 21252] at Section II.A.2. See Section II.A.2.b.1, below, for further information regarding identifying managing underwriters. Expanded Rule 430A could be used for self-underwritten offerings.

[22] In addition to supplying the omitted information, the supplemented prospectus would be updated as needed. In addition to the information expressly required in any federal securities law document, there must be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they were made, not misleading. See Securities Act Rule 408 [17 CFR 230.408] and Exchange Act Rule 12b–20 [17 CFR 240.12b–20].

[23] 15 U.S.C. 80a–1 *et seq.*

[24] These rules are generally found in Regulation S–T [17 CFR Part 232].

[25] 17 CFR 229.512(a) and 228.512(a). For purposes of this release, references to specific items of Regulation S–K [17 CFR 229.10 *et seq.*] also pertain to analogous provisions of Regulation S–B [17 CFR 228.10 *et seq.*].

[26] 17 CFR 249.308a.

[27] 17 CFR 249.308b.

[28] 17 CFR 249.308.

[29] 15 U.S.C. 77j(a).

[30] The proposal would not affect requirements concerning the age of financial statements contained in the registration statement at the time of effectiveness or the exhibits required to be filed as part of the registration statement before effectiveness. Rule 3–12 of Regulation S–X [17 CFR

Continued

proposal is not intended to permit ''generic'' registration statements that contain only minimum information about a proposed offering.

The due diligence efforts performed by underwriters, accounting professionals and others play a critical role in the integrity of our disclosure system. Under the current offering process for smaller companies, ample time exists for these ''gatekeepers'' to carry out due diligence activities. Concerns have been raised that the expedited access to the markets that would be provided by these proposals could make it difficult for gatekeepers, particularly underwriters, to perform adequate due diligence for the smaller companies that would be eligible to use expanded Rule 430A. [31] This may be particularly true if a company is able to seek aggressive competitive bids from several underwriters in a very short time frame immediately before offering its securities. While the nature of the due diligence investigation will vary considerably from one company to another because of the nature of the company, the underwriter's or other gatekeeper's involvement with the company over time, and the type of security being offered, is due diligence practical for offerings under these proposals? Could an underwriter perform the same quality of due diligence in a much shorter period of time? If not, should reliance on underwriters' due diligence continue if it would slow down the rapid access to the capital markets for smaller companies contemplated by these proposals? Has there been a change in the role other parties play concerning smaller companies, such as analysts or rating agencies, that should be considered? Should a waiting period between the company's determination to sell its securities and the commencement of the offering be imposed to permit greater time for due diligence? The rule proposal includes a number of safeguards and comment is solicited on whether additional safeguards should be included. Commenters should address whether these safeguards would adequately address the due diligence issues.

In addition, comment is solicited as to whether all the items of information that are permitted to be omitted under current Rule 430A(a) are appropriate for an offering under expanded Rule 430A. Is additional flexibility to omit information needed? In this regard, should certain terms of preferred or debt securities, such as financial covenants, be permitted to be omitted, or would this flexibility be inappropriate for smaller issuers? [32] Is it likely that expanded Rule 430A would be used for such securities, or is it likely that only common equity would be sold under this rule? Should the new provision be limited to common equity?

2. Conditions for Use of Expanded Rule 430A

Today's proposal would permit smaller companies to delay pricing their offerings so long as they otherwise met the requirements of current Rule 430A, other than the requirement to identify the managing underwriter(s) at the time the registration statement is declared effective, and they satisfied certain registrant and offering requirements. These latter requirements would assure that investors receive accurate and current information and the liabilities of the parties remain the same.

a. Registrant Requirements

First, expanded Rule 430A would be available only to a company that has been subject to the reporting provisions of Section 13(a) or 15(d) of the Exchange Act during the most recent twelve calendar months immediately preceding the filing of the registration statement and has filed all the material required to be filed pursuant to Section 13(a), 14 or 15(d) for this period.[33] In addition, the company must have filed all such required material at the time of offering and sale.[34] This proposed condition should help assure adequate and current public information concerning these companies. Comment is solicited as to whether a shorter (*e.g.*, six months) or longer (*e.g.*, two years) reporting period would be preferable. Should expanded Rule 430A be available in initial public offerings?

Comment also is solicited as to whether there should be qualitative conditions on the use of expanded Rule 430A. For example, to use Form S–2 or Form S–3, a company must be timely as well as current in its reporting obligations.[35] In addition, a company must not have failed to pay any dividend or sinking fund installment on preferred stock or defaulted on any installment or installments of indebtedness or on any rental on one or more long-term leases.[36] Should a company using the rule be required to satisfy any of these conditions, any combination of these conditions, or all of these conditions? Are such conditions necessary, given the other protections of expanded Rule 430A?

In addition, comment is solicited as to whether there are certain significant events (*e.g.*, a company, a majority shareholder, director, or executive officer found by a court or administrative body to have violated the federal securities laws) that should disqualify a company from using delayed pricing even though the expanded Rule 430A registration statement had been declared effective? Should a company be precluded from using expanded Rule 430A if it chooses a managing underwriter that was the underwriter of securities covered by any registration statement that is the subject of any pending proceeding or examination under Section 8 of the Securities Act,[37] or was the subject of any refusal order or stop order entered thereunder within 5 years? Should a company be permitted to use expanded Rule 430A where it names a managing underwriter that is, or was, subject to a permanent injunction for federal securities law violations? Comment also is solicited as to whether a company should be precluded from using the rule if its audited financial statements contain a ''going concern'' opinion from its accountants.

Second, the proposal would be available to foreign private issuers only if they file the same reports under Section 13(a) or 15(d) of the Exchange Act and meet the same disclosure requirements as domestic companies.[38] This limitation appears appropriate, given that foreign private issuers can file

210.3–12] and Item 601 of Regulation S–K [17 CFR 229.601].

As with current Rule 430A, trust indentures would not have to be filed in executed form at the time of effectiveness of the registration statement. The filing requirement may be satisfied by submission of the final form of the document to be used; the form must be complete, except that signatures and related matters could be omitted.

[31] The Commission estimates that at least 3,200 companies would qualify to use these proposals that do not qualify to use shelf registration. The average eligible company has a market capitalization of $27.5 million, assets of $80.1 million, and annual sales of $57.8 million. The median eligible company has a market capitalization of $22.3 million, assets of $27.0 million, and annual sales of $20.9 million.

[32] Under the proposal, as under current Rule 430A, the pricing terms of preferred stock that may be set by the board of directors under state law, such as the timing of an interest rate reset, could be set forth at the time of pricing.

[33] Proposed Rule 430A(e)(1)(i). The provisions of this rule would be available to a successor registrant. Proposed Instruction to Rule 430A(e) uses the same definition as General Instruction I.A.7 of Form S–3 and General Instruction I.F. of Form S–2 [17 CFR 239.12].

[34] Proposed Rule 430A(e)(1)(i). This requirement would need to be met at the time of using both the 48-hour prospectus and the pricing prospectus discussed below.

[35] General Instruction I.C. to Form S–2 and General Instruction I.A.3 of Form S–3.

[36] General Instruction I.D. to Form S–2 and General Instruction I.A.5 to Form S–3.

[37] 15 U.S.C. 77h.

[38] Proposed Rule 430A(e)(1)(ii).

periodic reports less frequently than domestic companies.[39] To permit smaller companies to delay pricing, there must be sufficient and current public information available in the marketplace and delivered to investors to assure investor protection. Comment is solicited as to whether there are alternative conditions that could be placed on foreign private issuers not eligible to use Form F–3 so that they could rely upon the proposals.

Third, investment companies registered under, and business development companies regulated under, the Investment Company Act of 1940 would be excluded from the use of expanded Rule 430A since these companies have special flexibility and restrictions on their securities that make delayed pricing unnecessary.[40] Comment is solicited, however, as to whether there are circumstances under which the flexibility of delayed pricing would be a useful tool for certain types of registered investment companies and business development companies.

Fourth, blank check and penny stock issuers would be ineligible to use the proposed rule, given the substantial abuses that have arisen in such offerings.[41] Are there any additional classes of issuers that should be excluded from expanded Rule 430A either because of the nature of the investment vehicle (*e.g.*, partnership or other similar programs) or potential for abuse (*e.g.*, blind pools that will not commit a material portion of the net proceeds of the offering to specified assets)? Should the same securities law violation disqualification provisions that are used in the Private Securities Litigation Reform Act of 1995[42] preclude the use of this rule?

The final registrant condition would pertain to the Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system of the Commission. As of May 6, 1996, the Commission has required all domestic companies to file most of their documents electronically via EDGAR,[43] absent a hardship exemption. One of the advantages of EDGAR is that it facilitates the dissemination of time-sensitive information to the nation and the world in a matter of minutes, giving investors and financial markets the benefit of immediate access to the information. In September 1995, the Commission established its own Internet Web site and began to post EDGAR filings and other materials on a 24-hour delayed basis.[44]

Since the proposals would extend the flexibility of delayed pricing to companies not eligible for Form S–3, adequate and current information regarding these companies must be broadly disseminated and available to the public. As EDGAR filings help assure such dissemination, the proposals would require that the company satisfy the same two EDGAR-related eligibility requirements as for Forms S–2 and S–3.[45] First, the company must have filed all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a hardship exemption.[46] Second, the company must have submitted all required financial data schedules.[47] In addition, to ensure that company-related information about these non-S–3 eligible companies is on the EDGAR database and thus widely disseminated, the proposals also would require that the company not have obtained a continuing hardship exemption under Rule 202(a) of Regulation S–T from the electronic filing requirements of the Commission during the 12 months immediately preceding the filing of the registration statement.[48] These EDGAR requirements would apply both at the time the registration statement is filed and the time of offer and sale.

Comment is solicited as to whether these EDGAR-related conditions are necessary to permit delayed pricing. The continuing hardship exemption condition would be limited to Rule 202(a) hardship exemptions since under this provision a registrant is not required to follow up the paper filing, which was the subject of the request, with an electronic confirming copy. If a registrant obtained a Rule 202(d) hardship exemption, however, then it would be required to file an electronic confirming copy of its paper filing within some agreed-upon period of time. Should this continuing hardship exemption condition be expanded to encompass Rule 202(d) hardship exemptions where the required electronic confirming copy was filed a significant period of time after the paper filing to which it relates? Is the one-year period for not having received a continuing hardship exemption under Rule 202(a) warranted? Or should a longer (*e.g.*, two years) or shorter (*e.g.*, six months) period be required?

b. Offering Requirements

(1) Post-Effective Amendments

In addition to the above registrant requirements, expanded Rule 430A would require the company to file a post-effective amendment to its registration statement under certain circumstances.[49] The purpose of this requirement is to assure that the staff has an opportunity to review the revised disclosure before the company proceeds with additional offerings.

Today's proposals would require the company to file a post-effective amendment to its registration statement in three circumstances. First, no later than 90 days after its fiscal year end, the company would have to file a post-effective amendment to its registration statement to update the document[50] and provide annual audited financial statements.[51] This requirement would

[39] Under the foreign integrated disclosure system, reporting foreign private issuers file an annual report on Form 20–F [17 CFR 249.220f]. All other interim financial information required to be made public is based upon home-country rules and practices. Consequently, foreign private issuers are not required to file quarterly reports on Form 10–Q or current reports on Form 8–K in accordance with U.S. disclosure practices. Rule 13a–16 [17 CFR 240.13a–16].

[40] Proposed Rule 430A(e)(1)(iii).

[41] Proposed Rule 430A(e)(1)(iv). A ''blank check'' company is defined at Securities Act Rule 419(a)(2) [17 CFR 230.419(a)(2)], while ''penny stock'' is defined at Exchange Act Rule 3a51–1 [17 CFR 240.3a51–1].

[42] Pub. L. No. 104–67, 109 Stat. 737 (December 22, 1995). As part of the Act, Section 27A was added to the Securities Act [15 U.S.C. 77z–2] and Section 21E was added to the Exchange Act [15 U.S.C. 78u–5] to create a statutory safe harbor from private liability for certain forward-looking statements. Among other matters, the 1995 Act excludes from the safe harbor statements made by the issuer and certain persons if the statements were made within three years after the maker of the statement had been found responsible for certain securities law or related violations. See Section 27A(b)(1)(A) of the Securities Act and Section 21E(b)(1)(A) of the Exchange Act.

[43] Forms SB–1 [17 CFR 239.9] and SB–2 [17 CFR 239.10] relating only to initial public offerings may be filed in paper at the Commission's Headquarters until May 5, 1997. Release No. 33–7373 (December 16, 1996) [61 FR 67200].

[44] The Commission's Internet Web site address is http://www.sec.gov.

[45] General Instructions I.H to Form S–2 and I.A.8 to Form S–3.

[46] Proposed Rule 430A(e)(1)(v).

[47] Proposed Rule 430A(e)(1)(v). Financial data schedules are required to be submitted as exhibits to filings containing updated annual or interim financial information, other than by incorporation by reference. Item 601(c) of Regulation S–K [17 CFR 229.601(c)].

[48] Proposed Rule 430A(e)(1)(v).

[49] In contrast, Form S–3 (and F–3) registrants may incorporate by reference certain information rather than filing a post-effective amendment. These registrants do not have a requirement to file post-effective amendments in the same set of circumstances.

[50] Each post-effective amendment would contain a completely updated prospectus, which would supersede all prior prospectuses. Proposed Rule 430A(e)(2)(i).

[51] Proposed Rule 430A(e)(2)(i). This requirement would be in addition to its requirement under Section 13(a) or 15(d) to file its 10–K or 10–KSB with the Commission.

If a company changes its fiscal year end, it must file a transition report on Form 10–K where the transition period is six months or more. For transition periods of less than six months,

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assure that Commission staff has the opportunity to review information regarding the company and the offering on an annual basis and that prospectus information distributed to investors is current. Comment is solicited as to whether this safeguard is needed, and if so, whether the time frame for filing the post-effective amendment should be tied to the filing of the Form 10–K (or Form 10–KSB) so that if the registrant determines to file its Form 10–K before its due date, the post-effective amendment would be required at the same time.

Second, a company would be required to file a post-effective amendment when it was required to file audited financial statements for significant probable business acquisitions pursuant to Rule 3–05 of Regulation S–X[52] and Item 310(c) of Regulation S–B[53] and pro forma financial information.[54] Under recent amendments, this would occur where the pending acquisition exceeds the 50% significance level.[55] The post-effective amendment would be filed as soon as the acquisition was probable.[56] Again, this requirement would assure that Commission staff has the opportunity to review the information.

To the extent that the pending acquisition falls below the 50% threshold level, the company would be required by Form 8–K to file audited financial statements of each significant acquired business within 75 days of consummation of the acquisition.[57] Comment is solicited as to whether under the proposed delayed pricing procedure, a company should be required to file a post-effective amendment in addition to a Form 8–K, where the acquisition falls below the 50% significance criterion. For example, should a 20% significance test be used?

Finally, since the proposal would permit delayed pricing, the rule would require the company to furnish the undertakings for updating registration statements required by Item 512(a) of Regulation S–K or Regulation S–B, as applicable. These undertakings require a post-effective amendment to be filed in specific circumstances, and would be in lieu of the similar undertakings required by Item 512(i) of Regulation S–K for other Rule 430A offerings. These undertakings would be as follows:

- The company must file a post-effective amendment to: (1) include any updated prospectus required by Section 10(a)(3) of the Securities Act; [58] (2) reflect any facts or events that represent a fundamental change in the information set forth in the registration statement; and (3) include any new or changed material information with respect to the plan of distribution.[59]
- The company must state that each post-effective amendment ''shall be deemed to be a new registration statement relating to the securities offered therein and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.'' [60]
- Finally, the company must deregister by means of a post-effective amendment any securities that remain unsold at the termination of the offering.[61]

Comment is solicited as to whether these undertakings, coupled with the other conditions of the proposed rule, would assure that investors receive adequate and current information. Are there any other circumstances that should require a post-effective amendment to be filed?

As noted above, under the proposal, a company would not need to name the managing underwriter(s) in its expanded Rule 430A registration statement. Given the important role of underwriters in an offering, should a company be required to identify the underwriter in the registration statement if it is known? Should a company be required to file a post-effective amendment to its registration statement when a managing underwriter has been selected?[62] A requirement to file a post-effective amendment could help assure that underwriters have necessary time to conduct a due diligence investigation before the securities are sold. Alternatively, when a managing underwriter was selected, would a supplemented prospectus be sufficient, as proposed?[63] If only a supplemented prospectus is required, should the form of underwriting agreement be filed in a post-effective amendment that becomes effective automatically or should it be filed in a required Form 8–K?

If a change in the managing underwriter(s) occurs from that initially disclosed in the registration statement that had been declared effective, should the company be required to file a post-effective amendment, or would a supplement suffice? If only a supplement is needed either to add the managing underwriter or reflect a change in the managing underwriter, should there be a waiting period before the company can sell its securities? Should a change in the managing underwriter solely to add or delete a co-manager necessitate a post-effective

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companies have the option to file transition reports on either Form 10–Q or Form 10–K. See Exchange Act Rules 13a–10 [17 CFR 240.13a–10] and 15d–10 [17 CFR 240.15d–10]. With respect to expanded Rule 430A, a post-effective amendment would have to be filed by the due date of the transition report on Form 10–K, namely, within 90 days of the close of the transition period or the date of the determination to change the fiscal year end, whichever is later.

[52] 17 CFR 210.3–05.

[53] 17 CFR 228.310(c). Proposed Rule 430A(e)(2)(i).

[54] Article 11 of Regulation S–X [17 CFR 210.11–01 *et seq.*] and Item 310(d) of Regulation S–B [17 CFR 228.310(d)].

[55] Rule 210.01–02(w) of Regulation S–X and Rule 310(c)(2) of Regulation S–B [17 CFR 210.1–02(w) and 228.310(c)(2)]. In October 1996, the Commission adopted amendments to streamline financial statement requirements of significant acquisitions to facilitate the Securities Act registration process. Release No. 33–7355 (October 10, 1996) [61 FR 203].

[56] Within 15 days of consummation of the significant acquisition, a company must file a Form 8–K reporting the event. Pursuant to staff position, the Form 8–K need not include more recent financial statements of the acquired business if no more than two interim periods have passed since the latest balance sheet date of the previously filed financial statements. However, audited financial statements must be updated in the Form 8–K to the company's most recently completed fiscal year pursuant to Item 310(g) of Regulation S-B [17 CFR 228.310(g)] and Rule 3–12(b) of Regulation S–X [17 CFR 210.3–12(b)].

[57] Items 2 and 7 of Form 8–K. The Form 8–K would contain: an accountant's report as required by Rule 2–02 of Regulation S–X [17 CFR 210.2–02]; and an accountant's consent to having his or her opinion deemed to be a part of the expanded Rule 430A registration statement. Section II.B, below, sets forth proposed amendments to the exhibit requirements of Regulations S–K and S–B to facilitate the filing of consents.

[58] Under Section 10(a)(3) of the Securities Act [15 U.S.C. 77j(a)(3)], where a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein must be of a date not more than sixteen months old. The nine-month period is calculated from the effective date of the registration statement, not of any later post-effective amendment.

[59] Item 512(a)(1) of Regulation S–K [17 CFR 229.512(a)(1)].

[60] Item 512(a)(2) of Regulation S–K [17 CFR 229.512(a)(2)].

[61] Item 512(a)(3) of Regulation S–K. Foreign issuers would be ineligible to use the proposed delayed pricing procedure unless they filed the same forms as domestic issuers, as discussed in Section II.A.2.a. As a result, paragraph (a)(4) of Item 512, which relates to foreign private issuers, would generally be inapplicable.

[62] Rule 415 at one time required a post-effective amendment to the registration statement to be filed when a managing underwriter was added or deleted. The Commission removed this requirement in Release No. 33–6423 (September 2, 1982) [47 FR 39799].

As with delayed shelf filings, a company using expanded Rule 430A could (but would not be required to) name a group of possible underwriters in the preliminary prospectus. (See n. 63, below, for when a company must identify any managing underwriter.) All of the other information required by Item 508 of Regulation S-K [17 CFR 229.508] regarding the plan of distribution would be included in the preliminary prospectus before requesting acceleration of the registration statement.

[63] As discussed below, at least 48 hours before sending any confirmation of sale, the supplemented prospectus containing any updating information along with the Exchange Act information would be required to be delivered. This supplement would have to name any managing underwriter. Proposed Rule 430A(e)(2)(iii).

amendment or a supplement? Is the term ''managing underwriter'' sufficiently clear based upon industry practice or should a definition be developed for delayed pricing?

(2) Delivery of Information

The final proposed delayed pricing conditions would pertain to delivery of updated company-related information. The company would be required to deliver a supplemented prospectus containing the omitted information and/or any updating information, together with its Form 10–Q or Form 10–QSB as of the end of the most recent fiscal quarter not included in the registration statement. The company also would be required to deliver all Forms 8–K filed since effectiveness of the registration statement, other than those solely relating to Item 5 of that form that are voluntary filings.[64] Instead of delivering such Exchange Act reports as separate documents at no charge, the company could elect to integrate all Exchange Act information into a single supplement to the prospectus that would include pricing and/or updated company information.[65]

This information delivery condition, which is substantially similar to that required in Form S–2,[66] would assure that potential investors receive adequate and current information about the registrant and its offering.[67] The delivered information would be deemed a part of the registration statement and the prospectus as of the date that the information is first used in the offering of securities, and thus have liability under Sections 11 and 12(a)(2) of the Securities Act.[68]

To assure that investors have time to review the information in connection with making the investment decision, a supplemented prospectus containing any updating information and the name of the managing underwriter, if any (but not necessarily the other omitted information), would have to be delivered with the Exchange Act information referenced above to potential investors at least 48 hours before sending the confirmation of sale.[69] The quarterly and Form 8–K information would be a part of the package. This would be analogous to the preliminary prospectus delivery requirement in Rule 15c2–8 for initial public offerings. Comment is solicited on whether this condition would be practicable for issuers and whether it would afford advantages to the investing public. Would these potential benefits justify the possible reduction in flexibility provided by the new procedure? If such a requirement is justified, should a longer period be required, such as five or ten business days?

Comment is solicited as to whether voluntary Item 5 Forms 8–K should be required to be delivered to each person who receives a prospectus and the other information specified by the rule. Alternatively, are there specified matters that should be required to be included in the supplemented prospectus itself rather than in the other delivered materials? Should the quarterly report to shareholders be permitted to be delivered in lieu of the Form 10–Q or Form 10–QSB if it includes the information required by those forms? If voluntary Forms 8–K are not required to be delivered, should they still be incorporated by reference into the registration statement in order to maintain liability, as would be true for Form S–3 offerings?

In this regard, companies are reminded that in addition to the information expressly required to be included in any federal securities law document, there must be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they were made, not misleading.[70] Comment is solicited as to whether there should be an express requirement for a company using delayed pricing to describe any and all material changes in the company's affairs that were not described in the updated information delivered with the prospectus.[71]

c. Additional or Alternative Conditions

Comment is solicited as to whether other conditions to delayed pricing are needed. For example, should a company be required to file a supplemented prospectus with the omitted information within a certain period of time after effectiveness of the registration statement? If the company did not price and offer its securities within this period, then a post-effective amendment could be required, as in current Rule 430A.[72] If a definite period for filing an expanded Rule 430A supplemented prospectus is needed, would three months be sufficient? Or, would a shorter (*e.g.*, one month) or longer period (*e.g.*, six months) be sufficient?

Should a minimum time period be imposed between the filing of Exchange Act reports, such as a Form 10–Q or 10–QSB or other updating information with material developments, and the offering of securities even though this information would be delivered to investors? If such a waiting period between the filing of an Exchange Act report and the offering of securities is warranted in order to assure dissemination of information to the marketplace, would a sufficient time be five business days? Alternatively, should a shorter (*e.g.*, three business days) or longer period of time (*e.g.*,

[64] Rule 430A(e)(2)(ii). Exhibits that had been filed with the Commission with these reports would not have to be delivered to security holders.

A registrant using delayed pricing would not need to deliver its Form 10–K [17 CFR 249.310] or Form 10–KSB [17 CFR 249.310b], since it would be required to file a post-effective amendment to the registration statement to include a new prospectus with the new annual audited financial statements each fiscal year. Proposed Rule 430A(e)(2)(i).

[65] The complete package would have to be delivered any time the prospectus was delivered.

[66] Form S–2 does not require the delivery of Forms 8–K; it does, however, require a company to describe any and all material changes to its affairs that have occurred since the end of the fiscal year for which certified financial statements were included in the information delivered to security holders and not described in the Form 10–Q, 10–QSB or quarterly report to security holders delivered to investors. Item 11 of Form S–2.

One of the recommendations of the Commission's Task Force on Disclosure Simplification was to eliminate Form S–2/F–2, and permit smaller companies that have been timely reporting for 12 months, to deliver, along with their prospectuses, periodic reports in lieu of restating information regarding themselves in the prospectuses contained in registration statements filed on Form S–1/F–1 [17 CFR 239.31]. This recommendation may be considered at a later time. If it were implemented, it could operate together with delayed pricing to reduce the costs of registration by eliminating printing and other costs associated with the preparation of the traditional prospectus and give even greater flexibility to registrants to time their offerings with favorable market conditions.

[67] Electronic media may be used as a means of delivering this information to security holders in certain circumstances. See Release Nos. 33–7233 (October 6, 1995) [60 FR 53458] and 33–7288 (May 9, 1996) [61 FR 24644], in which the Commission expressed its views with respect to the use of electronic media for information delivery under the federal securities laws.

[68] Proposed Rule 430A(e)(3). Proposed Rule 430A(e)(3) would maintain liability on all forms of prospectus filed with the Commission pursuant to Rule 424 in connection with the offering by deeming them to be part of the registration statement at the date of first use. This would be true for the delivered Exchange Act information as well. The rule also would provide that the Exchange Act reports that are deemed to be a part of the registration statement would be a part of the prospectus as of the date of first use.

The documents also would be subject to anti-fraud liability under Securities Act Section 17(a) [15 U.S.C. 77q(a)], Exchange Act Section 10(b) [15 U.S.C. 78j(b)] and Rule 10b–5 [17 CFR 240.10b–5] thereunder.

[69] Proposed Rule 430A(e)(2)(iii). Of course, the supplemented prospectus containing any updating information and all the omitted information, including the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information, would accompany or precede any confirmation of sale. Proposed Rule 430A(e)(2)(iv).

[70] Securities Act Rule 408 and Exchange Act Rule 12b–20.

[71] This would be analogous to the Item 11 line item requirement in Form S–2, discussed above.

[72] Rule 430A(a)(3).

seven business days) be imposed? Or would any required delay significantly reduce the flexibility that the rule is designed to provide?

Another condition to assure that adequate and current information regarding the company is widely available could be to require a waiting period between the company's determination to sell its securities and the commencement of the offering. For example, a company could be required to file a Form 8–K announcing its intent to offer its securities within a specified period of time. Since the trading market for certain smaller issuers may be relatively illiquid, this condition could give the market time to respond to this news. If such a period were to be imposed, would five business days be sufficient? Or would a shorter (*e.g.*, two business days) or longer (*e.g.*, seven business days) period of time be needed? Should the length of any waiting period be tied to the average daily trading volume of the company so that a longer waiting period could be required if the company has a low average daily trading volume, and thus less liquidity? Should average daily trading volume for such a test be determined in a manner consistent with recently adopted Regulation M?[73] If an average daily trading volume test is incorporated into expanded Rule 430A, should a public float component also be used as in Regulation M?[74] Actively-traded companies could be excluded from any waiting period. If a waiting period is desirable, should it be structured so that an announcement of the offering could not be made more than a certain period of time before the commencement of the offering?

As proposed, the rule would not limit the number of offerings that could be done from the registration statement. Like Form S–3, the delayed offering may be done as one offering or in several tranches. Should the rule be limited to a single delayed offering? Or should some other limit be placed on the number of offerings?

The Commission recently adopted Regulation M to prevent manipulative conduct by persons interested in a securities offering. At that time, the Commission modified the application of anti-manipulation regulation to shelf-registered distributions. The Commission explained that, for purposes of Regulation M, each takedown off a shelf is to be individually examined to determine whether the offering of that tranche constitutes a distribution (*i.e.*, whether it satisfies the ''magnitude'' and ''special selling efforts and selling methods'' criteria of a distribution).[75] This position is intended to provide greater flexibility to participants in shelf-registered distributions, which for primary offerings are now limited to larger issuers.[76]

The Commission has considered the appropriate application of anti-manipulation regulation to offerings with delayed pricing under proposed Rule 430A(e). Because the proposed rule is expected to be used principally by smaller issuers, many of which are less-seasoned and can have relatively illiquid markets for their securities, the Commission proposes to require compliance with the full applicable restricted period of Regulation M prior to pricing of each offering relying on proposed Rule 430A(e). Thus, issuers and underwriters participating in an offering using delayed pricing would be subject to a restricted period of one or five business days before pricing of each tranche. Commenters are invited to provide their views on this interpretation. Is it necessary to expressly amend Rules 101 and 102 of Regulation M to incorporate this position?

Additionally, Rule 105 of Regulation M is intended to preclude manipulative short selling in anticipation of a public offering.[77] The rule prohibits the covering of a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if the short sale occurred during the period commencing five business days before pricing the offering. The rule excludes offerings filed under Rule 415. It is uncertain whether offerings relying on proposed Rule 430A(e) and the accompanying amendment to Rule 415 will be conducted similarly to primary offerings off the shelf by larger issuers. Accordingly, the Commission seeks comment on whether to revise Rule 105 of Regulation M to exclude offerings filed under Rule 415, other than those filed pursuant to proposed Rule 415(a)(1)(xii).

Finally, comment is solicited as to whether a company should have the market flexibility to proceed under either expanded Rule 430A or current Rule 430A so long as it includes both sets of undertakings[78] in the initial filing or in a pre-effective amendment. At the time of requesting acceleration of the registration statement, the company could advise the staff as to which rule it would use.

The conditions discussed above are intended to strike a balance between the needs of certain smaller companies to price their securities on a primary delayed basis and the needs of investors to have adequate and current information regarding these registrants available to them to be able to make informed investment decisions. Comment is solicited as to whether the foregoing conditions, taken together, accomplish this objective or whether only certain combinations of these conditions are needed. If the latter, commenters are requested to specify the combinations that would be desirable and the reasons for their views.

B. Other Proposed Amendments

Corresponding amendments to Securities Act Rules 415, 424 and 434[79] and Item 601(b) of Regulations S–K and S–B[80] also are being proposed. Securities Act Rule 415 would be amended to add a new paragraph permitting delayed pricing under Rule 430A(e).[81]

Securities Act Rule 424, which pertains to the filing of prospectuses, would be revised to add two new paragraphs (8) and (9) relating to the filing of delayed pricing prospectuses so as to facilitate access and use of the

[73] 17 CFR 242.100 *et seq.* Release No. 34–38067 (December 20, 1996) [62 FR 520].

[74] See 17 CFR 242.101 and 102.

[75] Release No. 34–38067, 62 FR at 526.

[76] Under prior Commission interpretation, if the aggregate amount of securities registered on the shelf and the possibility of using special selling efforts existed, each takedown was deemed to be part of a single distribution, regardless of the amount of the securities sold or the manner of their sale. See Release No. 34–23611, 51 FR 33242.

[77] 17 CFR 242.105.

[78] Items 512(a) and 512(i) of Regulation S–K, respectively.

[79] One minor conforming change is being proposed to Rule 434. Paragraph (b)(2) would be amended to add a reference to Rule 430A(e) to the existing reference to Rule 430A(b).

[80] Item 601 of Regulations S–K and S–B would be amended to state that where the filing of a written consent is required with respect to material deemed to be a part of an expanded Rule 430A registration statement, the consent may be filed as an exhibit to the material that is deemed to be a part of the registration statement (*e.g.*, a Form 8–K containing financial statements for acquisitions below the 50% threshold). See Section II.A.2.b, above.

[81] Proposed paragraph (a)(1)(xii) to Rule 415. Paragraph (a)(2) of Rule 415, which provides that securities may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the date of the registration, would be amended to add a reference to Rule 430A(e) offerings. Finally, paragraph (a)(3) of Rule 415 would be revised to add a reference to Item 512(a) of Regulation S–B, which relates to the Rule 415 undertakings. This reference was inadvertently omitted from this paragraph when Regulation S–B was adopted in 1992. Release No. 33–6949 (July 30, 1992) [57 FR 36442].

Since Rule 430A(e) would be a type of Rule 415 offering, a registrant relying on the rule would have to check the Rule 415 box on the facing page of the registration statement.

information. If a company elected to use delayed pricing, supplemented prospectuses would be filed under Rule 424(b)(8) or (b)(9). Any prospectus filed under paragraph (b)(8) would reflect information, facts, or events that would constitute a substantive change from, or addition to, the information set forth in the last form of prospectus filed with the Commission under Rule 424 or as part of the expanded Rule 430A registration statement.[82] ''Substantive,'' as in current Securities Rule 424, refers to additions or modifications that supplement, update or correct the content and substance of the information contained in a prospectus, except for typographical, grammatical, format, and clarifying changes that do not affect an investor's understanding of the information.[83]

Also under paragraph (b)(8), a company would file any supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, that it delivers to any person, with quarterly information and Forms 8–K, who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. Any prospectus filed under Rule 424(b)(8) would be required to be filed no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sale, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.[84] Comment is solicited as to whether a shorter period is needed—either one business day after first use, or on the day of first use in order for the market to have this information.

The supplemented prospectus containing any updating information and all omitted price and price-related information that was omitted from the registration statement at the time of effectiveness would be required to be filed with the Commission under Rule 424(b)(9) no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.[85] This short period, which is the same as for current Rule 430A, coupled with the fact that the filing would be made via EDGAR, would facilitate prompt availability of the information to the investing public and the Commission. Comment is solicited as to whether this time frame should be shorter (*e.g.*, one business day) or longer (*e.g.*, three business days).

Comment is solicited as to whether expanded Rule 430A prospectuses, like current Rule 430A prospectuses, warrant separate classification for purposes of Rule 424. Alternatively, existing paragraphs of Rule 424 could be revised to reflect the filing of expanded Rule 430A prospectuses; however, ready identification by the Commission staff and public of these prospectuses could be hampered.

With respect to the tracking or monitoring of new delayed pricing offerings in general, would separate EDGAR submission form types for these registration statements be warranted? Currently, Rule 430A registration statements are not separately identified for purposes of EDGAR.

III. General Request for Comment

Any interested persons wishing to submit comment on any of the proposals set forth in this release are invited to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7–9–97; this file number should be included on the subject line if e-mail is used. Comments received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov). Comments are solicited from the point of view of issuers, underwriters and the investing public.

IV. Cost-Benefit Analysis

To assist the Commission in evaluating the costs and benefits that may result from these proposals, commenters are requested to submit their views and empirical data relating to any costs and benefits associated with these proposals. It is anticipated that expanded Rule 430A, if adopted, could facilitate the capital-raising efforts of smaller companies that meet certain conditions by permitting them to delay pricing their offerings after the registration statement becomes effective so as to take advantage of favorable market conditions. Such flexibility could enable such companies to raise equity capital on more advantageous terms or to obtain lower interest rates on debt. In addition, issuers would be able to vary certain terms of the securities being offered upon short notice, enabling them to more efficiently meet the competitive requirements of the public securities markets.

There would be certain costs associated with expanded Rule 430A, but they should be more than offset by its benefits. A company would be required to file a post-effective amendment to its registration statement at least annually until the offering is terminated. In addition, a company would be required to deliver its most recent Form 10–Q and non-voluntary Forms 8–K to investors along with its supplemented prospectus. This updated information could either be included in the supplemented prospectus itself or be set forth in separate documents that are delivered along with the prospectus. As noted in the release, the supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information, would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. These costs are necessary safeguards to the use of the rule in order to assure investor protection. The benefits of pricing flexibility should outweigh these costs.

The Commission is aware that many companies that may want to use delayed pricing may also be subject to state regulation. It is possible that the full benefits of this rule may not be available unless some modifications to state regulation are made.

Over 1,700 companies filed registration statements for securities offerings on Forms S–1, SB–2, and S–11 in 1996. Approximately half of these companies would have qualified for expanded Rule 430A if the rule had been in effect at that time. Of those companies that would not have qualified under the rule, 99% were disqualified because they were making their initial public offering (''IPO'').

Based on an analysis of 100 non-IPO securities offerings, the Commission estimates that 860 companies would have met the proposed eligibility criteria for expanded Rule 430A in

[82] Proposed paragraph (b)(8) to Rule 424. For example, where a company determined to update its prospectus supplement to include a recent developments section, it would file such supplement under proposed paragraph (b)(8) of Rule 424.

[83] Release No. 33–6714 (May 27, 1987) [52 FR 21252] at Section II.B.

[84] Proposed paragraph (b)(8) to Rule 424.

[85] Proposed paragraph (b)(9) to Rule 424. This time frame would mirror that of current Rule 430A offerings. Rule 424(b)(1).

1996. The 860 companies registered securities with an estimated offering value of $52 billion. The Commission estimates that approximately 11% of these offerings might have availed themselves of the expanded Rule 430A had it been available. This estimate is based upon the Commission's experience with the number of registrants that file Form S–3 for shelf offerings.

Expanded Rule 430A should not result in a major increase in costs or prices for consumers or individual industries; likewise, it should not have significant adverse effects on competition, investment, or innovation. However, comment is requested on these preliminary views. Commenters are asked to provide empirical data or other facts to support their views.

Comment is requested on whether the proposed rules are likely to have a $100 million or greater annual effect on the economy. Commenters should provide empirical data or other facts to support their views.

The Commission requests comment on the foregoing analysis and its preliminary views. Commenters are encouraged to provide their own analysis and views on these issues and any empirical data that would help the Commission assess the costs and benefits of these proposals. Commenters also are encouraged to suggest alternative or additional ways of providing more pricing flexibility to smaller companies, consistent with investor protection.

V. Summary of Initial Regulatory Flexibility Analysis

An Initial Regulatory Flexibility Analysis (''IRFA'') has been prepared in accordance with 5 U.S.C. 603 concerning expanded Rule 430A and other amendments discussed in this release. The analysis notes that expanded Rule 430A, if adopted, would benefit certain smaller companies, including small entities, in connection with their needs to raise capital. This goal would be accomplished by giving these companies flexibility to delay pricing after their registration statement becomes effective, thus permitting them to time their offerings to advantageous market conditions.

As discussed more fully in the IRFA, the Commission is aware of approximately 1019 Exchange Act reporting companies that currently satisfy the definition of ''small entity'' under Securities Act Rule 157. These Exchange Act reporting companies could potentially avail themselves of expanded Rule 430A assuming that the other conditions of the rule are satisfied (*e.g.*, having reported under the Exchange Act for at least a year, not being a blank check company or penny stock issuer, etc.). It is estimated that approximately 734 of these 1019 companies would be eligible to use the rule, if adopted. There is no reliable way to determine how many of these entities will want to use expanded Rule 430A or how many businesses may become subject to reporting obligations in the future.

As noted in the IRFA, it is not anticipated that increased recordkeeping burdens would result from expanded Rule 430A. To the extent that a small entity uses expanded Rule 430A, there would be an increase in its reporting obligations since it would be required to file a post-effective amendment to its registration statement at least annually until the offering is terminated. Compliance burdens also would increase since the company would be required to deliver updated company-related information along with the supplemented prospectus. This Exchange Act information could be included in a supplement to the prospectus or delivered in separate documents along with the prospectus. In addition, the supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K information would be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale. The IRFA also indicates that there are no current federal rules that duplicate, overlap or conflict with the rules to be amended.

As more fully discussed in the IRFA, other possible significant alternatives to the proposals were considered, including establishing different compliance or reporting requirements for small entities. These alternatives are not appropriate since they would be inconsistent with the goals of the Securities Act as they relate to the protection of investors. Another alternative would be to exempt small entities from all, or a part, of expanded Rule 430A. Small entities would benefit from the pricing flexibility from the rule so they would not want to be exempt from its coverage. To exempt small entities from certain conditions of expanded Rule 430A, for example, the requirement to file post-effective amendments under specified circumstances would be contrary to the goals of the Securities Act since investors in small entities should have the same protections as investors in larger companies. The opportunity for staff review of these post-effective amendment filings is considered to be an important safeguard to the use of the rule.

Written comments are encouraged with respect to any aspect of the IRFA. In particular, comment is solicited on the number of small entities that would be affected by the proposed rules and the determination that the proposed rules would not increase recordkeeping but would increase reporting and other compliance requirements. If commenters believe that the proposals would significantly impact a substantial number of small entities, the nature of the impact and an estimate of the extent of the impact should be provided. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also is requesting information regarding the potential impact of the proposed rules on the economy on an annual basis. Commenters should provide empirical data to support their views. Comments will be considered in the preparation of the Final Regulatory Flexibility Analysis if the proposed amendments are adopted. A copy of the IRFA may be obtained by contacting Barbara C. Jacobs, Division of Corporation Finance, Mail Stop 7–8, 450 Fifth Street, N.W., Washington, D.C. 20549.

VI. Paperwork Reduction Act

The staff has consulted with the Office of Management and Budget (''OMB'') and has submitted the proposals for review in accordance with the Paperwork Reduction Act of 1995 (''the Act'') (44 U.S.C. 3501 *et seq.*). The titles to the affected information collections are: ''Form S–1,'' ''Form SB–2,'' ''Form S–11,'' ''Form SB–1,'' ''Regulation S–K,'' and ''Regulation S–B.'' The specific information that must be included is explained in the forms themselves, and generally relates to the issuer and the securities being offered. The information is needed for prospective investors to make informed investment decisions.

The proposals, if adopted, would permit certain smaller companies to delay pricing of primary offerings after the registration statement becomes effective in order to provide them flexibility in the marketplace. By having more control over the timing of their offerings, these companies could take advantage of desired market conditions, thus enabling them to raise equity capital on more favorable terms or to obtain lower interest rates on debt. This increased flexibility could result in smaller issuers raising more capital through the public markets rather than through exempt offerings conducted in

the domestic and offshore markets. Consequently, it is anticipated that the proposals, if adopted, would result in companies filing Forms S–1, SB–2, S–11, and SB–1 rather than making exempt offerings.

The collections of information in the four forms and two regulations are required for the registration of various securities for sale to the public. The likely respondents to each form are: (i) for Form S–1, generally all issuers registering offerings of securities under the Securities Act that are not eligible to use other forms; (ii) for Form SB–2, generally small business issuers, as defined in Rule 405 of the Securities Act, registering securities offerings under the Securities Act; (iii) for Form S–11, generally real estate companies registering offerings of securities under the Securities Act; and (iv) and for Form SB–1, generally small business issuers registering up to $10 million of securities under the Securities Act in a continuous 12-month period. While the Commission cannot estimate the number of respondents that may use expanded Rule 430A, there are approximately 1,210 Forms S–1, 471 Forms SB–2, 58 Forms S–11, and 8 Forms SB–1 filed each year.[86] If expanded Rule 430A is adopted, the estimated burden for responding to the collections of information in each form is expected to increase given the requirement to file post-effective amendments to the registration statements under the three circumstances specified. The former estimates per respondent were as follows: (i) for Form S–1, 1,267 burden hours; (ii) for Form SB–2, 877 burden hours; (iii) for Form S–11, 858 burden hours; and (iv) for Form SB–1, 711 burden hours. The new estimates per respondent are as follows: (i) for Form S–1, 1,290 burden hours; (ii) for Form SB–2, 894 burden hours; (iii) for Form S–11, 873 burden hours; and (iv) for Form SB–1, 740 burden hours. For Form S–1, this would result in an estimated per year increase burden of 27,426 hours in the aggregate. For Form SB–2, this would result in an estimated per year increase burden of 8,242 hours in the aggregate. For Form S–11, this would result in an estimated per year increase burden of 10,309 hours in the aggregate. For Form SB–1, this would result in an estimated per year increase of 236 in the aggregate. Regulations S–K and S–B will continue to show an estimated burden hour of one. The information collection requirements imposed by the forms and regulations are mandatory to the extent that a company elects to do a registered offering. The information is made publicly available. The Commission may not require a response to the collection of information if the forms and regulations do not display a currently valid OMB control number.

In accordance with 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment on the following: whether the proposed changes in the collection of information is necessary; on the accuracy of the Commission's estimate of the burden of the proposed changes to the collection of information; on the quality, utility and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, with reference to File No. S7–9–97. The Office of Management and Budget is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Statutory Basis for the Proposals

The foregoing amendments are proposed pursuant to Sections 6, 7, 8, 10 and 19(a) of the Securities Act.

List of Subjects in 17 CFR Parts 228, 229, and 230

Registration requirements, Reporting and recordkeeping requirements, Securities.

Text of the Proposals

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 continues to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78w, 78*ll*, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

2. In § 228.512 (Item 512 of Regulation S–B), remove paragraph (c) and redesignate paragraphs (d) through (f) as paragraphs (c) through (e).

3. In § 228.601, revise the second note to the Exhibit Table of Item 601(a) under paragraph (a) and amend paragraph (b)(23)(ii) by revising the heading and first sentence to read as follows:

§ 228.601 (Item 601) Exhibits.

* * * * *

Exhibit Table

* * * * *

* * * Where the opinion of the expert or counsel has been incorporated by reference or has been deemed to be a part of a previously filed Securities Act registration statement.

* * * * *

(b) * * *

(23) Consent of experts and counsel. * * *

(ii) *Exchange Act reports.* If required to file a consent for material incorporated by reference into or deemed to be a part of a previously filed registration statement under the Securities Act, the dated and manually signed consent to the material incorporated by reference or deemed to be a part of. * * *

* * * * *

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

4. The authority citation for Part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78w, 78*ll* (d), 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, unless otherwise noted.

* * * * *

§ 229.512 [Amended]

5. In § 229.512 (Item 512 of Regulation S–K), remove paragraph (d) and redesignate paragraphs (e) through (j) as paragraphs (d) through (i).

6. In § 229.601, revise footnote 2 to the Exhibit Table of Item 601 and amend paragraph (b)(23)(ii) by revising the first sentence to read as follows:

§ 229.601 (Item 601) Exhibits.

* * * * *

Exhibit Table

* * * * *

[86] These estimates are based on the number of such filings made in calendar year 1996 and assume that there are no increases or decreases each year.

2. Where the opinion of the expert or counsel has been incorporated by reference or has been deemed to be a part of a previously filed Securities Act registration statement.

* * * * *

(b) * * *

(23) * * *

(ii) *Exchange Act reports.* Where the filing of a written consent is required with respect to material incorporated by reference in or deemed to be a part of a previously filed registration statement under the Securities Act, such consent may be filed as an exhibit to the material incorporated by reference or deemed to be a part of. * * *

* * * * *

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

7. The authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

8. By amending § 230.415 by adding paragraph (a)(1)(xii) and revising (a)(2) and (a)(3) to read as follows:

§ 230.415 Delayed or continuous offering and sale of securities.

(a) * * *

(1) * * *

(xii) Securities registered (or qualified to be registered) that are to be offered and sold on a delayed basis pursuant to § 230.430A(e) by or on behalf of the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary.

(2) Securities in paragraphs (a)(1)(viii) through (x) and (xii) of this section may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S–K (§ 229.512 of this chapter) or Regulation S–B (§ 228.512 of this chapter) as applicable.

* * * * *

9. By amending § 230.424 by adding paragraphs (b)(8) and (b)(9) before Instructions 1 and 2 to read as follows:

§ 230.424 Filing of prospectuses, number of copies.

* * * * *

(b) * * *

(8) A form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to § 230.415(a)(1)(xii) that discloses information, facts, or events that constitute a substantive change other than those covered in paragraph (b)(9) of this section shall be filed with the Commission no later than the second business day following the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(9) A form of prospectus used in connection with a primary offering of securities on a delayed basis pursuant to § 230.415(a)(1)(xii) that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon § 230.430A(a) shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

* * * * *

10. By amending § 230.430A by removing paragraph (d) and redesignating paragraph (e) as paragraph (d) and adding paragraph (e) before the Note to read as follows:

§ 230.430A Prospectus in a registration statement at the time of effectiveness.

* * * * *

(e) A registrant that complies with all the requirements of this section other than the requirements to identify the managing underwriter(s) in the registration statement that is declared effective pursuant to paragraph (a) of this section and the fifteen business day period of paragraph (a)(3) of this section may offer and sell securities on a delayed basis if the following registrant and offering requirements are satisfied.

(1) *Registrant requirements.* (i) The registrant has been subject to the reporting provisions of Section 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act during the most recent twelve calendar months immediately preceding the filing of the registration statement and has filed all the material required to be filed pursuant to Sections 13(a), 14 (15 U.S.C. 77j(a)) or 15(d) for this period. The registrant also must have filed all material required to be filed by Sections 13(a), 14 or 15(d) at the time of first use of the prospectus supplements required by paragraphs (e)(2)(iii) and (e)(2)(iv) of this section.

(ii) The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories, except that a foreign issuer, other than a foreign government, that satisfies all of the provisions of this section except for this one shall be deemed to have met the eligibility requirements of this section if such foreign issuer files the same reports with the Commission under Section 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act as domestic registrants pursuant to paragraph (e)(1)(i) of this section.

(iii) The registrant is not an investment company registered under, or a business development company regulated under, the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

(iv) The registrant is not a blank check company as defined in § 230.419 or a company that issues penny stock as defined in Section 3(a)(51) (15 U.S.C. 78(c)(a)(51)) of the Exchange Act and § 240.3a51–1 of this chapter.

(v) The registrant has: filed with the Commission all required electronic filings, including confirming electronic copies of documents submitted in paper pursuant to a hardship exemption; not obtained a continuing hardship exemption from electronic filing pursuant to § 232.202(a) of this chapter during the twelve months immediately preceding the filing of the registration statement; and submitted all Financial Data Schedules required by Item 601(c) of Regulation S–K or S–B (§ 229.601(c) or § 228.601(c) of this chapter), as appropriate. These requirements must be met at the time of filing the registration statement and at the time of first use of the prospectus supplements required by paragraphs (e)(2)(iii) and (e)(2)(iv) of this section.

(2) *Offering requirements.* (i) A registrant shall file a post-effective amendment to its registration statement to: provide annual audited financial statements for its latest fiscal year as required by §§ 210.3–01, 210.3–02, and 210.3–04 of this chapter no later than 90 days after the fiscal year end of the registrant; provide financial statements and pro forma information for probable acquisitions over the 50% materiality level as required by § 210.3–05 of this chapter and § 228.310 of this chapter as soon as the acquisition is probable; and satisfy any of the undertakings of Item 512(a) of Regulations S–K or S–B (§ 229.512(a) or § 228.512(a) of this chapter). Each post-effective amendment shall be deemed to be a new registration statement relating to the

securities offered therein and the offering of such securities at the time shall be deemed to be the initial bona fide offering thereof. Each such post-effective amendment shall contain a completely updated prospectus that supersedes all prior prospectuses.

(ii) To each person to whom the registrant delivers its supplemented prospectus containing the omitted information and/or any updating information, the registrant also shall deliver: its Form 10–Q (§ 249.308a of this chapter) or Form 10–QSB (§ 249.308b of this chapter) for the end of the most recent fiscal quarter not reflected in the registration statement; and Forms 8–K (§ 249.308 of this chapter) filed after the effectiveness of the registration statement, other than those solely relating to Item 5 of that form that are voluntary filings. Exhibits to such forms need not be provided except upon request. In lieu of delivering the quarterly or Form 8–K information as separate documents at no charge, the registrant may elect to include this information in any prospectus supplement delivered.

(iii) The supplemented prospectus containing any updating information and the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K (§ 249.308 of this chapter) information set forth in paragraph (e)(2)(ii) of this section, shall be delivered to any person who is expected to receive a confirmation of sale at least 48 hours before the sending of any confirmation of sale.

(iv) The supplemented prospectus containing any updating information and all the omitted information, including the name of the managing underwriter(s), if any, along with the quarterly and Form 8–K (§ 249.308 of this chapter) information set forth in paragraph (e)(2)(ii) of this section, shall accompany or precede any confirmation of sale.

(3) For purposes of determining liability under the Act, the following shall be deemed to be a part of the registration statement as of the date of first use in connection with an offering of securities: all forms of prospectus filed with the Commission pursuant to § 230.424(b) in connection with the offering; and all Forms 10–Q (17 CFR 249.308a), 10–QSB (17 CFR 249.308b), and 8–K (17 CFR 249.308) (other than those solely relating to Item 5 of Form 8–K that are voluntary filings) filed before the date the offering is terminated. In addition, the Forms 10–Q, 10–QSB, and Forms 8–K that are deemed to be a part of the registration statement shall also be a part of the prospectus as of the date of first use.

Instructions to Paragraph (e)

1. If the registrant is a successor registrant, it shall be deemed to have met the conditions of paragraph (e)(1) if: (a) its predecessor and it, taken together, do so, provided that the succession was primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company and that the assets and liabilities of the successor at the time of the succession were substantially the same as those of the predecessor, or (b) all predecessors met the conditions at the time of succession and the registrant has continued to do so since the succession.

2. Registrants who use Rule 430A(e) shall provide the undertakings of Item 512(a) of Regulation S-K or S-B (§§ 229.512(a) or 228.512(a) of this chapter) in lieu of those specified in Item 512(i) of Regulation S-K or S-B (§ 229.512(i) or § 228.512(i) of this chapter).

11. By amending § 230.434 by revising paragraph (b)(2) to read as follows:

§ 230.434 Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash.

* * * * *

(b) * * *

(2) Such prospectus subject to completion and term sheet, together, are not materially different from the prospectus in the registration statement at the time of its effectiveness or an effective post-effective amendment thereto (including, in both instances, information deemed to be a part of the registration statement at the time of effectiveness pursuant to § 230.430A(b) or (e)); and

* * * * *

By the Commission.

Dated: February 20, 1997.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–4669 Filed 2–27–97; 8:45 am]

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Friday
February 28, 1997

Part III

Federal Reserve System

12 CFR Part 225

Bank Holding Companies and Change in Bank Control (Regulation Y); Final Rule

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Reg. Y; Docket Nos. R–0935; R–0936]

Bank Holding Companies and Change in Bank Control (Regulation Y)

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board has adopted comprehensive amendments to Regulation Y that improve the competitiveness of bank holding companies by eliminating unnecessary regulatory burden and operating restrictions, and by streamlining the application/notice process. Among other revisions, the final rule incorporates a streamlined and expedited review process for bank acquisition proposals by well-run bank holding companies with a number of modifications intended to broaden and improve public notice of bank acquisition proposals, to assure that the regulatory filing is made well within the public comment period, and to better assure that proposals reviewed under the streamlined procedures do not raise issues under the statutory factors in the Bank Holding Company Act.

The final rule also implements the changes enacted in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 that eliminate certain notice and approval requirements and streamline others that involve nonbanking proposals by well-run bank holding companies. The final rule also includes a reorganized and expanded regulatory list of permissible nonbanking activities and removes a number of restrictions on those activities that are outmoded, have been superseded by Board order or do not apply to insured banks that conduct the same activity.

In addition, the final rule incorporates several amendments to the tying restrictions, including removal of the regulatory extension of those restrictions to bank holding companies and their nonbank subsidiaries. A number of other changes have also been included to eliminate unnecessary regulatory burden and to streamline and modernize Regulation Y, including changes to the provisions implementing the Change in Bank Control Act and section 914 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

EFFECTIVE DATE: April 21, 1997.

FOR FURTHER INFORMATION CONTACT: Scott G. Alvarez, Associate General Counsel (202/452–3583), Diane A. Koonjy, Senior Attorney (202/452–3274), Thomas R. Corsi, Senior Attorney (202/452–3275), Lisa R. Chavarria, Attorney (202/452–3904), Satish M. Kini, Attorney (202/452–3818), Gregory A. Baer, Managing Senior Counsel (202/452–3236), Legal Division; Molly Wassom, Assistant Director (202/452–2305), Sid Sussan, Assistant Director (202/452–2638), Nicholas A. Kalambokidis, Project Manager (202/452–3830), David Reilly, Supervisory Financial Analyst (202/452–5214), Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), Dorothea Thompson (202/452–3544), Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC.

SUPPLEMENTARY INFORMATION:

Background and Summary of Final Action

On August 28, 1996, the Board proposed comprehensive revisions to Regulation Y designed to eliminate unnecessary regulatory burden and paperwork, improve efficiency and eliminate unwarranted constraints on credit availability while faithfully implementing the statutory requirements that form the bases for Regulation Y. (61 FR 47242 (September 6, 1996)). The Board proposed these revisions after conducting the review of its regulations required by section 303 of the Riegle Community Development and Regulatory Improvement Act of 1994 (''Riegle Act''). Regulation Y governs the corporate practices and nonbanking activities of bank holding companies, sets forth the procedures for a company to become a bank holding company and for a bank holding company to seek Federal Reserve System (''System'') approval for a bank acquisition or a nonbanking proposal under the Bank Holding Company Act (''BHC Act''), implements the prohibitions on tying, implements the prior notice requirements of the Change in Bank Control Act (governing the acquisition of control of a bank or bank holding company by an individual) and section 914 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (governing appointment of senior officers and directors of certain banks and bank holding companies), and implements other provisions of law applicable to bank holding companies.

The changes proposed by the Board to Regulation Y included removal of a number of restrictions on the permissible nonbanking activities of bank holding companies, expansion and reorganization of the regulatory list of permissible nonbanking activities, streamlining of the application/notice process, revisions to the tying rules, and streamlining of the procedures governing change in bank control notices and senior executive officer and director appointments. On September 30, 1996, Congress, in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (''Regulatory Relief Act''), enacted several complementary changes to the BHC Act, primarily reducing the burden associated with seeking approval of nonbanking proposals. On October 23, 1996, the Board proposed, on an interim basis, a definition of a well-capitalized bank holding company for purposes of the procedures enacted in the Regulatory Relief Act. (61 FR 56404 (November 1, 1996)).

The Board received over 300 comments regarding its proposal. The comments reflected the views and suggestions of a wide cross-section of interested persons, including bank holding companies, community groups and representatives, trade associations, individuals, law firms, Congressional representatives, state and local government and supervisory officials, and others. The commenters enthusiastically supported the Board's proposal to establish a streamlined procedure for well-run bank holding companies to engage in nonbanking activities and make nonbanking acquisitions, to remove unnecessary or outmoded restrictions on nonbanking activities, and to expand the regulatory list of permissible nonbanking activities. Commenters also applauded the proposed amendments to the tying provisions that would enhance the ability of banking organizations to provide customer discounts on services. In addition, commenters supported the proposed streamlining of the provisions governing a change in control of state member banks and bank holding companies and the appointment of new directors and senior executive officers.

A significant number of commenters, representing primarily bank holding companies and banking industry trade associations and representatives, also strongly supported the Board's proposal to establish a streamlined procedure for well-run bank holding companies to seek System approval to acquire additional banks within certain limits. On the other hand, a large number of commenters, consisting primarily of community representatives and groups, and individuals, strongly opposed any change to the Board's current procedure

governing bank acquisitions, in general, and adoption of the Board's proposed streamlined review process, in particular.

After carefully reviewing the comments, the Board has adopted a final rule that largely incorporates the initiatives contained in its proposal. The Board has made a number of revisions in response to concerns, suggestions and information provided by commenters. In particular, the Board has changed in several respects the streamlined procedure governing bank acquisitions and has adopted a number of measures designed to broaden and improve public notice of acquisition proposals. These changes focus on assuring that interested persons will have a meaningful opportunity to provide the Board with information regarding acquisition proposals. These and other changes adopted by the Board in response to concerns and suggestions raised by commenters are discussed in more detail below.

A number of comments addressed matters that are better addressed in supervisory policy statements or guidelines governing specific activities or in the context of an individual proposal. Many other matters raised by commenters, including suggestions regarding venture capital and portfolio investment activities and the scope of a bank holding company's authority to acquire shares of investment companies under section 4(c)(7) of the BHC Act, were not addressed in the original proposal and remain under active review.

Explanation of Final Rule

A. Process for Seeking Approval of Bank and Nonbank Acquisitions

The Board's review of its current procedures for evaluating applications and notices identified two important principles that could be applied by the Board to reduce the burden associated with those procedures. One principle is that well-run bank holding companies that meet objective and verifiable measures for each of the criteria set forth in the BHC Act should be able to expect little burden or delay from the approval process unless special circumstances demonstrate that a closer review is warranted. The other principle is that the application/notice process should focus on an analysis of the effects of the specific proposal and should *not* become a vehicle for comprehensively evaluating and addressing supervisory and compliance issues that can more effectively be addressed in the supervisory process.

These principles guided the Board's decision to propose both procedural and substantive changes to the application/notice process in August 1996. In particular, the Board proposed to use the application/notice process as a gateway for identifying (and rejecting) organizations that do not have the resources or expertise to make an acquisition or conduct a particular activity, and to rely on the on-site inspection and supervisory process as the most effective way to determine if a particular organization is in fact managing its subsidiaries or conducting an approved activity in a safe and sound manner and within its authority.

In addition, the Board proposed to establish a streamlined process for reviewing proposals by well-run bank holding companies and reducing the information required to be filed for proposals that qualify for the streamlined procedure. The Board also proposed a number of other revisions that would eliminate unnecessary burden from the application/notice process, including eliminating the pre-acceptance procedure for all bank acquisition proposals, permitting public notice of an acquisition proposal to be published up to 30 days before the final regulatory filing was submitted to the System, and permitting the waiver of applications involving solely internal corporate reorganizations.

The final rule adopted by the Board incorporates these proposed changes with a number of important modifications discussed below.

1. Streamlined Procedure

The Board proposed a streamlined 15-day notice procedure for proposals by well-capitalized and well-managed bank holding companies with satisfactory or better performance ratings under the Community Reinvestment Act of 1977 (''CRA'') to acquire banks and nonbanking companies within certain size limits. The Board's original proposal retained the Board's current requirements that public notice of all bank acquisitions be provided (both by newspaper and by Federal Register) and that the public be provided at least a 30-day opportunity to submit comments to the System regarding a proposed bank acquisition. These notice and comment provisions applied equally to proposals that qualified for the streamlined procedure and to proposals reviewed under the normal 30/60-day procedures.

Many commenters strongly supported the establishment of a streamlined procedure for proposals by well-run bank holding companies that do not raise significant issues. These commenters indicated that the current approval procedure is burdensome and costly, particularly in the case of smaller acquisitions that do not raise any significant issue under the BHC Act. Commenters stated that the current process increases the risks and costs associated with an acquisition by imposing unnecessary delay in consummating both bank and nonbank acquisition proposals. This delay also increases the potential for loss of key employees, customer relationships and franchise value. In addition, commenters argued that delay in approving clearly permissible transactions postpones the realization by the holding company and the community of the benefits of the transaction and, in the case of a nonbanking proposal, puts bank holding companies at a disadvantage in competing with unregulated entities vying for the same target company. Moreover, commenters indicated that the management, legal and other resources required to prepare an application/notice under the current procedures are significant.

These commenters agreed that a streamlined procedure would reduce regulatory burden substantially by reducing the costs to bank holding companies of preparing applications as well as the costs associated with the delay inherent in the regulatory review process. Many commenters also stated that these changes would improve the ability of bank holding companies to be competitive with unregulated entities in making nonbanking acquisitions and engaging *de novo* in permissible nonbanking activities.

Several of these commenters urged the Board to take the additional step of reducing or eliminating the public comment period for proposals by banking organizations, or permitting a safe-harbor from comments if the banking organization maintains satisfactory or better CRA performance ratings or the comment relates to a matter that was reviewed in the CRA examination. These commenters argued that neither the BHC Act nor the CRA requires that public notice be provided for bank acquisition proposals, and that comments on the CRA performance of insured institutions would be more effective if provided in the CRA examination process. These commenters also contended that the delay associated with the requirement that the Board consider all public comments under a more protracted procedure is costly and delays the ability of well-run organizations to pass on benefits of an acquisition to the affected communities. In addition, they argued that providing a safe harbor from public comments for

organizations with satisfactory or better CRA performance ratings would provide an incentive for institutions to achieve better CRA performance ratings.

On the other hand, a significant number of commenters, including various community groups, believe that the current procedures for reviewing bank acquisition proposals work well and that no change to the current process is necessary. These commenters argued that the current 30/60-day procedure strikes an important balance between the banking industry's need for regulatory action within a limited period of time and the community's need to have a meaningful opportunity to discuss with the acquiring company the potential effects of a proposed bank acquisition and participate in the System review process. These commenters also expressed concern that the revisions proposed by the Board would weaken the review process for bank acquisition proposals by reducing the attention the System would pay to certain proposals, and would erode the ability of interested members of the public to provide information to the System for consideration in an analysis of the convenience and needs factor, the CRA performance record, and other aspects of a bank acquisition proposal. In addition, a number of these commenters argued that the Board should not adopt its proposed streamlined procedure for bank acquisition proposals by well-run bank holding companies because the Regulatory Relief Act adopts streamlined procedures only for nonbanking proposals and indicates that Congress rejected applying a similar streamlined approach to reviewing bank acquisitions.

The Board believes that it is important to address the concerns of both sets of commenters. The Board believes that it is sound public policy, in addition to being consistent with the Riegle Act, that the Board revise its application/notice process to reduce any unnecessary regulatory costs and burdens associated with that process. At the same time, the Board believes that revisions to its application/notice process should not diminish the quality of its review of transactions. In addition, the Board strongly believes that public participation in the application/notice process is important because it provides the Board with useful information, in particular, information regarding the effect of transactions on the relevant communities.

As the Board noted in its original proposal, the Board reviews approximately 1,300 applications and notices each year under the BHC Act. While these proposals include some complex and large proposals, the overwhelming preponderance are relatively simple proposals that raise no issues under the statutory factors that the Board is required to consider. In more than 90 percent of the cases submitted to the System, no public comment is submitted. Currently, these cases are largely considered and approved by the Reserve Banks under delegated authority in a process that involves a pre-acceptance period of on average 25 days and final action about 30 days following the date of acceptance of a filing.

In these cases, the Board believes that there is room to revise the current review process to reduce paperwork and regulatory burden. The Board believes that this reduction in burden can be accomplished without diminishing the System's review of the statutory factors in any case or the opportunity for the public to provide information to the System that is relevant to the statutory factors. Importantly, the Board is maintaining the public notice and period for public comment that currently apply to bank acquisitions, including bank acquisitions reviewed under the streamlined procedures.

Accordingly, the final rule adopts the streamlined review process originally proposed by the Board, with several important modifications. These changes are in response to specific concerns raised by commenters and are designed to provide earlier and broader public notice of acquisition proposals, better access to regulatory filings, and to assure that the public continues to have a meaningful opportunity to provide the System with relevant information regarding proposals subject to System review. The Board believes that adoption of a streamlined process for bank acquisitions as well as all of the other revisions proposed by the Board to Regulation Y are within the authority of the Board under the current BHC Act and do not require statutory changes.

The changes to the original proposal adopted in the final rule are discussed more fully below and include the following:

* *Timing of Publication.* The regulatory filing for a bank or nonbank acquisition proposal must be made within 15 calendar days of publication of the request for comment on the proposal (as opposed to 7 days under the current procedure and 30 days under the original proposed revisions);

* *New Methods of Public Notice.* In order to make public notice available earlier, a new list of all bank and nonbank acquisition proposals subject to System review will be prepared weekly and updated every 3 days, and made available to all interested parties using three methods: by mail (on a weekly basis), through a dedicated fax-on-demand facility (available 24 hours every day), and on the Board's Internet Home Page;

* *Information Regarding Convenience and Needs.* The regulatory filing under the streamlined procedure will retain the current requirement that the filer briefly describe the proposed transaction and the parties to the transaction, and, in the case of a bank or thrift acquisition, will require (as under the current procedure) a brief discussion of the effects of the proposal on the convenience and needs of the community and of steps that are being taken by the acquiring company to address weaknesses at insured institutions that have not received at least a satisfactory CRA performance rating;

* *Convenience and Needs Standard.* In the case of a bank or thrift acquisition, the standards for qualifying for the streamlined procedure have been modified to require the acquiring bank holding company to show that the transaction is consistent with the convenience and needs standard in the BHC Act as well as requiring that the CRA performance rating of the lead insured institution and insured institutions with at least 80 percent of the assets of the acquiring bank holding company be satisfactory or better;

* *Timely Comments Require Full Consideration.* A provision has been added specifying that a proposal filed under the streamlined procedure will be reviewed under the normal 30/60 day review process if a substantive written comment is received by the System during the public comment period;

* *Guidance in Defining Substantive Comments.* A provision has been added describing generally the types of comments that would be considered substantive (this provision contemplates that the vast majority of comments that are now considered by the Board would continue to be reviewed by the Board);

* *Extensions to Obtain Filing.* A provision has been added incorporating the Board's current policy of exercising discretion, based on the facts and circumstances, to grant an extension of the public comment period of 1 to 15 days to an interested member of the public that has made a timely request for a copy of the regulatory filing on a proposal (this extension will not itself disqualify a proposal from consideration under the streamlined procedure);

* *Joint Extension Requests.* A provision has been added reflecting the Board's current policy of permitting a

reasonable extension of the public comment period where the extension is jointly requested by an interested person and the applicant (for example, in order to permit completion of discussions between the applicant and the interested person); and,

* *Size Limitation.* A size limitation of $7.5 billion on any individual acquisition that may qualify for the streamlined procedures has been added as well as a limitation of 15 percent of the consolidated total capital of the acquiring company on the total consideration that may be paid in the case of the acquisition of a nonbanking company.

Under the new rule, bank and thrift acquisition proposals that meet the qualifying criteria in the regulation would be considered under a streamlined procedure that allows System action 3 business days following the close of the public comment period. This streamlined review process will allow System action on a qualifying proposal typically between 18 and 21 calendar days after the regulatory filing is made with the System. In addition, the regulatory filing required in these cases includes less paperwork than under the current procedures. Cases that are complex, or that raise an issue of first impression, issues of safety and soundness or other concerns, or that raise concerns regarding the effect of the proposal in the relevant communities will, as under the Board's current rules and policies, receive more in-depth analysis. Moreover, the Board retains the ability to notify a bank holding company for any reason that the streamlined notice procedure is not available and that the normal 30/60-day procedure must be followed.

The final rule eliminates unnecessary delay in all bank acquisition proposals by eliminating the current pre-acceptance period. Elimination of this period reduces the System review process by an average of 25 days. The function of this pre-acceptance period was to collect information regarding the specific proposal that may not be described in the original filing. The Board's experience in reviewing nonbanking proposals (which are not subject to a pre-acceptance review period) indicates that this period is not necessary and that the System is able to request and obtain additional information in a timely fashion during the normal review period that begins after acceptance of the regulatory filing. The final rule allows the System to continue to request additional information at any time and to return as incomplete any filing that does not contain the information prescribed in the regulation.

The final rule also adopts the procedures established in the Regulatory Relief Act regarding nonbanking proposals. These provisions eliminate the prior notice and approval requirements of the BHC Act for any bank holding company that meets the qualifying criteria to engage *de novo* in any nonbanking activity approved by the Board by regulation. In addition, the Regulatory Relief Act established a streamlined 12-business day review process for proposals by well-run bank holding companies to acquire a company (other than an insured depository institution) engaged in permissible nonbanking activities or to engage *de novo* in nonbanking activities approved only by order.

A company or proposal that does not qualify for the streamlined procedure would follow the current application process, which provides for Reserve Bank action within 30 days of filing and for Board action within 60 days of filing. In the event that the System determines that a proposal filed under the streamlined procedure must be reviewed under the normal 30/60-day procedure, the final rule provides that the notice filed under the streamlined procedure would be accepted under the normal procedure and the normal procedure would be deemed to have begun at the time the notice was filed under the streamlined procedure. In cases that have been shifted from the streamlined to the normal processing schedule, the Reserve Bank and the Board would determine whether information supplementing the streamlined filing is needed to address the relevant issues. As in any case, the System may request any additional information during the processing period necessary to resolve issues related to the proposal.

2. Public Participation in Review Process

a. Public Notice

The original proposal retained the current requirement for public notice of all acquisition proposals, including a full 30-day public comment period for bank acquisition proposals. As noted above, the final rule retains the current public notice requirement and 30-day public comment period for bank acquisition proposals, including proposals that qualify for the streamlined procedure. Public notice of these proposals would continue to be given through newspaper publications in the affected communities and through publication in the Federal Register, as required under the Board's current procedures.

The Regulatory Relief Act amended section 4 of the BHC Act to eliminate the requirement for public notice of certain nonbanking acquisition proposals by qualifying bank holding companies. The final rule implements the statutory changes enacted by the Regulatory Relief Act. Public notice of all acquisitions of insured depository institutions, including savings associations, is still required, however, and would mirror the notice requirements applicable to bank acquisition proposals. In addition, public notice would continue to be required for nonbank proposals that do not qualify for the streamlined procedures under the Regulatory Relief Act, and for any proposal that involves a new activity that has not previously been determined by the Board to be closely related to banking.

b. Steps To Improve Public Notice

In connection with its revision of the current procedures, the Board will implement three steps that are designed to improve the effectiveness and timeliness of the public notice of acquisition proposals. First, the Board will publish a new listing of all acquisition proposals submitted for System approval under the BHC Act. This new document will include all bank acquisition proposals that have been published for comment, whether submitted under the streamlined or normal procedures, as well as proposals to acquire a nonbanking company that require public notice. This new document will be updated at least weekly and will indicate the applicant and target organization, the date that the public comment period closes, and the Reserve Bank to which public comments may be sent. The new document will be a more comprehensive list of cases open to public comment than the current H–2 (which includes only application/notices that have been filed with the System and does not generally indicate proposals that have been published for comment but not yet filed), and will be more quickly available than the current H–2 (which includes a list of Board and Reserve Bank final actions and other information that often requires a longer time to assemble). This document will be available by mail.

Second, to expedite distribution of this information, the Board will make the new document available through a fax-on-demand call-in facility. This facility will be available 24 hours a day, 7 days a week, and will automatically fax a copy of the new document to any

caller. The information available on the fax call-in facility will be updated at least every three business days.

Third, the Board will make the new document available on its Internet Home Page, along with other information, including a list of actions taken by the System on applications and notices. Thus, the Board's Internet Home Page will include a list of all acquisition proposals requiring System approval under the BHC Act that have been published for public comment. This list will identify the applicant, target organization, closing date for the public comment period, and the Reserve Bank to which comments may be submitted. This information, like the fax call-in information, will be updated at least every 3 business days to reflect the addition of new proposals.

As a complement to providing broader and earlier public notice, the Board will make regulatory filings more quickly available to the public. The System expects to make the public portion of all pending applications/notices available to the public within 3 business days of filing.

c. Timing of Publication

Several commenters supported allowing an applying bank holding company to publish notice of a proposal up to 30 days in advance of filing the required application/notice for System approval. This would permit publication at a time closer to the announcement date of a proposed acquisition.

A large number of other commenters, however, suggested that permitting an applicant to publish notice 30 days before submitting an application/notice to the System would effectively deprive the public of an opportunity to comment on the information contained in the filing. These commenters were particularly concerned that this would result in less informed comments and would force commenters to express concerns relating to factors, such as the effect of the proposal on the convenience and needs of the community or CRA performance, without reviewing the plans of an applicant to address these matters or discussing these plans with the applicant.

In light of the comments, the Board has determined to adopt a revised approach that permits publication up to 15 days prior to the submission of the required filing. Under the Board's current rules, publication may occur up to 7 days prior to submission of the application. Allowing a slightly earlier publication date will allow for a shorter regulatory process in cases that meet the criteria for expedited action while at the same time assuring that the required filing will be available to the public for a significant part of the public comment period.

To address the possibility that a filing may not be submitted during the first 15 days of the public comment period, the final rule incorporates the Board's current policy that the Board may, in its discretion and based on the facts and circumstances, permit an extension of the public comment period, of an appropriate length up to 15 days, for an interested person that makes a timely request for both a copy of the required regulatory filing and additional time to file a comment regarding a proposal. In considering whether to grant a request for an extension, and the length of the extension to be granted, the Board has in the past and will continue to take into account such factors as when the proposal was announced and the regulatory filing made available to the public, when the request for the regulatory filing was made, and the specific reasons given by the requester for being unable to file a timely comment. A decision to grant an extension of the public comment period would *not* disqualify a proposal from action under the streamlined procedure.

d. Joint Requests To Extend the Comment Period

A number of commenters argued that a shortened processing period would frustrate the ability of community groups to conduct discussions with applicants in connection with a bank acquisition proposal regarding lending and other programs to help meet the convenience and needs of the community. These commenters indicated that a shorter regulatory review period would truncate the period for these discussions and potentially force premature objections to acquisition proposals, especially in situations that involve the initial entry of a banking organization into the community.

The Board believes that discussions between an insured institution and community representatives for purposes of identifying and helping to serve the banking needs of the community are appropriately and most effectively conducted throughout the year and should not be confined to the period when an acquisition proposal is under review. In the application/notice context, the Board has granted requests for an extension of the public comment period that were made jointly by an interested party and an applicant for the purpose of allowing completion of discussions regarding a matter, such as CRA performance or competitive divestitures, that is relevant to the statutory factors the Board must consider in reviewing the proposal. The final rule specifically incorporates this policy and states that a reasonable extension of the public comment period will be granted upon a joint request of an interested member of the public and the applicant. This type of extension will not disqualify an otherwise qualifying proposal from consideration under the streamlined procedure.

e. Protested Cases

The streamlined procedure proposed by the Board provided that the Board could require an applicant to follow the current 30 or 60 day procedure if the Board indicates to the applicant for any reason that the proposal does not qualify for the streamlined process. The Board also stated that it expected that proposals by well-run bank holding companies would be disqualified only sparingly and in extraordinary situations. Among the situations identified by the Board as meriting review under the normal 30/60-day procedure is the situation where a timely substantive public comment is received by the System that raises an issue that cannot be resolved by the Reserve Bank under its delegated authority.

A number of commenters argued that the Board should not disqualify a proposal from consideration under the streamlined process on the basis of a public comment regarding CRA or fair lending performance if the applicant organization's insured depository institutions have satisfactory or better CRA performance ratings or if the comment relates to a matter that was reviewed in the CRA examination process. Other commenters argued that a proposal should not be disqualified from streamlined processing if a comment is submitted that relates to information that is available to the Board outside the application process (such as HMDA data) or a matter uniquely within the Board's expertise (such as financial, managerial or competitive matters), or if the commenter has not first attempted to discuss the concerns with the acquiring organization outside the approval process.

On the other hand, a large number of community groups and representatives argued that the application/notice process provides an important opportunity for members of the public and representatives of affected communities to provide information to the System relating to the impact of a proposal on the community. These

commenters argued that it is critical to preserve the ability of the public to have input into the government review process and for the Board to take a close look at proposals that raise concern in the affected community. These commenters argued that the Board should indicate in the regulation that submission of a comment would trigger the normal 30/60-day processing period.

The Board had indicated in its original proposal that the filing of a timely comment could trigger the normal review process, and has adopted the suggestion of commenters that this be specifically included in the rule. Thus, the final rule provides that the normal 30/60-day process applies in any case in which a timely substantive comment regarding a proposal is received by the System. A proposal that is considered under the normal process will be acted on as soon as the System completes its review of the proposal, which may be before expiration of the 30 or 60 day period.

The final rule provides that a comment will be considered timely if it is submitted in writing and is received by the appropriate Reserve Bank or by the Board before the expiration of the public comment period. A comment will be considered to be substantive unless the comment involves individual complaints, or raises frivolous, previously-considered or unsubstantiated claims, or irrelevant issues.[1] The Board notes that under this standard the vast majority of comments that have in the past been considered by the Board will continue to be viewed as substantive and will continue to be reviewed by the Board. A comment that is delegable will be carefully weighed in the review process by the Reserve Bank and any action taken by the Reserve Bank is subject to review by the Board. The Reserve Bank may seek additional information necessary to evaluate any delegable comment and may refer a comment for investigation to the appropriate federal banking agency or other relevant agency, if appropriate.

f. Late Comments

In its original proposal, the Board proposed to adhere to its current rules governing consideration of public comments, and to discontinue its practice of routinely considering comments, including supplemental comments filed by a timely commenter, that are filed after the close of the public comment period. The Board's Rules of Procedure currently provide that the Board is required to consider a comment involving an application or notice only if the comment is in writing and is received by the System prior to the expiration of the public comment period.

A number of commenters argued that the Board should continue routinely to consider late comments. Many of these comments focused on the potential under the original proposal that the public comment period could expire prior to the time that the regulatory filing was made and that any comment based on the regulatory filing was, therefore, likely to be late. Other commenters contended that public notice of proposals and of the closing date of the comment period is not adequate under the current rule, and, consequently, that late comments should be accepted and considered. In addition, commenters argued that the approval process is an important opportunity for the community to participate in the review of transactions that will directly affect the community, and that leeway should be given to the community to submit late comments. A number of community groups indicated that discussions with applicants, particularly applicants entering a community for the first time, often require substantial time and cannot always be completed during the public comment period.

The Board believes that the public often provides the System with important information in connection with acquisitions subject to System review. Consequently, the Board has determined to provide public notice and a significant period for public comment for all bank acquisition proposals subject to System review under the BHC Act, including proposals that qualify for the streamlined procedures.

As noted above, the Board has also taken a number of significant steps to improve the effectiveness of the public notice regarding bank acquisition proposals, including establishing a public listing focused on acquisitions that are subject to public comment and System review and making this list available by mail, Internet and fax. In addition, the Board has amended its original proposal to assure that the regulatory filing will be submitted at least 15 days prior to the expiration of the public comment period, and has reiterated its policies regarding extensions of the public comment period to accommodate joint discussions between members of the public and applicants as well as timely requests for a regulatory submission that has been filed after the start of the public comment period.

Moreover, the Board notes that the public may at any time submit comments regarding the effectiveness of an insured depository institution in meeting the convenience and needs of the community for consideration in connection with the on-site examination of the CRA performance of the institution. The CRA examination process involves a review of the actual lending performance of an institution and includes discussions by examiners with members of the public regarding the institution's performance. Comments submitted for consideration in the CRA examination process provide the most effective opportunity for the public to affect the CRA performance and CRA rating of any institution and provide a regularly re-occurring opportunity for public input.

For these reasons, the Board has determined to adhere to its established rules regarding the filing of comments on proposals subject to System review. Accordingly, the Board will not consider comments, including supplemental comments filed by a timely commenter, that are submitted after the close of the public comment period and the filing of a late comment will not disqualify a proposal from review under the streamlined procedure. The Board continues to reserve the right to consider late comments at its discretion, but expects to exercise that discretion only in extraordinary circumstances.

3. Information Requirements

For transactions that qualify for the streamlined procedure, the Board proposed to reduce substantially the information required to be filed with the System. For example, the Board proposed to eliminate the requirement that the applicant submit financial information otherwise available to the System and the requirement that the applicant provide competitive data in cases that meet the Board's and the Department of Justice's policies.

Many commenters applauded the reduction in information requirements for proposals that meet the criteria for streamlined processing. Commenters noted that the costs of preparing an application/notice are often substantial and argued that these costs are unnecessary in cases that meet objective criteria and do not raise any regulatory issue. Commenters believed that the savings would be substantial from reducing the paperwork associated with applications and notices.

A number of other commenters expressed concern that elimination of certain information requirements from the regulatory filing would reduce the

[1] The Board will develop supervisory guidance identifying the limited types of comments that may be considered under delegated authority.

ability of the System adequately to review a proposal and of commenters to assess the consequences of the proposal for the communities involved. In particular, a large number of commenters objected to eliminating the portion of the current application that requires an applicant to explain the effect of a bank acquisition on the convenience and needs of the affected communities. Commenters found this information especially helpful in understanding the effect of a proposal by an organization located outside the community to make its initial entry into the community.

The original proposal retained the requirement that applicants briefly describe the proposed transaction and the institutions involved, as well as the type of funding proposed. The final rule continues to require this information.

As an initial matter, the Board believes that very little additional information is needed to evaluate the financial, managerial and competitive factors regarding the types of non-complex proposals that qualify for streamlined processing. The System already receives, through reports and examinations, substantial information regarding the financial and managerial resources of bank holding companies and their subsidiaries. In addition, in order to qualify for the streamlined procedure, the proposal must meet objective competitive criteria designed to assure that the proposal does not raise an issue under those factors.

The Board agrees with commenters that the information regarding the effect of a proposal on the convenience and needs of affected communities currently provided by an acquiring bank holding company in its regulatory submission is new information relevant to the System's decision on the proposal that may not otherwise be available. Bank holding companies currently provide a brief description of the effects of an acquisition proposal on the convenience and needs of affected communities in the regulatory filing. The Board's experience has been that the description provided in the initial application is useful and is not burdensome. Accordingly, the Board has determined to retain the requirement that, as part of its initial filing for approval, an applicant briefly explain the effect of a proposal on the convenience and needs of the affected communities. As under the current application/notice procedure, this explanation may contain a discussion of the CRA performance record of the acquiring organization and any actions that the organization proposes to take in order to help address the credit and other banking needs of the affected communities.

In addition, the final rule requires the applicant to outline the steps the organization is taking to address weaknesses in the CRA performance of insured depository institution subsidiaries of the acquiring holding company that have received a less than satisfactory CRA performance rating. The Board currently requests this information in the application process and believes this information is important for evaluating the ability of an acquiring organization to meet the convenience and needs of communities in which a bank or savings association acquisition is proposed. A holding company may satisfy this information requirement by filing copies of information prepared for the primary federal banking supervisor of the relevant institution, other documents already prepared by the organization, or a summary of the steps taken and being implemented.

The final rule also modifies, in certain respects, the information related to the financial, managerial and competitive factors that must be provided. These changes require limited information regarding the funding of an acquisition, certain *pro forma* financial information regarding the acquiring bank holding company and financial information regarding any nonbanking company that is proposed to be acquired. In addition, limited information regarding proposed new management is requested in certain cases. The final rule also clarifies the information needed for a new principal shareholder of a bank holding company to fulfill the notice requirement of the Change in Bank Control Act in connection with a transaction that is reviewed under the streamlined procedures of section 3 of the BHC Act.

In connection with nonbanking proposals, the final rule modifies the requirement that market index information be submitted in every case in light of the fact that competition in many nonbanking activities is broad and is measured on a national or regional basis that often makes calculation of market indexes burdensome and unnecessary. The rule requires instead a brief description of the competitive effects of the proposal in the relevant market and, in markets that are local in nature, a list of major competitors. It is expected that the Board or the appropriate Reserve Bank would indicate to an applicant when market index information is necessary. Finally, the rule requires a bank holding company that seeks approval under the streamlined procedure for a nonbanking proposal to describe briefly the public benefits of the proposal.

4. Criteria To Qualify for Streamlined Procedures

Many commenters lauded the use of objective criteria for identifying proposals that would qualify for streamlined review. These commenters found reliance on criteria that identify well-run bank holding companies to be a constructive method of rewarding organizations that are well run and encouraging other organizations to take steps to meet these criteria. A significant number of commenters also generally agreed that the standards proposed by the Board would establish appropriate levels for identifying proposals that clearly meet the statutory factors that the Board must consider under the BHC Act.

As discussed below, many other commenters expressed concern that establishing a streamlined procedure based on objective criteria would result in too little analysis of proposals under the streamlined procedure. A large number of commenters also argued that it is inappropriate to rely on CRA performance ratings as qualifying criteria for the convenience and needs standard.

The Board has adopted several modifications to the qualifying criteria to address concerns raised by commenters.

a. Definition of Well-Capitalized and Well-Managed Bank Holding Companies

In connection with its interim implementation of the Regulatory Relief Act,[2] the Board proposed to define a ''well-capitalized bank holding company'' for purposes of determining qualification for the streamlined procedure as any bank holding company that:

* Maintains a total risk-based capital ratio of 10.0 percent or greater and a Tier 1 risk-based capital ratio of 6.0 percent or greater, on a consolidated basis both before and immediately following consummation of the proposal;

* Maintains either a Tier 1 leverage ratio of 4.0 percent or greater or, if the bank holding company has a composite examination rating of 1 or has implemented the risk-based capital measure for market risk, a Tier 1

[2] The Board specifically requested comment on the definition of well-capitalized bank holding company in connection with enactment of the Regulatory Relief Act. Because the definition is contained in Regulation Y, the Board considered comments regarding that proposed definition in connection with this overall revision of Regulation Y.

leverage ratio of 3.0 percent or greater, on a consolidated basis both before and immediately following consummation of the proposal; and

* Is not subject to any written agreement, order, capital directive, asset maintenance requirement, or prompt corrective action directive to meet or maintain a higher capital level for any capital measure.

Commenters generally supported these levels for defining a well-capitalized bank holding company. Commenters noted that the risk-based levels parallel the level at which an insured bank is considered to be well-capitalized for purposes of various provisions of federal law.

Most commenters that addressed these requirements agreed that the leverage ratio can be an inexact measure of capital adequacy for many bank holding companies, particularly for holding companies that engage in significant nonbanking activities or for bank holding companies that have significant trading portfolios and fee-generating off-balance sheet activities. Accordingly, a number of commenters requested that the Board eliminate or further reduce the leverage requirement. Large domestic banking organizations contended that the arguments for adopting a lower leverage ratio for defining a well-capitalized bank holding company than is used in defining a well-capitalized bank—namely that the leverage ratio is an inexact measure in certain situations—also militate for elimination of the leverage ratio. Foreign banks in particular assert that adoption of a leverage requirement would violate the principle of national treatment and would exclude strong and well-capitalized foreign banking organizations from the streamlined procedure because a leverage ratio is not required under the Capital Accord developed by the Basle Committee on Banking Regulations and Supervisory Practices (''Basle Capital Accord'') and, consequently, is not applicable to banks in many foreign countries.

Smaller bank holding companies, on the other hand, argued that the leverage ratio should be applicable to all organizations equally. These organizations argued that eliminating or adopting a lower leverage standard would create an advantage for large organizations in making acquisitions.

The Board believes that, in the limited context of determining the qualifying criteria for the streamlined procedure, reliance on the risk-based capital ratios is sufficient. As noted above, the risk-based levels adopted are the same levels required in defining a well-capitalized bank.

The final rule does not establish a minimum leverage ratio for a bank holding company to qualify for the streamlined procedures because, as noted above and in the Board's original proposal, the leverage ratio is an inexact measure in certain situations. The Board has thus determined to apply a definition that applies equally to all organizations, regardless of size, origin or composition of balance sheet. The Board retains the ability to disqualify any organization from using the streamlined procedure if any financial or other factor, including the organization's leverage ratio, indicates that a closer review of the proposal is appropriate. The leverage ratio continues to be a criterion in defining whether an insured depository institution subsidiary of the holding company is well-capitalized.

To qualify for the streamlined procedure, a bank holding company must meet the risk-based capital levels on a consolidated basis. The Board generally will not apply these definitions to intermediate-tier bank holding companies involved in the transaction. The procedure allows the Board to notify a bank holding company that it should follow the normal 30/60-day procedure if the System has concern about the financial strength of an intermediate-tier bank holding company that, for example, is itself an operating company or that contains significant debt.

Several commenters argued that the Board should adopt a process for granting exceptions to the capital requirements where the applicant can demonstrate that capital ratios do not adequately indicate the financial strength of the organization. In light of the other changes that have been adopted, the Board does not believe that a special exceptions process is necessary or appropriate. The capital criteria are based on internationally accepted risk-based standards, and are for the limited purpose of identifying companies that qualify for a streamlined review process. Banking organizations that do not qualify under these criteria are still permitted to make acquisitions and engage in permissible nonbanking activities by following the normal 30/60 review process. As noted above, the standard of 10 percent total risk-based capital and 6 percent Tier 1 risk-based capital applies to all organizations, including foreign banking organizations, seeking to take advantage of the streamlined procedures. In its request for comment, the Board specifically requested comment on ways in which the qualifying criteria should be defined for foreign banking organizations in order to assure national treatment of foreign banking organizations under the streamlined procedures. Based on these comments, the final rule includes a number of provisions specifically applicable to foreign banking organizations.

Several commenters argued that, for purposes of determining whether a foreign banking organization meets the capital levels necessary to qualify for the streamlined procedure, a foreign banking organization should be permitted to use the definition of capital adopted by the home country of the foreign banking organization. For foreign banking organizations from countries that have adopted capital standards in all respects consistent with the Basle Capital Accord, the Board generally agrees that this permits the least burdensome approach to applying equivalent standards. Accordingly, the final rule provides that, for purposes of determining whether a foreign banking organization meets the capital ratios described above for a well-capitalized bank holding company, a foreign banking organization may use the capital terms and definitions of its home country provided that those standards are consistent in all respects with the Basle Capital Accord. If the home country has not adopted those standards, the foreign banking organization may use the streamlined procedures if it obtains from the Board a prior determination that its capital is equivalent to the capital that would be required of a U.S. banking organization for these purposes.

The Regulatory Relief Act provides that, for purposes of determining qualification for the streamlined procedures for nonbanking proposals, U.S. branches and agencies of foreign banking organizations are considered banks and must meet the capital and managerial standards applicable to U.S. banks. The Board recognizes that branches and agencies are a part of the foreign banking organization and that capital is not allocated separately to a branch or agency. Accordingly, for purposes of determining the qualification for the streamlined procedures, the final rule deems the capital ratios of U.S. branches and agencies of foreign banking organizations to be the same as the capital level of the foreign banking organization.

For purposes of determining whether a foreign banking organization meets the managerial definition for the streamlined procedures, the final rule requires that: (1) The largest U.S. branch, agency or depository institution controlled by the foreign bank have

received at least a ''satisfactory'' composite examination rating from its U.S. banking supervisor; (2) U.S. branches, agencies and depository institutions representing at least 80 percent of the U.S. risk-weighted assets controlled by the foreign banking organization at such offices have received at least a ''satisfactory'' composite examination rating from the U.S. banking supervisors; and (3) the overall rating of the foreign banking organization's combined U.S. operations is at least ''satisfactory.'' Further, no branch, agency or depository institution may have received one of the two lowest composite ratings at its most recent examination. In addition, as with domestic bank holding companies, no U.S. branch, agency or insured depository institution may be subject to an asset maintenance agreement with its chartering or licensing authority. Under the final rule, the System may disqualify any banking organization, including a foreign banking organization, from using the streamlined procedure for any appropriate reason, including if information from the primary supervisor of a domestic bank or home country supervisor for a foreign bank indicates that a more in-depth review of proposals involving that organization is warranted.

The final rule also retains the requirement that, in order to qualify for the streamlined procedure for bank acquisition proposals, a foreign banking organization must meet the home country supervision and information sufficiency requirements of the BHC Act.

Several commenters requested clarification of the types of supervisory actions that would disqualify a bank holding company from using the streamlined procedures. In this regard, the Regulatory Relief Act provides that, for purposes of the streamlined nonbanking procedures contained in that Act, a bank holding company may not be subject to certain types of administrative enforcement proceedings. The final rule clarifies that a bank holding company may not use the streamlined procedures for any nonbanking proposal or any bank acquisition proposal if any formal order, including a cease and desist order, written agreement, capital directive, asset maintenance agreement or other order or directive, is outstanding or any formal administrative action is pending against the bank holding company or any of its insured depository institutions. The System may, if appropriate, require a bank holding company to follow the normal 30/60-day procedure if an informal action, such as a memorandum of understanding or supervisory letter, pending against the bank holding company or any affiliate indicates that a more in-depth review is appropriate.

The Regulatory Relief Act permits exclusion of recently acquired insured depository institutions under certain circumstances in determining whether a bank holding company is well-managed. This exclusion has been adopted in the final rule for purposes of determining a bank holding company's qualification for the streamlined procedures for bank acquisition proposals as well as for nonbanking proposals.

The Regulatory Relief Act also permits the Board to adjust the level of insured depository institutions that must meet the well-managed definition for purposes of the streamlined nonbanking procedures, so long as the level adopted by the Board is consistent with safety and soundness and the purposes of the BHC Act. For purposes of the streamlined nonbanking procedures, the Board had proposed that the parent bank holding company, the lead insured depository institution and insured depository institutions controlling at least 80 percent of the insured depository institution assets of the holding company be well-managed (rather than 90 percent as in the Regulatory Relief Act). In addition, no insured depository institution controlled by the bank holding company (other than a recently acquired institution, subject to the limitations discussed above) may have received one of the 2 lowest composite examination ratings.

As noted above, commenters addressing this issue were largely in favor of this definition. The Board believes that, in the limited context of determining the availability of the streamlined procedures, the definition proposed and adopted in the final rule, and in particular, the level of insured depository institutions that must be well-managed, will adequately identify organizations that merit a more in-depth review and is a definition that is consistent with safety and soundness and the purposes of the BHC Act. The Board notes that the Board retains the authority and discretion to require any organization to follow the normal procedures if appropriate.

b. Competitive Criteria

A few commenters suggested that the Board amend the competitive criteria by eliminating or raising the qualifying threshold levels of the Herfindahl-Hirschman Index (''HHI''), by increasing or eliminating the market share test, and by allowing a bank holding company to meet the competitive criteria after making divestitures. The Board has determined not to change its formulation of the competitive standard for the streamlined procedures.

The competitive criteria proposed and adopted by the Board reflect the HHI thresholds above which a bank acquisition proposal comes under close scrutiny by the Department of Justice (''DOJ'') under the DOJ's Horizontal Merger Guidelines as applied to bank acquisitions, and by the Board under its existing delegation rules. In conducting a competitive analysis, both the Board and the courts have found the resulting market share to be an important indicator of the competitive effects of a proposal. Finally, divestitures to address competitive issues are not a normal event and typically indicate a transaction that requires an evaluation of information and factors beyond what may be accomplished in a streamlined procedure.

c. Convenience and Needs

Many commenters objected to the use of the CRA examination rating as a measure of whether a proposal would meet the convenience and needs of the communities affected by a bank acquisition proposal. These commenters argued that CRA performance ratings are often outdated, are as a rule too high and, at best, represent an average of an institution's overall performance. These commenters also argued that reliance on CRA ratings would amount to a safe-harbor for virtually all institutions, and would represent a step that Congress considered and rejected in adopting the Regulatory Relief Act. In addition, commenters objected that use of these criteria would eliminate an in-depth review of the convenience and needs standard in all but protested cases. Commenters also objected to permitting an organization with up to 20 percent of its assets in institutions with unsatisfactory CRA performance ratings to take advantage of streamlined procedures.

Other commenters argued that CRA ratings provide the most reliable indicator of an institution's record of helping to meet the credit and other banking needs of the institution's existing communities and represent a strong indicator of the institution's willingness and ability to meet the banking needs of new communities. Several of these commenters also contended that reliance on CRA performance ratings as a criterion for streamlined processing of acquisition proposals would encourage organizations to meet and maintain satisfactory performance levels.

After review of the comments, the Board has determined to amend the criteria for qualifying for the streamlined procedure. The criteria adopted require that the record show that the proposal is consistent with the convenience and needs standard under the BHC Act and that the acquiring organization have satisfactory or outstanding performance ratings under the CRA at its lead insured depository institution and insured institutions representing at least 80 percent of the organization's banking assets.

As noted above, the Board has determined to retain the portion of the current regulatory filing in which the applicant describes the effect of the proposal on the convenience and needs of the affected communities. The System would evaluate this information as well as other information available to the System, including CRA performance ratings, in determining whether a proposal meets the convenience and needs factor in connection with the System's review of the proposal. The Board continues to believe that the CRA performance rating is a valuable and important measure of the record and ability of an applicant to meet the convenience and needs of a community, and the Board would, as currently, give significant weight to that performance record in the streamlined process.

The Board believes that it may adopt the streamlined procedures as amended without any statutory changes to the BHC Act. The provisions under consideration by Congress in connection with the Regulatory Relief Act would have taken additional steps, including eliminating any public notice and opportunity for comment on bank acquisition proposals and eliminating consultation with the primary supervisor for the banks involved in the transaction.

d. Size

The Board proposed to limit to 35 percent of the acquiring holding company's assets the aggregate amount of bank and nonbanking assets that may be acquired during a 12-month period using the streamlined procedures. This aggregate limit would be calculated by reference to transactions approved under the streamlined procedure and would not include transactions that are reviewed under the normal 30/60-day process.

Several commenters argued that the 35 percent asset test would allow very significant proposals by large bank holding companies to be considered under the streamlined procedures, including mergers among institutions that rank among the ten largest banking organizations in the United States. These commenters contended that transactions that are large in absolute terms always require in-depth agency review.

A few other commenters argued, on the other hand, that it was important to assure that the streamlined procedures are available to acquisition proposals by large bank holding companies because acquisitions by these institutions allow the benefits of reduced regulatory costs to be shared by a larger number of consumers. These commenters suggested that the Board expand the size criteria in various ways.

Still other commenters argued that the size restriction would disproportionately limit transactions by small bank holding companies. These commenters contended that a higher limit should be established for small organizations because the objective criteria proposed by the Board are particularly effective in identifying transactions that would not raise statutory issues for small bank holding companies.

In addition to these comments, the Board considered that the Regulatory Relief Act applies a limit on nonbanking acquisitions of 10 percent of the acquiring bank holding company's assets, unless the Board finds that a higher limit is consistent with safety and soundness and the purposes of the BHC Act. The Regulatory Relief Act also includes a limit of 15 percent of the holding company's consolidated Tier 1 capital on the gross consideration that may be paid by a bank holding company in a nonbanking acquisition that is reviewed under the streamlined procedures contained in that Act.

In view of these comments and enactment of the Regulatory Relief Act, the Board has made two amendments to the size criterion originally proposed. First, the Board has adopted an absolute limit of $7.5 billion to the size of an individual acquisition that may be reviewed under the streamlined procedures. This limit would require an in-depth review—on the basis of size alone—of any combination between organizations within approximately the one-hundred largest bank holding companies or involving nonbanking companies with a significant amount of assets.

The second change to the size criterion involves adoption of a limit on the gross consideration that may be paid in a nonbanking acquisition by a bank holding company under the streamlined process. As noted above, this limit was included in the Regulatory Relief Act. The Board believes that, in the context of a nonbanking acquisition, a measure based on consideration paid often represents a better test of the potential impact of a proposal on the financial resources of the acquiring organization than a test based on the amount of assets acquired because nonbanking acquisitions often involve the purchase of expertise and fee-based businesses that do not involve significant assets.

As noted above, the Regulatory Relief Act adopted a limit of 10 percent of assets on the size of any individual nonbanking acquisition that may occur under the streamlined procedures. The Regulatory Relief Act allows the Board, by regulation, to adopt an asset size limit that exceeds the 10 percent limit if the Board determines that a different percentage is consistent with safety and soundness and the purposes of the BHC Act.

The Board has determined to adopt its proposed 35 percent limit. The size limit adopted by the Board takes account of the aggregate size of all acquisitions—both bank and nonbank acquisitions—reviewed under the streamlined procedures over a period of time that approximates the supervisory examination schedule for most banking organizations. This aggregate limit allows better monitoring of the overall growth of an organization than does an individual transaction limit. As noted above, the Board has also adopted an absolute limit of $7.5 billion on any individual acquisition that may be reviewed under the streamlined procedure, as well as a limit on the amount of consideration that may be paid in a nonbanking acquisition. The Board has also retained the ability to require review of any transaction using the normal 30/60-day process if warranted for safety and soundness or other reasons. The Board believes that, in view of these other limitations, the aggregate 35 percent size limit is consistent with safety and soundness and the purposes of the BHC Act.

The Board has determined not to raise the size of its proposed exception from the growth limit for smaller bank holding companies. The Board proposed to permit a qualifying bank holding company to make acquisitions without regard to the 35 percent of asset limitation so long as the total assets of the bank holding company remained below $300 million on a *pro forma* basis. The Board believes that it is important to monitor rapid growth in the relative size of an organization and that an examination rating may not accurately reflect the financial and managerial strength of an organization that has grown significantly since the last examination was conducted. The Board also notes that a significant

number of acquisitions by smaller bank holding companies that exceed the growth limit are likely to continue to qualify for the normal 30-day delegated action procedure.

e. Notice to Primary Bank Supervisor

In the case of the acquisition of a bank, the BHC Act requires that the primary supervisor for the bank to be acquired be given 30 calendar days in which to submit comments on the transaction. A similar provision was enacted in the Regulatory Relief Act that requires 30 days notice to be given to the Director of the Office of Thrift Supervision of a proposal by a bank holding company to acquire a savings association.

Financial, managerial, legal, safety and soundness, and other concerns that are known to the primary bank supervisor generally are shared with the System through ongoing arrangements for sharing supervisory information. Similarly, the System and the Office of Thrift Supervision regularly coordinate efforts and share information. Consequently, in practice, the primary supervisor generally allows the notice period regarding an application to expire without filing comments.

To implement this statutory requirement, the final rule requires the appropriate Reserve Bank to provide notice of each bank acquisition proposal to the primary supervisor for the relevant banks and of each savings association acquisition to the Director of OTS. The final rule allows the System to act on any proposal that qualifies for the streamlined procedure even though the period for obtaining comments from the primary supervisor has not expired. The final rule provides, however, that the System's action is subject to revocation if the primary supervisor objects to a transaction within the relevant notice period. Because bank acquisition proposals may not be consummated for at least 15 days after System action—which is the minimum post-approval period permitted by statute to allow DOJ review of a bank acquisition—it is expected that the notice period for the primary supervisor will expire prior to consummation of a bank acquisition proposal. In the case of thrift acquisitions, the OTS is working with the Board to streamline the comment process.

5. Preacceptance Review Period

The Board proposed to eliminate the current period prior to acceptance of a regulatory filing regarding a bank acquisition proposal during which the Reserve Bank reviews the informational sufficiency of the filing. Instead, the Board proposed to accept immediately any submission that contains the information specified in the rule for the proposed type of transaction. This change eliminates a pre-acceptance period that typically averages 25 days.

While commenters were generally in favor of this change, a number of commenters objected that elimination of the pre-acceptance period would reduce the ability of the System to obtain information needed to evaluate properly the merits of a proposal. The Board disagrees. The elimination of the pre-acceptance period does not in any way diminish the ability of the System at any time to request, or the responsibility of the applicant/notificant to provide, additional relevant information needed to evaluate a proposal. In addition, the Board has retained the right to return as incomplete any submission that does not contain the information specified in the regulation or appropriate form.

The Board had previously eliminated a similar pre-acceptance period that applied to nonbanking acquisitions. The Board's experience with elimination of the pre-acceptance period for nonbanking acquisitions has indicated that a similar period is not necessary for bank acquisition proposals.

6. Hart-Scott-Rodino Act

One commenter expressed concern whether bank and nonbanking acquisitions approved under the Board's streamlined procedures would be exempt from the notification requirements of section 7A of the Clayton Act. Section 7A of the Clayton Act, as added by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. 18A) (''HSR Act''), requires that persons contemplating certain mergers and acquisitions provide notice of the transaction to the Federal Trade Commission (''FTC'') and the DOJ. The HSR Act, however, specifically provides an exemption from these filing requirements for transactions that require agency approval under section 3 of the BHC Act (*i.e.*, the acquisition of shares or control of a bank or bank holding company). In addition, the HSR Act provides an exemption for transactions that require agency approval under section 4 of the BHC Act (*i.e.*, the acquisition by a bank holding company of a nonbanking company) if the acquiring company provides to the FTC and DOJ copies of all information filed with the Board.

The Board believes that the streamlined procedures under Regulation Y continue to satisfy the requirement for an exemption from the HSR Act for both bank and nonbanking acquisitions. The streamlined procedures represent a more streamlined procedure for obtaining System approval for the acquisition of a bank or bank holding company under section 3 or the acquisition of a nonbanking company under section 4 of the BHC Act. As provided in the HSR Act, bank holding companies would continue to be required to file with the DOJ and FTC the information submitted to the Board in connection with a nonbanking acquisition. The staff of the DOJ and FTC have informally agreed with this position.

7. Conditional Approval

The Board has authority to impose conditions in connection with its action on any proposal, and has in fact imposed conditions that address safety and soundness, CRA, conflicts of interest, and competitive issues in a number of prior cases. The final rule incorporates this policy in order to make clear that this authority is available in connection with action on any case, including a case that qualifies for the streamlined procedure.

8. Waiver Process

The Board's current regulation permits bank holding companies to seek a waiver of the application filing requirement under the BHC Act for transactions that involve the acquisition of stock of a bank for an instant in time as part of a bank-to-bank merger reviewed by another federal banking agency under the Bank Merger Act. The Board proposed three changes to this portion of the regulation. First, the Board proposed to reduce the period for its review of waiver requests to 10 days from 30 days. Second, the Board proposed to specify in the regulation the information that must be provided with a waiver request. Third, the Board proposed to make the waiver process available for certain internal corporate reorganizations.

Commenters discussing this proposal generally supported these changes. Several commenters suggested that the Board make waivers automatic and eliminate the filing and review requirement altogether. Another commenter argued, on the other hand, that the Board should not allow the waiver of any application and should require application filings in every case.

The Board continues to believe that the waiver process represents a sensible reduction in duplication of regulatory review of proposals that are subject to review under identical standards in two different federal statutes. Accordingly, the Board has determined to retain the waiver process with the changes proposed. The Board believes that a 10-

day review process is adequate and necessary to allow the System to identify any aspect of the proposal that may have a material effect on the bank holding company or otherwise fall outside the purview of the federal banking agency that is reviewing the merits of the underlying transaction.

The Board also believes that, as a general matter, corporate reorganizations (such as the formation of a wholly owned intermediate-tier holding company, the merger of wholly owned holding companies, and the transfer of a bank from one part of an organization to another part of the same organization) do not generally require agency review. In each case, the bank holding company already has System approval to control and operate the banks involved in the transaction. In these cases, the Board agrees with commenters that a waiver should be automatic. The supervisory process provides the Board with ample authority and opportunity to address concerns that may arise from internal corporate reorganizations. Accordingly, the Board has adopted its proposal to extend the waiver process to internal corporate reorganizations and has made these waivers available without any filing requirement.[3]

9. Small Bank Holding Company Policy Statement

As published in the proposed revision to Regulation Y, the Board's policy statement on one-bank holding companies was revised to generalize its applicability beyond the formation of a bank holding company to include acquisitions by qualifying small bank holding companies, to reduce the burden in the applications process, to incorporate previously informal policies that evolved since the original publication of the statement, and to remove obsolete language. Specifically, the Board proposed to permit small bank holding companies whose subsidiary banks are well managed and well-capitalized and whose proposals result in parent company debt to equity of less than 1.0:1, to be eligible for streamlined processing. These companies would also be permitted to pay dividends under certain conditions that are more clearly defined than in the existing statement. Proposals involving higher parent company leverage or a bank in less-than-satisfactory condition would be subjected to a focused review of the parent-level debt servicing ability, or other issue presented, under the Board's normal procedures. These organizations would also be restricted from paying dividends until their leverage was reduced to a 1.0:1 level and the organization is otherwise in satisfactory condition.

The final statement incorporates several changes that further reduce burden and make the policy statement more consistent with the general revisions to Regulation Y. It also incorporates suggestions from commenters and further clarifies the statement.

The major substantive change eliminates a disparity between larger and smaller bank holding companies in qualifying for the Board's streamlined procedures. The final statement incorporates the requirement that, to qualify for the new streamlined procedure, banks controlling 80 percent of the organization must be well-managed and well-capitalized, as opposed to the requirement in the previous version of the statement that all banks meet these criteria.

To address concern about the availability of the streamlined procedures to small bank holding companies that have not yet received an inspection rating, the final rule permits any unrated bank holding company, including a small bank holding company, to be eligible for streamlined processing as long as its subsidiary bank(s) are well-capitalized and well-rated and the bank holding company obtains a determination from the System that the company qualifies for the streamlined procedures.

Several commenters urged the Board to raise the $150 million size limit to qualify as a small bank holding company. The Board has determined not to raise this level at this time. The Board is concerned that an increase in the availability of higher levels of debt without consolidated capital requirements would raise overall risks to the banking system, including increased risk to the Bank Insurance Fund, without sufficient offsetting public benefits.

The statement was also reformatted to make it more understandable and several technical and conforming changes have been adopted.

10. One-Bank Holding Company Formations

The Board proposed a number of modifications to the streamlined notice procedure governing proposals by existing shareholders of a bank to establish a bank holding company. To qualify for this procedure under current rules, the shareholders of the bank must acquire at least 80 percent of the shares of the new bank holding company in substantially the same proportion as the shareholders' bank ownership, all shareholders must certify that the shareholders are not subject to any supervisory or administrative action, and the bank holding company must identify the shareholders of the new bank holding company.

The Board proposed to reduce the percentage of the bank holding company that must be owned by shareholders of the bank from 80 to 67 percent and to require only the principal shareholders (*i.e.*, shareholders owning in excess of 10 percent of the bank holding company) to certify that they are not subject to any supervisory or administrative action. In addition, the Board proposed to eliminate the publication requirement for this category of bank holding company formation because no publication is required for these transactions under the Riegle Act and because no regulatory purpose is served by requiring publication of these transactions, which represent only a corporate reorganization.

Only two commenters addressed these proposed revisions. Both supported the revisions and stated that the changes would help reduce unnecessary burden on individuals forming small bank holding companies. Accordingly, the Board has adopted the proposed changes in the final rule.

B. Explanation of Proposed Changes to the Nonbanking Provisions

1. General Review and Updating of Nonbanking Activities

Section 4(c)(8) of the BHC Act generally provides that a bank holding company may engage in, or acquire shares of a company engaged in, activities that the Board has determined, after notice and opportunity for comment, ''to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.'' The Board may make this determination by order or by regulation. The Board has to date determined by regulation that 24 activities are ''closely related to banking'' and has determined by individual order that a number of additional activities are also ''closely related to banking.''

Once the Board has determined—either by regulation or by order—that an activity is ''closely related to banking,'' the Board need not make that determination again in subsequent cases. Review of subsequent cases is limited to determining whether the

[3] Under the final rule, the waiver process is not available for transactions by a holding company that is organized in mutual form or for transactions that occur outside the United States. These cases typically raise a variety of issues that require review in the application/notice process.

conduct of the nonbanking activity by the applying bank holding company would result in public benefits that outweigh the potential adverse effects (the ''proper incident'' test).

The list of nonbanking activities contained in Regulation Y (the ''laundry list'') is intended to serve the purpose of providing a convenient and detailed list of most of the activities that the Board has found to be closely related to banking and therefore permissible for bank holding companies. The Regulation Y laundry list also designates the activities that may be approved by the Reserve Banks under delegated authority, although the Board has delegated authority for Reserve Banks to act on proposals involving a number of activities approved by order during intervals between modifications of Regulation Y.

The Board has adopted its proposed reorganization and revision of the list of permissible nonbanking activities contained in Regulation Y. Commenters generally agreed that reorganizing the list into categories of functionally related activities would make the list easier to understand and make it easier for bank holding companies to obtain approval to engage in related activities. The Board intends that this new organization of the laundry list permit a bank holding company to obtain approval at one time to engage in all of the activities on the laundry list, all activities listed in a functional category, or, at the holding company's choosing, any specific activity within a category.

As explained above, the Board has also amended Regulation Y to incorporate the changes enacted in the Regulatory Relief Act that eliminate the prior approval requirement for well-run bank holding companies that propose to engage *de novo* in nonbanking activities that have been permitted by regulation. This change will significantly reduce regulatory burden and improve the ability of well-run bank holding companies to respond quickly to changes in the marketplace by eliminating the requirement that these companies obtain System approval prior to commencing *de novo* an activity permitted by regulation. This change will also permit a well-run bank holding company, without any prior notice or Board approval, to commence immediately any activity that is currently on the laundry list, any activity that has been added to the regulatory list of permissible activities in this final rule, and any new activity that is added to the regulatory laundry list in the future, provided that the bank holding company meets the qualifying criteria at the time the nonbanking activity is commenced. A bank holding company that does not qualify under the final rule may file a notice seeking approval to engage in any or all activities contained on the laundry list, as reorganized in this final rule.

The Board has also adopted a streamlined procedure for well-run bank holding companies to obtain System approval to make nonbanking acquisitions that fall within the size limits noted above. This streamlined procedure is also available for proposals to engage *de novo* in nonbanking activities that have been permitted only by order.

As explained more fully below, the Board has amended the regulatory list of permissible activities to include nonbanking activities that previously have been determined by order to be closely related to banking. Among the activities that have been included are: (1) Riskless principal transactions; (2) private placement services; (3) foreign exchange trading for a bank holding company's own account; (4) dealing and related activities in gold, silver, platinum and palladium; (5) employee benefits consulting; (6) career counseling services; (7) asset management, servicing and collection activities; (8) acquiring and resolving debt-in-default; (9) printing and selling checks; and (10) providing real-estate settlement services.

In addition, the Board has broadened the scope of permissible derivatives and foreign exchange activities to assure that bank holding companies may conduct these activities to the same degree as banks. As explained below, the final rule also removes several restrictions on these activities that apply to bank holding companies but do not apply to banks that conduct these activities.

2. Removal of Restrictions Governing Permissible Activities

The Board has determined to remove a significant number of restrictions currently contained in the regulation that are outmoded, have been superseded by Board order, or do not apply to insured depository institutions that conduct the same activity. The removal of these restrictions from the regulation does not affect the Board's determination that each activity contained on the laundry list is so closely related to banking as to be a proper incident thereto. A detailed discussion of the restrictions that have been removed is contained in subsections (3), (5) and (6), or the section below explaining ''Restrictions Removed from Permissible Nonbanking Activities.''.

The Board has determined to grant relief from these conditions to all bank holding companies authorized to conduct each activity, without the need for a specific filing by any individual bank holding company. Henceforth, a bank holding company authorized to conduct an activity on the revised laundry list may conduct that activity subject to the limitations retained in this final rule and to other applicable laws. This relief extends only to the restrictions described as being removed in subsections (3), (5) or (6), or the section below explaining ''Restrictions Removed from Permissible Nonbanking Activities.'' In particular, the relief does not extend to commitments or conditions that relate to the financial resources of a particular bank holding company or its subsidiaries, or to commitments or conditions that relate to the risk management polices of the organization, periods for divestiture of impermissible assets or shares, or other commitments or conditions that are not discussed in subsections (3), (5), or (6) or the section below explaining ''Restrictions Removed from Permissible Nonbanking Activities.'' Bank holding companies that have committed to comply with restrictions not described in those sections as being removed may in writing request a determination that the condition or commitment is no longer appropriate.

In granting this relief, the Board notes that some of the conditions removed from activities on the Regulation Y laundry list involve restrictions imposed under other laws and regulations, such as the federal securities laws or the Commodity Exchange Act. The Board's action does not relieve any bank holding company of its obligation to conduct each activity in accordance with relevant state and federal law governing the activity. Other restrictions that have been removed describe good business practice but are not required to define the lawful scope of permissible activity. The Board will continue through the inspection process to monitor carefully the conduct of nonbanking activities by individual bank holding companies and reserves the right to impose any condition on the nonbanking activities or operations of any bank holding company as appropriate to assure that the activity is conducted in a safe and sound manner and within the authority granted by the Board.

3. Revision of Policy Statement Governing Investment Advisory Activities

The Board proposed to remove four restrictions contained in its 1972

interpretive rule regarding the investment advisory activities of bank holding companies with respect to mutual funds and other investment companies. These restrictions prohibit a bank holding company from:

* Owning any shares of a mutual fund advised by the bank holding company;

* Lending to a mutual fund advised by the bank holding company;

* Accepting shares of a mutual fund that the holding company advises as collateral for any loan to a customer for the purpose of purchasing those mutual fund shares; and

* Serving as an investment adviser to an investment company or mutual fund that has a name that is similar to, or a variation of, the name of the bank holding company or any of its subsidiary banks.

These restrictions are intended to ensure that a bank holding company does not control a mutual fund in violation of the Glass-Steagall Act, as well as to mitigate potential conflicts of interests and the potential for customer confusion about the uninsured nature of investment company shares. The Board had previously removed a prohibition on a bank holding company purchasing, as a fiduciary, shares of a mutual fund advised by the holding company as well as restrictions contained in a staff letter (the ''Sovran letter'') on the sale of mutual funds by employees of a holding company and its affiliates.

As the Board noted in its proposal, existing statutory provisions appear adequate to address concerns about the ownership of shares of a mutual fund by the bank holding company. In particular, the investment limitations of section 4 of the BHC Act appear adequate to mitigate potential conflicts of interests that could result from removal of the investment restriction and limit the ability of a bank holding company to acquire more than 5 percent of the voting shares of or to control a mutual fund it advises.

Removal of the two lending restrictions would permit bank holding companies and their affiliates to make certain loans to the extent permissible under applicable federal or state law. For example, federal law permits insured banks, within limits, to make loans to a mutual fund advised by the bank, and the federal securities laws govern the extension of credit by any broker/dealer to a customer to purchase shares of a mutual fund. The System expects that extensions of credit by the holding company to a mutual fund or to a customer who uses the shares as collateral for the loan would be done on a safe and sound basis.

The Board proposed to replace the fourth restriction with a provision permitting similar names so long as: (1) The investment company name is not identical to that of the holding company or an affiliated insured depository institution; (2) the investment company name does not include the term ''bank,''; and (3) the holding company or investment company discloses to customers in writing the role of the holding company as an adviser to the investment company and that shares of the investment company are not federally insured and are not obligations of or guaranteed by any insured depository institution. The SEC permits an investment company to have a name similar to that of an insured depository institution provided that the investment company makes a number of disclosures that advise customers that the investment company is not federally insured or guaranteed by the insured depository institution.[4]

Many commenters strongly supported these proposed revisions. Commenters stated that these changes would remove restrictions addressed more directly by other provisions of law and would allow bank holding companies to compete on a more equal basis with other investment advisors. Several commenters urged the Board to allow an investment company advised by a bank holding company to have a name identical to that of the bank holding company so long as the name is not identical to that of any subsidiary bank of the holding company. These commenters also contended that the Board's disclosure requirements in this area are duplicative and therefore should be eliminated. A small number of other commenters objected that the Board's proposal would cause increased confusion among customers regarding the nature of uninsured investment products.

After review of the comments, the Board believes that the proposed revisions to the interpretive rule are appropriate, and has adopted the revisions as proposed. The revised name restriction will allow increased flexibility in the marketing of investment companies advised by bank holding companies, and enhance the ability of bank holding companies to compete with other bank and nonbank-affiliated investment advisers. At the same time, the limitation on identical names and on the use of the word ''bank,'' when coupled with the disclosure requirements, should substantially mitigate the potential for customer confusion about the uninsured nature of investment company shares.

The Board believes that the disclosure requirements also continue to be appropriate to address the potential for customer confusion in situations in which the holding company or its affiliates advise a mutual fund and the sale of the mutual fund shares is not covered by the disclosure provisions of the Interagency Statement on Retail Sales of Nondeposit Investment Products. The disclosure requirements are increasingly proving to be an effective method for addressing potential customer confusion and do not appear to be onerous.

4. Procedures for Determining the Permissibility of Nonbanking Activities

The Board has adopted two provisions to Regulation Y to ease the burden associated with determining the authorization and scope of permissible nonbanking activities. First, the regulation specifically reflects the fact that the Board may, on its own initiative, begin a proceeding to find that an activity is permissible for bank holding companies, as the Board did in the case of many of the earlier nonbanking activities. As required by the BHC Act, the Board would provide public notice that it is considering the permissibility of a given activity and would provide an opportunity for public comment.

The Board expects to consider amending the laundry list, for example, as new activities are authorized for banks, as experience with a narrowly defined activity indicates that the activity should be more broadly defined, or as developments occur in technology or the marketplace for financial products and services. The System will actively track market developments as well as decisions that authorize banks to conduct new activities and evaluate adding these activities to the laundry list even if an individual request has not yet been made to engage in these activities.

Several commenters urged the Board to add a provision limiting the processing period for evaluating proposals regarding the permissibility of a particular new activity, much as the Board has proposed for determining the scope of a currently permissible activity. On the other hand, other commenters argued that the Board should seek public comment on all proposals involving the permissibility of new activities or the scope of currently permissible nonbanking activities.

The BHC Act, as amended by the Regulatory Relief Act, requires that the

[4] Letter of May 13, 1993, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 76,683.

Board provide notice and opportunity for public comment prior to determining that an activity is closely related to banking. The Regulatory Relief Act eliminated the requirement that the Board provide an opportunity for a formal hearing regarding the permissibility of an activity. The final rule reflects both of these statutory actions. In particular, the final rule retains the provision currently in Regulation Y for public notice and opportunity for comment in connection with consideration of the permissibility of a new activity, and eliminates the requirement for a hearing. The Board retains discretion to order a formal or informal hearing regarding the permissibility of an activity where a hearing may be useful in resolving disputes of fact regarding an activity. Because of the complexity of many of the issues raised in determining the permissibility of a new activity, the Board has determined not to establish a specific limit on the time for evaluating these proposals.

The Board has amended the regulation to establish a streamlined procedure outside the application process through which any bank holding company or other interested person may request an advisory opinion from the Board that a particular variation on an activity is permissible under an existing authorization and is not deemed to be a new activity. The Board would issue an advisory opinion within 45 days, and make this opinion available and applicable to all similarly situated bank holding companies. At the time the Board reviews an activity, the Board would determine whether it is appropriate to permit bank holding companies to engage in this activity without additional approval (as, for example, a variation of one or more previously authorized activities) or to require bank holding companies to obtain approval prior to conducting the activity (because, for example, the activity does not fall within a previously approved activity or category or involves special risks or concerns). As noted above, well-run bank holding companies may, without prior Board approval, engage *de novo* in any activity added to the regulatory laundry list.

Commenters agreed that these two procedures should make it easier for bank holding companies to participate in marketplace developments in permissible nonbanking activities. In addition, these procedures will eliminate a number of applications that are currently filed by bank holding companies that are uncertain about the scope of permissible activities.

5. Nonbanking Activities That Are Incidental to a Permissible Activity

The Board has adopted its proposal to permit a subsidiary of a bank holding company engaged in financial data processing or management consulting activities, as an incidental activity, to derive up to 30 percent of its annual revenue from nonfinancial data processing or management consulting services, respectively. Commenters discussing this aspect of the proposal strongly supported this proposal and contended that bank holding companies engaged in data processing and management consulting activities have substantial expertise in these areas that allow them safely and soundly to provide these services involving nonfinancial data or nonfinancial customers. In addition, several commenters argued that bank holding companies currently are at a competitive disadvantage in providing data processing and management consulting services and in hiring employees because of the strict limitations tying these services to financial data and financial consulting.

A number of commenters argued that the Board should permit a greater amount of incidental activity, some arguing for no limit. Two commenters argued, on the other hand, that bank holding companies should not be permitted to engage in any nonfinancial data processing because the commenters believed that the benefits of access to the Federal discount window and the payments system and the unique products that banks can provide combine to give bank holding companies and banks an unfair advantage in competing with nonfinancial firms to provide nonfinancial products and services, including firms owned by women and minorities.

After considering the comments, the Board has adopted the revisions to the data processing and management consulting provisions as proposed. The Board believes that these revisions are necessary to allow bank holding companies to compete effectively in providing financial data processing and management consulting services.

The strict limitations on providing non-financial data processing and management consulting activities that were previously applied to bank holding companies inhibit the ability of bank holding companies effectively to compete with other providers who often combine financial and nonfinancial products. In a number of recent cases reviewed by the Board, for example, the record has indicated that it is common practice for a software provider to integrate financial data processing software and nonfinancial data processing software in the same package. Similarly, commenters indicated that it is common for management consultants to provide advice on general matters in connection with providing advice on financial, accounting and similar matters. The strict limitations have also reduced the ability of bank holding companies to attract the most qualified employees—who often have expertise, clients, proprietary rights, and interests—that span financial and nonfinancial matters.

The Board believes that its proposed limit—30 percent of the revenue derived from permissible financial data processing activities, and 30 percent of the revenue derived from permissible financial management consulting services, respectively—represents a reasonable level of incidental activity that assures that the bank holding company is significantly involved in financial data processing or management consulting.[5] The Board does not believe that this limited participation will permit bank holding companies an unfair competitive advantage over other providers of data processing or management consulting services. As the Board and the industry gain experience in data processing and management consulting activities, the Board will review and adjust the level of incidental activities as appropriate.

6. Expanded Exception for Acquisitions of Lending Assets in the Ordinary Course of Business

The Board proposed to revise the regulatory language permitting a bank holding company, without additional approval, to acquire lending assets from a third party in the ordinary course of business. The Board currently permits a bank holding company, without additional approval, to acquire assets of an office of another company related to making, acquiring or servicing loans so long as the bank holding company and the transaction meet certain qualifications. Among the qualifications are that the assets relate to consumer or mortgage lending, and that the acquired assets represent the lesser of $25 million or 25 percent of the consumer lending, mortgage banking or industrial banking assets of the acquiring bank holding company. The office must also be

[5] In the data processing area, this 30 percent basket would not include revenue derived from the use of excess capacity or the sale of general purpose hardware that is currently permitted in accordance with the Board's regulation and policies governing those activities.

located in the geographic area served by the bank holding company.

The Board has revised this provision in three ways. First, since the Board no longer limits the geographic scope of its approval to engage in nonbanking activities, this restriction has been removed. Second, the scope of the exception has been broadened to permit the acquisition of assets related to any lending activity. Third, the threshold limits have been raised to permit the acquisition of assets representing up to the lesser of $100 million or 50 percent of the lending assets of the bank holding company.

Commenters generally favored the modifications proposed by the Board for expanding the scope and size of transactions that could be conducted in the ordinary course of business under this exception. The proposed broadening of the exception would eliminate an unnecessary approval requirement and paperwork for transactions that are relatively small and represent the ordinary course of business.

7. Consummation Period for Certain Proposals

The Board had originally proposed to eliminate the requirement that a bank holding company exercise its authority to engage *de novo* in a nonbanking activity within one year of receiving System approval. While several commenters expressed support for this approach, the final rule does not include a specific provision adopting this change for two reasons. First, since the date of the original proposal, the Regulatory Relief Act eliminated altogether the prior approval requirement for well-run bank holding companies that choose to engage *de novo* in nonbanking activities permissible by regulation. This statutory change eliminates a substantial portion of the cases that would have benefitted by the proposal to eliminate the consummation period. Second, the Board may, without any regulatory change, adjust the consummation period on a case-by-case basis. The Board believes this is a more appropriate approach in cases that do not qualify for the statutory exception in the Regulatory Relief Act.

C. Explanation of the Restrictions Removed From Permissible Nonbanking Activities

As noted above, the Board has removed restrictions contained in the current regulation that are outmoded, have been superseded by Board order or would not apply to an insured depository institution conducting the same activity. The limitations that remain are necessary to establish a definition of the permitted activity or to prevent circumvention of another statute, such as the Glass-Steagall Act. The following discussion explains, by functional group of activities, the restrictions that the Board has eliminated as well as certain limitations that the Board has retained. In several areas, the Board expects to develop supervisory policy statements to address potential adverse effects that may be associated with certain activities. The Board may seek comment on those supervisory policy statements as appropriate.

1. Extending Credit and Servicing Loans

Lending activities are already broadly defined and contain no restrictions. Permissible lending activities include the types of lending activities that were previously listed by way of example in Regulation Y, such as lending activities conducted by consumer, mortgage, commercial, factoring, and credit card companies. Removal of those specific examples from the proposed rule was intended to make clear that making, acquiring, brokering and servicing all types of loans or extensions of credit are considered permissible lending activities, and elimination of these examples from the final rule does not diminish the scope of the activity or the permissibility of those examples of lending activities. Nevertheless, at the request of a number of commenters, factoring has been re-included as an example of a permissible lending activity.

2. Activities Related to Extending Credit

A new category has been added authorizing activities that the Board determines to be usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit. Without limiting the scope of this activity, the category lists a number of activities that the Board has previously determined are related to credit extending activities, including, by way of example, credit bureau, collection agency, appraisal, asset management, check guarantee, and real-estate settlement activities.

Restrictions governing disclosures to customers, tying, preferential treatment of customers of affiliates, disclosure of confidential customer information without customer consent and similar restrictions previously contained in Regulation Y have been removed from these activities. These restrictions do not apply to banks that conduct these activities and, to the extent these restrictions are appropriate, supervisory guidance on the conduct of the activity will be developed.

Several commenters requested that the Board eliminate all restrictions governing the acquisition of debt in default, in particular, the requirement that the period for disposing of shares or assets securing debt in default be calculated as of the date the defaulted debt is acquired. The Board believes the three restrictions adopted in the regulation are necessary to define the scope of the activity and to assure that the activity remains the acquisition of debt rather than an impermissible acquisition of securities or other assets. The requirement regarding the calculation of the period for disposing of the underlying shares or assets subjects the activity to the same limitations that apply under the terms of the BHC Act to the acquisition of shares or assets in satisfaction of a debt-previously-contracted. During this period, the holding company may divest the property or, as in the case of any debt that has been previously contracted, restructure the debt.

3. Leasing Personal or Real Property

The changes to the leasing provision have been adopted as proposed. Specifically, the regulation removes a number of restrictions from the two types of leasing activities permissible for bank holding companies, full-payout leasing and high residual value leasing,[6] including the following restrictions:

* The lease must serve as the functional equivalent of an extension of credit (permissible high residual value leasing may not be the functional equivalent of an extension of credit);
* The property must be acquired only for a specific leasing transaction;
* Leased property must be re-leased or sold within 2 years of the end of each lease;
* The maximum lease term may not exceed 40 years; and
* No leased property may be held for more than 50 years.

Commenters favored removal of these restrictions and noted that removal of these restrictions from the regulation would permit bank holding companies

[6] A full-payout lease is the functional equivalent of an extension of credit and relies primarily on rental payments and tax benefits to recover the cost of the leased property and related financing costs. High residual value leasing may involve significant reliance on the expected residual value of the leased property—on average, under 50 percent, but in some cases, up to the full original cost of leased property—to recoup the cost of the leased property and related financing costs. Under the current regulation, bank holding companies may provide full-payout leases for any type of personal property or real property, and may make high residual value leases only for personal property.

greater flexibility to acquire property in quantity in the expectation of leasing activities and would allow more flexibility in selling or re-leasing property at the expiration of a lease. It is expected that supervisory guidance would be developed to address potential issues arising from removal of the restrictions.

The provision limiting to 100 percent of the initial acquisition cost the amount of reliance that may be placed on the residual value of leased personal property has also been removed. This limit does not apply to national bank leasing activities. While commenters favored removal of the requirement that the estimated residual value of real property be limited to 25 percent of the value of the property at the time of the initial lease, this restriction was retained in order to distinguish real property leasing from real estate development and investment activities.

Two other requirements were retained: (1) That the lease be non-operating, and (2) that the initial lease term be at least 90 days. These requirements were developed in the course of litigation regarding the leasing activities of national banks, and were relied on by the courts in distinguishing bank leasing activities from general property rental and real estate development businesses. The requirement that a lease be non-operating is also a statutory requirement limiting the high residual value leasing activities of national banks.

The regulation has been modified at the request of commenters to clarify that, as a general matter, the requirement that a lease be *non-operating* means that the bank holding company may not itself (or through a subsidiary) repair, operate, maintain or service the equipment or property being leased during the lease term. The Board has applied this interpretation since 1974 in order to help distinguish bank holding company leasing activities from general commercial activities. A more detailed definition of a nonoperating lease in the automobile rental context, which was developed in litigation and adopted by the courts, has also been retained. The regulation provides that, in either case, a bank holding company is permitted to arrange for a third party to provide these repair and other services in connection with a lease.

4. Operating Nonbank Depository Institutions

This category permits ownership of a savings association and an industrial loan company. The proposed regulation retains the restrictions in the BHC Act that the institution not be operated as a ''bank'' for purposes of the BHC Act[7] and that the activities of the institution conform to the relevant statutory provisions of the BHC Act. As noted above, by the terms of the Regulatory Relief Act, the operation of a savings association requires prior System approval.

5. Trust Company Functions

The current regulation limits the deposit-taking and lending activities of trust companies. These limitations are already encompassed in the requirement in the BHC Act that the trust company not be a ''bank'' for purposes of the BHC Act and have, therefore, been deleted from the regulation.

6. Financial and Investment Advisory Activities

Like the initial proposal, the final rule groups together all investment and financial advisory activities and broadly permits acting as investment or financial adviser to any person, without restriction. Without limiting the breadth of the advisory authority, the rule also lists specific examples of certain types of investment or financial advice, counseling and related services that previously had been separately authorized. These examples are:

* Advising an investment company and sponsoring, organizing and managing a closed-end investment company;

* Furnishing general economic information and forecasts;

* Providing financial advice regarding mergers and similar corporate transactions;

* Providing advice regarding commodities and derivatives transactions; and

* Providing consumer educational courses and providing tax-planning and tax-preparation.

The final rule removes the few restrictions that have in the past been imposed by the Board on financial and investment advisory activities. These restrictions do not apply to banks that provide investment advisory services.

Specifically, the final rule removes the restriction that discretionary investment advice be provided only to institutional customers, thereby allowing bank holding companies to manage retail customer accounts outside of the trust department of an affiliated bank (to the extent otherwise permitted by law). This activity would continue to be governed by the fiduciary principles in relevant state law. Moreover, the final rule permits bank holding companies to provide retail customers with investment advice concerning derivatives transactions and to provide discretionary investment advice regarding derivatives transactions to institutional or retail customers as an investment adviser, commodity trading advisor, or otherwise. This includes providing discretionary investment advice to any person regarding contracts relating to financial or nonfinancial assets. The conduct of these activities would, of course, be subject to the requirements of applicable law, including applicable state and federal laws governing fiduciary activities or advisory activities.

The final rule permits bank holding companies to engage in any combination of permissible nonbanking activities listed in Regulation Y. Accordingly, bank holding companies may provide financial and investment advice (including discretionary investment advice) together with permissible agency transactional services, investment or trading transactions as principal, or any other listed activities. Supervisory guidance may be developed, as needed, to address conflicts of interest that may arise from providing certain services in combination.

The final rule also deletes restrictions in the areas of tax-planning, tax-preparation and consumer counseling services that prohibited bank holding companies from promoting specific products and services and from obtaining or disclosing confidential customer information without the customer's consent. These restrictions do not apply to banks that engage in these activities.

The commenters addressing this activity strongly supported the consolidation of the various advisory activities, the expansion of permissible advisory activities, and the removal of existing restrictions imposed by the Board on these activities. These commenters argued that the provision of all types of financial and investment advice is within the expertise of banking organizations and, therefore, closely related to banking.

Several commenters requested further guidance on the scope of permissible advisory activities and urged the inclusion of examples of additional specific types of advisory activities, such as advisory activities related to real estate, in order to clarify the permissibility of these activities. Other commenters requested clarification that the use of examples did not imply that advisory activities that are omitted from the list of examples are not permissible.

[7] The BHC Act contains an exception from the definition of ''bank'' for industrial loan companies and savings associations that meet requirements listed in the BHC Act.

As noted above and in the original proposal, the final rule includes any investment or financial advisory activity without restriction. The examples included in the final rule are not intended in any way to limit the scope of the financial and investment advisory activity. The examples are illustrative rather than exclusive examples of permissible advisory activities, and have been retained to recognize that certain advisory activities have been specifically approved under other provisions of Regulation Y and continue to be permissible.

Some commenters suggested revisions to the proposal's description of certain examples. In response to these comments, the final rule clarifies that the provision regarding advice on mergers, acquisitions and other transactions includes ''other similar transactions.'' At the suggestion of several commenters, the final rule has been revised to clarify the permissibility of providing investment advice regarding transactions with respect to any transactions in foreign exchange, swaps and similar transactions, commodities, and forwards contracts, futures, options, options on futures, and similar instruments.

Several commenters noted that there currently is uncertainty regarding the jurisdiction of the CFTC over some transactions involving foreign exchange. The final rule is not affected by the scope of CFTC jurisdiction. The Board intends that references to transactions ''in foreign exchange'' throughout the regulation include transactions in foreign exchange, options on foreign exchange, futures on foreign exchange, options on futures on foreign exchange, swaps in foreign exchange, and similar foreign exchange-related instruments. A bank holding company must, of course, comply with the rules of any other federal or state agency to the extent that the bank holding company conducts an activity subject to that agency's jurisdiction, as determined by the relevant statute, agency rule or court decision.

7. Agency Transactional Services for Customer Investments

The final rule reorganizes into a single functional category the various transactional services that a bank holding company may provide as agent. This category includes securities brokerage activities, private placement activities, riskless principal activities, execution and clearance of derivatives contracts, foreign exchange execution services, and other transactional services.

a. Securities Brokerage Activities

The current regulation differentiates between securities brokerage services provided alone (*i.e.*, discount brokerage services) and securities brokerage services provided in combination with investment advisory services (*i.e.*, full-service brokerage activities). The final rule permits securities brokerage without distinguishing between discount and full-service brokerage activities.

Under the current regulation, bank holding companies providing full-service brokerage services must make certain disclosures to customers regarding the uninsured nature of securities and may not disclose confidential customer information without the customer's consent. These requirements were deleted in the proposal.

The Board sought comment on whether elimination of these restrictions from the regulation would lead to adverse effects, including customer confusion about the uninsured nature of non-deposit investment products sold through bank holding companies. Several commenters opposed the elimination of the disclosure requirements in the regulation, contending that the interagency policy statement and SEC regulations are not providing adequate consumer protection. A number of commenters, however, supported the elimination of the disclosure requirements in the regulation on the basis that these requirements were duplicative of requirements contained in the interagency policy statement and SEC regulations.

The final rule deletes the disclosure requirements. The disclosure requirements—along with a number of other requirements that specifically address the potential for customer confusion, training requirements, suitability requirements and other matters—are already contained in an interagency policy statement that governs the sale of securities and other non-deposit investment products on bank premises as well as in rules adopted by the SEC. In addition, similar disclosure requirements are required by the Board's policy statement governing the sale by bank holding companies of shares of mutual funds and other investment companies that the bank holding company advises.

Recent supervisory experience indicates that banking organizations and their affiliates, in general, are becoming more effective in implementing the regulatory disclosure requirements and that customers are becoming increasingly aware that investment products purchased at banking organizations and their affiliates are not federally insured. Moreover, the Board and the SEC have adequate supervisory authority to ensure that bank holding companies comply with the regulatory disclosure requirements. To the extent that disclosures to customers are appropriate in areas not covered by the regulatory policy statements or SEC regulations, the Board will consider whether to develop supervisory guidance, on an interagency basis where appropriate.

b. Riskless Principal Activities

The Board recently reduced the restrictions that govern riskless principal activities.[8] The restrictions that were retained were designed to ensure that bank holding companies do not avoid the Glass-Steagall Act provisions by classifying underwriting and dealing activities as riskless principal activities. The restrictions that the proposal retained prohibit:

* Selling bank-ineligible securities at the order of a customer who is the issuer or in a transaction in which the bank holding company has an agreement to place the securities of the issuer;

* Acting as riskless principal in any transaction involving a bank-ineligible security for which the bank holding company or an affiliate makes a market;

* Acting as riskless principal for any bank-ineligible security carried in the inventory of the bank holding company or any affiliate; and

* Acting as riskless principal on behalf of any U.S. affiliate that engages in bank-ineligible securities underwriting or dealing activities or any foreign affiliate that engages in securities underwriting or dealing activities outside the U.S.

The Board requested comment on whether these restrictions, and in particular the second and third restrictions, are necessary to assure compliance with the Glass-Steagall Act. The majority of commenters discussing the riskless principal activity argued for the deletion of all four restrictions, contending that none of the restrictions are necessary to ensure that a nonbanking subsidiary does not engage in underwriting or dealing through its riskless principal transactions and that any concern in this regard would be addressed by a requirement that the subsidiary not hold itself out as a dealer with respect to any security. Several commenters noted that the restrictions would prohibit riskless principal

[8] *The Bank of New York Company, Inc.*, 82 Federal Reserve Bulletin 748 (1996).

transactions on behalf of a section 20 affiliate even if this affiliate was not the underwriter or dealer for the security in question. These commenters maintained that this would put bank holding companies with section 20 affiliates at a competitive disadvantage.

Several commenters also suggested that the Board permit riskless principal transactions in the primary market generally. Some of these commenters specifically urged the Board to allow bank holding companies to act as riskless principal for the sale of commercial paper in the primary market because commercial paper tends to have short maturities.

The final rule retains the requirement that riskless principal transactions be conducted in the secondary market. The Board has determined, however, to eliminate all but two restrictions in the final rule. The final rule retains the first proposed restriction, which prohibits a bank holding company from using its riskless principal authority to sell bank-ineligible securities at the order of a customer who is the issuer or in a transaction in which the bank holding company has an agreement to place the securities of the issuer. This restriction, as well as the requirement that the transactions be conducted in the secondary market, is designed to distinguish riskless principal activities from private placement and underwriting or dealing activities. This classification of riskless principal transactions does not prevent bank holding companies from engaging pursuant to other authority in permissible private placement activities or in underwriting and dealing activities, both of which permit transactions in the primary market and with an issuer.

The Board has also determined to revise the second restriction to focus on transactions involving a bank-ineligible security for which the bank holding company or any affiliate acts as underwriter (during the underwriting period and for 30 days thereafter) or dealer. This revision narrows the scope of the restriction while addressing the Board's concern that a nonbanking subsidiary not use its riskless principal authority to engage in underwriting or dealing activities. As modified, this provision also addresses the concerns covered by the third and fourth restrictions. Consequently, the final rule deletes the last two restrictions in the proposal.

c. Private Placement Activities

The Board proposed to add private placement activities to the laundry list, using the definition of private placement activities adopted by the SEC and the federal securities laws. The proposal removed all but one restriction that had been imposed by Board order on the conduct of this activity. That restriction prohibits a bank holding company from purchasing for its own account securities that it is placing and from holding in inventory unsold portions of securities it is attempting to place.

Among the restrictions that the proposal removes from the conduct of private placement activities are prohibitions on:

* Extending credit that enhances the marketability of a security being placed;

* Lending to an issuer for the purposes of covering the funding lost through the unsold portion of securities being placed;

* Lending to the issuer for the purpose of repurchasing securities being placed;

* Acquiring securities through an account for which the bank holding company has fiduciary authority;

* Providing advice to any purchaser regarding a security the bank holding company is placing; and

* Placing securities with any non-institutional investors (the SEC rules allow sales to institutional investors and up to 35 non-institutional investors).

None of these restrictions have been applied to national banks that conduct private placement activities.

The Board sought comment on whether any of these restrictions must be retained to address potential adverse effects, including potential conflicts of interest or customer confusion, or to assure fulfillment of fiduciary duties. The commenters discussing private placement activities strongly supported the removal of these restrictions from private placement activities.

Several comments urged the Board, however, not to adopt the definition of private placement in the federal securities statutes, contending that such definition is too restrictive. The final rule, as the proposal, defines private placement in accordance with the Securities Act of 1933 (1933 Act) and the rules of the SEC. For purposes of including private placement activities on the laundry list, the Board believes it is reasonable to look to the definition of private placement adopted by the SEC, the primary federal regulator of securities activities, and the distinctions the SEC has drawn between private placement and underwriting or dealing activities. This definition does not limit bank holding companies from seeking to engage in other securities activities pursuant to Board order.

One commenter also requested that the definition of private placement be broadened to include private resales of securities to institutional buyers and private placements of securities of registered investment companies. The final rule would permit private resales of privately placed securities if the transaction is conducted in accordance with the requirements of the 1933 Act and the rules of the SEC, the bank holding company acts only as agent for such private resales by third parties, and the bank holding company neither purchases for its own account securities that it is placing nor holds in inventory unsold portions of securities it is attempting to place. This would not include acting as a dealer with respect to resales of privately placed securities, an activity that bank holding companies may seek to engage in pursuant to Board order. Similarly, the final rule would permit bank holding companies to act as agent for the private placement of securities issued by any company, including an investment company, to the extent that these private placements are conducted in accordance with the requirements of the 1933 Act and the SEC rules and the Board's restrictions on purchasing or inventorying such securities.

Some commenters also recommended that the Board remove the prohibition on a bank holding company purchasing or repurchasing the securities it places. Several of these commenters contended that such purchases should be permissible if the company made the decision to purchase the securities for its own account simultaneously with or after, and separate from, the decision to engage in the private placement. One commenter maintained that a company engaged in private placement activities should be permitted to invest in the securities being placed so long as it had a *bona fide* expectation of and made a *bona fide* effort in placing the securities. The final rule retains the proposal's restriction on purchasing or repurchasing the securities that are privately placed. The Board believes this restriction is appropriate to prevent a bank holding company from classifying as private placement activities its securities underwriting activities, which are governed by the Glass-Steagall Act and the Board's section 20 decisions.

The final rule does not contain a limitation on the amount of a particular issue of securities that a company may place with an affiliate. As the Board noted when it first authorized a bank holding company to place securities with an affiliate, banks privately place securities with affiliates and no

particular supervisory problem appears to have arisen from these investments.[9] The Board continues to recognize the increased potential for certain conflicts of interests if affiliates purchase a substantial portion of an issue of securities placed by an affiliate. In this regard, insured depository institutions that purchase securities privately placed by an affiliate must comply with section 23B of the Federal Reserve Act as well as the limitations in the Glass Steagall-Act relating to the purchase of investment securities. The Board expects that nonbank affiliates that purchase these securities will do so in accordance with appropriate internal policies and procedures.

d. Futures Commission Merchant Activities

i. In General

The current regulation authorizes bank holding companies to execute and clear derivatives on certain financial instruments on major exchanges, subject to a number of restrictions. The Board has, by order, broadened this authority in two key respects. First, the Board has by order permitted bank holding companies to execute and clear derivative contracts on a broad range of nonfinancial commodities. Second, the Board has permitted bank holding companies to clear derivative contracts without simultaneously providing execution services, and to provide execution services without also providing clearing services. Commenters strongly favored modification of the current regulation to reflect these Board orders.

As noted above, the final rule removes the restriction in the current regulation prohibiting a bank holding company from providing foreign exchange transactional services in the same subsidiary that provides advice regarding foreign exchange. Banks are not subject to this restriction. The final rule also would permit a bank holding company to perform permissible futures commission merchant (''FCM'') activities through a section 20 subsidiary.

The final rule permits a nonbanking subsidiary to act as an FCM regarding any exchange-traded futures contract and options on a futures contract based on a financial or nonfinancial commodity. The final rule also deletes the restriction that a bank holding company not act as an FCM on any exchange unless the rules of the exchange have been reviewed by the Board. All U.S. commodities exchanges are supervised by the CFTC and a review by the Federal Reserve System of the rules of an exchange, whether domestic or foreign, would not be the most effective method for addressing the safety of conducting FCM activities on the exchange. A more effective method for addressing the risks of FCM activities—whether on domestic or foreign exchanges—is through the on-site inspection and supervision of the risk management systems of the bank holding company. Accordingly, the Board would use the supervisory process, which includes regular inspections of the holding company and its affiliates, to address concerns about the effectiveness of the holding company's risk management systems.

The final rule removes several other requirements, including that the FCM subsidiary:

* Time stamp all orders and execute them in chronological order;
* Not trade for its own account;
* Not extend margin credit to customers; and
* Maintain adequate capital.

The CFTC has not found it necessary to prohibit FCMs from trading for their own account, and removal of that restriction from the Board's regulation allows an FCM affiliated with a bank holding company to compete on the same basis as an FCM not affiliated with a holding company. Experience has not indicated that the affiliation of an FCM with a bank holding company itself increases the risks or conflicts that could arise from the combination of FCM and proprietary trading activities. Conduct in the other areas listed above is addressed in rules of the CFTC or the relevant self-regulatory organizations, which are applicable to any FCM.

Like the initial proposal, the final rule retains the requirements of the current regulation that a bank holding company conduct its FCM activities through a separately incorporated subsidiary (*i.e.*, not through the parent bank holding company). The proposal retained the requirement of the current regulation that the subsidiary not become a member of an exchange that requires the parent bank holding company also to become a member of the exchange. The purpose of this restriction was to limit the bank holding company's exposure to contingent obligations under the loss sharing rules of exchange clearinghouses in order to preserve the holding company's ability to serve as a source of strength to its subsidiary insured depository institutions. The Board invited comment, however, on whether this restriction was appropriate and on whether the Board's concern could be addressed more effectively by an alternative restriction, such as a requirement that the parent bank holding company not provide a guarantee of non-proprietary trades conducted by an FCM subsidiary.

Most commenters that discussed FCM activities supported the alternative restriction as sufficient to address a bank holding company's potential exposure to contingent obligations under loss sharing rules of clearinghouses and to establish clear parameters for a bank holding company's involvement on an exchange or clearing association. Four commenters suggested that bank holding companies be given the option of choosing which restriction is more suitable to business conducted on a particular exchange. If a choice must be made between a prohibition against membership or against a guarantee of non-proprietary trades, these commenters generally preferred the latter, noting that holding company membership is a prerequisite on a number of exchanges for receiving reductions in fees or other benefits.

Based on its experience and a review of the comments, the Board has determined that an alternative restriction that prohibits the parent bank holding company from guaranteeing or otherwise becoming liable for non-proprietary trades conducted by or through its FCM subsidiary more effectively addresses the Board's concern about a parent bank holding company's exposure to an exchange's or clearinghouse's loss sharing rules than the current provision limiting the holding company's membership on an exchange. This alternative restriction effectively protects the parent bank holding company from potential exposure from customer trades and open-ended contingent liability under loss sharing rules while recognizing that most exchanges require a parent to guarantee proprietary trades. Accordingly, the final rule revises the regulation to prohibit the parent bank holding company from guaranteeing or otherwise becoming liable to an exchange or clearinghouse for trades other than those conducted by the subsidiary for its own account or for the account of an affiliate. The final rule eliminates the existing prohibition on an FCM subsidiary becoming a member of an exchange that requires the parent bank holding company also to become a member.

Other commenters requested confirmation that an FCM subsidiary may, as an incidental activity, provide various futures-related financing to customers, such as financing to cover margin obligations. Lending is a

[9] *J.P. Morgan & Company Inc.*, 76 Federal Reserve Bulletin 26, 28 (1990)

permissible activity for bank holding companies, and the final rule would not prohibit permissible lending activities in combination with FCM activities. This permits an FCM owned by a bank holding company to compete on the same terms with an FCM that is not affiliated with a bank holding company. The Board notes, however, that some exchanges prohibit FCMs from providing margin financing, and CFTC rules require full capitalization for any extensions of credit to customers. An FCM controlled by a bank holding company must continue to abide by the rules of the CFTC and any exchange on which the FCM is a member or trades.

Several commenters requested clarification that the authority for an FCM subsidiary to become a member of an exchange included authority to open an office in the country were the exchange is located. In addition, several commenters requested clarification that the expanded FCM activities permitted under Regulation Y also would be permitted under the Board's Regulation K.

Regulation Y currently provides, and the final rule continues to provide, that a nonbanking company permitted under section 4(c)(8) of the BHC Act to engage in a nonbanking activity may open offices outside the United States to conduct that same activity unless the bank holding company has not received approval to conduct the activity outside the United States. A bank holding company that currently has authority to engage in FCM activities on a geographically limited basis may, if it qualifies for the streamlined procedures, conduct these activities *de novo* outside the U.S. through direct offices of its 4(c)(8) affiliate without further approval. The scope of FCM and other activities that fall under Regulation K will be considered by the Board in connection with its review of Regulation K.

ii. Clearing-Only Activities

The Board has by order permitted bank holding companies to clear trades that the FCM has not executed itself, and the final rule incorporates this activity in the laundry list. The proposal retained two restrictions currently imposed by Board order. These restrictions: (1) Prohibit the clearing subsidiary from serving as the primary or qualifying clearing firm for a customer; and (2) require the clearing subsidiary to have a contractual right to decline to clear any trade that the subsidiary believes poses unacceptable risks (a so-called ''give-up'' agreement).

The Board adopted these restrictions to ensure that the clearing subsidiary of a bank holding company could limit its exposure to traders that execute trades themselves or through third parties. In particular, these restrictions prevent a bank holding company from clearing trades executed by exchange locals or market makers. In 1991, the Board rejected a proposal by a bank holding company to engage in clearing trades for exchange locals and market makers because of concerns about the inability of the bank holding company to monitor and control its credit exposures during the trading day. The Board found that the activity was closely related to banking, but believed that the potential adverse effects of conducting the activity outweighed the potential public benefits.[10]

The Board sought comment on whether these two restrictions on the conduct of clearing-only activities by bank holding companies should be retained. The Board also invited comment on whether and how bank holding companies are able to monitor and limit adequately the potential exposure from conducting these activities.

Commenters who discussed FCM activities strongly supported the removal of these two restrictions on clearing-only activities in favor of the Board relying on on-site examination and supervision of a clearing subsidiary's risk management systems for monitoring and managing its credit exposures. Commenters maintained that the Board's restrictions are not necessary in light of the risk management tools currently available to clearing firms. They contended that clearing firms can effectively monitor and limit their potential credit exposures through various risk management procedures, including: establishment of trading limits for each customer; adjustment of such limits based on market conditions and ongoing credit evaluations; monitoring of customer market risk, trading exposure and compliance with trading limits; assessment and collection of initial and maintenance performance bond or margin; and payment of gains and collection of losses associated with open positions through a mark-to-market process on both an intra-day and end-of-day basis.

Commenters explained that all exchanges provide clearing members with complete information regarding trades cleared through that member's account at the end of the trading day, which thereby limits a clearing FCM's exposure to a client to the trading transactions on that day. Commenters noted that technological improvements have enabled a growing number of exchanges to develop systems that collect and report intra-day trade matching information. Commenters also noted that, in many markets, a clearing firm can, pursuant to exchange rules or contractual arrangements, advise an executing broker that it will not accept further trades of that customer. In agreements with customers, clearing brokers also typically reserve the right to liquidate a customer's position if the required margin is not posted promptly. Commenters added that potential exposure is further mitigated by various exchange rules relating to position limits, and large trading position reporting. In addition, commenters contended that oversight by the CFTC or the SEC, which includes capital, reporting, performance bond and margin, and recordkeeping requirements, assists in monitoring the management of risks associated with acting as a primary clearing firm, including clearing trades executed by exchange locals and market makers.

In light of these comments, the final rule deletes the proposal's restrictions relating to primary clearing or qualifying firm activities and customer ''give-up'' agreements.[11] Examiners will assess and supervise FCM policies, procedures and practices relating to clearing-only activities, taking into consideration the nature of the FCM's clients, the particular exchanges through with the subsidiary provides clearing services, and the related risks involved. It is expected that the Board would develop supervisory guidance on management of risks involved in clearing-only activities.

e. Other Transactional Services

The proposal added a provision allowing a bank holding company to provide transactional services for customers involving any derivative or foreign exchange transaction that a bank holding company is permitted to conduct for its own account. Commenters supported the inclusion of these activities on the regulatory laundry list. Inclusion of this activity is not intended to limit the securities brokerage, FCM, private placement or riskless principal activities permitted under the final rule.

[10] *Stichting Prioriteit ABN AMRO Holding*, 77 Federal Reserve Bulletin 189 (1991).

[11] A commenter requested that the Board clarify in the regulation that the securities brokerage activity permitted in Regulation Y encompasses clearing apart from executing trades in securities. Both the current and final rule permit securities brokerage activities broadly, including executing-without-clearing and clearing-without-executing trades in securities. The final rule specifies this.

Several commenters suggested that the scope of this provision be expanded to include acting as a broker with respect to forward contracts based on financial and nonfinancial commodities, regardless of whether the bank holding company could invest in or trade such instrument as principal. The commenters contended that providing brokerage services, as agent, to customers with respect to forward contracts on either financial or nonfinancial commodities should not be dependent on whether the bank holding company may take a principal position in the contract. In view of these comments, the final rule clarifies that a bank holding company may act as a broker with respect to forward contracts based on a financial or nonfinancial commodity that also serves as the basis for an exchange-traded futures contract. This permits a bank holding company to act as agent in a forward contract that involves the same commodities and assessment of risk that underlay the permissible FCM activities of bank holding companies without extending this authority to forward contracts for the delayed sale of commercial products (such as automobiles, consumer products, etc.) or real estate.

Several commenters requested that acting as a commodity pool operator (''CPO''), including acting as the general partner of a partnership that invests in commodities as well as futures and options on financial and nonfinancial commodities, be added to the list of permissible activities. The commenters noted that the Board recently permitted by order a bank holding company to act as a CPO, subject to a number of limitations.[12] Although some proposals to act as a CPO may involve a combination of permissible activities, certain proposals raise supervisory issues and open-end pool structures may raise Glass-Steagall Act issues. In addition, some proposals raise questions about the proper treatment of the CPO's interest in the commodity pool for capital adequacy purposes.[13] These issues can be evaluated more effectively on a case-by-case basis through the application review process. Accordingly, the Board has determined not to add acting as a CPO as a separate activity on the laundry list at this time.

8. Investment or Trading Transactions as Principal

The final rule, as the proposal, incorporates decisions by the Board that permit bank holding companies broadly to invest as principal in derivatives on financial and nonfinancial commodities. The proposal would allow a bank holding company to invest or trade as principal in a derivative contract on a financial or nonfinancial commodity or index of commodities, so long as any one of three conditions is met:

* The underlying asset is a permissible investment for state member banks;

* The derivative contract requires cash settlement; or

* The derivative contract allows for assignment, termination or offset prior to expiration and the bank holding company makes every reasonable effort to avoid delivery.

Some commenters were concerned that the proposal as worded would not include trading as principal in derivatives based on or linked to bank ineligible securities, such as certain equity index swaps or equity index futures contracts, an activity that the Board has approved by order. The final rule clarifies that a bank holding company may trade as principal a derivatives contract on an index of rates, prices or the value of any financial or nonfinancial asset or group of assets, so long as the contract requires cash settlement. This does not include acting as a dealer in options based on indexes of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of federal securities laws and are bank-ineligible securities for purposes of the Glass-Steagall Act.[14] Similarly, activities authorized by this rule do not include acting as a dealer in any other instruments that are bank-ineligible securities for purposes of section 20. Thus, dealing in securities, including acting as a market-maker, specialist or registered options trader on an exchange, would be governed by the Board's orders regarding bank-ineligible securities underwriting and dealing activities. Under the final rule, the three alternative conditions would not apply to derivative contracts based on an index, but would apply to all other derivative contracts.

Several commenters suggested that an additional alternative be added that permits trading as principal in a derivative contract that involves an asset that is a permissible investment for a national bank or for a bank holding company. The final rule adopts a provision that would include any other instruments approved by the Board.

In addition, some commenters requested clarification that the alternative conditions apply only to a bank holding company's trading activities and not to investments for the company's own account. Other commenters maintained that trading for a bank holding company's own account should not be viewed as a nonbanking activity subject to section 4(c)(8) but as a servicing activity under section 4(c)(1)(C) of the BHC Act.

Bank holding companies have increasingly proposed to acquire companies engaged in, or to engage through an existing subsidiary in, derivatives trading and investment activities that would be beyond the scope of investment or trading activities encompassed within the bank servicing exemption.[15] The addition of proprietary trading activities to the regulation clarifies the permissibility of this activity as a separate business activity.

The final rule, as the proposal, also includes authority that the Board has previously granted by order permitting bank holding companies to buy, sell and store gold, silver, platinum and palladium bullion, coins, bars and rounds. To enable the regulation to remain current with relevant regulatory pronouncements regarding the permissible activities of banks, several commenters suggested that the proposed list of metals be expanded to include copper (recently permitted for national banks) and any other permissible investments for national banks or bank holding companies. In view of these comments, the final rule adds copper and includes any other metal approved by the Board.

Some commenters requested that the Board add to the regulatory laundry list underwriting and dealing to a limited extent in certain municipal revenue bonds, one-to-four family mortgage-related securities, consumer receivable securities, and commercial paper because the Board, by order, has permitted these activities. Several commenters also urged the Board to add accepting delivery of commodities to the list of activities because national banks may take delivery of physical commodities by warehouse receipt or ''pass-through delivery'' to another party when hedging financial exposures

[12] *See The Bessemer Group, Incorporated,* 82 Federal Reserve Bulletin 569 (1996).

[13] For example, the limitations in the case cited above included a requirement to consolidate, for regulatory capital purposes, the assets and liabilities of subsidiary partnerships for which a wholly owned subsidiary of the bank holding company would serve as a general partner. The subsidiary partnerships were to employ leverage (including margin debt and short sales) in making investments.

[14] *See Swiss Bank Corporation,* 82 Federal Reserve Bulletin 685 n. 8 (1996).

[15] *E.g., Swiss Bank Corporation,* 81 Federal Reserve Bulletin 185 (1995).

arising from otherwise permissible activities. The final rule does not expand the laundry list to include these activities because these activities raise issues involving risk management policies and procedures that are more appropriately addressed through the application review process.

In this regard, the Board believes that, at this time, all proposals to engage *de novo* or to make an initial acquisition of a company engaged in corporate debt and/or equity securities underwriting and dealing activities should be reviewed under the normal procedures, and not under the streamlined procedures. This will allow the System to conduct a review of the risk-management systems of the bank holding company in connection with the initial entry of a bank holding company into this activity. Bank holding companies that have already received Board approval to engage in these broad securities activities may acquire companies engaged in these activities if the bank holding company and the proposed acquisition qualify for the streamlined procedure, unless the System notifies the company that the normal procedure should be used.

9. Management Consulting and Counseling Activities

The current regulation authorizes bank holding companies to provide management consulting services on any matter to any depository institution or affiliate of a depository institution. The rule has been expanded in two respects. First, bank holding companies may provide management consulting services regarding financial, economic, accounting, or audit matters to any company. These are financial activities that are directly related to the activities and expertise of bank holding companies. Commenters discussing this issue agreed that this activity is closely related to banking for purposes of section 4(c)(8) of the BHC Act.

Second, for the reasons explained above, the final rule permits a bank holding company to derive up to 30 percent of its management consulting revenue from management consulting services provided to any customer on any matter. As noted above, commenters discussing this activity strongly supported this provision as necessary to permit bank holding companies to attract and retain the most qualified personnel, and to compete effectively against unregulated companies that offer a broad array of management consulting services to customers of bank holding companies. For the reasons explained above, the Board has determined not to raise the 30 percent limit on this basket of permitted incidental activities at this time, and will monitor the scope and nature of these activities.

Two restrictions have been retained governing interlocks with and investments in client companies. While several commenters argued for removal of these restrictions, the Board continues to believe that these limits are necessary in the context of management consulting arrangements in order to ensure that a bank holding company does not exercise control over a client company through a management consulting contract and to prevent conflicts of interest. These restrictions do not limit the ability of a bank holding company to provide management consulting services to an affiliate, which is a servicing activity permitted under section 4(c)(1)(C) of the BHC Act.

10. Support Services

This category includes courier services (other than armored car services) and printing checks and related documents. Both services are included in the laundry list as they were authorized by the Board, without change.

11. Insurance Agency and Underwriting Activities

The insurance provisions reflect the detailed restrictions on insurance activities of bank holding companies specified in the BHC Act. The current regulation has not been changed. Several commenters urged the Board to take a variety of steps to authorize broader insurance activities. The Board will continue to consider these suggestions in light of the specific terms of the BHC Act.

12. Community Development Activities

The current regulation permits bank holding companies to make equity and debt investments in corporations and projects designed primarily to promote community welfare. The Board has adopted its proposal clarifying that this activity includes providing advisory and related services to community development programs. The Board has permitted these advisory services by order.

13. Money Orders, Savings Bonds and Traveler's Checks

The current regulation limits the sale and issuance of money orders and similar consumer payment instruments to instruments with a face value of less than $1,000. The Board has by order authorized this activity for payment instruments of any face amount. Accordingly, the limitation on the face amount of these instruments has been removed.

14. Data Processing Activities

The current regulation broadly authorizes bank holding companies to provide data processing and data transmission services by any technological means so long as the data processed or furnished are financial, banking, or economic. The final rule clarifies that a bank holding company may render advice to anyone on processing and transmitting banking, financial and economic data.

The following two restrictions on permissible data processing activities have been deleted:

* All data processing services must be provided pursuant to a written agreement with the third party that describes and limits the services; and

* Data processing facilities must be designed, marketed and operated for processing and transmitting financial, banking, or economic data.

As explained above, the data processing activity has also been revised to permit bank holding companies to derive up to 30 percent of their data processing revenues from processing and transmitting data that are not financial, banking, or economic. As explained above, most commenters addressing this activity strongly supported all of these changes and, in particular, the proposal to permit the conduct of some nonfinancial data processing activities as an incident to financial data processing activities.

D. Changes to Tying Restrictions

The Board has adopted significant amendments to its rules regarding tying arrangements. The amendments remove Board-imposed tying restrictions on bank holding companies and their nonbank subsidiaries; create exceptions from the statutory restriction on bank tying arrangements to allow banks greater flexibility to package products with their affiliates; and establish a safe harbor from the tying restrictions for certain foreign transactions. These amendments are designed to enhance competition in banking and nonbanking products and allow banks and their affiliates to provide more efficient and lower-cost service to customers.

Section 106 of the BHC Act Amendments of 1970 contains five restrictions intended to prohibit anti-competitive behavior by banks: Two prohibit tying arrangements; two prohibit reciprocity arrangements; and one prohibits exclusive dealing arrangements.[16] The tying restrictions,

[16] 12 U.S.C. § 1972.

which have the greatest effect on industry practices, prohibit a bank from restricting the availability or varying the consideration for one product or service (the ''tying product'') on the condition that a customer purchase another product or service offered by the bank or by any of its affiliates (the ''tied product''). Although section 106 applies only when a bank offers the tying product, the Board in 1971 extended these special restrictions to bank holding companies and their nonbank subsidiaries.[17]

Section 106 was adopted in 1970 when Congress expanded the authority of the Board to approve proposals by bank holding companies to engage in nonbanking activities. Section 106 was based on congressional concern that banks' unique role in the economy, in particular their power to extend credit, would allow them to create a competitive advantage for their affiliates in the new, nonbanking markets that they were being allowed to enter.[18] Congress therefore imposed special limitations on tying by banks—restrictions beyond those imposed by the antitrust laws. Section 106 is a broader prohibition, unlike the antitrust laws, a plaintiff in action under section 106 need not show that: (1) the seller has market power in the market for the tying product; (2) the tying arrangement has had an anti-competitive effect in the market for the tied product; or (3) the tying arrangement has had a substantial effect on interstate commerce.

The Board has authority to grant exceptions to section 106 and, in the past few years, has used its exemptive authority to allow banking organizations to package their products when doing so would benefit the organization and its customers without anti-competitive effects. For example, the Board has allowed arrangements that included discounts on brokerage services and other products based on a customer's relationship with the bank or bank holding company. The final rule would build on this recent history by permitting broader categories of packaging arrangements that also do not raise the concerns that section 106 was intended to address.

1. Rescind the Board's Regulatory Extension of the Statute

As noted above, the Board has by regulation extended the restrictions of section 106 to bank holding companies and their nonbank subsidiaries as if they were banks. This extension was adopted at the same time that the Board approved by regulation the first laundry list of nonbanking activities under section 4(c)(8) of the BHC Act, apparently as a prophylactic measure addressed at potential anti-competitive practices by companies engaging in nonbanking activities.[19]

As noted in the preamble to the proposed rule, the Board has gained extensive experience with bank holding companies, their nonbank affiliates, and the markets in which they operate. Based on this experience, the Board has concluded that these nonbank companies do not possess the market power over credit or other unique competitive advantages that Congress assumed that banks enjoyed in 1970. Accordingly, the Board has decided that applying the special bank anti-tying rules to such companies is no longer justified. Any competitive problems that might arise would be isolated cases, better addressed not through a special blanket prohibition but rather through the same general antitrust laws that bind the non-bank-affiliated competitors of these entities.

Commenters discussing the tying proposal overwhelmingly supported the Board's proposal to rescind its regulatory extension of the anti-tying rules to nonbanks. Commenters noted that, in rescinding its rule, the Board would not be granting an ''exception'' to section 106, which never envisioned that nonbank affiliates would be covered by the special anti-tying rules applicable to banks, but rather returning the coverage of the statute to that intended by Congress. Commenters argued that the proposed rescission would benefit banking organizations and the public by permitting bank holding companies and their nonbank subsidiaries to package products and services more flexibly—particularly in packages with products and services of bank affiliates—thereby enabling the provision of more efficient and lower-cost products and services to their business and retail customers.

Commenters also generally agreed that removal of these special restrictions on bank holding companies and their nonbank subsidiaries would eliminate a competitive disadvantage by allowing them the same freedom to package products that their non-bank-affiliated competitors currently enjoy. Some of these commenters noted that the Sherman Act would continue to prohibit bank holding companies and their subsidiaries from engaging in any tying arrangement that had an anti-competitive effect.

Only two commenters opposed the Board's proposal to rescind the regulatory extension of bank anti-tying rules to nonbank affiliates.[20] One commenter, a law firm representing a nonbanking corporation, opposed the Board's proposal to free nonbank affiliates from the special tying rules applicable to banks, as well as the other proposed changes to the anti-tying regulation. This commenter stated that the proposed changes should not be adopted without a comprehensive study of their potential ramifications. The commenter also maintained that the Board's regulatory extension of the anti-tying rules to nonbank affiliates is consistent with the legislative history of section 106, which evinced concern over possible unfair business practices of nonbank affiliates as well as banks themselves. In addition, the commenter questioned whether the general antitrust laws and the nature of the competition faced by banking organizations would be adequate to prevent unfair or anti-competitive practices, and whether the proposal would produce efficiency, lower costs, and fair competition between banking and nonbanking organizations.[21]

Another law firm, representing a group of insurance industry trade associations, also opposed the Board's proposal to remove the special anti-tying rules applicable to nonbank

[17] 36 FR 10777 (June 3, 1971).

[18] *See* S. Rep. No. 1084, 91st Cong., 2d Sess. (1970).

[19] In recent years, the Board has enacted limited relief from the anti-tying restrictions on nonbanks within bank holding company structures. For example, the Board has permitted a nonbanking subsidiary to offer discounts on products and services based on the customer's obtaining some other product or service from that subsidiary or another nonbank affiliate. 12 CFR 225.7(b)(3). However, even with this relief, tying between a bank holding company or its nonbank subsidiary and an affiliated bank has remained restricted, as has any tying arrangement not limited to the offering of a discount.

[20] In addition, a community group generally opposed the Board's proposed changes to the tying rules on the basis of concerns about relationships between banks and their consumer finance company affiliates. These concerns focused on fair lending and equal credit opportunity, appropriate disclosure of referral fees and other matters, and compliance with various consumer lending statutes and regulations. The Board does not believe, and this commenter has provided no basis for concluding, that the anti-tying statute or regulations are intended to address or have the effect of addressing these concerns. Moreover, these concerns are already addressed by separate statutes and regulations, including the Equal Credit Opportunity Act, Home Mortgage Disclosure Act, and Real Estate Settlement Procedures Act of 1974.

[21] With respect to fair competition between banking and nonbanking organizations, the commenter asserted that banking organizations have an inherent competitive advantage from being able to conduct the business of banking. This commenter also noted the increasing concentration of resources within the banking industry itself, and indicated that the existing anti-tying rules may have contributed to the competitive vitality of the markets in which nonbank affiliates operate.

affiliates. This commenter maintained that the bank anti-tying rules should continue to apply to nonbank affiliates because these affiliates may appear to the public to be indistinguishable from the banks themselves and because the same public policy concern regarding banks' power over credit warrants the extension of the prophylactic rule for banks to entities having an affiliate relationship with banks.[22]

The Board does not believe that these concerns warrant retention of special anti-tying rules for nonbank affiliates of banks. In particular, the Board's experience as regulator and supervisor of banks, bank holding companies, and their subsidiaries provides an adequate basis for judgments about the competitive nature of markets in which banking organizations operate. Commenters have not provided evidence to the contrary or proposed specific subjects for further study. Moreover, commenters opposing the proposal have produced no evidence that the antitrust rules and the nature of the nonbanking markets in which bank affiliates operate would not be sufficient to prevent unfair or anti-competitive practices, or that the proposed liberalization of the Board's tying rules would not yield efficiencies and corresponding lower costs for customers. The Board does not believe, and commenters have provided no basis for concluding, that affiliation with a bank creates a competitive advantage warranting the application of special bank anti-tying rules to nonbank affiliates.[23] Finally, while the legislative history of section 106 may evince concern with the competitive practices of banks and their affiliates, the statute itself clearly applies only to tying by banks themselves.

For the foregoing reasons, the Board is rescinding its extension of bank anti-tying rules to bank holding companies and their nonbank subsidiaries.

2. Retain Limited Prohibition on Tying Arrangements Involving Electronic Benefit Transfer Services

In the proposed rule, the Board sought comment on whether it should retain its regulatory extension of the statute for purposes of one type of tying arrangement. Section 825(a)(3) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, signed into law on August 22, 1996, amended the Food Stamp Act of 1977 to prohibit tying the availability of electronic benefit transfer services to other point-of-sale services. Enforcement of the Food Stamp Act is assigned to the Secretary of Agriculture.[24] Banks, bank holding companies, and nonbank subsidiaries of bank holding companies were exempted from the statute, apparently because they were already restricted by section 106 (in the case of banks) and the Board's regulation (in the case of bank holding companies and their nonbank subsidiaries). Thus, unless the Board were to retain a restriction on bank holding companies and their nonbank subsidiaries, they would be the only companies not subject to a special restriction on tying of electronic benefit transfer services.

Commenters either supported or expressly did not object to this limited retention of a special anti-tying rule for electronic benefit transfer services. Commenters acknowledged that the principle of competitive equality underlying the general rescission of special anti-tying rules for nonbank entities dictated retention of the special rules in this limited context.

The Board has decided to retain this restriction.

3. Treat Inter-affiliate Tying Arrangements the Same as Intra-bank Arrangements

Section 106 contains an explicit exception (the ''statutory traditional bank product exception'') that permits a bank to tie any product or service to a loan, discount, deposit, or trust service offered by that bank.[25] For example, a bank could condition the use of its messenger service on a customer's maintaining a deposit account at the bank. Although the statutory traditional bank product exception appears to have been effective in preserving traditional relationships between a customer and bank, the exception is limited in an important way: it does not extend to transactions involving products offered by affiliates.

The Board has adopted a ''regulatory traditional bank product exception'' that generally extends the statutory exception to transactions involving affiliates. However, the Board placed two restrictions on the regulatory exception. First, the Board required that both products involved in the tying arrangement be traditional bank products. Second, the Board required that the arrangement consist of discounting the tying product rather than restricting its availability. However, as noted in the preamble to the proposed rule, Congress decided not to apply these two restrictions to the statutory traditional bank product exception for intra-bank transactions, and it is difficult to argue that inter-affiliate transactions pose any greater risk of anti-competitive behavior than those intra-bank transactions. Moreover, Congress has already extended the statutory traditional bank product exception to cover inter-affiliate transactions, without restriction, for savings associations and their affiliates.[26] For these reasons, the Board proposed eliminating the above restrictions so that any tying arrangement within a banking organization would be permissible if the tied product is a loan, discount, deposit, or trust service.

Commenters discussing this proposal overwhelmingly supported this aspect of the proposal, agreeing with the Board that there is no reason to subject inter-affiliate tying arrangements to restrictions that are not applicable to intra-bank arrangements. Three commenters raised general objections to the elimination of these restrictions. These objections were similar to those advanced against the proposed rescission of the tying rules applicable to nonbank affiliates. The Board notes that, because insurance products are not among the traditional bank products listed in the statute or the rule, this aspect of the proposal would not

[22] This commenter also advanced several arguments for not rescinding these rules with respect to packaged offerings that include insurance products, specifically: (1) That such packaging arrangements may violate state insurance laws that prohibit insurance agents from offering rebates on the sale of insurance products; and (2) that permitting insurance premium payments as part of a discount package may similarly violate state anti-rebate and insurance advertising laws, and could result in customer confusion and a conflict with the Interagency Statement on Retail Sales of Nondeposit Investment Products. The commenter also argued that the proposal could enable banks to coerce customers to purchase insurance in order to obtain a loan, and that permitting a combination of insured deposit and uninsured investment products in a single package could obscure the differences between these products and produce confusion among customers of banking organizations.

[23] The Board also notes that these commenters have not provided any reason to conclude that an increased concentration of resources in the banking industry itself warrants an extension of anti-tying rules to the nonbanking markets in which bank affiliates operate.

Other matters raised by commenters also provide no basis for extending the special bank anti-tying rules to nonbank affiliates. The Board does not believe that the rescission of this extension or other aspects of the proposed rule would preempt state laws regarding insurance or other matters. Furthermore, concerns about possible customer confusion are effectively addressed through more direct means such as the Interagency Statement on Retail Sales of Nondeposit Investment Products. The Board also notes that section 106 would continue to prohibit banks from using their power over credit to induce customers to purchase insurance products.

[24] 104 Pub. L. 193, 110 Stat. 2105; 7 U.S.C. § 2016(i)(11).

[25] 12 U.S.C. 1972(1)(A).

[26] 12 U.S.C. 1464(q)(1)(A).

enhance a banking organization's ability to leverage possible market power in other product markets to engage in anti-competitive behavior in insurance markets.

A substantial number of commenters urged the Board to adopt an expanded definition of the ''traditional bank products'' which may be tied to other offerings under the statutory and regulatory exceptions. Some of these commenters proposed a specific list of additional products—such as foreign exchange, interest rate swaps and other derivative products, and investment advisory services—to be exempted by the rule. Other commenters proposed a more general approach for expanding this definition: for example, exempting products authorized as part of the business of banking under relevant chartering laws. Others urged the Board to exempt all but a limited set of tying arrangements from the statutory restrictions—for example, by covering only transactions where the tying product is a consumer or small business loan.[27] The Board believes that these suggestions warrant serious consideration, but intends to study this issue and provide notice and seek comment before adopting any changes not suggested in the proposed rule.

For the foregoing reasons, the Board has decided to adopt the extension of the traditional bank product exception as proposed.

4. Extend the Expanded Regulatory ''Traditional Bank Product'' Exception to Reciprocity Arrangements

As noted above, section 106 prohibits not only tying arrangements but also reciprocity arrangements (conditioning the availability of or varying the consideration for one product on the providing of another by the customer).[28] Like the tying prohibition, the prohibition on reciprocity arrangements contains an exception intended to preserve traditional banking relationships. The exception provides that a bank may condition the availability of a product or service on the customer's providing to the bank some product or service ''related to and usually provided in connection with'' a loan, discount, deposit, or trust service.[29] The Board noted in the proposed rule that it had received only one request to extend this exception, and commenters confirmed that these types of reciprocity arrangements are not common in the industry.

Like the statutory traditional bank product exception to the tying prohibition, this exception to the reciprocity prohibition does not apply to inter-affiliate transactions, and, in the proposed rule, the Board proposed to extend the statutory exception for traditional banking relationships to cover such inter-affiliate transactions. For reasons similar to those advanced with respect to the extension of the statutory exception for tying arrangements, most commenters discussing this aspect of the proposal strongly supported the extension of permitted reciprocity arrangements, while a small number of commenters opposed this aspect of the proposal. The opposing comments did not raise any objections specific to reciprocity arrangements.

For the foregoing reasons, and because the Board does not believe that inter-affiliate reciprocity arrangements pose any greater anti-competitive threat than similar intra-bank arrangements permitted by Congress, the Board is adopting substantially as proposed the extension of the statutory exception for certain reciprocity arrangements. The Board has decided to make technical changes to the proposed exception to make clear that the regulatory exception is co-extensive with the statutory exception.

5. Coverage of Foreign Transactions Under Section 106

In response to a request that the Board clarify whether section 106 restricts foreign transactions, the Board sought comment on whether it should establish a ''safe harbor'' with respect to some set of foreign transactions. In particular, the Board sought comment on whether the safe harbor should define ''foreign transactions'' according to the location of the customer, the location of the market where any potential anti-competitive effects would occur, or some other factor.

Federal legislation is presumed to apply only within the territorial jurisdiction of the United States, unless the legislation clearly expresses a contrary intent on the part of Congress. No such intent is evident in section 106.[30] However, determining whether a series of transactions has sufficient connection to the United States to trigger section 106 can be a difficult process. The proposed safe harbor was intended to provide certainty with respect to a defined set of transactions. Thus, the proposed safe harbor was not intended to be an interpretation of section 106, as some transactions outside the safe harbor may not be covered by the statute.

Commenters addressing this issue overwhelmingly supported the creation of a safe harbor. Commenters argued that a safe harbor would provide needed certainty to banking organizations operating abroad and permit these organizations to compete with foreign firms. One commenter noted that U.S. banks sometimes cannot participate in lending syndicates dominated by foreign banks because the loan agreement contains conditions that would violate section 106. Furthermore, in some countries it is customary for a financial advisor or credit provider to link services in formulating proposals and a U.S. bank's inability to do so places it at a competitive disadvantage.

In terms of how the safe harbor would be defined, commenters strongly urged that the locus of the customer be determinative. Commenters uniformly rejected any test based on the locus of any anti-competitive effects, on two grounds. First, such a test assumes that there will be anti-competitive effects from the tying arrangements, which is by definition true in the case of a Sherman Act violation but not necessarily true in the case of a violation of the *per se* prohibition on tying in section 106. Second, determining where a transaction has its effect can be a difficult process yielding no clear answer, and the test would therefore leave substantial uncertainty in terms of compliance.

Some commenters also urged the Board to exempt transactions to finance projects located outside the United States and transactions with foreign branches of U.S. companies.

A small number of commenters objected generally to this proposed change to the tying rules without providing any specific reason why a safe harbor for foreign transactions should not be adopted. One commenter maintained that a safe harbor was not necessary because relevant case law had provided sufficient clarity and certainty with respect to this question.

For the reasons advanced by commenters, the Board is adopting a ''safe harbor'' from the anti-tying rules for transactions with corporate customers that are incorporated or otherwise organized, and have their principal place of business, outside the United States, or with individuals who are citizens of a foreign country and are not resident in the United States. However, the safe harbor would not protect tying arrangements where the

[27] Some commenters also suggested that the Board issue interpretations to clarify the scope of the statutory list of four traditional bank products.

[28] 12 U.S.C. 1972(1)(C) and (D).

[29] 12 U.S.C. 1972(1)(C).

[30] *See Gushi Bros. Co.* v. *Bank of Guam*, 28 F.3d 1535, 1542–43 (9th Cir. 1994).

customer is a U.S.-incorporated division of a foreign company. Furthermore, the safe harbor would not shelter a transaction from other antitrust laws if they were otherwise applicable.

The Board agrees with commenters that some transactions with U.S. persons may be so foreign in nature, because of the location of either the project that is the subject of the transaction or the customer's office that is entering into the transaction, that they do not raise the competitive concerns that section 106 or the antitrust laws were designed to address. The Board also believes, however, that many such foreign-based transactions do have competitive implications in the United States—for example, where a U.S. corporation seeks financing for a project abroad, and the bank seeks to tie this financing to an affiliate's U.S. securities underwriting services—and the Board does not believe that commenters have provided an adequate and clear basis for excluding such transactions from any ''safe harbor'' for foreign transactions with U.S. persons.

6. Technical Changes

The Board also is adopting a definition of ''bank'' for purposes of the anti-tying rules to clarify that any exemptions afforded to banks generally also would be applicable to credit card and other limited purpose institutions and to United States branches and agencies of foreign banks.[31]

E. Other Changes

1. Filings Under the Change in Bank Control Act

The final rule, as the proposal, reorganizes, clarifies, and simplifies the portion of Regulation Y that implements the Change in Bank Control Act (''CIBC Act''). The final rule attempts to harmonize the scope and procedural requirements of the Board's regulation implementing the CIBC Act with those of the other federal banking agencies and to reduce any unnecessary regulatory burden.

In particular, the final rule reduces regulatory burden by reducing from two to one the number of times a person must receive permission under the CIBC Act to acquire shares of the same state member bank or bank holding company. Specifically, the final rule eliminates the current requirement that all persons who have received authorization to control in excess of 10 percent, but less than 25 percent, of the voting shares of a member bank or bank holding company file a second notice before acquiring control of 25 percent or more of the voting shares of the institution.

The Board has determined that this new rule will apply to any person who *currently* controls 10 percent (but less than 25 percent) of the shares of a state member bank or bank holding company with Board approval under the CIBC Act, unless the approval granted to the person specifically limited the amount of shares that the person may control or the person is otherwise notified in writing by the System that additional approval is required. In future cases in which a person appears to have sufficient financial resources to acquire more than 10 percent, but less than 100 percent of the shares of a bank, the System may limit the approval granted on a case-by-case basis by requiring further review of the financial resources of the person as appropriate.

Commenters that discussed the CIBC Act proposal supported the proposed revisions. In particular, these commenters endorsed the elimination of the requirement to file a second notice to the Board upon exceeding 25 percent ownership of a member bank or bank holding company when a prior notice to acquire in excess of 10 percent had been filed and approved by the Board.

Commenters also supported the proposal to clarify certain terms used in the CIBC Act portion of the rule. The final rule adds definitions of key terms to clarify the scope of the regulation. In particular, the final rule defines the terms *acting in concert* and *immediate family*, and includes specific presumptions of concerted action, to clarify the rule and to provide guidance to acquirors. In addition, the final rule incorporates current Board practice that the acquisition of a loan in default that is secured by voting securities of a state member bank or bank holding company is presumed to be an acquisition of the underlying securities.

The final rule also reduces regulatory burden on persons whose ownership percentages increase as the result of an action outside the control of the person, such as a redemption of voting securities by the issuing bank or a sale of shares by a third party. In these situations, the proposal would permit the person affected by the bank or third party action to file a notice within 90 calendar days *after* the transaction occurs, provided that the acquiring person does not reasonably have advance knowledge of the triggering transaction.

In addition, the final rule provides for more flexible timing for newspaper announcements of filings under the CIBC Act by permitting notificants to publish the announcement up to 15 calendar days before submitting the filing. The newspaper notice requirement also is modified to eliminate the requirement that the notice include a statement of the percentage of shares proposed to be acquired.

Finally, the final rule adds a new section reflecting the stock loan reporting requirements in section 205 of the Federal Deposit Insurance Corporation Improvement Act as amended by section 2226 of the Regulatory Relief Act. Before the passage of the Regulatory Relief Act, all financial institutions were required to file reports documenting credit outstanding by the institution and its affiliates when the credit was secured by 25 percent or more of any class of voting securities of an insured depository institution. The Regulatory Relief Act limits this requirement to credit outstanding by foreign banks and their affiliates.

One commenter suggested that the Board require any person participating in a proxy solicitation to obtain prior approval under the CIBC Act and urged broadening the definition of persons who would be deemed to be acting in concert (and thus required to join in a CIBC Act filing) to include persons soliciting proxies. This commenter also suggested that the institution that is the target of a proxy solicitation be granted standing as a party to a CIBC Act filing, be furnished copies of all filings, and be permitted to submit comments.

The Board has not adopted these suggestions. The Board has long held, and a federal court has agreed, that the CIBC Act is not automatically triggered by the formation of a group for the purpose of acquiring proxies for voting shares and that private parties do not have legal standing to challenge agency action under the CIBC Act.[32] The final rule provides for public notice of all CIBC Act filings (unless immediate or expeditious action is required) and permits any private party to submit comments for Board consideration. This approach is in keeping with the purpose of the CIBC Act, which is to permit the federal banking agencies to review changes in the ownership of banks and bank holding companies and is not intended to be a mechanism for private

[31] One commenter urged that the safe harbor for combined-balance discounts be clarified by specifying that products offered by an affiliate of the bank may be included as eligible products. The Board notes that the proposed and final rule refer to ''products specified by the bank'', and do not contain any limitation with respect to the entity offering the product.

[32] *See Citizen First Bancorp, Inc.* v. *Harreld*, 559 F.Supp. 867 (1982).

parties to frustrate contested acquisitions.

2. Notices of Changes in Directors and Senior Executive Officers

In addition to the BHC Act and the CIBC Act, Regulation Y implements section 914 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which requires a state member bank or bank holding company (together, ''regulated institutions'') to give prior notice to the System before changing directors or senior executive officers under certain circumstances. The final rule has been modified in light of amendments to section 914 enacted by the Regulatory Relief Act and in cooperation with the staffs of the other federal financial institutions supervisory agencies, in an attempt to develop uniform procedures for requiring and reviewing section 914 notices.

As amended, section 914 no longer requires prior notice from regulated institutions chartered for less than two years or regulated institutions that underwent a change in control within two years. Accordingly, provisions in the proposed rule relating to these circumstances as triggering a section 914 notice have been deleted from the final rule.

Section 914 also was amended by the Regulatory Relief Act to permit the System to extend the 30-day prior notice period for an additional period not to exceed 60 days. The Board expects to continue to process most section 914 notices within 30 days and the final rule retains the 30-day prior notice period. In special circumstances, such as an incomplete administrative record, the final rule permits the System to extend the prior notice period for an additional 60 days as provided in section 914 after notifying the regulated institution or individual filing the notice of the extension and the reason for not processing the notice within 30 days.

In all waiver requests, the final rule continues to require that all information required to be filed under the rule be provided within the time period specified by the System. The final rule also adopts the System's current practice of granting individuals who are not proposed by management and who are elected as new directors of regulated institutions an automatic waiver of the 30-day prior notice requirement in order to serve immediately as board members. To qualify for an automatic waiver, the individual must also provide the System with all information required to be filed under the rule within two business days after the individual's election. The System may issue a notice of disapproval within 30 days after a waiver request is granted or the election of an individual serving pursuant to an automatic waiver.

One commenter argued that the automatic waiver procedures should require an individual to resign as a director after a notice of disapproval has been issued by the System. While disapproval would require the individual to resign as a director, the final rule does not incorporate the suggestion because the System has sufficient enforcement authority under applicable law to remove a disapproved director from the board.

The final rule also makes other changes, such as modifications to the appeal procedure for a disapproved notice, that are intended to clarify the proposed rule.

3. Other Changes

The Board received three comments requesting that the Board expand its proposed presumption exempting testamentary trusts from the definition of ''company'' so as to exempt inter vivos (or living) trusts. Inter vivos trusts are trusts that are established by individuals during their lifetime to facilitate estate planning. The Board, on a case-by-case basis, has applied criteria similar to the criteria proposed in Regulation Y in determining whether an inter vivos trust is a ''company'' for purposes of the BHC Act. Accordingly, the final rule has been expanded to presume that an inter vivos trust is exempt from the definition of ''company'' if the trust meets the criteria in the final rule and is not otherwise found to be a business trust or company. The final rule also amends the time limit in which a trust must terminate to reflect that the BHC Act permits certain trusts to extend for 25 years.

The final rule also reduces from 30 to 15 the number of days notice required before a large stock redemption by a bank holding company, permits small bank holding companies to make stock redemptions without prior notice if the holding company meets certain leverage and capital requirements, and permits bank holding companies to take account of intervening new issues of stock in computing when a stock redemption notice must be filed.

In addition, the final rule adopts the changes enacted in the Regulatory Relief Act to the period for divesting certain shares acquired in satisfaction of a debt previously contracted. These changes permit the Board to extend the divestiture period, under certain circumstances, to a period of up to 10 years.

Moreover, the final rule deletes the provisions implementing section 2(g)(3) of the BHC Act, which have been repealed by the Regulatory Relief Act. The Board has also deleted references in Regulation Y to limitations on asset growth imposed on certain institution by the Competitive Equality Banking Act of 1987 (Pub. L. 100–86, 101 Stat 552) because these limitations were removed by section 2304 of the Regulatory Relief Act.

Finally, the final rule adopts the proposed definitions of ''class of voting securities'' and ''immediate family'' and includes several other technical changes.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, the Board is required to conduct an analysis of the effect on small institutions of the revisions to Regulation Y. As of September 30, 1996, the number of bank holding companies totalled 5,250.[33] The following chart provides a distribution, based on asset size, for those companies.

Asset size category (M=million)	Number of bank holding companies	Percent of bank holding company assets
Less than $150M ..	3,874	[34] 5.2
$150M–$300M	677	3.2
Greater than $300M	699	91.6

The comprehensive revision to Regulation Y is intended to eliminate unnecessary burden for all bank holding companies, including smaller banking organizations. Included in the revision are expedited application/notice procedures with minimal information requirements for well-rated and well-run bank holding companies. The vast majority of bank holding companies would qualify to use the streamlined procedures, and it is estimated that more than 50 percent of the applications/notices reviewed by the Federal Reserve System during 1995 would have qualified for the new streamlined procedures. The revisions also include a reorganization and streamlining of the regulatory laundry list of permissible nonbanking activities,

[33] Financial top-tier domestic bank holding companies. Excludes middle-tier bank holding companies, and foreign bank holding companies that are not required to file a Y–9 report with the Federal Reserve System.

[34] Bank holding companies with consolidated assets of less than $150 million are not required to file financial regulatory reports on a consolidated basis. Assets for this group are estimated based on reports filed by the parent companies and subsidiaries.

the removal of unnecessary and outmoded regulatory restrictions, and a waiver of filing requirements for bank acquisitions that are in-substance bank-to-bank mergers. These changes apply to all bank holding companies and will be particularly helpful to small bank holding companies.

The revisions include a number of other changes applicable to smaller organizations in particular. These changes include a special exception for small bank holding companies with assets of less than $300 million from the aggregate size limit applying to the use of the expedited application procedures, an update of the small bank holding company policy statement that applies to bank holding companies with assets of less than $150 million and reduces burden for qualifying small bank holding companies, reduction of the thresholds for qualification for streamlined formation of new bank holding companies, reduction in the filing requirements under the Change in Bank Control Act, and addition of a new exception for small bank holding companies from the prior approval requirements regarding stock redemption proposals. These and the other changes described above are explained in more detail in the Supplementary Information portion of this document.

The Board expects that the final rule will result in a significant reduction in regulatory filings, in the paperwork burden and processing time associated with regulatory filings, and in the costs associated with complying with the regulation, thereby improving the ability of all bank holding companies, including small organizations, to conduct business on a more cost-efficient basis.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Ch. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the rule under the authority delegated to the Board by the Office of Management and Budget. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, the following information collections unless it displays a currently valid OMB control number. The OMB control numbers are indicated below.

The collection of information requirements in this regulation are found in 12 CFR 225.11, 12 CFR 225.12, 12 CFR 225.14, 12 CFR 225.17, 12 CFR 225.23, 12 CFR 225.24, 12 USC 1817(j) and 1831(i), 12 CFR 225.73, 12 CFR 225.4, and 12 CFR 225.3(a). This information is required to evidence compliance with the requirements of the Bank Holding Company Act, the Change in Bank Control Act and provisions of the Federal Deposit Insurance Act. The respondents are for-profit financial institutions and other corporations, including small businesses, and individuals.

The Board received no comments that specifically addressed burden estimates.

The streamlining of applications to acquire banks and nonbanking companies by institutions that meet the qualifying criteria should result in a significant reduction in burden for respondents that file the Application for Prior Approval To Become a Bank Holding Company, or for a Bank Holding Company To Acquire an Additional Bank or Bank Holding Company (FR Y–3; OMB No. 7100–0171). Approximately 196 respondents file the FR Y–3 annually pursuant to section 3(a)(1) of the Bank Holding Company Act (Act) and 303 respondents file annually the FR Y–3 pursuant to section 3(a)(3) and 3(a)(5) of the Act. The current burden per response is 48.5 hours and 59.0 hours, respectively, for a total estimated annual burden of 27,383 hours. Under the rule, it is estimated that at least 50 percent of these respondents, or a total of 249 respondents for both types of applications, would meet the criteria to qualify for the filing of a streamlined application. The average number of hours per response for proposed applications of each type is estimated to decrease to 2.5 hours. Therefore the total amount of annual burden is estimated to be 14,343.5 hours. Based on an hourly cost of $50, the annual cost to the public under the revision is estimated to be $717,175, which represents an estimated cost reduction of $651,975 from the estimated annual cost to the public of $1,369,150 under the current rule.

The final rule should result in a significant reduction in regulatory burden by eliminating the prior review and approval requirements for well-run bank holding companies to engage *de novo* in nonbanking activities that are permissible by Board regulation; streamlining the application process to engage *de novo* in nonbanking activities that are permissible only by Board order and to acquire nonbanking companies; and permitting bank holding companies to obtain approval at one time to engage in a preauthorized list of nonbanking activities. Thus, respondents that file the Application for Prior Approval To Engage Directly or Indirectly in Certain Nonbanking Activities (FR Y–4; OMB No. 7100–0121) will experience a significant reduction in costs. Approximately 362 respondents file the FR Y–4 annually to meet application requirements, and 114 respondents file to meet notification requirements. The current burden per response is 59.0 hours and 1.5 hours, respectively, for a total estimated annual burden of 21,529 hours. Under the rule it is estimated that at least 50 percent of these respondents would meet the criteria to qualify either for elimination or for the filing of a streamlined application, representing 181 applications and 57 notifications. The average number of hours per response for the required post-consummation notice is 0.5 hours and for the required streamlined notice is 1.5 hours. Therefore the total amount of annual burden is estimated to be 11,121.5 hours. Based on an hourly cost of $50, the annual cost to the public under the revision is estimated to be $556,075, which represents an estimated cost reduction of $520,375 from the current estimated annual cost to the public of $1,076,450 under the current rule.

The elimination of the requirement that a person who has already received Board approval under the Change in Bank Control Act obtain additional approvals to acquire additional shares of the same bank or bank holding company should result in a significant reduction in burden for respondents that file the Notice of Change in Bank Control (FR 2081; OMB No. 7100–0134). Approximately 300 respondents file the FR 2081 annually to meet the notification requirements of change in control, 280 respondents file to meet the requirements for notice of a change in director or senior executive officer, and 1000 respondents file to meet requirements to report certain biographical and financial information. The current burden per response for each requirement is 30.0 hours, 2.0 hours, and 4.0 hours, respectively, for a total estimated annual burden of 13,560 hours. Under the rule it is estimated that 50 percent fewer notifications of change in control will be filed for an annual total of 150 responses. The estimated number of filings to meet the other two requirements and the estimated average hours per response for each requirement remains unchanged. Therefore the total amount of annual burden is estimated to be 9,060 hours. Based on an hourly cost of $20, the total annual cost to the public under the revision is estimated to be $181,200, which represents an estimated cost reduction of $90,000 from the current estimated annual cost to the public of $271,200 under the current rule.

The allowance for bank holding companies to take account of

intervening new issues of stock in computing when a stock redemption notice must be filed and the exemption provided to small bank holding companies that meet certain leverage and capital requirements should result in a significant reduction in burden for respondents that file the Notice of Proposed Stock Redemption (FR 4008; OMB No. 7100–0131). Approximately 50 respondents file the FR 4008 annually. The current burden per response is 15.5 hours, for a total estimated annual burden of 775 hours. Under the rule it is estimated that 50 percent fewer notifications will be filed for an annual total of 25 responses and the estimated average hours per response remains unchanged. Therefore the total amount of annual burden is estimated to be 387.5 hours. Based on an hourly cost of $30, the total annual cost to the public under the revision is estimated to be $11,625, which represents a cost reduction of $11,625 from the current estimated cost to the public of $23,250 under the current rule.

The streamlining of application requirements are not expected to change the ongoing annual burden associated with the Application for a Foreign Organization to Become a Bank Holding Company (FR Y–1f; OMB No. 7100–0119). Approximately 2 respondents file the FR Y–1f annually. The current burden per response is 77 hours for a total estimated annual burden of 144 hours. Based on an hourly cost of $20, the annual cost to the public is estimated to be $3,080.

All information contained in these collections of information are available to the public unless the respondent can substantiate that disclosure of certain information would result in substantial competitive harm or an unwarranted invasion of personal privacy or would otherwise qualify for an exemption under the Freedom of Information Act.

The Federal Reserve has a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden may be sent to: Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551; and to the Office of Management and Budget, Paperwork Reduction Project (7100–0196), Washington, DC 20503.

List of Subjects in 12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding Companies, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Board amends 12 CFR part 225 as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

1. The authority citation for part 225 continues to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(l), 3106, 3108, 3310, 3331–3351, 3907, and 3909.

2. Subpart A is revised to read as follows:

Subpart A—General Provisions

Sec.
225.1 Authority, purpose, and scope.
225.2 Definitions.
225.3 Administration.
225.4 Corporate practices.
225.5 Registration, reports, and inspections.
225.6 Penalties for violations.
225.7 Exceptions to tying restrictions

Subpart A—General Provisions

§ 225.1 Authority, purpose, and scope.

(a) *Authority.* This part[1] (Regulation Y) is issued by the Board of Governors of the Federal Reserve System (*Board*) under section 5(b) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844(b)) (*BHC Act*); sections 8 and 13(a) of the International Banking Act of 1978 (12 U.S.C. 3106 and 3108); section 7(j)(13) of the Federal Deposit Insurance Act, as amended by the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)(13)) (*Bank Control Act*); section 8(b) of the Federal Deposit Insurance Act (12 U.S.C. 1818(b)); section 914 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (12 U.S.C. 1831i); section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972); and the International Lending Supervision Act of 1983 (Pub. L. 98–181, title IX). The BHC Act is codified at 12 U.S.C. 1841, *et seq.*

(b) *Purpose.* The principal purposes of this part are to:

(1) Regulate the acquisition of control of banks by companies and individuals;

(2) Define and regulate the nonbanking activities in which bank holding companies and foreign banking organizations with United States operations may engage; and

(3) Set forth the procedures for securing approval for these transactions and activities.

[1] Code of Federal Regulations, title 12, chapter II, part 225.

(c) *Scope*—(1) *Subpart A* contains general provisions and definitions of terms used in this regulation.

(2) *Subpart B* governs acquisitions of bank or bank holding company securities and assets by bank holding companies or by any company that will become a bank holding company as a result of the acquisition.

(3) *Subpart C* defines and regulates the nonbanking activities in which bank holding companies and foreign banking organizations may engage directly or through a subsidiary. The Board's Regulation K governs certain nonbanking activities conducted by foreign banking organizations and certain foreign activities conducted by bank holding companies (12 CFR part 211, International Banking Operations).

(4) *Subpart D* specifies situations in which a company is presumed to control voting securities or to have the power to exercise a controlling influence over the management or policies of a bank or other company; sets forth the procedures for making a control determination; and provides rules governing the effectiveness of divestitures by bank holding companies.

(5) *Subpart E* governs changes in bank control resulting from the acquisition by individuals or companies (other than bank holding companies) of voting securities of a bank holding company or state member bank of the Federal Reserve System.

(6) *Subpart F* specifies the limitations that govern companies that control so-called nonbank banks and the activities of nonbank banks.

(7) *Subpart G* prescribes minimum standards that apply to the performance of real estate appraisals and identifies transactions that require state certified appraisers.

(8) *Subpart H* identifies the circumstances when written notice must be provided to the Board prior to the appointment of a director or senior officer of a bank holding company and establishes procedures for obtaining the required Board approval.

(9) *Appendix A* to the regulation contains the Board's Risk-Based Capital Adequacy Guidelines for bank holding companies.

(10) *Appendix B* contains the Board's Capital Adequacy Guidelines for measuring leverage for bank holding companies and state member banks.

(11) *Appendix C* contains the Board's policy statement governing small bank holding companies.

(12) *Appendix D* contains the Board's Capital Adequacy Guidelines for measuring tier 1 leverage for bank holding companies.

(13) *Appendix E* contains the Board's Capital Adequacy Guidelines for measuring market risk of bank holding companies.

§ 225.2 Definitions.

Except as modified in this regulation or unless the context otherwise requires, the terms used in this regulation have the same meaning as set forth in the relevant statutes.

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with, another company.

(b)(1) *Bank* means:

(i) An insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(ii) An institution organized under the laws of the United States which both:

(A) Accepts demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties or others; and

(B) Is engaged in the business of making commercial loans.

(2) *Bank* does not include those institutions qualifying under the exceptions listed in section 2(c)(2) of the BHC Act (12 U.S.C. 1841(c)(2)).

(c)(1) *Bank holding company* means any company (including a bank) that has direct or indirect control of a bank, other than control that results from the ownership or control of:

(i) Voting securities held in good faith in a fiduciary capacity (other than as provided in paragraphs (e)(2)(ii) and (iii) of this section) without sole discretionary voting authority, or as otherwise exempted under section 2(a)(5)(A) of the BHC Act;

(ii) Voting securities acquired and held only for a reasonable period of time in connection with the underwriting of securities, as provided in section 2(a)(5)(B) of the BHC Act;

(iii) Voting rights to voting securities acquired for the sole purpose and in the course of participating in a proxy solicitation, as provided in section 2(a)(5)(C) of the BHC Act;

(iv) Voting securities acquired in satisfaction of debts previously contracted in good faith, as provided in section 2(a)(5)(D) of the BHC Act, if the securities are divested within two years of acquisition (or such later period as the Board may permit by order); or

(v) Voting securities of certain institutions owned by a thrift institution or a trust company, as provided in sections 2(a)(5)(E) and (F) of the BHC Act.

(2) Except for the purposes of § 225.4(b) of this subpart and subpart E of this part, or as otherwise provided in this regulation, *bank holding company* includes a foreign banking organization. For the purposes of subpart B of this part, *bank holding company* includes a foreign banking organization only if it owns or controls a bank in the United States.

(d)(1) *Company* includes any bank, corporation, general or limited partnership, association or similar organization, business trust, or any other trust unless by its terms it must terminate either within 25 years, or within 21 years and 10 months after the death of individuals living on the effective date of the trust.

(2) *Company* does not include any organization, the majority of the voting securities of which are owned by the United States or any state.

(3) *Testamentary trusts exempt.* Unless the Board finds that the trust is being operated as a business trust or company, a trust is presumed not to be a company if the trust:

(i) Terminates within 21 years and 10 months after the death of grantors or beneficiaries of the trust living on the effective date of the trust or within 25 years;

(ii) Is a testamentary or *inter vivos* trust established by an individual or individuals for the benefit of natural persons (or trusts for the benefit of natural persons) who are related by blood, marriage or adoption;

(iii) Contains only assets previously owned by the individual or individuals who established the trust;

(iv) Is not a Massachusetts business trust; and

(v) Does not issue shares, certificates, or any other evidence of ownership.

(4) *Qualified limited partnerships exempt.* Company does not include a qualified limited partnership, as defined in section 2(o)(10) of the BHC Act.

(e)(1) *Control* of a bank or other company means (except for the purposes of subpart E of this part):

(i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of voting securities of the bank or other company, directly or indirectly or acting through one or more other persons;

(ii) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of the bank or other company;

(iii) The power to exercise, directly or indirectly, a controlling influence over the management or policies of the bank or other company, as determined by the Board after notice and opportunity for hearing in accordance with § 225.31 of subpart D of this part; or

(iv) Conditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a bank or other company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another bank or other company.

(2) A bank or other company is deemed to control voting securities or assets owned, controlled, or held, directly or indirectly:

(i) By any subsidiary of the bank or other company;

(ii) In a fiduciary capacity (including by pension and profit-sharing trusts) for the benefit of the shareholders, members, or employees (or individuals serving in similar capacities) of the bank or other company or any of its subsidiaries; or

(iii) In a fiduciary capacity for the benefit of the bank or other company or any of its subsidiaries.

(f) *Foreign banking organization* and *qualifying foreign banking organization* have the same meanings as provided in § 211.21(n) and § 211.23 of the Board's Regulation K (12 CFR 211.21(n) and 211.23).

(g) *Insured depository institution* includes an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) and a savings association.

(h) *Lead insured depository institution* means the largest insured depository institution controlled by the bank holding company as of the quarter ending immediately prior to the proposed filing, based on a comparison of the average total risk-weighted assets controlled during the previous 12-month period by each insured depository institution subsidiary of the holding company.

(i) *Management official* means any officer, director (including honorary or advisory directors), partner, or trustee of a bank or other company, or any employee of the bank or other company with policy-making functions.

(j) *Nonbank bank* means any institution that:

(1) Became a bank as a result of enactment of the Competitive Equality Amendments of 1987 (Pub. L. 100–86), on the date of enactment (August 10, 1987); and

(2) Was not controlled by a bank holding company on the day before the enactment of the Competitive Equality Amendments of 1987 (August 9, 1987).

(k) *Outstanding shares* means any voting securities, but does not include securities owned by the United States or by a company wholly owned by the United States.

(l) Person includes an individual, bank, corporation, partnership, trust, association, joint venture, pool,

syndicate, sole proprietorship, unincorporated organization, or any other form of entity.

(m) *Savings association* means:

(1) Any federal savings association or federal savings bank;

(2) Any building and loan association, savings and loan association, homestead association, or cooperative bank if such association or cooperative bank is a member of the Savings Association Insurance Fund; and

(3) Any savings bank or cooperative that is deemed by the director of the Office of Thrift Supervision to be a savings association under section 10(l) of the Home Owners Loan Act.

(n) *Shareholder*—(1) *Controlling shareholder* means a person that owns or controls, directly or indirectly, 25 percent or more of any class of voting securities of a bank or other company.

(2) *Principal shareholder* means a person that owns or controls, directly or indirectly, 10 percent or more of any class of voting securities of a bank or other company, or any person that the Board determines has the power, directly or indirectly, to exercise a controlling influence over the management or policies of a bank or other company.

(o) *Subsidiary* means a bank or other company that is controlled by another company, and refers to a direct or indirect subsidiary of a bank holding company. An indirect subsidiary is a bank or other company that is controlled by a subsidiary of the bank holding company.

(p) *United States* means the United States and includes any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

(q)(1) *Voting securities* means shares of common or preferred stock, general or limited partnership shares or interests, or similar interests if the shares or interest, by statute, charter, or in any manner, entitle the holder:

(i) To vote for or to select directors, trustees, or partners (or persons exercising similar functions of the issuing company); or

(ii) To vote on or to direct the conduct of the operations or other significant policies of the issuing company.

(2) *Nonvoting shares.* Preferred shares, limited partnership shares or interests, or similar interests are not *voting securities* if:

(i) Any voting rights associated with the shares or interest are limited solely to the type customarily provided by statute with regard to matters that would significantly and adversely affect the rights or preference of the security or other interest, such as the issuance of additional amounts or classes of senior securities, the modification of the terms of the security or interest, the dissolution of the issuing company, or the payment of dividends by the issuing company when preferred dividends are in arrears;

(ii) The shares or interest represent an essentially passive investment or financing device and do not otherwise provide the holder with control over the issuing company; and

(iii) The shares or interest do not entitle the holder, by statute, charter, or in any manner, to select or to vote for the selection of directors, trustees, or partners (or persons exercising similar functions) of the issuing company.

(3) *Class of voting shares.* Shares of stock issued by a single issuer are deemed to be the same class of voting shares, regardless of differences in dividend rights or liquidation preference, if the shares are voted together as a single class on all matters for which the shares have voting rights other than matters described in paragraph (o)(2)(i) of this section that affect solely the rights or preferences of the shares.

(r) *Well–capitalized*–(1) *Bank holding company.* In the case of a bank holding company,[2] *well-capitalized* means that:

(i) On a consolidated basis, the bank holding company maintains a total risk-based capital ratio of 10.0 percent or greater, as defined in Appendix A of this part;

(ii) On a consolidated basis, the bank holding company maintains a Tier 1 risk-based capital ratio of 6.0 percent or greater, as defined in Appendix A of this part; and

(iii) The bank holding company is not subject to any written agreement, order, capital directive, or prompt corrective action directive issued by the Board to meet and maintain a specific capital level for any capital measure.

(2) *Insured depository institution.* In the case of an insured depository institution, *well-capitalized* means that the institution maintains at least the capital levels required to be ''well-capitalized'' under the capital adequacy regulations or guidelines applicable to the institution that have been adopted by the appropriate federal banking agency for the institution under section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o).

[2] For purposes of this subpart and subparts B and C of this part, a bank holding company with consolidated assets under $150 million that is subject to the Small Bank Holding Company Policy Statement in Appendix C of this part will be deemed to be ''well-capitalized'' if the bank holding company meets the requirements for expedited/waived processing in Appendix C.

(3) *Foreign banks*—(i) *Standards applied.* For purposes of determining whether a foreign banking organization qualifies under paragraph (r)(1) of this section:

(A) A foreign banking organization whose home country supervisor, as defined in § 211.21 of the Board's Regulation K (12 CFR 211.21), has adopted capital standards consistent in all respects with the Capital Accord of the Basle Committee on Banking Supervision (Basle Accord) may calculate its capital ratios under the home country standard; and

(B) A foreign banking organization whose home country supervisor has not adopted capital standards consistent in all respects with the Basle Accord shall obtain a determination from the Board that its capital is equivalent to the capital that would be required of a U.S. banking organization under paragraph (r)(1) of this section.

(ii) *Branches and agencies.* For purposes of determining, under paragraph (r)(1) of this section, whether a branch or agency of a foreign banking organization is well-capitalized, the branch or agency shall be deemed to have the same capital ratios as the foreign banking organization.

(s) *Well-managed*—(1) *In general.* A company, insured depository institution, or branch or agency of a foreign banking organization is *well-managed* if:

(i) At its most recent inspection or examination or subsequent review by the appropriate federal banking agency for the company or institution, the company or institution received:

(A) At least a satisfactory composite rating; and

(B) At least a satisfactory rating for management and for compliance, if such a rating is given; or

(ii) In the case of a company or insured depository institution that has not received an examination rating, the Board has determined, after a review of the managerial and other resources of the company or depository institution, that the company or institution qualifies for the streamlined procedures in this subpart, and subparts B and C of this part.

(2) *Foreign banking organizations.* A foreign banking organization shall qualify under this paragraph if the combined operations of the foreign banking organization in the United States have received at least a satisfactory composite rating at the most recent annual assessment.

§ 225.3 Administration.

(a) *Delegation of authority.* Designated Board members and officers and the

Federal Reserve Banks are authorized by the Board to exercise various functions prescribed in this regulation and in the Board's Rules Regarding Delegation of Authority (12 CFR part 265) and the Board's Rules of Procedure (12 CFR part 262).

(b) *Appropriate Federal Reserve Bank.* In administering this regulation, unless a different Federal Reserve Bank is designated by the Board, the appropriate Federal Reserve Bank is as follows:

(1) For a bank holding company (or a company applying to become a bank holding company): the Reserve Bank of the Federal Reserve district in which the company's banking operations are principally conducted, as measured by total domestic deposits in its subsidiary banks on the date it became (or will become) a bank holding company;

(2) For a foreign banking organization that has no subsidiary bank and is not subject to paragraph (b)(1) of this section: the Reserve Bank of the Federal Reserve district in which the total assets of the organization's United States branches, agencies, and commercial lending companies are the largest as of the later of January 1, 1980, or the date it becomes a foreign banking organization;

(3) For an individual or company submitting a notice under subpart E of this part: The Reserve Bank of the Federal Reserve district in which the banking operations of the bank holding company or state member bank to be acquired are principally conducted, as measured by total domestic deposits on the date the notice is filed.

§ 225.4 Corporate practices.

(a) *Bank holding company policy and operations.* (1) A bank holding company shall serve as a source of financial and managerial strength to its subsidiary banks and shall not conduct its operations in an unsafe or unsound manner.

(2) Whenever the Board believes an activity of a bank holding company or control of a nonbank subsidiary (other than a nonbank subsidiary of a bank) constitutes a serious risk to the financial safety, soundness, or stability of a subsidiary bank of the bank holding company and is inconsistent with sound banking principles or the purposes of the BHC Act or the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*), the Board may require the bank holding company to terminate the activity or to terminate control of the subsidiary, as provided in section 5(e) of the BHC Act.

(b) *Purchase or redemption by bank holding company of its own securities*—(1) *Filing notice.* Except as provided in paragraph (b)(6) of this section, a bank holding company shall give the Board prior written notice before purchasing or redeeming its equity securities if the gross consideration for the purchase or redemption, when aggregated with the net consideration paid by the company for all such purchases or redemptions during the preceding 12 months, is equal to 10 percent or more of the company's consolidated net worth. For the purposes of this section, ''net consideration'' is the gross consideration paid by the company for all of its equity securities purchased or redeemed during the period minus the gross consideration received for all of its equity securities sold during the period.

(2) *Contents of notice.* Any notice under this section shall be filed with the appropriate Reserve Bank and shall contain the following information:

(i) The purpose of the transaction, a description of the securities to be purchased or redeemed, the total number of each class outstanding, the gross consideration to be paid, and the terms and sources of funding for the transaction;

(ii) A description of all equity securities redeemed within the preceding 12 months, the net consideration paid, and the terms of any debt incurred in connection with those transactions; and

(iii) (A) If the bank holding company has consolidated assets of $150 million or more, consolidated *pro forma* risk-based capital and leverage ratio calculations for the bank holding company as of the most recent quarter, and, if the redemption is to be debt funded, a parent-only *pro forma* balance sheet as of the most recent quarter; or

(B) If the bank holding company has consolidated assets of less than $150 million, a *pro forma* parent-only balance sheet as of the most recent quarter, and, if the redemption is to be debt funded, one-year income statement and cash flow projections.

(3) *Acting on notice.* Within 15 calendar days of receipt of a notice under this section, the appropriate Reserve Bank shall either approve the transaction proposed in the notice or refer the notice to the Board for decision. If the notice is referred to the Board for decision, the Board shall act on the notice within 30 calendar days after the Reserve Bank receives the notice.

(4) *Factors considered in acting on notice.* (i) The Board may disapprove a proposed purchase or redemption if it finds that the proposal would constitute an unsafe or unsound practice, or would violate any law, regulation, Board order, directive, or any condition imposed by, or written agreement with, the Board.

(ii) In determining whether a proposal constitutes an unsafe or unsound practice, the Board shall consider whether the bank holding company's financial condition, after giving effect to the proposed purchase or redemption, meets the financial standards applied by the Board under section 3 of the BHC Act, including the Board's Capital Adequacy Guidelines (Appendix A of this part) and the Board's Policy Statement for Small Bank Holding Companies (Appendix C of this part).

(5) *Disapproval and hearing.* (i) The Board shall notify the bank holding company in writing of the reasons for a decision to disapprove any proposed purchase or redemption. Within 10 calendar days of receipt of a notice of disapproval by the Board, the bank holding company may submit a written request for a hearing.

(ii) The Board shall order a hearing within 10 calendar days of receipt of the request if it finds that material facts are in dispute, or if it otherwise appears appropriate. Any hearing conducted under this paragraph shall be held in accordance with the Board's Rules of Practice for Formal Hearings (12 CFR part 263).

(iii) At the conclusion of the hearing, the Board shall by order approve or disapprove the proposed purchase or redemption on the basis of the record of the hearing.

(6) *Exception for well-capitalized bank holding companies.* A bank holding company is not required to obtain prior Board approval for the redemption or purchase of its equity securities under this section provided:

(i) Both before and immediately after the redemption, the bank holding company is well-capitalized;

(ii) The bank holding company is well-managed; and

(iii) The bank holding company is not the subject of any unresolved supervisory issues.

(c) *Deposit insurance.* Every bank that is a bank holding company or a subsidiary of a bank holding company shall obtain Federal Deposit Insurance and shall remain an *insured bank* as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)).

(d) *Acting as transfer agent, municipal securities dealer, or clearing agent.* A bank holding company or any nonbanking subsidiary that is a ''bank,'' as defined in section 3(a)(6) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(6)), and that is a transfer agent of securities, a municipal securities dealer, a clearing agency, or a

participant in a clearing agency (as those terms are defined in section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)), shall be subject to §§ 208.8 (f)–(j) of the Board's Regulation H (12 CFR 208.8 (f)–(j)) as if it were a state member bank.

(e) *Reporting requirement for credit secured by certain bank holding company stock.* Each executive officer or director of a bank holding company the shares of which are not publicly traded shall report annually to the board of directors of the bank holding company the outstanding amount of any credit that was extended to the executive officer or director and that is secured by shares of the bank holding company. For purposes of this paragraph, the terms ''executive officer'' and ''director'' shall have the meaning given in § 215.2 of Regulation O (12 CFR 215.2).

(f) *Suspicious activity report.* A bank holding company or any nonbank subsidiary thereof, or a foreign bank that is subject to the BHC Act or any nonbank subsidiary of such foreign bank operating in the United States, shall file a suspicious activity report in accordance with the provisions of § 208.20 of the Board's Regulation H (12 CFR 208.20).

§ 225.5 Registration, reports, and inspections.

(a) *Registration of bank holding companies.* Each company shall register within 180 days after becoming a bank holding company by furnishing information in the manner and form prescribed by the Board. A company that receives the Board's prior approval under subpart B of this part to become a bank holding company may complete this registration requirement through submission of its first annual report to the Board as required by paragraph (b) of this section.

(b) *Reports of bank holding companies.* Each bank holding company shall furnish, in the manner and form prescribed by the Board, an annual report of the company's operations for the fiscal year in which it becomes a bank holding company, and for each fiscal year during which it remains a bank holding company. Additional information and reports shall be furnished as the Board may require.

(c) *Examinations and inspections.* The Board may examine or inspect any bank holding company and each of its subsidiaries and prepare a report of their operations and activities. With respect to a foreign banking organization, the Board may also examine any branch or agency of a foreign bank in any state of the United States and may examine or inspect each of the organization's subsidiaries in the United States and prepare reports of their operations and activities. The Board shall rely, as far as possible, on the reports of examination made by the primary federal or state supervisor of the subsidiary bank of the bank holding company or of the branch or agency of the foreign bank.

§ 225.6 Penalties for violations.

(a) *Criminal and civil penalties.* (1) Section 8 of the BHC Act provides criminal penalties for willful violation, and civil penalties for violation, by any company or individual, of the BHC Act or any regulation or order issued under it, or for making a false entry in any book, report, or statement of a bank holding company.

(2) Civil money penalty assessments for violations of the BHC Act shall be made in accordance with subpart C of the Board's Rules of Practice for Hearings (12 CFR part 263, subpart C). For any willful violation of the Bank Control Act or any regulation or order issued under it, the Board may assess a civil penalty as provided in 12 U.S.C. 1817(j)(15).

(b) *Cease-and-desist proceedings.* For any violation of the BHC Act, the Bank Control Act, this regulation, or any order or notice issued thereunder, the Board may institute a cease-and-desist proceeding in accordance with the Financial Institutions Supervisory Act of 1966, as amended (12 U.S.C. 1818(b) *et seq.*).

§ 225.7 Exceptions to tying restrictions.

(a) *Purpose.* This section establishes exceptions to the anti-tying restrictions of section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971, 1972(1)). These exceptions are in addition to those in section 106. The section also restricts tying of electronic benefit transfer services by bank holding companies and their nonbank subsidiaries.

(b) *Exceptions to statute.* Subject to the limitations of paragraph (c) of this section, a bank may:

(1) *Extension to affiliates of statutory exceptions preserving traditional banking relationships.* Extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement that a customer:

(i) Obtain a loan, discount, deposit, or trust service from an affiliate of the bank; or

(ii) Provide to an affiliate of the bank some additional credit, property, or service that the bank could require to be provided to itself pursuant to section 106(b)(1)(C) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1972(1)(C)).

(2) *Safe harbor for combined-balance discounts.* Vary the consideration for any product or package of products based on a customer's maintaining a combined minimum balance in certain products specified by the bank (eligible products), if:

(i) The bank offers deposits, and all such deposits are eligible products; and

(ii) Balances in deposits count at least as much as nondeposit products toward the minimum balance.

(3) *Safe harbor for foreign transactions.* Engage in any transaction with a customer if that customer is:

(i) A corporation, business, or other person (other than an individual) that:

(A) Is incorporated, chartered, or otherwise organized outside the United States; and

(B) Has its principal place of business outside the United States; or

(ii) An individual who is a citizen of a foreign country and is not resident in the United States.

(c) *Limitations on exceptions.* Any exception granted pursuant to this section shall terminate upon a finding by the Board that the arrangement is resulting in anti-competitive practices. The eligibility of a bank to operate under any exception granted pursuant to this section shall terminate upon a finding by the Board that its exercise of this authority is resulting in anti-competitive practices.

(d) *Extension of statute to electronic benefit transfer services.* A bank holding company or nonbank subsidiary of a bank holding company that provides electronic benefit transfer services shall be subject to the anti-tying restrictions applicable to such services set forth in section 7(i)(11) of the Food Stamp Act of 1977 (7 U.S.C. 2016(i)(11)).

(e) For purposes of this section, *bank* has the meaning given that term in section 106(a) of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971), but shall also include a United States branch, agency, or commercial lending company subsidiary of a foreign bank that is subject to section 106 pursuant to section 8(d) of the International Banking Act of 1978 (12 U.S.C. 3106(d)), and any company made subject to section 106 by section 4(f)(9) or 4(h) of the BHC Act.

3. Subpart B is revised to read as follows:

Subpart B—Acquisition of Bank Securities or Assets

Subpart B—Acquisition of Bank Securities or Assets

§ 225.11 Transactions requiring Board approval

The following transactions require the Board's prior approval under section 3 of the Bank Holding Company Act except as exempted under § 225.12 or as otherwise covered by § 225.17 of this subpart:

(a) *Formation of bank holding company.* Any action that causes a bank or other company to become a bank holding company.

(b) *Acquisition of subsidiary bank.* Any action that causes a bank to become a subsidiary of a bank holding company.

(c) *Acquisition of control of bank or bank holding company securities.*

(1) The acquisition by a bank holding company of direct or indirect ownership or control of any voting securities of a bank or bank holding company, if the acquisition results in the company's control of more than 5 percent of the outstanding shares of any class of voting securities of the bank or bank holding company.

(2) An acquisition includes the purchase of additional securities through the exercise of preemptive rights, but does not include securities received in a stock dividend or stock split that does not alter the bank holding company's proportional share of any class of voting securities.

(d) *Acquisition of bank assets.* The acquisition by a bank holding company or by a subsidiary thereof (other than a bank) of all or substantially all of the assets of a bank.

(e) *Merger of bank holding companies.* The merger or consolidation of bank holding companies, including a merger through the purchase of assets and assumption of liabilities.

(f) *Transactions by foreign banking organization.* Any transaction described in paragraphs (a) through (e) of this section by a foreign banking organization that involves the acquisition of an interest in a U.S. bank or in a bank holding company for which application would be required if the foreign banking organization were a bank holding company.

§ 225.12 Transactions not requiring Board approval.

The following transactions do *not* require the Board's approval under § 225.11 of this subpart:

(a) *Acquisition of securities in fiduciary capacity.* The acquisition by a bank or other company (other than a trust that is a company) of control of voting securities of a bank or bank holding company in good faith in a fiduciary capacity, unless:

(1) The acquiring bank or other company has sole discretionary authority to vote the securities and retains this authority for more than two years; or

(2) The acquisition is for the benefit of the acquiring bank or other company, or its shareholders, employees, or subsidiaries.

(b) *Acquisition of securities in satisfaction of debts previously contracted.* The acquisition by a bank or other company of control of voting securities of a bank or bank holding company in the regular course of securing or collecting a debt previously contracted in good faith, if the acquiring bank or other company divests the securities within two years of acquisition. The Board or Reserve Bank may grant requests for up to three one-year extensions.

(c) *Acquisition of securities by bank holding company with majority control.* The acquisition by a bank holding company of additional voting securities of a bank or bank holding company if more than 50 percent of the outstanding voting securities of the bank or bank holding company is lawfully controlled by the acquiring bank holding company prior to the acquisition.

(d) *Acquisitions involving bank mergers and internal corporate reorganizations*—(1) *Transactions subject to Bank Merger Act.* The merger or consolidation of a subsidiary bank of a bank holding company with another bank, or the purchase of assets by the subsidiary bank, or a similar transaction involving subsidiary banks of a bank holding company, if the transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 U.S.C. 1828(c)) and does not involve the acquisition of shares of a bank. This exception does not include:

(i) The merger of a nonsubsidiary bank and a nonoperating subsidiary bank formed by a company for the purpose of acquiring the nonsubsidiary bank; or

(ii) Any transaction requiring the Board's prior approval under § 225.11(e) of this subpart.

The Board may require an application under this subpart if it determines that the merger or consolidation would have a significant adverse impact on the financial condition of the bank holding company, or otherwise requires approval under section 3 of the BHC Act.

(2) *Certain acquisitions subject to Bank Merger Act.* The acquisition by a bank holding company of shares of a bank or company controlling a bank or the merger of a company controlling a bank with the bank holding company, if the transaction is part of the merger or consolidation of the bank with a subsidiary bank (other than a nonoperating subsidiary bank) of the acquiring bank holding company, or is part of the purchase of substantially all of the assets of the bank by a subsidiary bank (other than a nonoperating subsidiary bank) of the acquiring bank holding company, and if:

(i) The bank merger, consolidation, or asset purchase occurs simultaneously with the acquisition of the shares of the bank or bank holding company or the merger of holding companies, and the bank is not operated by the acquiring bank holding company as a separate entity other than as the survivor of the merger, consolidation, or asset purchase;

(ii) The transaction requires the prior approval of a federal supervisory agency under the Bank Merger Act (12 U.S.C. 1828(c));

(iii) The transaction does not involve the acquisition of any nonbank company that would require prior approval under section 4 of the BHC Act (12 U.S.C. 1843);

(iv) Both before and after the transaction, the acquiring bank holding company meets the Board's Capital Adequacy Guidelines (Appendixes A, B, C, D, and E of this part);

(v) At least 10 days prior to the transaction, the acquiring bank holding company has provided to the Reserve Bank written notice of the transaction that contains:

(A) A copy of the filing made to the appropriate federal banking agency under the Bank Merger Act; and

(B) A description of the holding company's involvement in the transaction, the purchase price, and the source of funding for the purchase price; and

(vi) Prior to expiration of the period provided in paragraph (d)(2)(v) of this section, the Reserve Bank has not

informed the bank holding company that an application under § 225.11 is required.

(3) *Internal corporate reorganizations.* (i) Subject to paragraph (d)(3)(ii) of this section, any of the following transactions performed in the United States by a bank holding company:

(A) The merger of holding companies that are subsidiaries of the bank holding company;

(B) The formation of a subsidiary holding company; [1]

(C) The transfer of control or ownership of a subsidiary bank or a subsidiary holding company between one subsidiary holding company and another subsidiary holding company or the bank holding company.

(ii) A transaction described in paragraph (d)(3)(i) of this section qualifies for this exception if:

(A) The transaction represents solely a corporate reorganization involving companies and insured depository institutions that, both preceding and following the transaction, are lawfully controlled and operated by the bank holding company;

(B) The transaction does not involve the acquisition of additional voting shares of an insured depository institution that, prior to the transaction, was less than majority owned by the bank holding company;

(C) The bank holding company is not organized in mutual form; and

(D) Both before and after the transaction, the bank holding company meets the Board's Capital Adequacy Guidelines (Appendixes A, B, C, D, and E of this part).

(e) *Holding securities in escrow.* The holding of any voting securities of a bank or bank holding company in an escrow arrangement for the benefit of an applicant pending the Board's action on an application for approval of the proposed acquisition, if title to the securities and the voting rights remain with the seller and payment for the securities has not been made to the seller.

(f) *Acquisition of foreign banking organization.* The acquisition of a foreign banking organization where the foreign banking organization does not directly or indirectly own or control a bank in the United States, unless the acquisition is also by a foreign banking organization and otherwise subject to § 225.11(f) of this subpart.

[1] In the case of a transaction that results in the formation or designation of a new bank holding company, the new bank holding company must complete the registration requirements described in § 225.5.

§ 225.13 Factors considered in acting on bank acquisition proposals.

(a) *Factors requiring denial.* As specified in section 3(c) of the BHC Act, the Board may not approve any application under this subpart if:

(1) The transaction would result in a monopoly or would further any combination or conspiracy to monopolize, or to attempt to monopolize, the business of banking in any part of the United States;

(2) The effect of the transaction may be substantially to lessen competition in any section of the country, tend to create a monopoly, or in any other manner be in restraint of trade, unless the Board finds that the transaction's anti-competitive effects are clearly outweighed by its probable effect in meeting the convenience and needs of the community;

(3) The applicant has failed to provide the Board with adequate assurances that it will make available such information on its operations or activities, and the operations or activities of any affiliate of the applicant, that the Board deems appropriate to determine and enforce compliance with the BHC Act and other applicable federal banking statutes, and any regulations thereunder; or

(4) In the case of an application involving a foreign banking organization, the foreign banking organization is not subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country, as provided in § 211.24(c)(1)(ii) of the Board's Regulation K (12 CFR 211.24(c)(1)(ii)).

(b) *Other factors.* In deciding applications under this subpart, the Board also considers the following factors with respect to the applicant, its subsidiaries, any banks related to the applicant through common ownership or management, and the bank or banks to be acquired:

(1) *Financial condition.* Their financial condition and future prospects, including whether current and projected capital positions and levels of indebtedness conform to standards and policies established by the Board.

(2) *Managerial resources.* The competence, experience, and integrity of the officers, directors, and principal shareholders of the applicant, its subsidiaries, and the banks and bank holding companies concerned; their record of compliance with laws and regulations; and the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications.

(3) *Convenience and needs of community.* The convenience and needs of the communities to be served, including the record of performance under the Community Reinvestment Act of 1977 (12 U.S.C. 2901 *et seq.*) and regulations issued thereunder, including the Board's Regulation BB (12 CFR part 228).

(c) *Interstate transactions.* The Board may approve any application or notice under this subpart by a bank holding company to acquire control of all or substantially all of the assets of a bank located in a state other than the home state of the bank holding company, without regard to whether the transaction is prohibited under the law of any state, if the transaction complies with the requirements of section 3(d) of the BHC Act (12 U.S.C. 1842(d)).

(d) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address competitive, financial, managerial, safety and soundness, convenience and needs, compliance or other concerns, to ensure that approval is consistent with the relevant statutory factors and other provisions of the BHC Act.

§ 225.14 Expedited action for certain bank acquisitions by well-run bank holding companies.

(a) *Filing of notice*—(1) *Information required and public notice.* As an alternative to the procedure provided in § 225.15, a bank holding company that meets the requirements of paragraph (c) of this section may satisfy the prior approval requirements of § 225.11 in connection with the acquisition of shares, assets or control of a bank, or a merger or consolidation between bank holding companies, by providing the appropriate Reserve Bank with a written notice containing the following:

(i) A certification that all of the criteria in paragraph (c) of this section are met;

(ii) A description of the transaction that includes identification of the companies and insured depository institutions involved in the transaction [2] and identification of each banking market affected by the transaction;

[2] If, in connection with a transaction under this subpart, any person or group of persons proposes to acquire control of the acquiring bank holding company for purposes of the Bank Control Act or § 225.41, the person or group of persons may fulfill the notice requirements of the Bank Control Act and § 225.43 by providing, as part of the submission by the acquiring bank holding company under this subpart, identifying and biographical information required in paragraph (6)(A) of the Bank Control Act (12 U.S.C. 1817(j)(6)(A)), as well as any financial or other information requested by the Reserve Bank under § 225.43.

(iii) A description of the effect of the transaction on the convenience and needs of the communities to be served and of the actions being taken by the bank holding company to improve the CRA performance of any insured depository institution subsidiary that does not have at least a satisfactory CRA performance rating at the time of the transaction;

(iv) Evidence that notice of the proposal has been published in accordance with § 225.16(b)(1);

(v)(A) If the bank holding company has consolidated assets of $150 million or more, an abbreviated consolidated *pro forma* balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, consolidated *pro forma* risk-based capital ratios for the acquiring bank holding company as of the most recent quarter, and a description of the purchase price and the terms and sources of funding for the transaction;

(B) If the bank holding company has consolidated assets of less than $150 million, a *pro forma* parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, and a description of the purchase price, the terms and sources of funding for the transaction, and the sources and schedule for retiring any debt incurred in the transaction;

(vi) If the bank holding company has consolidated assets of less than $300 million, a list of and biographical information regarding any directors or senior executive officers of the resulting bank holding company that are not directors or senior executive officers of the acquiring bank holding company or of a company or institution to be acquired;

(vii) For each insured depository institution whose Tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, Tier 1 capital and total capital of the institution on a *pro forma* basis; and

(viii) The market indexes for each relevant banking market reflecting the *pro forma* effect of the transaction.

(2) *Waiver of unnecessary information.* The Reserve Bank may reduce the information requirements in paragraph (a)(1)(v) through (viii) of this section as appropriate.

(b)(1) *Action on proposals under this section.* The Board or the appropriate Reserve Bank shall act on a proposal submitted under this section or notify the bank holding company that the transaction is subject to the procedure in § 225.15 within 5 business days after the close of the public comment period. The Board and the Reserve Bank shall not approve any proposal under this section prior to the third business day following the close of the public comment period, unless an emergency exists that requires expedited or immediate action. The Board may extend the period for action under this section for up to 5 business days.

(2) *Acceptance of notice in event expedited procedure not available.* In the event that the Board or the Reserve Bank determines after the filing of a notice under this section that a bank holding company may not use the procedure in this section and must file an application under § 225.15, the application shall be deemed accepted for purposes of § 225.15 as of the date that the notice was filed under this section.

(c) *Criteria for use of expedited procedure.* The procedure in this section is available only if:

(1) *Well-capitalized organization*—(i) *Bank holding company.* Both at the time of and immediately after the proposed transaction, the acquiring bank holding company is well-capitalized;

(ii) *Insured depository institutions.* Both at the time of and immediately after the proposed transaction:

(A) The lead insured depository institution of the acquiring bank holding company is well-capitalized;

(B) Well-capitalized insured depository institutions control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the acquiring bank holding company; and

(C) No insured depository institution controlled by the acquiring bank holding company is undercapitalized;

(2) *Well-managed organization.* (i) *Satisfactory examination ratings.* At the time of the transaction, the acquiring bank holding company, its lead insured depository institution, and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the holding company are well-managed;

(ii) *No poorly managed institutions.* No insured depository institution controlled by the acquiring bank holding company has received 1 of the 2 lowest composite ratings at the later of the institution's most recent examination or subsequent review by the appropriate federal banking agency for the institution;

(iii) *Recently acquired institutions excluded.* Any insured depository institution that has been acquired by the bank holding company during the 12-month period preceding the date on which written notice is filed under paragraph (a) of this section may be excluded for purposes of paragraph (c)(2)(ii) of this section if :

(A) The bank holding company has developed a plan acceptable to the appropriate federal banking agency for the institution to restore the capital and management of the institution; and

(B) All insured depository institutions excluded under this paragraph represent, in the aggregate, less than 10 percent of the aggregate total risk-weighted assets of all insured depository institutions controlled by the bank holding company;

(3) *Convenience and needs criteria*—(i) *Effect on the community.* The record indicates that the proposed transaction would meet the convenience and needs of the community standard in the BHC Act; and

(ii) *Established CRA performance record.* At the time of the transaction, the lead insured depository institution of the acquiring bank holding company and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured institutions controlled by the holding company have received a satisfactory or better composite rating at the most recent examination under the Community Reinvestment Act;

(4) *Public comment.* No comment that is timely and substantive as provided in § 225.16 is received by the Board or the appropriate Reserve Bank other than a comment that supports approval of the proposal;

(5) *Competitive criteria*—(i) *Competitive screen.* Without regard to any divestitures proposed by the acquiring bank holding company, the acquisition does not cause:

(A) Insured depository institutions controlled by the acquiring bank holding company to control in excess of 35 percent of market deposits in any relevant banking market; or

(B) The Herfindahl-Hirschman index to increase by more than 200 points in any relevant banking market with a post-acquisition index of at least 1800; and

(ii) *Department of Justice.* The Department of Justice has not indicated to the Board that consummation of the transaction is likely to have a significantly adverse effect on competition in any relevant banking market;

(6) *Size of acquisition*—(i) *In general*—(A) *Limited Growth.* Except as provided in paragraph (c)(6)(ii) of this section, the sum of the aggregate risk-weighted assets to be acquired in the proposal and the aggregate risk-

weighted assets acquired by the acquiring bank holding company in all other qualifying transactions does not exceed 35 percent of the consolidated risk-weighted assets of the acquiring bank holding company. For purposes of this paragraph *other qualifying transactions* means any transaction approved under this section or § 225.23 during the 12 months prior to filing the notice under this section; and

(B) *Individual size limitation.* The total risk-weighted assets to be acquired do not exceed $7.5 billion;

(ii) *Small bank holding companies.* Paragraph (c)(6)(i)(A) of this section shall not apply if, immediately following consummation of the proposed transaction, the consolidated risk-weighted assets of the acquiring bank holding company are less than $300 million;

(7) *Supervisory actions.* During the 12-month period ending on the date on which the bank holding company proposes to consummate the proposed transaction, no formal administrative order, including a written agreement, cease and desist order, capital directive, prompt corrective action directive, asset maintenance agreement, or other formal enforcement action, is or was outstanding against the bank holding company or any insured depository institution subsidiary of the holding company, and no formal administrative enforcement proceeding involving any such enforcement action, order, or directive is or was pending;

(8) *Interstate acquisitions.* Board-approval of the transaction is not prohibited under section 3(d) of the BHC Act;

(9) *Other supervisory considerations.* Board approval of the transaction is not prohibited under the informational sufficiency or comprehensive home country supervision standards set forth in section 3(c)(3) of the BHC Act; and

(10) *Notification.* The acquiring bank holding company has not been notified by the Board, in its discretion, prior to the expiration of the period in paragraph (b)(1) of this section that an application under § 225.15 is required in order to permit closer review of any financial, managerial, competitive, convenience and needs or other matter related to the factors that must be considered under this part.

(d) *Comment by primary banking supervisor*—(1) *Notice.* Upon receipt of a notice under this section, the appropriate Reserve Bank shall promptly furnish notice of the proposal and a copy of the information filed pursuant to paragraph (a) of this section to the primary banking supervisor of the insured depository institutions to be acquired.

(2) *Comment period.* The primary banking supervisor shall have 30 calendar days (or such shorter time as agreed to by the primary banking supervisor) from the date of the letter giving notice in which to submit its views and recommendations to the Board.

(3) *Action subject to supervisor's comment.* Action by the Board or the Reserve Bank on a proposal under this section is subject to the condition that the primary banking supervisor not recommend in writing to the Board disapproval of the proposal prior to the expiration of the comment period described in paragraph (d)(2) of this section. In such event, any approval given under this section shall be revoked and, if required by section 3(b) of the BHC Act, the Board shall order a hearing on the proposal.

(4) *Emergencies.* Notwithstanding paragraphs (d)(2) and (d)(3) of this section, the Board may provide the primary banking supervisor with 10 calendar days' notice of a proposal under this section if the Board finds that an emergency exists requiring expeditious action, and may act during the notice period or without providing notice to the primary banking supervisor if the Board finds that it must act immediately to prevent probable failure.

(5) *Primary banking supervisor.* For purposes of this section and § 225.15(b), *the primary banking supervisor* for an institution is:

(i) The Office of the Comptroller of the Currency, in the case of a national banking association or District bank;

(ii) The appropriate supervisory authority for the State in which the bank is chartered, in the case of a State bank;

(iii) The Director of the Office of Thrift Supervision, in the case of a savings association.

(e) *Branches and agencies of foreign banking organizations.* For purposes of this section, a U.S. branch or agency of a foreign banking organization shall be considered to be an insured depository institution. A U.S. branch or agency of a foreign banking organization shall be subject to paragraph (c)(3)(ii) of this section only to the extent it is insured by the Federal Deposit Insurance Corporation in accordance with section 6 of the International Banking Act of 1978 (12 U.S.C. 3104).

§ 225.15 Procedures for other bank acquisition proposals.

(a) *Filing application.* Except as provided in § 225.14, an application for the Board's prior approval under this subpart shall be governed by the provisions of this section and shall be filed with the appropriate Reserve Bank on the designated form.

(b) *Notice to primary banking supervisor.* Upon receipt of an application under this subpart, the Reserve Bank shall promptly furnish notice and a copy of the application to the primary banking supervisor of each bank to be acquired. The primary supervisor shall have 30 calendar days from the date of the letter giving notice in which to submit its views and recommendations to the Board.

(c) *Accepting application for processing.* Within 7 calendar days after the Reserve Bank receives an application under this section, the Reserve Bank shall accept it for processing as of the date the application was filed or return the application if it is substantially incomplete. Upon accepting an application, the Reserve Bank shall immediately send copies to the Board. The Reserve Bank or the Board may request additional information necessary to complete the record of an application at any time after accepting the application for processing.

(d) *Action on applications*—(1) *Action under delegated authority.* The Reserve Bank shall approve an application under this section within 30 calendar days after the acceptance date for the application, unless the Reserve Bank, upon notice to the applicant, refers the application to the Board for decision because action under delegated authority is not appropriate.

(2) *Board action.* The Board shall act on an application under this subpart that is referred to it for decision within 60 calendar days after the acceptance date for the application, unless the Board notifies the applicant that the 60-day period is being extended for a specified period and states the reasons for the extension. In no event may the extension exceed the 91-day period provided in § 225.16(f). The Board may, at any time, request additional information that it believes is necessary for its decision.

§ 225.16 Public notice, comments, hearings, and other provisions governing applications and notices.

(a) *In general.* The provisions of this section apply to all notices and applications filed under § 225.14 and § 225.15.

(b) *Public notice*—(1) *Newspaper publication*—(i) *Location of publication.* In the case of each notice or application submitted under § 225.14 or § 225.15, the applicant shall publish a notice in a newspaper of general circulation, in

the form and at the locations specified in § 262.3 of the Rules of Procedure (12 CFR 262.3);

(ii) *Contents of notice.* A newspaper notice under this paragraph shall provide an opportunity for interested persons to comment on the proposal for a period of at least 30 calendar days;

(iii) *Timing of publication.* Each newspaper notice published in connection with a proposal under this paragraph shall be published no more than 15 calendar days before and no later than 7 calendar days following the date that a notice or application is filed with the appropriate Reserve Bank.

(2) Federal Register *notice. (i) Publication by Board.* Upon receipt of a notice or application under § 225.14 or § 225.15, the Board shall promptly publish notice of the proposal in the Federal Register and shall provide an opportunity for interested persons to comment on the proposal for a period of no more than 30 days;

(ii) *Request for advance publication.* A bank holding company may request that, during the 15-day period prior to filing a notice or application under § 225.14 or § 225.15, the Board publish notice of a proposal in the Federal Register. A request for advance Federal Register publication shall be made in writing to the appropriate Reserve Bank and shall contain the identifying information prescribed by the Board for Federal Register publication;

(3) *Waiver or shortening of notice.* The Board may waive or shorten the required notice periods under this section if the Board determines that an emergency exists requiring expeditious action on the proposal, or if the Board finds that immediate action is necessary to prevent the probable failure of an insured depository institution.

(c) *Public comment*—(1) *Timely comments.* Interested persons may submit information and comments regarding a proposal filed under this subpart. A comment shall be considered timely for purposes of this subpart if the comment, together with all supplemental information, is submitted in writing in accordance with the Board's Rules of Procedure and received by the Board or the appropriate Reserve Bank prior to the expiration of the latest public comment period provided in paragraph (b) of this section.

(2) *Extension of comment period*—(i) *In general.* The Board may, in its discretion, extend the public comment period regarding any proposal submitted under this subpart.

(ii) *Requests in connection with obtaining application or notice.* In the event that an interested person has requested a copy of a notice or application submitted under this subpart, the Board may, in its discretion and based on the facts and circumstances, grant such person an extension of the comment period for up to 15 calendar days.

(iii) *Joint requests by interested person and acquiring company.* The Board will grant a joint request by an interested person and the acquiring bank holding company for an extension of the comment period for a reasonable period for a purpose related to the statutory factors the Board must consider under this subpart.

(3) *Substantive comment.* A comment will be considered substantive for purposes of this subpart unless it involves individual complaints, or raises frivolous, previously-considered or wholly unsubstantiated claims or irrelevant issues.

(d) *Notice to Attorney General.* The Board or Reserve Bank shall immediately notify the United States Attorney General of approval of any notice or application under § 225.14 or § 225.15.

(e) *Hearings.* As provided in section 3(b) of the BHC Act, the Board shall order a hearing on any application or notice under § 225.15 if the Board receives from the primary supervisor of the bank to be acquired, within the 30-day period specified in § 225.15(b), a written recommendation of disapproval of an application. The Board may order a formal or informal hearing or other proceeding on the application or notice, as provided in § 262.3(i)(2) of the Board's Rules of Procedure. Any request for a hearing (other than from the primary supervisor) shall comply with § 262.3(e) of the Rules of Procedure (12 CFR 262.3(e)).

(f) *Approval through failure to act*—(1) *Ninety-one day rule.* An application or notice under § 225.14 or § 225.15 shall be deemed approved if the Board fails to act on the application or notice within 91 calendar days after the date of submission to the Board of the complete record on the application. For this purpose, the Board acts when it issues an order stating that the Board has approved or denied the application or notice, reflecting the votes of the members of the Board, and indicating that a statement of the reasons for the decision will follow promptly.

(2) *Complete record.* For the purpose of computing the commencement of the 91-day period, the record is complete on the latest of:

(i) The date of receipt by the Board of an application or notice that has been accepted by the Reserve Bank;

(ii) The last day provided in any notice for receipt of comments and hearing requests on the application or notice;

(iii) The date of receipt by the Board of the last relevant material regarding the application or notice that is needed for the Board's decision, if the material is received from a source outside of the Federal Reserve System; or

(iv) The date of completion of any hearing or other proceeding.

(g) *Exceptions to notice and hearing requirements.*

(1) *Probable bank failure.* If the Board finds it must act immediately on an application or notice in order to prevent the probable failure of a bank or bank holding company, the Board may modify or dispense with the notice and hearing requirements of this section.

(2) *Emergency.* If the Board finds that, although immediate action on an application or notice is not necessary, an emergency exists requiring expeditious action, the Board shall provide the primary supervisor 10 days to submit its recommendation. The Board may act on such an application or notice without a hearing and may modify or dispense with the other notice and hearing requirements of this section.

(h) *Waiting period.* A transaction approved under § 225.14 or § 225.15 shall not be consummated until 30 days after the date of approval of the application, except that a transaction may be consummated:

(1) Immediately upon approval, if the Board has determined under paragraph (g) of this section that the application or notice involves a probable bank failure;

(2) On or after the 5th calendar day following the date of approval, if the Board has determined under paragraph (g) of this section that an emergency exists requiring expeditious action; or

(3) On or after the 15th calendar day following the date of approval, if the Board has not received any adverse comments from the United States Attorney General relating to the competitive factors and the Attorney General has consented to the shorter waiting period.

§ 225.17 Notice procedure for one-bank holding company formations.

(a) *Transactions that qualify under this section.* An acquisition by a company of control of a bank may be consummated 30 days after providing notice to the appropriate Reserve Bank in accordance with paragraph (b) of this section, provided that all of the following conditions are met:

(1) The shareholder or shareholders who control at least 67 percent of the shares of the bank will control, immediately after the reorganization, at

least 67 percent of the shares of the holding company in substantially the same proportion, except for changes in shareholders' interests resulting from the exercise of dissenting shareholders' rights under state or federal law; [3]

(2) No shareholder, or group of shareholders acting in concert, will, following the reorganization, own or control 10 percent or more of any class of voting shares of the bank holding company, unless that shareholder or group of shareholders was authorized, after review under the Change in Bank Control Act of 1978 (12 U.S.C. 1817(j)) by the appropriate federal banking agency for the bank, to own or control 10 percent or more of any class of voting shares of the bank; [4]

(3) The bank is adequately capitalized (as defined in section 38 of the Federal Deposit Insurance Act (12 U.S.C. 1831o));

(4) The bank received at least a composite ''satisfactory'' rating at its most recent examination, in the event that the bank was examined;

(5) At the time of the reorganization, neither the bank nor any of its officers, directors, or principal shareholders is involved in any unresolved supervisory or enforcement matters with any appropriate federal banking agency;

(6) The company demonstrates that any debt that it incurs at the time of the reorganization, and the proposed means of retiring this debt, will not place undue burden on the holding company or its subsidiary on a *pro forma* basis; [5]

(7) The holding company will not, as a result of the reorganization, acquire control of any additional bank or engage in any activities other than those of managing and controlling banks; and

(8) During this period, neither the appropriate Reserve Bank nor the Board objected to the proposal or required the filing of an application under § 225.15 of this subpart.

[3] A shareholder of a bank in reorganization will be considered to have the same proportional interest in the holding company if the shareholder interest increases, on a *pro rata* basis, as a result of either the redemption of shares from dissenting shareholders by the bank or bank holding company, or the acquisition of shares of dissenting shareholders by the remaining shareholders.

[4] This procedure is not available in cases in which the exercise of dissenting shareholders' rights would cause a company that is not a bank holding company (other than the company in formation) to be required to register as a bank holding company. This procedure also is not available for the formation of a bank holding company organized in mutual form.

[5] For a banking organization with consolidated assets, on a *pro forma basis*, of less than $150 million (other than a banking organization that will control a *de novo* bank), this requirement is satisfied if the proposal complies with the Board's policy statement on small bank holding companies (Appendix C of this part).

(b) *Contents of notice.* A notice filed under this paragraph shall include:

(1) Certification by the notificant's board of directors that the requirements of 12 U.S.C. 1842(a)(C) and this section are met by the proposal;

(2) A list identifying all principal shareholders of the bank prior to the reorganization and of the holding company following the reorganization, and specifying the percentage of shares held by each principal shareholder in the bank and proposed to be held in the new holding company;

(3) A description of the resulting management of the proposed bank holding company and its subsidiary bank, including:

(i) Biographical information regarding any senior officers and directors of the resulting bank holding company who were not senior officers or directors of the bank prior to the reorganization; and

(ii) A detailed history of the involvement of any officer, director, or principal shareholder of the resulting bank holding company in any administrative or criminal proceeding; and

(4) *Pro forma* financial statements for the holding company, and a description of the amount, source, and terms of debt, if any, that the bank holding company proposes to incur, and information regarding the sources and timing for debt service and retirement.

(c) *Acknowledgment of notice.* Within 7 calendar days following receipt of a notice under this section, the Reserve Bank shall provide the notificant with a written acknowledgment of receipt of the notice. This written acknowledgment shall indicate that the transaction described in the notice may be consummated on the 30th calendar day after the date of receipt of the notice if the Reserve Bank or the Board has not objected to the proposal during that time.

(d) *Application required upon objection.* The Reserve Bank or the Board may object to a proposal during the notice period by providing the bank holding company with a written explanation of the reasons for the objection. In such case, the bank holding company may file an application for prior approval of the proposal pursuant to § 225.15 of this subpart.

4. Subpart C is revised to read as follows:

Subpart C—Nonbanking Activities and Acquisitions by Bank Holding Companies

Sec.

Subpart C—Nonbanking Activities and Acquisitions by Bank Holding Companies

§ 225.21 Prohibited nonbanking activities and acquisitions; exempt bank holding companies.

(a) *Prohibited nonbanking activities and acquisitions.* Except as provided in § 225.22 of this subpart, a bank holding company or a subsidiary may not engage in, or acquire or control, directly or indirectly, voting securities or assets of a company engaged in, any activity other than:

(1) Banking or managing or controlling banks and other subsidiaries authorized under the BHC Act; and

(2) An activity that the Board determines to be so closely related to banking, or managing or controlling banks as to be a proper incident thereto, including any incidental activities that are necessary to carry on such an activity, if the bank holding company has obtained the prior approval of the Board for that activity in accordance with the requirements of this regulation.

(b) *Exempt bank holding companies.* The following bank holding companies are exempt from the provisions of this subpart:

(1) *Family-owned companies.* Any company that is a ''company covered in 1970'' (as defined in section 2(b) of the BHC Act), more than 85 percent of the voting securities of which was collectively owned on June 30, 1968, and continuously thereafter, by members of the same family (or their spouses) who are lineal descendants of common ancestors.

(2) *Labor, agricultural, and horticultural organizations.* Any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation

under section 501 of the Internal Revenue Code (26 U.S.C. 501(c)).

(3) *Companies granted hardship exemption.* Any bank holding company that has controlled only one bank since before July 1, 1968, and that has been granted an exemption by the Board under section 4(d) of the BHC Act, subject to any conditions imposed by the Board.

(4) *Companies granted exemption on other grounds.* Any company that acquired control of a bank before December 10, 1982, without the Board's prior approval under section 3 of the BHC Act, on the basis of a narrow interpretation of the term *demand deposit* or *commercial loan,* if the Board has determined that:

(i) Coverage of the company as a bank holding company under this subpart would be unfair or represent an unreasonable hardship; and

(ii) Exclusion of the company from coverage under this part is consistent with the purposes of the BHC Act and section 106 of the Bank Holding Company Act Amendments of 1970 (12 U.S.C. 1971, 1972(1)). The provisions of § 225.4 of subpart A of this part do not apply to a company exempt under this paragraph.

§ 225.22 Exempt nonbanking activities and acquisitions.

(a) *Certain de novo activities.* A bank holding company may, either directly or indirectly, engage *de novo* in any nonbanking activity listed in § 225.28(b) (other than operation of an insured depository institution) without obtaining the Board's prior approval if the bank holding company:

(1) Meets the requirements of paragraphs (c) (1), (2), and (6) of § 225.23;

(2) Conducts the activity in compliance with all Board orders and regulations governing the activity; and

(3) Within 10 business days after commencing the activity, provides written notice to the appropriate Reserve Bank describing the activity, identifying the company or companies engaged in the activity, and certifying that the activity will be conducted in accordance with the Board's orders and regulations and that the bank holding company meets the requirements of paragraphs (c) (1), (2), and (6) of § 225.23.

(b) *Servicing activities.* A bank holding company may, without the Board's prior approval under this subpart, furnish services to or perform services for, or establish or acquire a company that engages solely in servicing activities for:

(1) The bank holding company or its subsidiaries in connection with their activities as authorized by law, including services that are necessary to fulfill commitments entered into by the subsidiaries with third parties, if the bank holding company or servicing company complies with the Board's published interpretations and does not act as principal in dealing with third parties; and

(2) The internal operations of the bank holding company or its subsidiaries. Services for the internal operations of the bank holding company or its subsidiaries include, but are not limited to:

(i) Accounting, auditing, and appraising;

(ii) Advertising and public relations;

(iii) Data processing and data transmission services, data bases, or facilities;

(iv) Personnel services;

(v) Courier services;

(vi) Holding or operating property used wholly or substantially by a subsidiary in its operations or for its future use;

(vii) Liquidating property acquired from a subsidiary;

(viii) Liquidating property acquired from any sources either prior to May 9, 1956, or the date on which the company became a bank holding company, whichever is later; and

(ix) Selling, purchasing, or underwriting insurance, such as blanket bond insurance, group insurance for employees, and property and casualty insurance.

(c) *Safe deposit business.* A bank holding company or nonbank subsidiary may, without the Board's prior approval, conduct a safe deposit business, or acquire voting securities of a company that conducts such a business.

(d) *Nonbanking acquisitions not requiring prior Board approval.* The Board's prior approval is not required under this subpart for the following acquisitions:

(1) *DPC acquisitions.* (i) Voting securities or assets, acquired by foreclosure or otherwise, in the ordinary course of collecting a debt previously contracted (DPC property) in good faith, if the DPC property is divested within two years of acquisition.

(ii) The Board may, upon request, extend this two-year period for up to three additional years. The Board may permit additional extensions for up to 5 years (for a total of 10 years), for shares, real estate or other assets where the holding company demonstrates that each extension would not be detrimental to the public interest and either the bank holding company has made good faith attempts to dispose of such shares, real estate or other assets or disposal of the shares, real estate or other assets during the initial period would have been detrimental to the company.

(iii) Transfers of DPC property within the bank holding company system do not extend any period for divestiture of the property.

(2) *Securities or assets required to be divested by subsidiary.* Voting securities or assets required to be divested by a subsidiary at the request of an examining federal or state authority (except by the Board under the BHC Act or this regulation), if the bank holding company divests the securities or assets within two years from the date acquired from the subsidiary.

(3) *Fiduciary investments.* Voting securities or assets acquired by a bank or other company (other than a trust that is a company) in good faith in a fiduciary capacity, if the voting securities or assets are:

(i) Held in the ordinary course of business; and

(ii) Not acquired for the benefit of the company or its shareholders, employees, or subsidiaries.

(4) *Securities eligible for investment by national bank.* Voting securities of the kinds and amounts explicitly eligible by federal statute (other than section 4 of the Bank Service Corporation Act, 12 U.S.C. 1864) for investment by a national bank, and voting securities acquired prior to June 30, 1971, in reliance on section 4(c)(5) of the BHC Act and interpretations of the Comptroller of the Currency under section 5136 of the Revised Statutes (12 U.S.C. 24(7)).

(5) *Securities or property representing 5 percent or less of a company.* Voting securities of a company or property that, in the aggregate, represent 5 percent or less of the outstanding shares of any class of voting securities of a company, or that represent a 5 percent interest or less in the property, subject to the provisions of 12 CFR 225.137.

(6) *Securities of investment company.* Voting securities of an investment company that is solely engaged in investing in securities and that does not own or control more than 5 percent of the outstanding shares of any class of voting securities of any company.

(7) *Assets acquired in ordinary course of business.* Assets of a company acquired in the ordinary course of business, subject to the provisions of 12 CFR 225.132, if the assets relate to activities in which the acquiring company has previously received Board

approval under this regulation to engage.

(8) *Asset acquisitions by lending company or industrial bank.* Assets of an office(s) of a company, all or substantially all of which relate to making, acquiring, or servicing loans if:

(i) The acquiring company has previously received Board approval under this regulation or is not required to obtain prior Board approval under this regulation to engage in lending activities or industrial banking activities;

(ii) The assets acquired during any 12-month period do not represent more than 50 percent of the risk-weighted assets (on a consolidated basis) of the acquiring lending company or industrial bank, or more than $100 million, whichever amount is less;

(iii) The assets acquired do not represent more than 50 percent of the selling company's consolidated assets that are devoted to lending activities or industrial banking business;

(iv) The acquiring company notifies the Reserve Bank of the acquisition within 30 days after the acquisition; and

(v) The acquiring company, after giving effect to the transaction, meets the Board's Capital Adequacy Guidelines (Appendix A of this part), and the Board has not previously notified the acquiring company that it may not acquire assets under the exemption in this paragraph.

(e) *Acquisition of securities by subsidiary banks*—(1) *National bank.* A national bank or its subsidiary may, without the Board's approval under this subpart, acquire or retain securities on the basis of section 4(c)(5) of the BHC Act in accordance with the regulations of the Comptroller of the Currency.

(2) *State bank.* A state-chartered bank or its subsidiary may, insofar as federal law is concerned, and without the Board's prior approval under this subpart:

(i) Acquire or retain securities, on the basis of section 4(c)(5) of the BHC Act, of the kinds and amounts explicitly eligible by federal statute for investment by a national bank; or

(ii) Acquire or retain all (but, except for directors' qualifying shares, not less than all) of the securities of a company that engages solely in activities in which the parent bank may engage, at locations at which the bank may engage in the activity, and subject to the same limitations as if the bank were engaging in the activity directly.

(f) *Activities and securities of new bank holding companies.* A company that becomes a bank holding company may, for a period of two years, engage in nonbanking activities and control voting securities or assets of a nonbank subsidiary, if the bank holding company engaged in such activities or controlled such voting securities or assets on the date it became a bank holding company. The Board may grant requests for up to three one-year extensions of the two-year period.

(g) *Grandfathered activities and securities.* Unless the Board orders divestiture or termination under section 4(a)(2) of the BHC Act, a ''company covered in 1970,'' as defined in section 2(b) of the BHC Act, may:

(1) Retain voting securities or assets and engage in activities that it has lawfully held or engaged in continuously since June 30, 1968; and

(2) Acquire voting securities of any newly formed company to engage in such activities.

(h) *Securities or activities exempt under Regulation K.* A bank holding company may acquire voting securities or assets and engage in activities as authorized in Regulation K (12 CFR part 211).

§ 225.23 Expedited action for certain nonbanking proposals by well-run bank holding companies.

(a) *Filing of notice*—(1) *Information required.* A bank holding company that meets the requirements of paragraph (c) of this section may satisfy the notice requirement of this subpart in connection with the acquisition of voting securities or assets of a company engaged in nonbanking activities that the Board has permitted by order or regulation (other than an insured depository institution) [1], or a proposal to engage *de novo,* either directly or indirectly, in a nonbanking activity that the Board has permitted by order or by regulation, by providing the appropriate Reserve Bank with a written notice containing the following:

(i) A certification that all of the criteria in paragraph (c) of this section are met;

(ii) A description of the transaction that includes identification of the companies involved in the transaction, the activities to be conducted, and a commitment to conduct the proposed activities in conformity with the Board's regulations and orders governing the conduct of the proposed activity;

(iii) If the proposal involves an acquisition of a going concern:

(A) If the bank holding company has consolidated assets of $150 million or more, an abbreviated consolidated *pro forma* balance sheet for the acquiring bank holding company as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, consolidated *pro forma* risk-based capital ratios for the acquiring bank holding company as of the most recent quarter, a description of the purchase price and the terms and sources of funding for the transaction, and the total revenue and net income of the company to be acquired;

(B) If the bank holding company has consolidated assets of less than $150 million, a *pro forma* parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction, a description of the purchase price and the terms and sources of funding for the transaction and the sources and schedule for retiring any debt incurred in the transaction, and the total assets, off-balance sheet items, revenue and net income of the company to be acquired;

(C) For each insured depository institution whose Tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, Tier 1 capital and total capital of the institution on a *pro forma* basis;

(iv) Identification of the geographic markets in which competition would be affected by the proposal, a description of the effect of the proposal on competition in the relevant markets, a list of the major competitors in that market in the proposed activity if the affected market is local in nature, and, if requested, the market indexes for the relevant market; and

(v) A description of the public benefits that can reasonably be expected to result from the transaction.

(2) *Waiver of unnecessary information.* The Reserve Bank may reduce the information requirements in paragraphs (a)(1) (iii) and (iv) of this section as appropriate.

(b)(1) *Action on proposals under this section.* The Board or the appropriate Reserve Bank shall act on a proposal submitted under this section, or notify the bank holding company that the transaction is subject to the procedure in § 225.24, within 12 business days following the filing of all of the information required in paragraph (a) of this section.

(2) *Acceptance of notice if expedited procedure not available.* If the Board or the Reserve Bank determines, after the filing of a notice under this section, that a bank holding company may not use

[1] A bank holding company may acquire voting securities or assets of a savings association or other insured depository institution that is not a bank by using the procedures in § 225.14 of subpart B if the bank holding company and the proposal qualify under that section as if the savings association or other institution were a bank for purposes of that section.

the procedure in this section and must file a notice under § 225.24, the notice shall be deemed accepted for purposes of § 225.24 as of the date that the notice was filed under this section.

(c) *Criteria for use of expedited procedure.* The procedure in this section is available only if:

(1) *Well-capitalized organization*—(i) *Bank holding company.* Both at the time of and immediately after the proposed transaction, the acquiring bank holding company is well-capitalized;

(ii) *Insured depository institutions.* Both at the time of and immediately after the transaction:

(A) The lead insured depository institution of the acquiring bank holding company is well-capitalized;

(B) Well-capitalized insured depository institutions control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by the acquiring bank holding company; and

(C) No insured depository institution controlled by the acquiring bank holding company is undercapitalized;

(2) *Well-managed organization*—(i) *Satisfactory examination ratings.* At the time of the transaction, the acquiring bank holding company, its lead insured depository institution, and insured depository institutions that control at least 80 percent of the total risk-weighted assets of insured depository institutions controlled by such holding company are well-managed;

(ii) *No poorly managed institutions.* No insured depository institution controlled by the acquiring bank holding company has received 1 of the 2 lowest composite ratings at the later of the institution's most recent examination or subsequent review by the appropriate federal banking agency for the institution.

(iii) *Recently acquired institutions excluded.* Any insured depository institution that has been acquired by the bank holding company during the 12-month period preceding the date on which written notice is filed under paragraph (a) of this section may be excluded for purposes of paragraph (c)(2)(ii) of this section if:

(A) The bank holding company has developed a plan acceptable to the appropriate federal banking agency for the institution to restore the capital and management of the institution; and

(B) All insured depository institutions excluded under this paragraph represent, in the aggregate, less than 10 percent of the aggregate total risk-weighted assets of all insured depository institutions controlled by the bank holding company;

(3) *Permissible activity.* (i) The Board has determined by regulation or order that each activity proposed to be conducted is so closely related to banking, or managing or controlling banks, as to be a proper incident thereto; and

(ii) The Board has not indicated that proposals to engage in the activity are subject to the notice procedure provided in § 225.24;

(4) *Competitive criteria*—(i) *Competitive screen.* In the case of the acquisition of a going concern, the acquisition, without regard to any divestitures proposed by the acquiring bank holding company, does not cause:

(A) The acquiring bank holding company to control in excess of 35 percent of the market share in any relevant market; or

(B) The Herfindahl-Hirschman index to increase by more than 200 points in any relevant market with a post-acquisition index of at least 1800; and

(ii) *Other competitive factors.* The Board has not indicated that the transaction is subject to close scrutiny on competitive grounds;

(5) *Size of acquisition*—(i) *In general*—(A) *Limited growth.* Except as provided in paragraph (c)(5)(ii) of this section, the sum of aggregate risk-weighted assets to be acquired in the proposal and the aggregate risk-weighted assets acquired by the acquiring bank holding company in all other qualifying transactions does not exceed 35 percent of the consolidated risk-weighted assets of the acquiring bank holding company. For purposes of this paragraph, ''other qualifying transactions'' means any transaction approved under this section or § 225.14 during the 12 months prior to filing the notice under this section;

(B) *Consideration paid.* The gross consideration to be paid by the acquiring bank holding company in the proposal does not exceed 15 percent of the consolidated Tier 1 capital of the acquiring bank holding company; and

(C) *Individual size limitation.* The total risk-weighted assets to be acquired do not exceed $7.5 billion;

(ii) *Small bank holding companies.* Paragraph (c)(5)(i)(A) of this section shall not apply if, immediately following consummation of the proposed transaction, the consolidated risk-weighted assets of the acquiring bank holding company are less than $300 million;

(6) *Supervisory actions.* During the 12-month period ending on the date on which the bank holding company proposes to consummate the proposed transaction, no formal administrative order, including a written agreement, cease and desist order, capital directive, prompt corrective action directive, asset maintenance agreement, or other formal enforcement order is or was outstanding against the bank holding company or any insured depository institution subsidiary of the holding company, and no formal administrative enforcement proceeding involving any such enforcement action, order, or directive is or was pending; and

(7) *Notification.* The bank holding company has not been notified by the Board, in its discretion, prior to the expiration of the period in paragraph (b) of this section that a notice under § 225.24 is required in order to permit closer review of any potential adverse effect or other matter related to the factors that must be considered under this part.

(d) *Branches and agencies of foreign banking organizations.* For purposes of this section, a U.S. branch or agency of a foreign banking organization shall be considered to be an insured depository institution.

§ 225.24 Procedures for other nonbanking proposals.

(a) *Notice required for nonbanking activities.* Except as provided in § 225.22 and § 225.23, a notice for the Board's prior approval under § 225.21(a) to engage in or acquire a company engaged in a nonbanking activity shall be filed by a bank holding company (including a company seeking to become a bank holding company) with the appropriate Reserve Bank in accordance with this section and the Board's Rules of Procedure (12 CFR 262.3).

(1) *Engaging de novo in listed activities.* A bank holding company seeking to commence or to engage *de novo,* either directly or through a subsidiary, in a nonbanking activity listed in § 225.28 shall file a notice containing a description of the activities to be conducted and the identity of the company that will conduct the activity.

(2) *Acquiring company engaged in listed activities.* A bank holding company seeking to acquire or control voting securities or assets of a company engaged in a nonbanking activity listed in § 225.28 shall file a notice containing the following:

(i) A description of the proposal, including a description of each proposed activity, and the effect of the proposal on competition among entities engaging in each proposed activity in each relevant market with relevant market indexes;

(ii) The identity of any entity involved in the proposal, and, if the notificant proposes to conduct the activity through

an existing subsidiary, a description of the existing activities of the subsidiary;

(iii) A statement of the public benefits that can reasonably be expected to result from the proposal;

(iv) If the bank holding company has consolidated assets of $150 million or more:

(A) Parent company and consolidated *pro forma* balance sheets for the acquiring bank holding company as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction;

(B) Consolidated *pro forma* risk-based capital and leverage ratio calculations for the acquiring bank holding company as of the most recent quarter; and

(C) A description of the purchase price and the terms and sources of funding for the transaction;

(v) If the bank holding company has consolidated assets of less than $150 million:

(A) A *pro forma* parent-only balance sheet as of the most recent quarter showing credit and debit adjustments that reflect the proposed transaction; and

(B) A description of the purchase price and the terms and sources of funding for the transaction and, if the transaction is debt funded, one-year income statement and cash flow projections for the parent company, and the sources and schedule for retiring any debt incurred in the transaction;

(vi) For each insured depository institution whose Tier 1 capital, total capital, total assets or risk-weighted assets change as a result of the transaction, the total risk-weighted assets, total assets, Tier 1 capital and total capital of the institution on a *pro forma* basis; and

(vii) A description of the management expertise, internal controls and risk management systems that will be utilized in the conduct of the proposed activities; and

(viii) A copy of the purchase agreements, and balance sheet and income statements for the most recent quarter and year-end for any company to be acquired.

(3) *Engaging in or acquiring company to engage in unlisted activities.* A bank holding company seeking to engage *de novo* in, or to acquire or control voting securities or assets of a company engaged in, any activity not listed in § 225.28 shall file a notice containing the following:

(i) Evidence that the proposed activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto, or, if the Board previously determined by order that the activity is permissible for a bank holding company to conduct, a commitment to comply with all the conditions and limitations established by the Board governing the activity; and

(ii) The information required in paragraphs (a)(1) or (a)(2) of this section, as appropriate.

(b) *Notice provided to Board.* The Reserve Bank shall immediately send to the Board a copy of any notice received under paragraphs (a)(2) or (a)(3) of this section.

(c) *Notice to public*—(1) *Listed activities and activities approved by order*—(i) In a case involving an activity listed in § 225.28 or previously approved by the Board by order, the Reserve Bank shall notify the Board for publication in the Federal Register immediately upon receipt by the Reserve Bank of:

(A) A notice under this section; or

(B) A written request that notice of a proposal under this section or § 225.23 be published in the Federal Register. Such a request may request that Federal Register publication occur up to 15 calendar days prior to submission of a notice under this subpart.

(ii) The Federal Register notice published under this paragraph shall invite public comment on the proposal, generally for a period of 15 days.

(2) *New activities*—(i) *In general.* In the case of a notice under this subpart involving an activity that is not listed in § 225.28 and that has not been previously approved by the Board by order, the Board shall send notice of the proposal to the Federal Register for publication, unless the Board determines that the notificant has not demonstrated that the activity is so closely related to banking or to managing or controlling banks as to be a proper incident thereto. The Federal Register notice shall invite public comment on the proposal for a reasonable period of time, generally for 30 days.

(ii) *Time for publication.* The Board shall send the notice required under this paragraph to the Federal Register within 10 business days of acceptance by the Reserve Bank. The Board may extend the 10-day period for an additional 30 calendar days upon notice to the notificant. In the event notice of a proposal is not published for comment, the Board shall inform the notificant of the reasons for the decision.

(d) *Action on notices*—(1) *Reserve Bank action*—(i) *In general.* Within 30 calendar days after receipt by the Reserve Bank of a notice filed pursuant to paragraphs (a)(1) or (a)(2) of this section, the Reserve Banks shall:

(A) Approve the notice; or

(B) Refer the notice to the Board for decision because action under delegated authority is not appropriate.

(ii) *Return of incomplete notice.* Within 7 calendar days of receipt, the Reserve Bank may return any notice as informationally incomplete that does not contain all of the information required by this subpart. The return of such a notice shall be deemed action on the notice.

(iii) *Notice of action.* The Reserve Bank shall promptly notify the bank holding company of any action or referral under this paragraph.

(iv) *Close of public comment period.* The Reserve Bank shall not approve any notice under this paragraph (d)(1) of this section prior to the third business day after the close of the public comment period, unless an emergency exists that requires expedited or immediate action.

(2) *Board action*—(i) *Internal schedule.* The Board seeks to act on every notice referred to it for decision within 60 days of the date that the notice is filed with the Reserve Bank. If the Board is unable to act within this period, the Board shall notify the notificant and explain the reasons and the date by which the Board expects to act.

(ii) *Extension of required period for action*—(A) *In general.* The Board may extend the 60-day period required for Board action under paragraph (d)(2)(i) of this section for an additional 30 days upon notice to the notificant.

(B) *Unlisted activities.* If a notice involves a proposal to engage in an activity that is not listed in § 225.28, the Board may extend the period required for Board action under paragraph (d)(2)(i) of this section for an additional 90 days. This 90-day extension is in addition to the 30-day extension period provided in paragraph (d)(2)(ii)(A) of this section. The Board shall notify the notificant that the notice period has been extended and explain the reasons for the extension.

(3) *Requests for additional information.* The Board or the Reserve Bank may modify the information requirements under this section or at any time request any additional information that either believes is needed for a decision on any notice under this section.

(4) *Tolling of period.* The Board or the Reserve Bank may at any time extend or toll the time period for action on a notice for any period with the consent of the notificant.

§ 225.25 Hearings, alteration of activities, and other matters.

(a) *Hearings*—(1) *Procedure to request hearing.* Any request for a hearing on a

notice under this subpart shall comply with the provisions of 12 CFR 262.3(e).

(2) *Determination to hold hearing.* The Board may order a formal or informal hearing or other proceeding on a notice as provided in 12 CFR 262.3(i)(2). The Board shall order a hearing only if there are disputed issues of material fact that cannot be resolved in some other manner.

(3) *Extension of period for hearing.* The Board may extend the time for action on any notice for such time as is reasonably necessary to conduct a hearing and evaluate the hearing record. Such extension shall not exceed 91 calendar days after the date of submission to the Board of the complete record on the notice. The procedures for computation of the 91-day rule as set forth in § 225.16(f) apply to notices under this subpart that involve hearings.

(b) *Approval through failure to act.* (1) Except as provided in paragraph (a) of this section or § 225.24(d)(4), a notice under this subpart shall be deemed to be approved at the conclusion of the period that begins on the date the complete notice is received by the Reserve Bank or the Board and that ends 60 calendar days plus any applicable extension and tolling period thereafter.

(2) *Complete notice.* For purposes of paragraph (b)(1) of this section, a notice shall be deemed complete at such time as it contains all information required by this subpart and all other information requested by the Board or the Reserve Bank.

(c) *Notice to expand or alter nonbanking activities*—(1) *De novo expansion.* A notice under this subpart is required to open a new office or to form a subsidiary to engage in, or to relocate an existing office engaged in, a nonbanking activity that the Board has previously approved for the bank holding company under this regulation, only if:

(i) The Board's prior approval was limited geographically;

(ii) The activity is to be conducted in a country outside of the United States and the bank holding company has not previously received prior Board approval under this regulation to engage in the activity in that country; or

(iii) The Board or appropriate Reserve Bank has notified the company that a notice under this subpart is required.

(2) *Activities outside United States.* With respect to activities to be engaged in outside the United States that require approval under this subpart, the procedures of this section apply only to activities to be engaged in directly by a bank holding company that is not a qualifying foreign banking organization, or by a nonbank subsidiary of a bank holding company approved under this subpart. Regulation K (12 CFR part 211) governs other international operations of bank holding companies.

(3) *Alteration of nonbanking activity.* Unless otherwise permitted by the Board, a notice under this subpart is required to alter a nonbanking activity in any material respect from that considered by the Board in acting on the application or notice to engage in the activity.

(d) *Emergency savings association acquisitions.* In the case of a notice to acquire a savings association, the Board may modify or dispense with the public notice and hearing requirements of this subpart if the Board finds that an emergency exists that requires the Board to act immediately and the primary federal regulator of the institution concurs.

§ 225.26 Factors considered in acting on nonbanking proposals.

(a) *In general.* In evaluating a notice under § 225.23 or § 225.24, the Board shall consider whether the notificant's performance of the activities can reasonably be expected to produce benefits to the public (such as greater convenience, increased competition, and gains in efficiency) that outweigh possible adverse effects (such as undue concentration of resources, decreased or unfair competition, conflicts of interest, and unsound banking practices).

(b) *Financial and managerial resources.* Consideration of the factors in paragraph (a) of this section includes an evaluation of the financial and managerial resources of the notificant, including its subsidiaries and any company to be acquired, the effect of the proposed transaction on those resources, and the management expertise, internal control and risk-management systems, and capital of the entity conducting the activity.

(c) *Competitive effect of de novo proposals.* Unless the record demonstrates otherwise, the commencement or expansion of a nonbanking activity *de novo* is presumed to result in benefits to the public through increased competition.

(d) *Denial for lack of information.* The Board may deny any notice submitted under this subpart if the notificant neglects, fails, or refuses to furnish all information required by the Board.

(e) *Conditional approvals.* The Board may impose conditions on any approval, including conditions to address permissibility, financial, managerial, safety and soundness, competitive, compliance, conflicts of interest, or other concerns to ensure that approval is consistent with the relevant statutory factors and other provisions of the BHC Act.

§ 225.27 Procedures for determining scope of nonbanking activities.

(a) *Advisory opinions regarding scope of previously approved nonbanking activities*—(1) *Request for advisory opinion.* Any person may submit a request to the Board for an advisory opinion regarding the scope of any permissible nonbanking activity. The request shall be submitted in writing to the Board and shall identify the proposed parameters of the activity, or describe the service or product that will be provided, and contain an explanation supporting an interpretation regarding the scope of the permissible nonbanking activity.

(2) *Response to request.* The Board shall provide an advisory opinion within 45 days of receiving a written request under this paragraph.

(b) *Procedure for consideration of new activities*—(1) *Initiation of proceeding.* The Board may, at any time, on its own initiative or in response to a written request from any person, initiate a proceeding to determine whether any activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto.

(2) *Requests for determination.* Any request for a Board determination that an activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto, shall be submitted to the Board in writing, and shall contain evidence that the proposed activity is so closely related to banking or managing or controlling banks as to be a proper incident thereto.

(3) *Publication.* The Board shall publish in the Federal Register notice that it is considering the permissibility of a new activity and invite public comment for a period of at least 30 calendar days. In the case of a request submitted under paragraph (b) of this section, the Board may determine not to publish notice of the request if the Board determines that the requester has provided no reasonable basis for a determination that the activity is so closely related to banking, or managing or controlling banks as to be a proper incident thereto, and notifies the requester of the determination.

(4) *Comments and hearing requests.* Any comment and any request for a hearing regarding a proposal under this section shall comply with the provisions of § 262.3(e) of the Board's Rules of Procedure (12 CFR 262.3(e)).

§ 225.28 List of permissible nonbanking activities.

(a) *Closely related nonbanking activities.* The activities listed in paragraph (b) of this section are so closely related to banking or managing or controlling banks as to be a proper incident thereto, and may be engaged in by a bank holding company or its subsidiary in accordance with the requirements of this regulation.

(b) *Activities determined by regulation to be permissible*—(1) *Extending credit and servicing loans.* Making, acquiring, brokering, or servicing loans or other extensions of credit (including factoring, issuing letters of credit and accepting drafts) for the company's account or for the account of others.

(2) *Activities related to extending credit.* Any activity usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit, as determined by the Board. The Board has determined that the following activities are usual in connection with making, acquiring, brokering or servicing loans or other extensions of credit:

(i) *Real estate and personal property appraising.* Performing appraisals of real estate and tangible and intangible personal property, including securities.

(ii) *Arranging commercial real estate equity financing.* Acting as intermediary for the financing of commercial or industrial income-producing real estate by arranging for the transfer of the title, control, and risk of such a real estate project to one or more investors, if the bank holding company and its affiliates do not have an interest in, or participate in managing or developing, a real estate project for which it arranges equity financing, and do not promote or sponsor the development of the property.

(iii) *Check-guaranty services.* Authorizing a subscribing merchant to accept personal checks tendered by the merchant's customers in payment for goods and services, and purchasing from the merchant validly authorized checks that are subsequently dishonored.

(iv) *Collection agency services.* Collecting overdue accounts receivable, either retail or commercial.

(v) *Credit bureau services.* Maintaining information related to the credit history of consumers and providing the information to a credit grantor who is considering a borrower's application for credit or who has extended credit to the borrower.

(vi) *Asset management, servicing, and collection activities.* Engaging under contract with a third party in asset management, servicing, and collection [2] of assets of a type that an insured depository institution may originate and own, if the company does not engage in real property management or real estate brokerage services as part of these services.

(vii) *Acquiring debt in default.* Acquiring debt that is in default at the time of acquisition, if the company:

(A) Divests shares or assets securing debt in default that are not permissible investments for bank holding companies, within the time period required for divestiture of property acquired in satisfaction of a debt previously contracted under § 225.12(b); [3]

(B) Stands only in the position of a creditor and does not purchase equity of obligors of debt in default (other than equity that may be collateral for such debt); and

(C) Does not acquire debt in default secured by shares of a bank or bank holding company.

(viii) *Real estate settlement servicing.* Providing real estate settlement services.[4]

(3) *Leasing personal or real property.* Leasing personal or real property or acting as agent, broker, or adviser in leasing such property if:

(i) The lease is on a nonoperating basis; [5]

(ii) The initial term of the lease is at least 90 days;

(iii) In the case of leases involving real property:

(A) At the inception of the initial lease, the effect of the transaction will yield a return that will compensate the lessor for not less than the lessor's full investment in the property plus the estimated total cost of financing the property over the term of the lease from rental payments, estimated tax benefits, and the estimated residual value of the property at the expiration of the initial lease; and

(B) The estimated residual value of property for purposes of paragraph (b)(3)(iii)(A) of this section shall not exceed 25 percent of the acquisition cost of the property to the lessor.

(4) *Operating nonbank depository institutions*—(i) *Industrial banking.* Owning, controlling, or operating an industrial bank, Morris Plan bank, or industrial loan company, so long as the institution is not a bank.

(ii) *Operating savings association.* Owning, controlling, or operating a savings association, if the savings association engages only in deposit-taking activities, lending, and other activities that are permissible for bank holding companies under this subpart C.

(5) *Trust company functions.* Performing functions or activities that may be performed by a trust company (including activities of a fiduciary, agency, or custodial nature), in the manner authorized by federal or state law, so long as the company is not a bank for purposes of section 2(c) of the Bank Holding Company Act.

(6) *Financial and investment advisory activities.* Acting as investment or financial advisor to any person, including (without, in any way, limiting the foregoing):

(i) Serving as investment adviser (as defined in section 2(a)(20) of the Investment Company Act of 1940, 15 U.S.C. 80a–2(a)(20)), to an investment company registered under that act, including sponsoring, organizing, and managing a closed-end investment company;

(ii) Furnishing general economic information and advice, general economic statistical forecasting services, and industry studies;

(iii) Providing advice in connection with mergers, acquisitions, divestitures, investments, joint ventures, leveraged buyouts, recapitalizations, capital structurings, financing transactions and similar transactions, and conducting financial feasibility studies; [6]

(iv) Providing information, statistical forecasting, and advice with respect to any transaction in foreign exchange, swaps, and similar transactions,

[2] Asset management services include acting as agent in the liquidation or sale of loans and collateral for loans, including real estate and other assets acquired through foreclosure or in satisfaction of debts previously contracted.

[3] For this purpose, the divestiture period for property begins on the date that the debt is acquired, regardless of when legal title to the property is acquired.

[4] For purposes of this section, real estate settlement services do not include providing title insurance as principal, agent, or broker.

[5] The requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly, engage in operating, servicing, maintaining, or repairing leased property during the lease term. For purposes of the leasing of automobiles, the requirement that the lease be on a nonoperating basis means that the bank holding company may not, directly or indirectly: (1) Provide servicing, repair, or maintenance of the leased vehicle during the lease term; (2) purchase parts and accessories in bulk or for an individual vehicle after the lessee has taken delivery of the vehicle; (3) provide the loan of an automobile during servicing of the leased vehicle; (4) purchase insurance for the lessee; or (5) provide for the renewal of the vehicle's license merely as a service to the lessee where the lessee could renew the license without authorization from the lessor. The bank holding company may arrange for a third party to provide these services or products.

[6] Feasibility studies do not include assisting management with the planning or marketing for a given project or providing general operational or management advice.

commodities, and any forward contract, option, future, option on a future, and similar instruments;

(v) Providing educational courses, and instructional materials to consumers on individual financial management matters; and

(vi) Providing tax-planning and tax-preparation services to any person.

(7) *Agency transactional services for customer investments—(i) Securities brokerage.* Providing securities brokerage services (including securities clearing and/or securities execution services on an exchange), whether alone or in combination with investment advisory services, and incidental activities (including related securities credit activities and custodial services), if the securities brokerage services are restricted to buying and selling securities solely as agent for the account of customers and do not include securities underwriting or dealing.

(ii) *Riskless principal transactions.* Buying and selling in the secondary market all types of securities on the order of customers as a ''riskless principal'' to the extent of engaging in a transaction in which the company, after receiving an order to buy (or sell) a security from a customer, purchases (or sells) the security for its own account to offset a contemporaneous sale to (or purchase from) the customer. This does not include:

(A) Selling bank-ineligible securities [7] at the order of a customer that is the issuer of the securities, or selling bank-ineligible securities in any transaction where the company has a contractual agreement to place the securities as agent of the issuer; or

(B) Acting as a riskless principal in any transaction involving a bank-ineligible security for which the company or any of its affiliates acts as underwriter (during the period of the underwriting or for 30 days thereafter) or dealer.[8]

(iii) *Private placement services.* Acting as agent for the private placement of securities in accordance with the requirements of the Securities Act of 1933 (1933 Act) and the rules of the Securities and Exchange Commission, if the company engaged in the activity does not purchase or repurchase for its own account the securities being placed, or hold in inventory unsold portions of issues of these securities.

(iv) *Futures commission merchant.* Acting as a futures commission merchant (FCM) for unaffiliated persons in the execution, clearance, or execution and clearance of any futures contract and option on a futures contract traded on an exchange in the United States or abroad if:

(A) The activity is conducted through a separately incorporated subsidiary of the bank holding company, which may engage in activities other than FCM activities (including, but not limited to, permissible advisory and trading activities); and

(B) The parent bank holding company does not provide a guarantee or otherwise become liable to the exchange or clearing association other than for those trades conducted by the subsidiary for its own account or for the account of any affiliate.

(v) *Other transactional services.* Providing to customers as agent transactional services with respect to swaps and similar transactions, any transaction described in paragraph (b)(8) of this section, any transaction that is permissible for a state member bank, and any other transaction involving a forward contract, option, futures, option on a futures or similar contract (whether traded on an exchange or not) relating to a commodity that is traded on an exchange.

(8) *Investment transactions as principal*—(i) *Underwriting and dealing in government obligations and money market instruments.* Underwriting and dealing in obligations of the United States, general obligations of states and their political subdivisions, and other obligations that state member banks of the Federal Reserve System may be authorized to underwrite and deal in under 12 U.S.C. 24 and 335, including banker's acceptances and certificates of deposit, under the same limitations as would be applicable if the activity were performed by the bank holding company's subsidiary member banks or its subsidiary nonmember banks as if they were member banks.

(ii) *Investing and trading activities.* Engaging as principal in:

(A) Foreign exchange;

(B) Forward contracts, options, futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on any rate, price, financial asset (including gold, silver, platinum, palladium, copper, or any other metal approved by the Board), nonfinancial asset, or group of assets, other than a bank-ineligible security,[9] if:

(*1*) A state member bank is authorized to invest in the asset underlying the contract;

(*2*) The contract requires cash settlement; or

(*3*) The contract allows for assignment, termination, or offset prior to delivery or expiration, and the company makes every reasonable effort to avoid taking or making delivery; and

(C) Forward contracts, options,[10] futures, options on futures, swaps, and similar contracts, whether traded on exchanges or not, based on an index of a rate, a price, or the value of any financial asset, nonfinancial asset, or group of assets, if the contract requires cash settlement.

(iii) *Buying and selling bullion, and related activities.* Buying, selling and storing bars, rounds, bullion, and coins of gold, silver, platinum, palladium, copper, and any other metal approved by the Board, for the company's own account and the account of others, and providing incidental services such as arranging for storage, safe custody, assaying, and shipment.

(9) *Management consulting and counseling activities*—(i) *Management consulting.* (A) Providing management consulting advice: [11]

(*1*) On any matter to unaffiliated depository institutions, including commercial banks, savings and loan associations, savings banks, credit unions, industrial banks, Morris Plan banks, cooperative banks, industrial loan companies, trust companies, and branches or agencies of foreign banks;

(*2*) On any financial, economic, accounting, or audit matter to any other company.

(B) A company conducting management consulting activities under this subparagraph and any affiliate of such company may not:

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[7] A bank-ineligible security is any security that a State member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

[8] A company or its affiliates may not enter quotes for specific bank-ineligible securities in any dealer quotation system in connection with the company's riskless principal transactions; except that the company or its affiliates may enter ''bid'' or ''ask'' quotations, or publish ''offering wanted'' or ''bid wanted'' notices on trading systems other than NASDAQ or an exchange, if the company or its affiliate does not enter price quotations on different sides of the market for a particular security during any two-day period.

[9] A bank-ineligible security is any security that a state member bank is not permitted to underwrite or deal in under 12 U.S.C. 24 and 335.

[10] This reference does not include acting as a dealer in options based on indices of bank-ineligible securities when the options are traded on securities exchanges. These options are securities for purposes of the federal securities laws and bank-ineligible securities for purposes of section 20 of the Glass-Steagall Act, 12 U.S.C. 337. Similarly, this reference does not include acting as a dealer in any other instrument that is a bank-ineligible security for purposes of section 20. A bank holding company may deal in these instruments in accordance with the Board's orders on dealing in bank-ineligible securities.

[11] In performing this activity, bank holding companies are not authorized to perform tasks or operations or provide services to client institutions either on a daily or continuing basis, except as necessary to instruct the client institution on how to perform such services for itself. See also the Board's interpretation of bank management consulting advice (12 CFR 225.131).

(*1*) Own or control, directly or indirectly, more than 5 percent of the voting securities of the client institution; and

(*2*) Allow a management official, as defined in 12 CFR 212.2(h), of the company or any of its affiliates to serve as a management official of the client institution, except where such interlocking relationship is permitted pursuant to an exemption granted under 12 CFR 212.4(b) or otherwise permitted by the Board.

(C) A company conducting management consulting activities may provide management consulting services to customers not described in paragraph (b)(9)(i)(A)(*1*) of this section or regarding matters not described in paragraph (b)(9)(i)(A)(*2*) of this section, if the total annual revenue derived from those management consulting services does not exceed 30 percent of the company's total annual revenue derived from management consulting activities.

(ii) *Employee benefits consulting services.* Providing consulting services to employee benefit, compensation and insurance plans, including designing plans, assisting in the implementation of plans, providing administrative services to plans, and developing employee communication programs for plans.

(iii) *Career counseling services.* Providing career counseling services to:

(A) A financial organization [12] and individuals currently employed by, or recently displaced from, a financial organization;

(B) Individuals who are seeking employment at a financial organization; and

(C) Individuals who are currently employed in or who seek positions in the finance, accounting, and audit departments of any company.

(10) *Support services*—(i) *Courier services.* Providing courier services for:

(A) Checks, commercial papers, documents, and written instruments (excluding currency or bearer-type negotiable instruments) that are exchanged among banks and financial institutions; and

(B) Audit and accounting media of a banking or financial nature and other business records and documents used in processing such media.[13]

(ii) *Printing and selling MICR-encoded items.* Printing and selling checks and related documents, including corporate image checks, cash tickets, voucher checks, deposit slips, savings withdrawal packages, and other forms that require Magnetic Ink Character Recognition (MICR) encoding.

(11) *Insurance agency and underwriting*—(i) *Credit insurance.* Acting as principal, agent, or broker for insurance (including home mortgage redemption insurance) that is:

(A) Directly related to an extension of credit by the bank holding company or any of its subsidiaries; and

(B) Limited to ensuring the repayment of the outstanding balance due on the extension of credit [14] in the event of the death, disability, or involuntary unemployment of the debtor.

(ii) *Finance company subsidiary.* Acting as agent or broker for insurance directly related to an extension of credit by a finance company [15] that is a subsidiary of a bank holding company, if:

(A) The insurance is limited to ensuring repayment of the outstanding balance on such extension of credit in the event of loss or damage to any property used as collateral for the extension of credit; and

(B) The extension of credit is not more than $10,000, or $25,000 if it is to finance the purchase of a residential manufactured home [16] and the credit is secured by the home; and

(C) The applicant commits to notify borrowers in writing that:

(*1*) They are not required to purchase such insurance from the applicant;

(*2*) Such insurance does not insure any interest of the borrower in the collateral; and

(*3*) The applicant will accept more comprehensive property insurance in place of such single-interest insurance.

(iii) *Insurance in small towns.* Engaging in any insurance agency activity in a place where the bank holding company or a subsidiary of the bank holding company has a lending office and that:

(A) Has a population not exceeding 5,000 (as shown in the preceding decennial census); or

(B) Has inadequate insurance agency facilities, as determined by the Board, after notice and opportunity for hearing.

(iv) *Insurance-agency activities conducted on May 1, 1982.* Engaging in any specific insurance-agency activity [17] if the bank holding company, or subsidiary conducting the specific activity, conducted such activity on May 1, 1982, or received Board approval to conduct such activity on or before May 1, 1982.[18] A bank holding company or subsidiary engaging in a specific insurance agency activity under this clause may:

(A) Engage in such specific insurance agency activity only at locations:

(*1*) In the state in which the bank holding company has its principal place of business (as defined in 12 U.S.C. 1842(d));

(*2*) In any state or states immediately adjacent to such state; and

(*3*) In any state in which the specific insurance-agency activity was conducted (or was approved to be conducted) by such bank holding company or subsidiary thereof or by any other subsidiary of such bank holding company on May 1, 1982; and

(B) Provide other insurance coverages that may become available after May 1, 1982, so long as those coverages insure against the types of risks as (or are otherwise functionally equivalent to) coverages sold or approved to be sold on May 1, 1982, by the bank holding company or subsidiary.

(v) *Supervision of retail insurance agents.* Supervising on behalf of insurance underwriters the activities of retail insurance agents who sell:

(A) Fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or its subsidiaries; and

(B) Group insurance that protects the employees of the bank holding company or its subsidiaries.

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[12] *Financial organization* refers to insured depository institution holding companies and their subsidiaries, other than nonbanking affiliates of diversified savings and loan holding companies that engage in activities not permissible under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1842(c)(8)).

[13] See also the Board's interpretation on courier activities (12 CFR 225.129), which sets forth conditions for bank holding company entry into the activity.

[14] *Extension of credit* includes direct loans to borrowers, loans purchased from other lenders, and leases of real or personal property so long as the leases are nonoperating and full-payout leases that meet the requirements of paragraph (b)(3) of this section.

[15] *Finance company* includes all non-deposit-taking financial institutions that engage in a significant degree of consumer lending (excluding lending secured by first mortgages) and all financial institutions specifically defined by individual states as finance companies and that engage in a significant degree of consumer lending.

[16] These limitations increase at the end of each calendar year, beginning with 1982, by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics.

[17] Nothing contained in this provision shall preclude a bank holding company subsidiary that is authorized to engage in a specific insurance-agency activity under this clause from continuing to engage in the particular activity after merger with an affiliate, if the merger is for legitimate business purposes and prior notice has been provided to the Board.

[18] For the purposes of this paragraph, activities engaged in on May 1, 1982, include activities carried on subsequently as the result of an application to engage in such activities pending before the Board on May 1, 1982, and approved subsequently by the Board or as the result of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition.

(vi) *Small bank holding companies.* Engaging in any insurance-agency activity if the bank holding company has total consolidated assets of $50 million or less. A bank holding company performing insurance-agency activities under this paragraph may not engage in the sale of life insurance or annuities except as provided in paragraphs (b)(11) (i) and (iii) of this section, and it may not continue to engage in insurance-agency activities pursuant to this provision more than 90 days after the end of the quarterly reporting period in which total assets of the holding company and its subsidiaries exceed $50 million.

(vii) *Insurance-agency activities conducted before 1971.* Engaging in any insurance-agency activity performed at any location in the United States directly or indirectly by a bank holding company that was engaged in insurance-agency activities prior to January 1, 1971, as a consequence of approval by the Board prior to January 1, 1971.

(12) *Community development activities*—(i) *Financing and investment activities.* Making equity and debt investments in corporations or projects designed primarily to promote community welfare, such as the economic rehabilitation and development of low-income areas by providing housing, services, or jobs for residents.

(ii) *Advisory activities.* Providing advisory and related services for programs designed primarily to promote community welfare.

(13) *Money orders, savings bonds, and traveler's checks.* The issuance and sale at retail of money orders and similar consumer-type payment instruments; the sale of U.S. savings bonds; and the issuance and sale of traveler's checks.

(14) *Data processing.* (i) Providing data processing and data transmission services, facilities (including data processing and data transmission hardware, software, documentation, or operating personnel), data bases, advice, and access to such services, facilities, or data bases by any technological means, if:

(A) The data to be processed or furnished are financial, banking, or economic; and

(B) The hardware provided in connection therewith is offered only in conjunction with software designed and marketed for the processing and transmission of financial, banking, or economic data, and where the general purpose hardware does not constitute more than 30 percent of the cost of any packaged offering.

(ii) A company conducting data processing and data transmission activities may conduct data processing and data transmission activities not described in paragraph (b)(14)(i) of this section if the total annual revenue derived from those activities does not exceed 30 percent of the company's total annual revenues derived from data processing and data transmission activities.

5. Subpart D is amended as follows:

§ 225.31 [Amended]

(A) Section 225.31, paragraph (d)(2)(ii), is amended by removing the words ''as defined in 12 CFR 206.2(k)''; and

§ 225.32 [Removed]

(B) Section 225.32 is removed.

6. Subpart E is revised to read as follows:

Subpart E—Change in Bank Control

Sec.

Subpart E—Change in Bank Control

§ 225.41 Transactions requiring prior notice.

(a) *Prior notice requirement.* Any person acting directly or indirectly, or through or in concert with one or more persons, shall give the Board 60 days' written notice, as specified in § 225.43 of this subpart, before acquiring control of a state member bank or bank holding company, unless the acquisition is exempt under § 225.42.

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

(1) *Acquisition* includes a purchase, assignment, transfer, or pledge of voting securities, or an increase in percentage ownership of a state member bank or a bank holding company resulting from a redemption of voting securities.

(2) *Acting in concert* includes knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a state member bank or bank holding company whether or not pursuant to an express agreement.

(3) *Immediate family* includes a person's father, mother, stepfather, stepmother, brother, sister, stepbrother, stepsister, son, daughter, stepson, stepdaughter, grandparent, grandson, granddaughter, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, the spouse of any of the foregoing, and the person's spouse.

(c) *Acquisitions requiring prior notice*—(1) *Acquisition of control.* The acquisition of voting securities of a state member bank or bank holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 25 percent or more of any class of voting securities of the institution.

(2) *Rebuttable presumption of control.* The Board presumes that an acquisition of voting securities of a state member bank or bank holding company constitutes the acquisition of control under the Bank Control Act, requiring prior notice to the Board, if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if:

(i) The institution has registered securities under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l); or

(ii) No other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.[1]

(d) *Rebuttable presumption of concerted action.* The following persons shall be presumed to be acting in concert for purposes of this subpart:

(1) A company and any controlling shareholder, partner, trustee, or management official of the company, if both the company and the person own voting securities of the state member bank or bank holding company;

(2) An individual and the individual's immediate family;

(3) Companies under common control;

(4) Persons that are parties to any agreement, contract, understanding, relationship, or other arrangement, whether written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a state member bank or bank holding company, other than through a revocable proxy as described in § 225.42(a)(5) of this subpart;

(5) Persons that have made, or propose to make, a joint filing under sections 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated

[1] If two or more persons, not acting in concert, each propose to acquire simultaneously equal percentages of 10 percent or more of a class of voting securities of the state member bank or bank holding company, each person must file prior notice to the Board.

thereunder by the Securities and Exchange Commission; and

(6) A person and any trust for which the person serves as trustee.

(e) *Acquisitions of loans in default.* The Board presumes an acquisition of a loan in default that is secured by voting securities of a state member bank or bank holding company to be an acquisition of the underlying securities for purposes of this section.

(f) *Other transactions.* Transactions other than those set forth in paragraph (c) of this section resulting in a person's control of less than 25 percent of a class of voting securities of a state member bank or bank holding company are not deemed by the Board to constitute control for purposes of the Bank Control Act.

(g) *Rebuttal of presumptions.* Prior notice to the Board is not required for any acquisition of voting securities under the presumption of control set forth in this section, if the Board finds that the acquisition will not result in control. The Board shall afford any person seeking to rebut a presumption in this section an opportunity to present views in writing or, if appropriate, orally before its designated representatives at an informal conference.

§ 225.42 Transactions not requiring prior notice.

(a) *Exempt transactions.* The following transactions do not require notice to the Board under this subpart:

(1) *Existing control relationships.* The acquisition of additional voting securities of a state member bank or bank holding company by a person who:

(i) Continuously since March 9, 1979 (or since the institution commenced business, if later), held power to vote 25 percent or more of any class of voting securities of the institution; or

(ii) Is presumed, under § 225.41(c)(2) of this subpart, to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities of the institution or, in other cases, where the Board determines that the person has controlled the bank continuously since March 9, 1979;

(2) *Increase of previously authorized acquisitions.* Unless the Board or the Reserve Bank otherwise provides in writing, the acquisition of additional shares of a class of voting securities of a state member bank or bank holding company by any person (or persons acting in concert) who has lawfully acquired and maintained control of the institution (for purposes of § 225.41(c) of this subpart), after complying with the procedures and receiving approval to acquire voting securities of the institution under this subpart, or in connection with an application approved under section 3 of the BHC Act (12 U.S.C. 1842; § 225.11 of subpart B of this part) or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(3) *Acquisitions subject to approval under BHC Act or Bank Merger Act.* Any acquisition of voting securities subject to approval under section 3 of the BHC Act (12 U.S.C. 1842; § 225.11 of subpart B of this part), or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c));

(4) *Transactions exempt under BHC Act.* Any transaction described in sections 2(a)(5), 3(a)(A), or 3(a)(B) of the BHC Act (12 U.S.C. 1841(a)(5), 1842(a)(A), and 1842(a)(B)), by a person described in those provisions;

(5) *Proxy solicitation.* The acquisition of the power to vote securities of a state member bank or bank holding company through receipt of a revocable proxy in connection with a proxy solicitation for the purposes of conducting business at a regular or special meeting of the institution, if the proxy terminates within a reasonable period after the meeting;

(6) *Stock dividends.* The receipt of voting securities of a state member bank or bank holding company through a stock dividend or stock split if the proportional interest of the recipient in the institution remains substantially the same; and

(7) *Acquisition of foreign banking organization.* The acquisition of voting securities of a qualifying foreign banking organization. (This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the Bank Control Act (12 U.S.C. 1817(j) (9), (10), and (12)) and § 225.44 of this subpart.)

(b) *Prior notice exemption.* (1) The following acquisitions of voting securities of a state member bank or bank holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person notifies the appropriate Reserve Bank within 90 calendar days after the acquisition and provides any relevant information requested by the Reserve Bank:

(i) Acquisition of voting securities through inheritance;

(ii) Acquisition of voting securities as a *bona fide* gift; and

(iii) Acquisition of voting securities in satisfaction of a debt previously contracted (DPC) in good faith.

(2) The following acquisitions of voting securities of a state member bank or bank holding company, which would otherwise require prior notice under this subpart, are not subject to the prior notice requirements if the acquiring person does not reasonably have advance knowledge of the transaction, and provides the written notice required under section 225.43 to the appropriate Reserve Bank within 90 calendar days after the transaction occurs:

(i) Acquisition of voting securities resulting from a redemption of voting securities by the issuing bank or bank holding company; and

(ii) Acquisition of voting securities as a result of actions (including the sale of securities) by any third party that is not within the control of the acquiror.

(3) Nothing in paragraphs (b)(1) or (b)(2) of this section limits the authority of the Board to disapprove a notice pursuant to § 225.43(h) of this subpart.

§ 225.43 Procedures for filing, processing, publishing, and acting on notices.

(a) *Filing notice.* (1) A notice required under this subpart shall be filed with the appropriate Reserve Bank and shall contain all the information required by paragraph 6 of the Bank Control Act (12 U.S.C. 1817(j)(6)), or prescribed in the designated Board form.

(2) The Board may waive any of the informational requirements of the notice if the Board determines that it is in the public interest.

(3) A notificant shall notify the appropriate Reserve Bank or the Board immediately of any material changes in a notice submitted to the Reserve Bank, including changes in financial or other conditions.

(4) When the acquiring person is an individual, or group of individuals acting in concert, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, as required in the designated Board form, together with a statement of any material changes since the date of the statement or summary. The Reserve Bank or the Board, nevertheless, may request additional information, if appropriate.

(b) *Acceptance of notice.* The 60-day notice period specified in § 225.41 of this subpart begins on the date of receipt of a complete notice. The Reserve Bank shall notify the person or persons submitting a notice under this subpart in writing of the date the notice is or was complete and thereby accepted for processing. The Reserve Bank or the Board may request additional relevant information at any time after the date of acceptance.

(c) *Publication*—(1) *Newspaper Announcement.* Any person(s) filing a notice under this subpart shall publish, in a form prescribed by the Board, an announcement soliciting public comment on the proposed acquisition. The announcement shall be published in a newspaper of general circulation in the community in which the head office of the state member bank to be acquired is located or, in the case of a proposed acquisition of a bank holding company, in the community in which its head office is located and in the community in which the head office of each of its subsidiary banks is located. The announcement shall be published no earlier than 15 calendar days before the filing of the notice with the appropriate Reserve Bank and no later than 10 calendar days after the filing date; and the publisher's affidavit of a publication shall be provided to the appropriate Reserve Bank.

(2) *Contents of newspaper announcement.* The newspaper announcement shall state:

(i) The name of each person identified in the notice as a proposed acquiror of the bank or bank holding company;

(ii) The name of the bank or bank holding company to be acquired, including the name of each of the bank holding company's subsidiary banks; and

(iii) A statement that interested persons may submit comments on the notice to the Board or the appropriate Reserve Bank for a period of 20 days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section.

(3) Federal Register *announcement.* The Board shall, upon filing of a notice under this subpart, publish announcement in the Federal Register of receipt of the notice. The Federal Register announcement shall contain the information required under paragraphs (c)(2)(i) and (c)(2)(ii) of this section and a statement that interested persons may submit comments on the proposed acquisition for a period of 15 calendar days, or such shorter period as may be provided, pursuant to paragraph (c)(5) of this section. The Board may waive publication in the Federal Register, if the Board determines that such action is appropriate.

(4) *Delay of publication.* The Board may permit delay in the publication required under paragraphs (c)(1) and (c)(3) of this section if the Board determines, for good cause shown, that it is in the public interest to grant such delay. Requests for delay of publication may be submitted to the appropriate Reserve Bank.

(5) *Shortening or waiving notice.* The Board may shorten or waive the public comment or newspaper publication requirements of this paragraph, or act on a notice before the expiration of a public comment period, if it determines in writing that an emergency exists, or that disclosure of the notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the bank or bank holding company to be acquired.

(6) *Consideration of public comments.* In acting upon a notice filed under this subpart, the Board shall consider all public comments received in writing within the period specified in the newspaper or Federal Register announcement, whichever is later. At the Board's option, comments received after this period may, but need not, be considered.

(7) *Standing.* No person (other than the acquiring person) who submits comments or information on a notice filed under this subpart shall thereby become a party to the proceeding or acquire any standing or right to participate in the Board's consideration of the notice or to appeal or otherwise contest the notice or the Board's action regarding the notice.

(d) *Time period for Board action*—(1) *Consummation of acquisition* —(i) The notificant(s) may consummate the proposed acquisition 60 days after submission to the Reserve Bank of a complete notice under paragraph (a) of this section, unless within that period the Board disapproves the proposed acquisition or extends the 60-day period, as provided under paragraph (d)(2) of this section.

(ii) The notificant(s) may consummate the proposed transaction before the expiration of the 60-day period if the Board notifies the notificant(s) in writing of the Board's intention not to disapprove the acquisition.

(2) *Extensions of time period.* (i) The Board may extend the 60-day period in paragraph (d)(1) of this section for an additional 30 days by notifying the acquiring person(s).

(ii) The Board may further extend the period during which it may disapprove a notice for two additional periods of not more than 45 days each, if the Board determines that:

(A) Any acquiring person has not furnished all the information required under paragraph (a) of this section;

(B) Any material information submitted is substantially inaccurate;

(C) The Board is unable to complete the investigation of an acquiring person because of inadequate cooperation or delay by that person; or

(D) Additional time is needed to investigate and determine that no acquiring person has a record of failing to comply with the requirements of the Bank Secrecy Act, subchapter II of Chapter 53 of Title 31, United States Code.

(iii) If the Board extends the time period under this paragraph, it shall notify the acquiring person(s) of the reasons therefor and shall include a statement of the information, if any, deemed incomplete or inaccurate.

(e) *Advice to bank supervisory agencies.* (1) Upon accepting a notice relating to acquisition of securities of a state member bank, the Reserve Bank shall send a copy of the notice to the appropriate state bank supervisor, which shall have 30 calendar days from the date the notice is sent in which to submit its views and recommendations to the Board. The Reserve Bank also shall send a copy of any notice to the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.

(2) If the Board finds that it must act immediately in order to prevent the probable failure of the bank or bank holding company involved, the Board may dispense with or modify the requirements for notice to the state supervisor.

(f) *Investigation and report.* (1) After receiving a notice under this subpart, the Board or the appropriate Reserve Bank shall conduct an investigation of the competence, experience, integrity, and financial ability of each person by and for whom an acquisition is to be made. The Board shall also make an independent determination of the accuracy and completeness of any information required to be contained in a notice under paragraph (a) of this section. In investigating any notice accepted under this subpart, the Board or Reserve Bank may solicit information or views from any person, including any bank or bank holding company involved in the notice, and any appropriate state, federal, or foreign governmental authority.

(2) The Board or the appropriate Reserve Bank shall prepare a written report of its investigation, which shall contain, at a minimum, a summary of the results of the investigation.

(g) *Factors considered in acting on notices.* In reviewing a notice filed under this subpart, the Board shall consider the information in the record, the views and recommendations of the appropriate bank supervisor, and any other relevant information obtained during any investigation of the notice.

(h) *Disapproval and hearing*—(1) *Disapproval of notice.* The Board may

disapprove an acquisition if it finds adverse effects with respect to any of the factors set forth in paragraph 7 of the Bank Control Act (12 U.S.C. 1817(j)(7)) (*i.e.*, competitive, financial, managerial, banking, or incompleteness of information).

(2) *Disapproval notification.* Within three days after its decision to issue a notice of intent to disapprove any proposed acquisition, the Board shall notify the acquiring person in writing of the reasons for the action.

(3) *Hearing.* Within 10 calendar days of receipt of the notice of the Board's intent to disapprove, the acquiring person may submit a written request for a hearing. Any hearing conducted under this paragraph shall be in accordance with the Rules of Practice for Formal Hearings (12 CFR part 263). At the conclusion of the hearing, the Board shall, by order, approve or disapprove the proposed acquisition on the basis of the record of the hearing. If the acquiring person does not request a hearing, the notice of intent to disapprove becomes final and unappealable.

§ 225.44 Reporting of stock loans.

(a) *Requirements.* (1) Any foreign bank or affiliate of a foreign bank that has credit outstanding to any person or group of persons, in the aggregate, which is secured, directly or indirectly, by 25 percent or more of any class of voting securities of a state member bank, shall file a consolidated report with the appropriate Reserve Bank for the state member bank.

(2) The foreign bank or its affiliate also shall file a copy of the report with its appropriate Federal banking agency.

(3) Any shares of the state member bank held by the foreign bank or any affiliate of the foreign bank as principal must be included in the calculation of the number of shares in which the foreign bank or its affiliate has a security interest for purposes of paragraph (a) of this section.

(b) *Definitions.* For purposes of paragraph (a) of this section:

(1) *Foreign bank* shall have the same meaning as in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(2) *Credit outstanding* includes any loan or extension of credit; the issuance of a guarantee, acceptance, or letter of credit, including an endorsement or standby letter of credit; and any other type of transaction that extends credit or financing to the person or group of persons.

(3) *Group of persons* includes any number of persons that the foreign bank or any affiliate of a foreign bank has reason to believe:

(i) Are acting together, in concert, or with one another to acquire or control shares of the same insured depository institution, including an acquisition of shares of the same depository institution at approximately the same time under substantially the same terms; or

(ii) Have made, or propose to make, a joint filing under section 13 or 14 of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78n), and the rules promulgated thereunder by the Securities and Exchange Commission regarding ownership of the shares of the same insured depository institution.

(c) *Exceptions.* Compliance with paragraph (a) of this section is not required if:

(1) The person or group of persons referred to in that paragraph has disclosed the amount borrowed and the security interest therein to the Board or appropriate Reserve Bank in connection with a notice filed under § 225.41 of this subpart, or another application filed with the Board or Reserve Bank as a substitute for a notice under § 225.41 of this subpart, including an application filed under section 3 of the BHC Act (12 U.S.C. 1842) or section 18(c) of the Federal Deposit Insurance Act (Bank Merger Act, 12 U.S.C. 1828(c)), or an application for membership in the Federal Reserve System; or

(2) The transaction involves a person or group of persons that has been the owner or owners of record of the stock for a period of one year or more; or, if the transaction involves stock issued by a newly chartered bank, before the bank is opened for business.

(d) *Report requirements.* (1) The consolidated report shall indicate the number and percentage of shares securing each applicable extension of credit, the identity of the borrower, and the number of shares held as principal by the foreign bank and any affiliate thereof.

(2) A foreign bank, or any affiliate of a foreign bank, shall file the consolidated report in writing within 30 days of the date on which the foreign bank or affiliate first believes that the security for any outstanding credit consists of 25 percent or more of any class of voting securities of a state member bank.

(e) *Other reporting requirements.* A foreign bank, or any affiliate thereof, that is supervised by the System and is required to report credit outstanding that is secured by the shares of an insured depository institution to another Federal banking agency also shall file a copy of the report with the appropriate Reserve Bank.

§ 225.51 [Removed]

7. Subpart F is amended by removing § 225.51.

8. Subpart G is amended by revising the heading to read as follows:

Subpart G—Appraisal Standards for Federally Related Transactions

9. Subpart H, consisting of §§ 225.71 through 225.73, is revised to read as follows:

Subpart H—Notice of Addition or Change of Directors and Senior Executive Officers

Subpart H—Notice of Addition or Change of Directors and Senior Executive Officers

§ 225.71 Definitions.

(a) *Director* means a person who serves on the board of directors of a regulated institution, except that this term does not include an advisory director who:

(1) Is not elected by the shareholders of the regulated institution;

(2) Is not authorized to vote on any matters before the board of directors or any committee thereof;

(3) Solely provides general policy advice to the board of directors and any committee thereof; and

(4) Has not been identified by the Board or Reserve Bank as a person who performs the functions of a director for purposes of this subpart.

(b) *Regulated institution* means a state member bank or a bank holding company.

(c) *Senior executive officer* means a person who holds the title or, without regard to title, salary, or compensation, performs the function of one or more of the following positions: president, chief executive officer, chief operating officer, chief financial officer, chief lending officer, or chief investment officer. *Senior executive officer* also includes any other person identified by the Board or Reserve Bank, whether or not hired as an employee, with significant influence over, or who participates in, major policymaking decisions of the regulated institution.

(d) *Troubled condition* for a regulated institution means an institution that:

(1) Has a composite rating, as determined in its most recent report of examination or inspection, of 4 or 5 under the Uniform Financial Institutions Rating System or under the

Federal Reserve Bank Holding Company Rating System;

(2) Is subject to a cease-and-desist order or formal written agreement that requires action to improve the financial condition of the institution, unless otherwise informed in writing by the Board or Reserve Bank; or

(3) Is informed in writing by the Board or Reserve Bank that it is in troubled condition for purposes of the requirements of this subpart on the basis of the institution's most recent report of condition or report of examination or inspection, or other information available to the Board or Reserve Bank.

§ 225.72 Director and officer appointments; prior notice requirement.

(a) *Prior notice by regulated institution.* A regulated institution shall give the Board 30 days' written notice, as specified in § 225.73, before adding or replacing any member of its board of directors, employing any person as a senior executive officer of the institution, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if:

(1) The regulated institution is not in compliance with all minimum capital requirements applicable to the institution as determined on the basis of the institution's most recent report of condition or report of examination or inspection;

(2) The regulated institution is in troubled condition; or

(3) The Board determines, in connection with its review of a capital restoration plan required under section 38 of the Federal Deposit Insurance Act or subpart B of the Board's Regulation H, or otherwise, that such notice is appropriate.

(b) *Prior notice by individual.* The prior notice required by paragraph (a) of this section may be provided by an individual seeking election to the board of directors of a regulated institution.

§ 225.73 Procedures for filing, processing, and acting on notices; standards for disapproval; waiver of notice.

(a) *Filing notice*—(1) *Content.* The notice required in § 225.72 shall be filed with the appropriate Reserve Bank and shall contain:

(i) The information required by paragraph 6(A) of the Change in Bank Control Act (12 U.S.C. 1817(j)(6)(A)) as may be prescribed in the designated Board form;

(ii) Additional information consistent with the Federal Financial Institutions Examination Council's Joint Statement of Guidelines on Conducting Background Checks and Change in Control Investigations, as set forth in the designated Board form; and

(iii) Such other information as may be required by the Board or Reserve Bank.

(2) *Modification.* The Reserve Bank may modify or accept other information in place of the requirements of § 225.73(a)(1) for a notice filed under this subpart.

(3) *Acceptance and processing of notice.* The 30-day notice period specified in § 225.72 shall begin on the date all information required to be submitted by the notificant pursuant to § 225.73(a)(1) is received by the appropriate Reserve Bank. The Reserve Bank shall notify the regulated institution or individual submitting the notice of the date on which all required information is received and the notice is accepted for processing, and of the date on which the 30-day notice period will expire. The Board or Reserve Bank may extend the 30-day notice period for an additional period of not more than 60 days by notifying the regulated institution or individual filing the notice that the period has been extended and stating the reason for not processing the notice within the 30-day notice period.

(b) *Commencement of service*—(1) *At expiration of period.* A proposed director or senior executive officer may begin service after the end of the 30-day period and any extension as provided under paragraph (a)(3) of this section, unless the Board or Reserve Bank disapproves the notice before the end of the period.

(2) *Prior to expiration of period.* A proposed director or senior executive officer may begin service before the end of the 30-day period and any extension as provided under paragraph (a)(3) of this section, if the Board or the Reserve Bank notifies in writing the regulated institution or individual submitting the notice of the Board's or Reserve Bank's intention not to disapprove the notice.

(c) *Notice of disapproval.* The Board or Reserve Bank shall disapprove a notice under § 225.72 if the Board or Reserve Bank finds that the competence, experience, character, or integrity of the individual with respect to whom the notice is submitted indicates that it would not be in the best interests of the depositors of the regulated institution or in the best interests of the public to permit the individual to be employed by, or associated with, the regulated institution. The notice of disapproval shall contain a statement of the basis for disapproval and shall be sent to the regulated institution and the disapproved individual.

(d) *Appeal of a notice of disapproval.* (1) A disapproved individual or a regulated institution that has submitted a notice that is disapproved under this section may appeal the disapproval to the Board within 15 days of the effective date of the notice of disapproval. An appeal shall be in writing and explain the reasons for the appeal and include all facts, documents, and arguments that the appealing party wishes to be considered in the appeal, and state whether the appealing party is requesting an informal hearing.

(2) Written notice of the final decision of the Board shall be sent to the appealing party within 60 days of the receipt of an appeal, unless the appealing party's request for an informal hearing is granted.

(3) The disapproved individual may not serve as a director or senior executive officer of the state member bank or bank holding company while the appeal is pending.

(e) *Informal hearing.* (1) An individual or regulated institution whose notice under this section has been disapproved may request an informal hearing on the notice. A request for an informal hearing shall be in writing and shall be submitted within 15 days of a notice of disapproval. The Board may, in its sole discretion, order an informal hearing if the Board finds that oral argument is appropriate or necessary to resolve disputes regarding material issues of fact.

(2) An informal hearing shall be held within 30 days of a request, if granted, unless the requesting party agrees to a later date.

(3) Written notice of the final decision of the Board shall be given to the individual and the regulated institution within 60 days of the conclusion of any informal hearing ordered by the Board, unless the requesting party agrees to a later date.

(f) *Waiver of notice*—(1) *Waiver requests.* The Board or Reserve Bank may permit an individual to serve as a senior executive officer or director before the notice required under this subpart is provided, if the Board or Reserve Bank finds that:

(i) Delay would threaten the safety or soundness of the regulated institution or a bank controlled by a bank holding company;

(ii) Delay would not be in the public interest; or

(iii) Other extraordinary circumstances exist that justify waiver of prior notice.

(2) *Automatic waiver.* An individual may serve as a director upon election to the board of directors of a regulated institution before the notice required

under this subpart is provided if the individual:

(i) Is not proposed by the management of the regulated institution;

(ii) Is elected as a new member of the board of directors at a meeting of the regulated institution; and

(iii) Provides to the appropriate Reserve Bank all the information required in § 225.73(a) within two (2) business days after the individual's election.

(3) *Effect on disapproval authority.* A waiver shall not affect the authority of the Board or Reserve Bank to disapprove a notice within 30 days after a waiver is granted under paragraph (f)(1) of this section or the election of an individual who has filed a notice and is serving pursuant to an automatic waiver under paragraph (f)(2) of this section.

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10. Section 225.125 is amended by revising paragraphs (f) and (g) to read as follows:

§ 225.125 Investment adviser activities

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(f) In the Board's opinion, the Glass-Steagall Act provisions, as interpreted by the U.S. Supreme Court, forbid a bank holding company to sponsor, organize, or control a mutual fund. However, the Board does not believe that such restrictions apply to closed-end investment companies as long as such companies are not primarily or frequently engaged in the issuance, sale, and distribution of securities. A bank holding company should not act as investment adviser to an investment company that has a name similar to the name of the holding company or any of its subsidiary banks, unless the prospectus of the investment company contains the disclosures required in paragraph (h) of this section. In no case should a bank holding company act as investment adviser to an investment company that has either the same name as the name of the holding company or any of its subsidiary banks, or a name that contains the word ''bank.''

(g) In view of the potential conflicts of interests that may exist, a bank holding company and its bank and nonbank subsidiaries should not purchase in their sole discretion, in a fiduciary capacity (including as managing agent), securities of any investment company for which the bank holding company acts as investment adviser unless, the purchase is specifically authorized by the terms of the instrument creating the fiduciary relationship, by court order, or by the law of the jurisdiction under which the trust is administered.

* * * * *

§ 225.145 [Amended]

11. Section 225.145, paragraph (a) the fifth sentence is amended by removing the words ''increasing their assets at an annual rate exceeding 7 percent during any 12-month period after August 10, 1988,'' and the last sentence by removing ''225.51 and''.

12. Appendix C is revised to read as follows:

Appendix C to Part 225—Small Bank Holding Company Policy Statement

Policy Statement on Assessment of Financial and Managerial Factors

In acting on applications filed under the Bank Holding Company Act, the Board has adopted, and continues to follow, the principle that bank holding companies should serve as a source of strength for their subsidiary banks. When bank holding companies incur debt and rely upon the earnings of their subsidiary banks as the means of repaying such debt, a question arises as to the probable effect upon the financial condition of the holding company and its subsidiary bank or banks.

The Board believes that a high level of debt at the parent holding company impairs the ability of a bank holding company to provide financial assistance to its subsidiary bank(s) and, in some cases, the servicing requirements on such debt may be a significant drain on the resources of the bank(s). For these reasons, the Board has not favored the use of acquisition debt in the formation of bank holding companies or in the acquisition of additional banks. Nevertheless, the Board has recognized that the transfer of ownership of small banks often requires the use of acquisition debt. The Board, therefore, has permitted the formation and expansion of small bank holding companies with debt levels higher than would be permitted for larger holding companies. Approval of these applications has been given on the condition that small bank holding companies demonstrate the ability to service acquisition debt without straining the capital of their subsidiary banks and, further, that such companies restore their ability to serve as a source of strength for their subsidiary banks within a relatively short period of time.

In the interest of continuing its policy of facilitating the transfer of ownership in banks without compromising bank safety and soundness, the Board has, as described below, adopted the following procedures and standards for the formation and expansion of small bank holding companies subject to this policy statement.

1. Applicability of Policy Statement

This policy statement applies only to bank holding companies with *pro forma* consolidated assets of less than $150 million that: (i) are *not* engaged in any nonbanking activities involving significant leverage [1] and (ii) do *not* have a significant amount of outstanding debt that is held by the general public.

While this policy statement primarily applies to the formation of small bank holding companies, it also applies to existing small bank holding companies that wish to acquire an additional bank or company and to transactions involving changes in control, stock redemptions, or other shareholder transactions. [2]

2. Ongoing Requirements

The following guidelines must be followed on an ongoing basis for all organizations operating under this policy statement.

A. Reduction in parent company leverage: Small bank holding companies are to reduce their parent company debt consistent with the requirement that all debt be retired within 25 years of being incurred. The Board also expects that these bank holding companies reach a debt to equity ratio of .30:1 or less within 12 years of the incurrence of the debt. [3] The bank holding company must also comply with debt servicing and other requirements imposed by its creditors.

B. Capital adequacy: Each insured depository subsidiary of a small bank holding company is expected to be well-capitalized. Any institution that is not well-capitalized is expected to become well-capitalized within a brief period of time.

C. Dividend restrictions: A small bank holding company whose debt to equity ratio is greater than 1.0:1 is not expected to pay corporate dividends until such time as it reduces its debt to equity ratio to 1.0:1 or less and otherwise meets the criteria set forth in §§ 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) of Regulation Y. [4]

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[1] A parent company that is engaged in significant off-balance sheet activities would generally be deemed to be engaged in activities that involve significant leverage.

[2] The appropriate Reserve Bank should be contacted to determine the manner in which a specific situation may qualify for treatment under this policy statement.

[3] The term *debt*, as used in the ratio of debt to equity, means any borrowed funds (exclusive of short-term borrowings that arise out of current transactions, the proceeds of which are used for current transactions), and any securities issued by, or obligations of, the holding company that are the functional equivalent of borrowed funds.

The term *equity*, as used in the ratio of debt to equity, means the total stockholders' equity of the bank holding company as defined in accordance with generally accepted accounting principles. In determining the total amount of stockholders' equity, the bank holding company should account for its investments in the common stock of subsidiaries by the equity method of accounting.

Ordinarily the Board does not view redeemable preferred stock as a substitute for common stock in a small bank holding company. Nevertheless, to a limited degree and under certain circumstances, the Board will consider redeemable preferred stock as equity in the capital accounts of the holding company if the following conditions are met: (1) The preferred stock is redeemable only at the option of the issuer and (2) the debt to equity ratio of the holding company would be at or remain below .30:1 following the redemption or retirement of any preferred stock. Preferred stock that is convertible into common stock of the holding company may be treated as equity.

[4] Dividends may be paid by small bank holding companies with debt to equity at or below 1.0:1 and otherwise meeting the requirements of § § 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) if the dividends are reasonable in amount, do not

Continued

Small bank holding companies formed before the effective date of this policy statement may switch to a plan that adheres to the intent of this statement provided they comply with the requirements set forth above.

3. Core Requirements for All Applicants

In assessing applications or notices by organizations subject to this policy statement, the Board will continue to take into account a full range of financial and other information about the applicant, and its current and proposed subsidiaries, including the recent trend and stability of earnings, past and prospective growth, asset quality, the ability to meet debt servicing requirements without placing an undue strain on the resources of the bank(s), and the record and competency of management. In addition, the Board will require applicants to meet the following requirements:

A. Minimum down payment: The amount of acquisition debt should not exceed 75 percent of the purchase price of the bank(s) or company to be acquired. When the owner(s) of the holding company incurs debt to finance the purchase of the bank(s) or company, such debt will be considered acquisition debt even though it does not represent an obligation of the bank holding company, unless the owner(s) can demonstrate that such debt can be serviced without reliance on the resources of the bank(s) or bank holding company.

B. Ability to reduce parent company leverage: The bank holding company must clearly be able to reduce its debt to equity ratio and comply with its loan agreement(s) as set forth in paragraph 2A above.

Failure to meet the criteria in this section would normally result in denial of an application.

4. Additional Application Requirements for Expedited/Waived Processing

A. Expedited notices under §§ 225.14 and 225.23 of Regulation Y: A small bank holding company proposal will be eligible for the expedited processing procedures set forth in §§ 225.14 and 225.23 of Regulation Y if the bank holding company is in compliance with the ongoing requirements of this policy statement, the bank holding company meets the core requirements for all applicants noted above, and the following requirements are met:

i. The parent bank holding company has a *pro forma* debt to equity ratio of 1.0:1 or less.

ii. The bank holding company meets all of the criteria for expedited action set forth in §§ 225.14 or 225.23 of Regulation Y.

B. Waiver of stock redemption filing: A small bank holding company will be eligible for the stock redemption filing exception for well-capitalized bank holding companies contained in § 225.4(b)(6) if the following requirements are met:

i. The parent bank holding company has a *pro forma d*ebt to equity ratio of 1.0:1 or less.

ii. The bank holding company is in compliance with the ongoing requirements of this policy statement and meets the requirements of §§ 225.14(c)(1)(ii), 225.14(c)(2), and 225.14(c)(7) of Regulation Y.

William W. Wiles,

Secretary of the Board.

[FR Doc. 97–4906 Filed 2–27–97; 8:45 am]

BILLING CODE 6210–01–P

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adversely affect the ability of the bank holding company to service its debt in an orderly manner, and do not adversely affect the ability of the subsidiary banks to be well-capitalized. It is expected that dividends will be eliminated if the holding company is (1) not reducing its debt consistent with the requirement that the debt to equity ratio be reduced to .30:1 within 12 years of consummation of the proposal or (2) not meeting the requirements of its loan agreement(s).

Federal Register

Friday
February 28, 1997

Part IV

The President

Notice of February 27, 1997—Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

Federal Register
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Friday, February 28, 1997

Presidential Documents

Title 3—

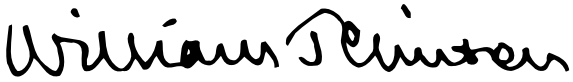
The President

Notice of February 27, 1997

Continuation of the National Emergency Relating to Cuba and of the Emergency Authority Relating to the Regulation of the Anchorage and Movement of Vessels

On March 1, 1996, by Proclamation 6867, I declared a national emergency to address the disturbance or threatened disturbance of international relations caused by the February 24, 1996, destruction by the Government of Cuba of two unarmed U.S.-registered civilian aircraft in international airspace north of Cuba. In July 1995, the Government of Cuba demonstrated a ready and reckless use of force against U.S. registered vessels that entered into Cuban territorial waters that resulted in damage and injury to persons on board. In July 1996, the Government of Cuba stated its intent to forcefully defend its sovereignty against any U.S.-registered vessels or aircraft that might enter Cuban territorial waters or airspace while involved in a memorial flotilla and peaceful protest. Since these events, the Government of Cuba has not demonstrated that it will refrain from the future use of reckless and excessive force against U.S. vessels or aircraft that may engage in memorial activities or peaceful protest north of Cuba. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to Cuba and the emergency authority relating to the regulation of the anchorage and movement of vessels set out in Proclamation 6867.

This notice shall be published in the Federal Register and transmitted to the Congress.



THE WHITE HOUSE,
February 27, 1997.

[FR Doc. 97–5260
Filed 2–27–97; 11:22 am]
Billing code 3195–01–P

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- Pennsylvania; published 1-29-97

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- Copperbelly water snake; published 1-29-97

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AGRICULTURE DEPARTMENT

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- Pork and pork products from Mexico transiting United States; comments due by 3-3-97; published 12-31-96

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  - Medical image management; comments due by 3-3-97; published 12-2-96

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Cessna; comments due by 3-7-97; published 1-6-97

Construcciones Aeronauticas, S.A.; comments due by 3-3-97; published 1-27-97

Fairchild; comments due by 3-6-97; published 1-17-97

Short Brothers plc; comments due by 3-7-97; published 1-27-97

Williams International, L.L.C.; comments due by 3-7-97; published 1-6-97

TRANSPORTATION DEPARTMENT

National Highway Traffic Safety Administration

Dual fueled electric passenger automobiles; minimum driving range; comments due by 3-4-97; published 1-3-97

TREASURY DEPARTMENT

Alcohol, Tobacco and Firearms Bureau

Alcoholic beverages:

Distilled spirits, wine, and malt beverages; labeling and advertising--

Margarita; use of term; comments due by 3-7-97; published 2-20-97

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Depreciation alocations; recapture among partners in a partnership; comments due by 3-6-97; published 12-12-96