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# Rules and Regulations

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

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## DEPARTMENT OF AGRICULTURE

### Office of the Secretary

#### 7 CFR Part 17

#### Regulations Governing the Financing of Commercial Sales of Agricultural Commodities

**AGENCY:** Commodity Credit Corporation.

**ACTION:** Final rule.

**SUMMARY:** This rule amends regulations applicable to the financing of the sale and exportation of agricultural commodities pursuant to title I of the Agricultural Trade Development and Assistance Act of 1954, as amended ("Pub. L. 480").

The amendment simplifies the purchasing procedures and shortens the regulations. The purpose of these changes is to keep the costs of the Pub. L. 480, title I program as low as possible, to reflect the provisions of the Federal Agricultural Improvement and Reform Act of 1996, and to reduce the public reporting burden.

Executive Order 12752 of February 25, 1991, establishes a program under title I of Pub. L. 480 to be implemented by the Secretary of Agriculture. In accordance with section 406(c) of Pub. L. 480, the funds, facilities, and authorities of the Commodity Credit Corporation are used to carry out this program.

**EFFECTIVE DATE:** This rule is effective November 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Connie B. Delaplane, Director, P.L. 480 Operations Division, Export Credits, Foreign Agricultural Service, Room 4549, South Building, Stop 1033, U.S. Department of Agriculture, 1400 Independence Ave., SW., Washington, D.C. 20250-1033. Telephone: (202) 720-3664.

**SUPPLEMENTARY INFORMATION:** This final rule is issued in conformance with

Executive Order 12866. It has been determined significant for the purposes of E.O. 12866 and, therefore, has been reviewed by the Office of Management and Budget ("OMB").

#### Regulatory Flexibility Act

This final rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act. The Vice President, Commodity Credit Corporation ("CCC"), who is the General Sales Manager, has certified that this rule will not have a significant economic impact on a substantial number of small entities. The final rule eliminates some existing program requirements which should make it easier for firms to participate, including small businesses. A copy of this final rule has been submitted to the General Counsel, Small Business Administration.

#### Executive Order 12372

This program is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials. See the Notice related to 7 CFR Part 3015, Subpart V, published at 48 FR 29115 (June 24, 1983).

#### Paperwork Reduction Act

In accordance with the provisions of the Paperwork Reduction Act of 1995, the Department submitted an updated information collection package to the Office of Management and Budget (OMB) under OMB control number 0551-0005, in conjunction with the publication of the proposed rule in the **Federal Register** (see "Background.") OMB has approved the estimated total burden of 455 hours through February 28, 2000. Copies of this information collection can be obtained from Valerie Countiss, the Agency Information Collection Coordinator, at (202) 720-6713.

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. The final rule would have preemptive effect with respect to any state or local laws, regulations, or policies which conflict with such provisions or which otherwise impede their full implementation. The final rule would not have retroactive effect. The rule does not require that administrative

remedies be exhausted before suit may be filed.

#### Background

Title I of the Agricultural Trade Development and Assistance Act of 1954, as amended (Pub. L. 480) authorizes CCC to finance the sale and exportation of agricultural commodities on concessional credit terms. 7 U.S.C. 1701 *et seq.* On January 27, 1997, the Commodity Credit Corporation ("CCC") published a Proposed Rule (62 FR 3810) to amend the regulations governing the financing of the sale and exportation of agricultural commodities made available under title I, Pub. L. 480. The proposed rule was drafted after considering comments received in response to an Advance Notice of Proposed Rulemaking (60 FR 47495) published September 13, 1995. Most of the comments received supported the changes made by the proposed rule. The comments which raised questions are discussed below, except those comments that were outside the scope of the proposed rule. A copy of the "Benefit-Cost Assessment" prepared in connection with this final rule can be obtained from Connie B. Delaplane. See **For Further Information Contact.**

#### Discussion of Comments

##### *Purchase Authorizations*

After CCC and the participant have signed a title I agreement, CCC issues a purchase authorization ("PA") in response to a request from the participant. One comment asked that the importer or the shipping agent be permitted to request the PA. However, having the participant prepare the brief written request helps to insure that the participant also signs the PA when it is issued a few days later. By this signature the participant accepts the specific contracting and documentary requirements in the PA which govern CCC financing under the program. Because the participant must bear any costs which are not eligible for CCC financing, it is important that the participant be fully involved in both requesting and signing the PA. Since the requirement for requesting PA's appears in the title I agreement, there is no need also to include it in the regulations and this portion of the proposed rule will be adopted without change.

### Shipping Agents

The proposed rule would require an agent of the participant or importer (shipping agent) to provide complete information on the firm and its activities only once per fiscal year, instead of each time the firm is nominated by a participant. One commenter requested that we further change the procedure to adopt an "initial registration" of interested firms at the beginning of each fiscal year, similar to the determination of eligibility for commodity suppliers. The firm would not have to be nominated by a participant to be registered.

We do not believe that adopting this suggestion would further reduce the reporting burden on a shipping agent, or expedite the FAS review process. In fact, it would place a greater burden on firms which would submit information for such "initial registration," yet never be nominated as a shipping agent. Also, if FAS were to "register" any interested firm, regardless of whether a participant wished to employ the firm, FAS' workload would be increased. Finally, such "registration" could imply endorsement or approval by FAS, which could be misleading to participants. FAS does not investigate firms which wish to act as shipping agents; it simply accepts the nomination of an agent by the participant if the requirements of the regulations are met. The regulations implement the provisions of section 407(b)(4) of the Federal Agriculture Improvement and Reform Act of 1996 regarding conflicts of interest. Based on this evaluation, CCC will adopt the rule as proposed.

### Eligibility of Commodity Suppliers

The proposed rule would have permitted any supplier eligible under the GSM-102 or GSM-103 programs to participate in sales under title I. FAS would not have evaluated the firm's responsibility or its experience as an exporter of U.S. agricultural commodities. After reviewing the potential impact of this change on food aid recipients under the program, we have reinstated the requirement for a separate, but simplified, eligibility determination for title I suppliers. It is crucial for most food aid recipients that suppliers fulfill their contracts without problems or significant delay. Title I shipments are often a key part of the supply pipeline for recipients, which generally are not able to make a prompt commercial purchase should a supplier fail to perform. In addition, if a commodity supplier did not deliver the commodity, the recipient might also be required to pay the full shipping costs

to the contracted vessel ("deadfreight"). By retaining the requirement that FAS evaluate the export experience and financial responsibility of a prospective supplier, we will help protect participants against non-performance.

One comment noted that the IFB requirements for bid and performance bonds have "adequately guaranteed performance by suppliers in the past." It is true that recipients normally require commodity suppliers to submit a bid bond (generally 2% of the value of the offer) and to open a performance bond when they receive a contract. The performance bond is usually 5% of the value of the contract. These bonds provide some protection against an unreliable supplier, but would be insufficient to cover the full cost of "deadfreight," for example. Buyers, of course, have not relied solely on these bonds in the past; FAS has screened out firms which did not demonstrate export experience and financial responsibility. It is not practical for recipients to increase the amount of the bid and performance bonds to cover the maximum costs of a default by the supplier; such bonds would be more expensive for the suppliers, and would increase all commodity costs under the program.

Under Title I, recipients must buy either on the "lowest landed cost" basis (the lowest combination of commodity and freight offered) or on the basis of the lowest priced commodity offered. This helps insure that CCC funds provide as much tonnage as possible, and to give qualified commodity suppliers an equal opportunity to compete. Because of this program requirement, recipients may not simply select the supplier(s) with which they are familiar. It would be inefficient to require each recipient to evaluate the ability of potential U.S. suppliers to perform; some recipients would not be able to conduct such an analysis. Submitting information to each recipient would also increase the workload for suppliers wishing to participate in the program.

In order to reduce the reporting burden for suppliers, we have eliminated the requirement that prospective suppliers provide the name, address and chief executive officers for all branches, affiliates and subsidiaries, and that eligible suppliers keep this information current.

Although the final rule is not as beneficial to suppliers as the proposed rule, it does reduce the reporting burden for suppliers while maintaining an acceptable level of protection for the recipient. As a result, CCC has determined to adopt the provisions in

the final rule regarding eligibility of suppliers.

### Invitations for Bids

One comment asked that the Invitation for Bids ("IFB") specify how the buyer will pay the supplier whenever the buyer requests a supplier to bear a cost not eligible for CCC financing. Although § 17.5(e) provides that the contracts between commodity suppliers and buyers "\* \* \* should stipulate the responsibility of each party for payment of any costs not eligible for financing by CCC" we agree that this information should also be included in the IFB. Sections 17.5(c)(2) and 17.8(b)(1)(iv) have been amended to add this requirement for IFB's for commodity and for ocean transportation.

In this regard, it is important to note that some payments which had been permitted under the existing regulations, but which cannot now be financed by CCC, will be prohibited when this final rule becomes effective. This includes consular fees for legalization of documents, for example, and total brokerage commissions which exceed 2½ percent of the freight. We have added a new paragraph, § 17.6(c)(3), for improved clarity regarding total brokerage commissions. This paragraph is consistent with the regulations governing brokerage commissions for commodities shipped under section 416(b) of the Agricultural Act of 1949 and the Food for Progress Act of 1985 (7 CFR 1499.8(d)). The preamble to the proposed rule discussed the ceiling on brokerage commissions and requested suggestions for other ways to address the general issue of costs which are ineligible for CCC financing. Since no comments were submitted offering alternative procedures, the final rule retains the provisions in the proposed rule.

### Ocean Transportation

A comment asked that we delete the requirement that the vessel owner may claim detention when a required letter of credit is not available at loading (§ 17.8(k)(6)). The comment questioned the appropriateness of a claim for detention in this case since the freight could not be collected until after the vessel arrived at the first discharge port. However, it is very important to the program that the vessel owner have the letter of credit available before loading. This provides assurance of payment when the voyage is completed, reducing the owner's risk and thereby keeping freight costs as low as possible. The comment also noted that the requirement for detention

disadvantaged foreign flag vessels. The regulations apply to freight contracts for voyages for which CCC finances all or part of the costs, whether on U.S.-flag or non-U.S. flag vessels.

Another comment agreed with the proposed change (§ 17.8(b)(2)) which no longer prohibits clarification or submission of certain technical information after opening of ocean transportation offers; the author requested confirmation that this would not be a vehicle through which an offer could be made responsive after it had been submitted. As described in the preamble to the proposed rule, only freight offers which are responsive to the terms of the IFB as of the date and time for receipt of offers could be considered. No information or clarification submitted after that date and time could be used to make the offer responsive. The prohibition against negotiation also remains in the regulations. The change simply acknowledges that it is occasionally necessary to seek factual information after an offer has been submitted, such as the maximum tonnage which can be loaded at a certain port, given existing draft conditions and stowage factors for the commodity in question. Another comment requested that ocean freight be earned (and paid) when the vessel loads, stating that this is the commercial standard. The program operated in this manner before 1960, at which time CCC found it necessary to change freight procedures to protect its interest, so that freight was payable on the vessel's arrival at the first discharge port. An importing country had fixed a vessel which was abandoned by the owner before the vessel departed the load port, but after receipt of freight payment on loading, CCC incurred additional costs and freight charges to ship the cargo on another vessel.

More recent program experience still supports this position. Within the last ten years, several vessels carrying title I cargo sank en route to the discharge port. Under the final rule, the risk of non-performance of the voyage remains on the ocean carrier, subject to a determination of force majeure. The final rule does continue the policy of allowing a supplier to receive freight prior to arrival if the supplier posts acceptable security.

In general, requiring freight to be payable on discharge maximizes the incentive to the supplier of ocean transportation to complete the voyage as contracted. In order to maintain this protection for CCC, and for program recipients, the proposed rule has been adopted as proposed. The requirement

applies, of course, only when CCC finances any part of the ocean freight.

The same comment also requested that we change the method for settlement of demurrage and despatch at the load port. The current procedure was instituted in a final rule published December 7, 1995 (60 FR 62702). This rule provided that demurrage and despatch at load would be settled between the parties which controlled the loading (the supplier of ocean transportation and the commodity supplier.) This change was made to make the program operate closer to commercial practice than in the past, when CCC shared in despatch earnings. It also made title I more consistent with other food aid programs in this regard. Although it is true that no contract exists between the two suppliers, FAS has not heard of serious problems in arranging payment of demurrage and despatch on this basis. We have retained this provision in the final rule, but will review the issue if it appears appropriate based on further experience.

#### *Payment to Suppliers*

Most comments supported the proposal that CCC pay suppliers directly for all amounts which CCC finances, instead of requiring participants to open letters of credit covering these amounts. Two comments asked whether CCC would be able to pay as promptly as a bank does (generally, examining documents within two business days from presentation, with payment no later than one business day following the date documents are found in order.) Another comment asked whether the Uniform Customs and Practices for Documentary Credits ("UCP 500") would be the standard by which CCC would examine documents. CCC's examination of documents will be more extensive than that conducted by banks; it will not be based on UCP 500 but on the "post audit" process now performed by CCC on documents submitted to CCC by banks after they have made payment to suppliers. CCC staff will compare the documents to the documentary requirements in the PA and the IFB, and will check all calculations on the documents to ensure that no mathematical errors have been made. CCC will also review the documents received to ensure there are no discrepancies among the documents. As part of the direct payment process, CCC must also prepare and process the payment document, SF-1166, "Voucher and Schedule of Payments." The CCC review will replace CCC's existing "post audit" of documents and the banks' own review of documents. CCC expects to be able to pay suppliers within a

maximum of seven business days after receipt of all the required documents, if there are no discrepancies. CCC will not disburse any funds to the supplier until all documents are received, audited, and found to be in order.

Therefore, suppliers should take note that they are solely responsible for ensuring that all the proper documents are included in the package submitted to CCC for payment, and that they are completed correctly. This will help CCC pay the suppliers sooner. Section 17.9(a)(3) has been revised to contain a more detailed description of the examination of documents by CCC. In addition, a new § 17.9(a)(4) has been added to reflect the provisions of the Debt Collection Improvement Act of 1996, Pub. L. 104-134, which requires that CCC must issue all payments by electronic transfer. Suppliers must provide CCC with the necessary information to facilitate this procedure.

One comment said that the seller had no assurance of receiving payment without a letter of credit since CCC can alter or revoke the PA. However, § 17.3(d) states that, if the GSM were to "supplement, modify or revoke" a PA, CCC would " \* \* \* reimburse suppliers who would otherwise be entitled to be financed by CCC for costs which were incurred as a result of such action \* \* \* in connection with firm sales or shipping contracts \* \* \*." This long-standing provision remains in the regulations.

The comment added that the proposal overstated the benefits to recipients of the change to direct payment by CCC, in part because the banking fees were actually lower than estimated in the proposed rule. The fees charged by banks related to letters of credit are not public information, but the estimate in the proposed rule was based on comments from program participants, which have paid such fees. The issue is greater than the bank fees, however; participants face the very real potential for significant freight and commodity costs (detention and carrying charges) which are not financed by CCC. These costs must be paid by the participant when loading is delayed because operable letters of credit were not available. If a dispute arises, participants may also be responsible for legal costs.

Finally, this comment stated that banks may be reluctant to issue letters of credit for small amounts of freight not covered by CCC, or may increase their fees to cover costs for these low-revenue transactions. It is possible that some banks may forego this business, or increase their fees slightly, but we do

not anticipate that all banks will decline to participate.

We have evaluated these comments carefully. It is true that suppliers may not be paid by CCC quite as quickly as they were by banks under letters of credit, because of the more detailed document review conducted by CCC, and that this may lead some firms to increase commodity prices slightly under the program, to cover a few days of lost interest. To the extent this occurs, it would mean a very small reduction in the commodity tonnage which could be shipped within the fixed funding provided under a Pub. L. 480, title I agreement. However, we anticipate that the significant cost savings to recipients will clearly outweigh this disadvantage, and the other concerns discussed in this preamble. Recipients must pay bank charges for letters of credit and must pay suppliers if loading is delayed because the letter of credit is not available. (Commodity suppliers receive "carrying charges" in such cases, and suppliers of ocean transportation can collect "detention." One day of "detention" for a U.S.-flag vessel can cost the recipient as much as \$25,000.) As a result, the final rule retains the change to direct payment by CCC. However, we will carefully monitor the impact of this change and will review the decision based on a year's experience.

#### Documentation

A comment requested that weight certificates be issued only by the Federal Grain Inspection Service, USDA ("FGIS") or its cooperators. By law, FGIS must weigh certain commodities which are exported, such as wheat or corn. For other commodities, the program has, for many years, permitted private firms to provide weight certificates. Since including this option is consistent with commercial practice and it gives both buyer and seller more flexibility in contracting under title I, we have determined that the proposed rule will be adopted as published.

Another comment asked whether the "federal appeal inspection certificate" (§ 17.9(c)(5)) were still valid. We have revised this paragraph to reflect the current procedure when a certificate is issued representing an appeal inspection. The same comment noted that a phytosanitary certificate issued by USDA cannot show a number on its face, including the PA number. (§ 17.9(b) requires that the supplier arrange for the PA number to be put on required documents.) The comment explained that the PA number could be placed on a separate sheet of paper

which is stapled to the phytosanitary certificate. CCC will accept this procedure for the phytosanitary certificate, and the provision will be adopted as proposed.

#### List of Subjects in 7 CFR Part 17

Agricultural commodities, Exports, Finance, Maritime carriers.

Accordingly, part 17 of 7 CFR is revised to read as follows:

### PART 17—SALES OF AGRICULTURAL COMMODITIES MADE AVAILABLE UNDER TITLE I OF THE AGRICULTURAL TRADE DEVELOPMENT AND ASSISTANCE ACT OF 1954, AS AMENDED

#### Sec.

- 17.1 General.
- 17.2 Definition of terms.
- 17.3 Purchase authorizations.
- 17.4 Agents of the participant or importer.
- 17.5 Contracts between commodity suppliers and importers.
- 17.6 Discounts, fees, commissions and payments.
- 17.7 Notice of sale procedures.
- 17.8 Ocean transportation.
- 17.9 CCC payment to suppliers.
- 17.10 Refunds and insurance.
- 17.11 Recordkeeping and access to records.

**Authority:** 7 U.S.C. 1701–1704, 1731–1736b, 1736f, 5676; E.O. 12220, 45 FR 44245.

#### § 17.1 General.

(a) *What this part covers.* This part contains the regulations governing the financing of the sale and exportation of agricultural commodities by the Commodity Credit Corporation (CCC), through private trade channels to the maximum extent practicable, under the authority of title I of the Agricultural Trade Development and Assistance Act of 1954, as amended (hereinafter called "the Act").

(b) *Agricultural commodities agreements.* (1) Under the Act, the Government of the United States enters into Agricultural Commodities Agreements with governments of foreign countries or with private entities. These agreements cover financing of the sale and exportation of agricultural commodities, including certain ocean transportation costs.

(2) Agricultural Commodities Agreements may provide that a participant will repay CCC for the financing extended by CCC either in dollars or in local currencies.

(3) A private entity must maintain a bona fide business office in the United States and have a person, principal, or agent on whom service of judicial process may be had in the United States.

(c) *Purchase authorizations.* This part covers, among other things, the issuance by the General Sales Manager of

purchase authorizations which authorize the participant to:

- (1) Purchase agricultural commodities; and
- (2) Procure ocean transportation therefor.

(d) *Financing.* For amounts to be financed by CCC, CCC will pay the supplier of commodity or of ocean transportation in accordance with § 17.9(a)(3). The cost of ocean freight or ocean freight differential will be financed by CCC only when specifically provided for in the purchase authorization.

(e) *Where information is available.* General information about operations under this part is available from the Director, Pub. L. 480 Operations Division, Foreign Agricultural Service, USDA, Washington, D.C. 20250–1033. Information about financing operations under this part, including forms prescribed for use thereunder, is available from the Controller, Commodity Credit Corporation, USDA, 1400 Independence Avenue, SW, Washington, D.C. 20250–0581.

#### § 17.2 Definition of terms.

Terms used in the regulations in this part are defined or identified as follows, subject to amplification in subsequent sections:

*Affiliate and associated company*—any legal entity which owns or controls, or is owned or controlled by, another legal entity. For a corporation, ownership of the voting stock is the controlling criterion. A legal entity is considered to own or control a second legal entity if—

(1) The legal entity owns an interest of 50 percent or more in the second legal entity; or

(2) The legal entity and one or more other legal entities, in which it owns an interest of 50 percent or more, together own an interest of 50 percent or more in the second legal entity; or

(3) The legal entity owns an interest of 50 percent or more in another legal entity which in turn owns an interest of 50 percent or more in the second legal entity.

*CCC*—the Commodity Credit Corporation, USDA.

*Commodity*—an agricultural commodity produced in the United States, or product thereof produced in the United States, as specified in the applicable purchase authorization.

*Controller*—the Controller, Commodity Credit Corporation, or the Controller's designee.

*Copy*—a photocopy or other type of copy of an original document showing all data shown on the original, including signature or the name of the

person signing the original or, if the signature or name is not shown on the copy, a statement that the original was signed.

**Delivery**—the transfer to or for the account of an importer of custody and right of possession of the commodity at U.S. ports or Canadian transshipment points in accordance with the delivery terms of the contract and purchase authorization. For purposes of financing, delivery is deemed to occur as of the on-board date shown on the ocean bill of lading.

**Destination country**—the foreign country to which the commodity is exported.

**Director**—the Director, Pub. L. 480 Operations Division, Foreign Agricultural Service.

**Expediting services**—services provided to the vessel owner at the discharge port in order to facilitate the discharge and sailing of the vessel; this may include assisting with paperwork, obtaining permits and inspections, supervision and consultation.

**FAS**—the Foreign Agricultural Service, USDA.

**FSA**—the Farm Service Agency, USDA.

**FSA Office**—the office designated in the purchase authorization to administer this financing operation on behalf of CCC.

**Finance**—To expend CCC funds, whether or not the participant is required to repay the funds to CCC. For example, this part refers to CCC "financing" both the ocean freight differential, which the participant does not repay, and the commodity cost, which the participant does repay.

**Form CCC-106**—the form entitled "Advice of Vessel Approval."

**Form CCC-329**—the signed original of the form entitled "Supplier's Certificate."

**General Sales Manager and GSM**—the General Sales Manager, FAS, or the General Sales Manager's designee.

**Importer**—the person that contracts with the supplier for the importation of the commodity. The importer may be the participant or any person to which a participant has issued a subauthorization.

**Importing country**—any nation with which an agreement has been signed under the Act.

**Invitation for bids and IFB**—a publicly advertised request for offers.

**Legal entity** includes, but is not limited to, an individual (except that an individual and his or her spouse and their minor children are considered as one legal entity), partnership, association, company, corporation and trust.

**Letter of credit**—an irrevocable commercial letter of credit issued, confirmed, or advised by a banking institution in the United States and payable in U.S. dollars.

**Local currency**—the currency of the importing or destination country.

**Notice of arrival**—a written notice in accordance with § 17.8(g) stating that the vessel has arrived at the first port of discharge.

**Ocean bill of lading**—(1) *In the case of cargo carried on a vessel other than LASH barges:* An "on-board" bill of lading, or a bill of lading with an "on-board" endorsement, which is dated and signed or initialed on behalf of the carrier; or

(2) *In the case of cargo carried in a LASH barge:* (i) For the purpose of financing commodity price, an "on-board" bill of lading showing the date the commodity was loaded on board barges, which is dated and signed or initialed on behalf of the carrier, or a bill of lading or a LASH barge bill of lading with an "on-board barge" endorsement which is dated and signed or initialed on behalf of the carrier.

(ii) For the purpose of financing ocean freight or ocean freight differential, a bill of lading which is dated and signed or initialed on behalf of the carrier indicating that the barge containing the cargo was placed aboard the vessel named in the Form CCC-106 not later than eight running days after the last LASH barge loading date (contract layday) specified in the Form CCC-106. This may be either an "on board" bill of lading or a bill of lading or a LASH barge bill of lading with an "on-board ocean vessel" endorsement.

(3) Documentary requirements for a copy of an "ocean bill of lading" refer to a non-negotiable copy thereof.

**Ocean freight contract**—a charter party or liner booking note.

**Ocean transportation**—interchangeable with the term "ocean freight".

**Ocean transportation brokerage**—services provided by shipping agents related to their engagement to arrange ocean transportation and services provided by ships brokers related to their engagement to arrange employment of vessels.

**Ocean transportation-related services**—furnishing the following services: lightening, stevedoring, and bagging (whether these services are performed at load or discharge), and inland transportation, i.e., transportation from the discharge port to the designated inland point of entry in the destination country, if the discharge port is not located in the destination country.

**Participant**—the collective term used to denote the importing country or the private entity with which an agreement has been negotiated under the Act.

**Person**—an individual or other legal entity.

**Private entity**—the nongovernmental legal entity with which an agreement has been signed under the Act.

**Purchase authorization**—Form FAS-480, "Authorization to Purchase Agricultural Commodities," issued to a participant under this part.

**Purchasing agent**—any person engaged by a participant to procure agricultural commodities.

**Secretary**—the Secretary of Agriculture of the United States, or the Secretary's designee.

**Selling agent**—a representative for the supplier of the commodity, who is not employed by or otherwise connected with the importer or the participant.

**Shipping agent**—any person engaged by a participant to arrange ocean transportation.

**Ships broker**—any person engaged by a supplier of ocean transportation to arrange employment of vessels.

**Supplier**—any person who sells a commodity to an importer under the terms of a purchase authorization, or who sells ocean transportation to an importer or supplier of the commodity under the terms of a purchase authorization.

**USDA**—the U.S. Department of Agriculture.

**United States**—the 50 States, the District of Columbia, and Puerto Rico.

### § 17.3 Purchase authorizations.

(a) **Issuance.** After an agreement is signed, the GSM will issue a purchase authorization to the participant for each commodity included in the agreement.

(b) **Contents.** Each purchase authorization includes the following information:

(1) The commodity to be purchased and specifications, approximate quantity and maximum dollar amount authorized;

(2) Contracting requirements;

(3) The contracting period, during which suppliers and importers must enter into contracts; and the delivery period, during which the commodity must be delivered;

(4) The terms of delivery to the importer;

(5) Documentation required for CCC financing in addition to or in lieu of the documentation specified in § 17.9;

(6) Provisions relating to payment to CCC, if applicable;

(7) The address of the FSA office administering the financing operation on behalf of CCC;

(8) The method of financing provided under the Agricultural Commodities Agreement;

(9) Any provisions relating to financing by CCC in addition to or in lieu of those specified in this part;

(10) Authorization to procure ocean transportation, and provisions relating to the financing of ocean freight or ocean freight differential, as applicable;

(11) Any other provisions considered necessary by the General Sales Manager.

(c) *Applicability of this part.* In addition to the provisions of a particular purchase authorization, each purchase authorization, unless otherwise provided, is subject to the provisions of this part to the same extent as if the provisions were fully set forth in the purchase authorization.

(d) *Modification or revocation.* The General Sales Manager reserves the right at any time for any reason or cause whatsoever to supplement, modify or revoke any purchase authorization, including the termination of deliveries, if it is determined to be in the interest of the U.S. Government. CCC shall reimburse suppliers who would otherwise be entitled to be financed by CCC for costs which were incurred as a result of such action by the GSM in connection with firm sales or shipping contracts, and which were not otherwise recovered by the supplier after a reasonable effort to minimize such costs: *Provided, however,* That such reimbursement shall not be made to a supplier if the GSM determines that the GSM's action was taken because the supplier failed to comply with the requirements of the regulations in this part or the applicable purchase authorization; *Provided further,* That reimbursement to suppliers of ocean transportation shall not exceed the ocean freight differential when the purchase authorization provides only for financing the differential.

(e) *Subauthorizations.* The participant may issue subauthorizations to importers consistent with the terms of the applicable purchase authorization. The participant, in subauthorizing, shall specify to importers all the provisions of the applicable purchase authorization which apply to the subauthorization.

(f) *Cotton textiles.* (1) Except as provided in paragraph (f)(2) of this section, financing of textiles under this part is limited to cotton yarns and fabrics processed up to and including the dyed and printed state, and preshrinking. Any processing of such yarns and fabrics beyond this stage will be at the expense of the participant.

(2) Purchase authorizations may permit cotton textiles processed beyond the stage described in paragraph (f)(1) of

this section to be purchased, but the maximum financing by CCC is limited to the equivalent value of the cotton yarns and fabrics described in paragraph (f)(1) of this section, contained in the textiles, plus eligible ocean transportation costs.

(3) Financing is available only for textiles manufactured entirely of U.S. cotton in the United States.

#### § 17.4 Agents of the participant or importer.

(a) *General.* (1) A participant or importer is not required to use a purchasing agent or shipping agent, or employ the services of any other agent, broker, consultant, or other representative (hereafter "agent") in connection with arranging the purchase of agricultural commodities under title I of the Act and arranging ocean transportation for such commodities. However, if an agent is used, the participant shall submit a written nomination of the agent to the Deputy Administrator, Export Credits, FAS, along with a copy of the proposed agreement between the participant or importer and such agent. The written nomination shall also specify the period of time to be covered by the nomination. A person may not act as agent for a participant or importer unless the Deputy Administrator, Export Credits, FAS, has provided a written statement that the nomination is accepted in accordance with the provisions of this section.

(2) See § 17.6(c) regarding commissions, fees, or other compensation of any kind to agents of a participant or importer.

(3) A freight agent employed by the Agency for International Development under titles II and III is not eligible to act as an agent for the participant or importer during the period of such employment. A subcontractor of such freight agent is not eligible to act as an agent for the participant or importer during the period of its subcontract.

(b) *Affiliate defined.* For purposes of this section, the term affiliate has the meaning provided in § 17.2 and, in addition, persons will also be considered to be affiliates if any of the following conditions are met:

(1) There are any common officers or directors.

(2) There is any investment by eligible commodity suppliers, selling agents, or persons engaged in furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether or not any part of the

ocean transportation is financed by the U.S. Government, or by agents of such persons, or their officers or directors, in the agent of the participant or importer.

(3) There is any investment by the agent of the participant or importer, or its officers or directors, in approved commodity suppliers; selling agents; or persons engaged in furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether or not any part of the ocean transportation is financed by the U.S. Government, or in agents of such persons. These conditions include those cases in which investment has been concealed by the utilization of any scheme or device to circumvent the purposes of this section but does not include investment in any mutual fund.

(c) *Information to be furnished.* A person nominated to act as an agent of the participant or importer, and any independent contractor that may be hired by such person to perform functions of a shipping agent, shall furnish to the Deputy Administrator, Export Credits, FAS, the following information or documentation as may be applicable:

(1) The names of all incorporators;

(2) The names and titles of all officers and directors;

(3) The names of all affiliates, including the names and titles of all officers and directors of each affiliate, and a description of the type of business in which the affiliate is engaged;

(4) The names and proportionate share interest of all stockholders;

(5) If beneficial interest in stock is held by other than the named shareholders, the names of the holders of the beneficial interest and the proportionate share of each;

(6) The amount of the subscribed capital;

(7) For USDA acceptance of a nomination covering services provided during each U.S. fiscal year (October 11–September 30), a written statement signed by such person:

(i) Certifying that, during the U.S. fiscal year covered by USDA's acceptance of the nomination, the person has not engaged in, and will not engage in, supplying commodities under any title of the Act or the Food for Progress Act of 1985 or furnishing ocean transportation or ocean transportation-related services for commodities provided under any title of the Act, section 416(b) of the Agricultural Act of 1949, or the Food for Progress Act of 1985, whether any part of the ocean transportation is financed

by the U.S. Government; and that the person has not served and will not serve as an agent of firms engaged in providing such commodities, ocean transportation and ocean transportation-related services;

(ii) Certifying that, for ocean transportation brokerage services provided during the U.S. fiscal year covered by USDA's acceptance of the nomination, the person has not shared and will not share freight commissions with the participant, the importer, or any agent of the participant or the importer, whether CCC finances any part of the ocean freight. CCC will consider as sharing a commission a situation where the agent forgoes part or all of a commission and the supplier of ocean transportation pays a commission directly to the participant, the importer, or any other person on behalf of the participant or the importer; and

(iii) Undertaking that, during the U.S. fiscal year covered by USDA's acceptance of the nomination, affiliates of such person have not engaged in and will not engage in the activities or actions prohibited in this paragraph (c)(7).

(8) A certification that neither the person nor any affiliates has arranged to give or receive any payment, kickback, or illegal benefit in connection with the person's selection as agent of the participant or importer.

(d) *USDA acceptance.* (1) USDA will consider accepting the nomination of a person to act as an agent of the participant or importer when the documents required to be submitted by this section are received by the Deputy Administrator, Export Credits, FAS.

(2) USDA's acceptance of such nomination shall remain in effect for the period of time requested by the participant or such shorter period as the Deputy Administrator, Export Credits, FAS, may determine. USDA will withdraw such acceptance if the agent of the participant or importer, or any of the affiliates of such agent, violates the certifications or undertakings made pursuant to paragraphs (c) (7) and (8) of this section.

(3) A person is required to submit the information and documentation required by § 17.4(c) to support the person's first nomination to act as an agent of any participant or importer for each fiscal year. For subsequent nominations covering the same fiscal year, the person must provide a written certification that the information and documentation provided earlier are still accurate and complete, or must provide the details of any changes to previously submitted information.

(e) *Notification.* The Deputy Administrator, Export Credits, FAS, shall promptly notify persons nominated as agents of the participant or importer, of the determination or of the need for further inquiry, and shall provide a written response within 30 calendar days of receipt of all the required documents. If USDA will not accept the nomination, the notification shall state the reasons therefor. The determination of the Deputy Administrator, Export Credits, FAS, is effective immediately and continues in effect pending the result of any appeal to the General Sales Manager.

(f) *Non-acceptance or withdrawal.* (1) If USDA does not accept the nomination of a person, or if acceptance has been withdrawn pursuant to the provisions of this section, the person may, within 30 calendar days, present to the General Sales Manager, orally or in writing, any reasons as to why such action should not stand. Nothing in this paragraph shall be construed as to prohibit a person whose nomination has not been accepted or whose acceptance has been withdrawn by USDA from being nominated at a later time.

(2) If, in the procurement of commodities made available under title I, Pub. L. 480, a participant or importer uses an agent whose nomination has not been accepted in writing by the Deputy Administrator, Export Credits, FAS, USDA may withhold sales approval.

(3) If, in the shipping of commodities made available under title I, Pub. L. 480, a participant or importer uses an agent whose nomination has not been accepted in writing by the Deputy Administrator, Export Credits, FAS, USDA may withhold vessel approval or may deduct from the ocean freight differential to be paid, the amount of any commission to the agent in connection with the shipment.

(g) *No competitive advantage.* A shipping agent may not take any action which would give a competitive advantage to any supplier of commodities or ocean transportation. This includes, but is not limited to, providing advance notice of IFB's or amendments, or selectively enforcing IFB or contract requirements.

#### **§ 17.5 Contracts between commodity suppliers and importers.**

(a) *Commodity suppliers and selling agents.* (1) Commodity suppliers must be determined to be eligible under the Pub. L. 480, title I program in order for their contracts to be eligible for CCC financing. A prospective commodity supplier must be engaged in the business of selling agricultural commodities for export from the United

States. The commodity supplier must maintain a bona fide business office in the United States, and must have a person, principal or agent on whom service of judicial process may be had in the United States.

(2) Persons who wish to participate as commodity suppliers shall submit the following information to the Foreign Agricultural Service, Stop 1033, USDA, 1400 Independence Ave., SW, Washington, D.C. 20250-1033:

(i) A current financial statement of the prospective supplier, preferably an audited statement, as evidence of financial responsibility. Submission of a letter of reference from a bank is also encouraged.

(ii) A statement containing general background information about the firm, including the names and titles of the chief executive officers and a description of the firm's experience as an exporter of U.S. agricultural commodities. Copies of bills of lading supporting this statement are also requested.

(iii) Any other information requested relating to whether the prospective supplier is responsible and is able to perform its obligations under this part and the purchase authorization.

(3) If, at the time the commodity supplier reports the sale it is determined that an agent employed or engaged by a commodity supplier to obtain a contract is not a selling agent as defined in § 17.2, the sale will not be eligible for financing.

(b) *Eligibility for financing.* To be eligible for financing, commodity contracts must comply with the following requirements unless otherwise specified in the purchase authorization.

(1) Commodity contracts between suppliers and importers are considered to be conditioned on the approval by USDA of the contract price; conformance of the sale to the provisions of the purchase authorization; responsiveness of the offer to IFB terms; and compliance by the supplier and the selling agent, if any, with paragraph (a) of this section.

(2) Importers and suppliers must enter into contracts within the contracting period specified in the purchase authorization. The contracts must provide for deliveries to the importer in accordance with the delivery terms and during the delivery period specified in the purchase authorization, or any amendment or modification thereto.

(3) Contracts for a commodity, under a purchase authorization which limits delivery terms to f.o.b. or f.a.s., must be separate and apart from the contracts for ocean transportation of the commodity.

(4) The supplier's sales price may not exceed the prevailing range of export market prices as applied to the terms of sale at the time of sale, as determined by USDA. The "time of sale" is the date and time specified in the IFB for receipt of offers; or the date of the contract amendment if the amendment affects the sale price, as determined by USDA. The contract price may not be on a cost plus a percentage-of-cost basis.

(c) *Contracting procedures.* (1) *Purchasing—general*—(i) Importers must purchase commodities on the basis of IFB's.

(ii) The participant shall maintain a record of all offers received from suppliers until the expiration of three years after final payment under contracts awarded under the purchase authorization. The GSM may examine these records or request specific information in connection with the offers.

(2) *Invitations for bids.* The following conditions shall apply on all purchases of commodities on the basis of IFB's:

(i) The General Sales Manager must approve the terms of the IFB before it is issued by the importer.

(ii) The importer shall issue the IFB in the United States and shall open all offers in public in the United States at the time and place specified in the IFB.

(iii) The IFB must permit submission of offers from all suppliers who meet the requirements of this subpart.

(iv) The IFB may not preclude offers for shipment from any United States port(s) unless the purchase authorization provides for exportation only from certain ports.

(v) The IFB may not establish minimum quantities to be offered or which will be considered.

(vi) The IFB must stipulate the responsibility for each party for payment of any costs not eligible for financing by CCC.

(vii) The IFB must be in compliance with this part, the purchase authorization, and sound commercial standards.

(3) *Contract awards.* (i) The importer shall consider only offers which are responsive to the IFB and shall make awards either on the basis of the lowest commodity price(s) offered or on the basis of lowest landed cost. However, when vessels offered under the flag of the participant, the importing country or the destination country; or vessels controlled by the participant, the importing country or the destination country are to be used, the participant must purchase commodities for shipment on such vessels only on the basis of the lowest commodity price(s)

offered. This limitation may, however, be waived by the GSM:

(A) When the lowest commodity price(s) offered are in locations where vessels cannot reasonably be made available without a substantial increase in freight costs to the participant;

(B) For small quantities offered at additional loading points (in aggregate not more than 15 percent of the total tonnage offered by a vessel); or

(C) Where this limitation would conflict with the purposes of the program.

(ii) For purposes of this section, "lowest commodity price(s)" means the lowest commodity price(s) offered for loading onto the type of vessel (dry bulk carrier, tanker, etc.) to be utilized to carry the commodity purchased.

(iii) For purposes of this section, "lowest landed cost" means the combination of commodity price and ocean freight rate resulting in the lowest total cost to deliver the commodity to the importing country, considering the quantity which must be shipped on privately owned U.S.-flag commercial vessels, as determined by the Director. Lowest landed cost may be defined on either a foreign flag or U.S. flag basis. Awards may not be made on the lowest landed cost basis unless IFB's are issued for commodity and ocean freight so that all commodity and ocean freight offers are reviewed simultaneously.

(iv) Participants are encouraged to purchase commodities on the basis of lowest landed cost when U.S. flag vessels are to be used. If such commodity purchases are not made on the basis of lowest landed cost (U.S. flag), ocean freight differential payments will nonetheless be calculated on the rates of U.S. flag vessels which would represent the lowest landed cost.

(v) Announcement of awards shall be made in the United States. The importer shall promptly submit to the Director copies of all offers received with a copy of the IFB which was issued. No sale can be approved for financing until this information has been received by FAS. The decision of the GSM shall be final regarding the responsiveness of offers to IFB terms in the awarding of contracts.

(d) *Contract quantity eligible for financing.* The quantity eligible for financing in the contract between the supplier and the importer may not exceed that quantity approved by the Pub. L. 480 Operations Division, FAS, including any approved contract tolerance.

(e) *Contract disputes.* Contracts between suppliers and importers should stipulate the responsibility of each party for payment of any costs not eligible for financing by CCC. Questions as to

payment of ineligible costs should be resolved between the contracting parties.

(f) *Contract provisions.* Each contract entered into for financing under this part is deemed to include all terms and conditions required by the regulations in this part.

(g) *Export Trade Act (Webb-Pomerene Law).* A supplier who is a member of a Webb-Pomerene association and who enters into contracts with importers as a member of such an association shall so indicate in a statement on, or attached to, the copy of the supplier's detailed invoice referred to in § 17.9(c)(2).

#### § 17.6 Discounts, fees, commissions and payments.

For purposes of this section, the term "payment" means a commission, fee or other compensation of any kind. The term "other compensation of any kind" includes anything given in return for any consideration, services, or benefits received or to be received.

(a) *Discounts.* If a contract provides for one or more discounts (including but not limited to trade or quantity discounts and discounts for prompt payment) whether expressed as such or as "commissions" to the importer, CCC will only pay the invoice amount after the discount (supplier's contracted price less all discounts).

(b) *Selling agents.* (1) A supplier may not make a payment to a selling agent employed or engaged by the supplier to obtain a contract. This prohibition applies to any payment to a person who has acted as a selling agent to obtain a contract even though the payment may be for services performed that are not themselves services to obtain a contract.

(2) A person is deemed to act "to obtain a contract" if the person acts on behalf of a commodity supplier to:

(i) Influence a buyer to award a contract to the supplier;

(ii) Give the supplier a competitive advantage in relation to other potential suppliers; or

(iii) Influence CCC to approve a contract for financing under this part.

(3) CCC will not consider acts which are purely ministerial in nature and do not require the exercise of personal influence, judgment, or discretion (such as attending bid openings or presenting offers at bid openings), or services to implement a contract after it has been entered into by the parties (such as handling documentation problems or contract disputes), as acts to obtain a contract.

(c) *Other prohibitions.* (1) Suppliers of commodities or ocean transportation may not:

(i) Pay a commission to the participant or importer; to any agency, including an agency of the government of the importing country or the destination country; or to a corporation owned or controlled by the participant or the government of the importing country or the destination country.

(ii) Pay a commission to any affiliate of the participant, if the participant is a private entity;

(iii) Make any payment to an agent of the participant or importer, in the person's capacity as such agent, other than ocean transportation brokerage commissions.

(iv) Pay an address commission or payment.

(2) For ocean transportation, in addition to this paragraph, see also § 17.8(j).

(3) When any portion of the ocean freight is financed by CCC, total ocean transportation brokerage commissions earned on U.S. and non-U.S.-flag bookings by all parties arranging vessel fixtures shall not exceed 2½ percent of the total freight costs.

(4) If a payment is made in violation of this section, CCC may demand dollar refund of the entire amount financed by CCC under the contract.

#### § 17.7 Notice of sale procedures.

(a) *Telephonic notice of sale.* The supplier shall, immediately upon making a firm sale, telephone a notice of sale to Pub L. 480 Operations Division, FAS. A sale is considered firm when the supplier has been notified by the importer of an award, even though the contract is conditioned on approval by FAS (see § 17.5(b)(1).) If the supplier fails to furnish a notice of sale within 3 working days after the date of sale, CCC has the right to refuse to finance the sale.

(b) *Sale approval.* (1) Pub. L. 480 Operations Division will notify the supplier by telephone of approval of the notice of sale.

(2) The supplier will prepare Form FAS-359, "Declaration of Sale," and submit it to Pub. L. 480 Operations Division promptly as soon as FAS has provided the CCC Registration Number to the supplier. The supplier or the supplier's authorized representative must sign the form.

(3) Each Form FAS-359 shall cover only a single sale contract. If a sale is made under two or more purchase authorizations, the supplier will prepare separate forms for each purchase authorization.

(4) If any correction is needed to the Form FAS-359, the supplier must immediately notify FAS. If a contract is amended, the supplier should present

the original Form FAS-359 for payment along with a copy of the written USDA approval of the contract amendment.

(c) *Sale disapproval.* (1) Pub. L. 480 Operations Division, FAS, will notify the supplier by telephone when a sale is disapproved for financing. The related contract between the supplier and importer shall, for purposes of financing, be considered null and void.

(2) On receipt of a notice of disapproval, the supplier shall promptly notify the importer.

(d) *Contract delivery period.* Price approval is limited to exports made during the delivery period stated in the notice of sale or any contract amendment approved by the Pub. L. 480 Operations Division, FAS. If the supplier cannot complete delivery by the terminal delivery date of the contract delivery period, the supplier and the participant or importer shall submit a notice of contract amendment as provided in paragraph (e) of this section. If the supplier fails to comply, § 17.10(d) shall apply.

(e) *Contract amendments.* (1) The supplier and the participant or importer shall each submit a written notice of each contract amendment to the Director immediately after the amendment to the contract is made. This includes not only any change in the contract delivery period or any other terms and conditions of the contract as provided in the information given in the original notice of sale or any amendment thereto, but also any change in any other terms and conditions of the contract.

(2) The notice of contract amendment must contain the following:

(i) A request that USDA approve an amendment to the specifically identified sale contract between (the participant or importer) and (the commodity supplier).

(ii) A statement of what the amendment consists of (as, extension of delivery period through (date)) and a detailed explanation of the reasons for the amendment.

(iii) A statement that the contract amendment has been agreed to by both buyer and seller.

(3) Pub. Law 480 Operations Division, FAS, will notify the supplier as to whether the amendment is approved or disapproved.

(4) The supplier shall furnish a copy of the USDA approval of the amendment with other documentation submitted to obtain payment.

(5) If the supplier fails to furnish notice of a contract amendment to Pub. L. 480 Operations Division, FAS, within 3 working days after the date of such amendment, CCC has the right to refuse

to finance the sale or any portion of the sale.

(6) Any amendment must be consistent with the provisions of the purchase authorization and this part and must otherwise be acceptable to Pub. L. 480 Operations Division, FAS.

#### § 17.8 Ocean transportation.

(a) *General.* (1) This section applies to the financing of ocean freight or ocean freight differential. Ocean freight will be financed by CCC only to the extent specifically provided for in the purchase authorization. The purchase authorization may provide requirements in addition to or in lieu of those specified in this section.

(2) The supplier of ocean transportation must be engaged in the business of furnishing ocean transportation from the United States and must have a person, principal or agent, on whom service of judicial process may be had in the United States.

(3) The quantity of the commodity which must be shipped on privately owned U.S.-flag commercial vessels will be determined by the Director.

(4) The supplier of ocean transportation shall release copies of the ocean bills of lading to the supplier of the commodity promptly upon completion of loading of the vessel.

(5) When CCC finances any part of the ocean freight or the ocean freight differential, the participant must open an operable irrevocable letter of credit for the portion of the ocean freight not financed by CCC. All banking institution charges, such as commissions, expenses, etc., are for the account of the participant. The amount of the letter of credit shall be computed using the information provided in the Form CCC-106. The letter of credit shall provide for sight payment or acceptance of a draft, payable in U.S. dollars, on the basis of the quantities specified in the applicable ocean freight contract. If the supplier of ocean transportation accepts the commodity before receipt of an acceptable letter of credit from a bank, the supplier takes such action at its own risk. This action in itself does not affect eligibility for CCC financing.

(b) *Contracting procedures—(1) Invitations for Bids (IFB's)*—(i) Public freight "Invitations for Bids" are required in the solicitation of freight offers from all U.S. and non-U.S. flag vessels when CCC is financing any portion of the ocean freight.

(ii) For non-U.S. flag vessels when CCC is not financing any portion of the ocean freight, public freight IFB's are also required unless otherwise authorized by the Director, or unless the participant requires the use of vessels

under its flag, the flag of the destination country, or other non-U.S. flag vessels under its control. Vessels considered to be under the control of the participant or the destination country include vessels under time charters, bare boat charters, consecutive voyage charters, or other contractual arrangements for the carriage of commodities which provide guaranteed access to vessels.

(iii) Prior to release to the trade, all freight IFB's must be submitted to the Director for approval. Freight IFB's must be issued by means of Bridge News, New York, plus at least one other means of communication.

(iv) All freight IFB's must:

(A) Specify a closing time for the receipt of offers and state that late offers will not be considered;

(B) Provide that offers are required to have a canceling date no later than the last contract layday specified in the IFB;

(C) Provide the same deadline for receipt of offers from both U.S. flag vessels and non-U.S. flag vessels;

(D) Stipulate the responsibility for each party for payment of any costs not eligible for financing by CCC (in the IFB or the pro forma charter party).

(2) *Competitive bidding.* When CCC is financing any portion of the freight, all offers shall be opened in public in the United States at the time and place specified in the IFB. Offers shall be opened prior to receipt of offers for the sale of commodities as the Director determines appropriate. Only offers which are responsive to the IFB may be considered, and no negotiation shall be permitted.

(3) *Records of offers.* Copies of all offers received must be promptly furnished to the Director, who may require the participant, or its shipping agent, to submit a written certification to the GSM that all offers received (with the times of receipt designated thereon) were transmitted to the Department. For purposes of this paragraph "time of receipt" shall be the time a hand-carried offer or a mailed offer was received at the designated location for presentation or, if transmitted electronically, the time the offer was received, as supported by evidence satisfactory to the Director.

(4) *Re-tenders.* The Director may permit or require a participant to refuse any and all bids, and in such case a participant may conduct a re-tender with the approval of the Director. The Director shall not approve or require freight re-tenders unless they will increase the likelihood of meeting U.S. flag cargo preference requirements, will permit the desired quantity to be shipped, will likely result in reduced CCC expenditures, or are otherwise

determined to be in the best interest of the program.

(c) *Request for vessel approval.* The pertinent terms of all proposed charters and all proposed liner bookings, regardless of whether any portion of ocean freight is financed by CCC, must be submitted to the Director for review and approval before fixture of the vessel. Tentative advance vessel approvals may be obtained by telephone provided Form CCC-105, "Ocean Shipment Data—Pub. L. 480 (Request for Vessel Approval)", is furnished promptly confirming the information supplied by telephone. The Form CCC-105 shall be submitted in duplicate to the Director.

(d) *Advice of vessel approval.* (1) USDA will give written approval of charters and liner bookings on Form CCC-106, "Advice of Vessel Approval." The Form CCC-106 will state whether CCC will finance any part of the ocean freight. For f.a.s. or f.o.b. shipments, CCC will issue a signed original of Form CCC-106 to the ocean carrier when CCC finances any part of the ocean freight. For c.& f. or c.i.f. shipments, CCC will issue Form CCC-106 to the supplier of commodity.

(2) If CCC agrees to finance any portion of the ocean freight, the participant or its agent shall forward a copy of the ocean freight contract immediately after execution to the Director for review and approval prior to issuance of Form CCC-106.

(3) CCC may also require the supplier of ocean transportation to submit copies of lightening, stevedoring, or bagging contracts for any voyage for which CCC finances ocean freight or ocean freight differential.

(e) *Special charter party provisions required when any part of ocean freight is financed by CCC.* This paragraph applies when CCC finances any part of the ocean freight for commodities booked on charter terms. In the event of any conflict between the provisions of the regulations in this part and the charter party or ocean bills of lading issued pursuant thereto, the provisions of the regulations in this part shall prevail. The charter party shall contain or, for the purpose of financing pursuant to the regulations in this part, be deemed to contain the following provisions:

(1) That if there is any failure on the part of the supplier of ocean transportation to perform the charter party after the vessel has tendered at the loading port, the charterer shall be entitled to incur all expenses which in the judgment of the General Sales Manager are required to enable the vessel to carry out her obligations under

the charter party including, but not limited to, expenses for lifting any liens asserted against the vessel.

(2) That, notwithstanding any prior assignments of freight made by the owner or operator, the expenses authorized in paragraph (e)(1) of this section may be deducted from the freight earned under the charter party.

(3) That ocean freight is earned and that 100% thereof is payable by the charterers when the vessel and cargo arrive at the first port of discharge, subject to paragraph (e)(4) of this section, and to the further condition that if a force majeure as described in paragraph (l)(1) of this section results in the loss of part of the vessel's cargo, 100% of the ocean freight is payable on the part so lost. This provision does not relieve the carrier of the obligation to carry to other points of discharge if so required by the charter party.

(4) That if a force majeure as described in paragraph (l)(1) of this section prevents the vessel's arrival at the first port of discharge, the freight shall be payable by the charterer at the time the General Sales Manager determines that such force majeure was the cause of nonarrival.

(5) That laydays are non-reversible.

(6) That in a dispute involving any rights and obligations of CCC, including rights and obligations as successor or assignee, which cannot be settled by agreement, the dispute shall not be subject to arbitration.

(f) *Special charter party information required when any part of ocean freight is financed by CCC.* When CCC finances any part of the ocean freight for commodities booked on charter terms, the charter party shall contain the following information:

(1) The name of each party participating in the ocean freight brokerage commission, if any, and the percentage thereof payable to each party;

(2) The name of the vessel and the name of the substitute vessel, if any.

(g) *Notice of arrival.* Each Form CCC-106 will indicate whether a notice of arrival is required. A notice of arrival, when required, must be furnished promptly by the participant or its designated agent or other source acceptable to CCC (excluding the carrier or its agent) and must include the name of the vessel, the purchase authorization number, the first port of discharge, and the date of arrival. The notice of arrival of the vessel also constitutes prima facie evidence of arrival of the cargo.

(h) *Foreign flag vessels.* The cost of ocean transportation will be financed by CCC on non-U.S. flag vessels only when, and to the extent, specifically provided

in the applicable purchase authorization.

(i) *U.S.-flag vessels.* When a commodity is required to be shipped on a privately owned U.S.-flag commercial vessel, Form CCC-106 will set forth:

(1) The rate of the ocean freight differential, if any, which the Director determines to exist between the prevailing foreign-flag vessel rate and the U.S.-flag vessel rate; and

(2) The approximate tonnage for which CCC will authorize reimbursement of ocean freight or ocean freight differential, as appropriate.

(j) *Items not eligible for financing by CCC.* The following costs will not be financed by CCC, either separately or as part of the commodity contract price:

(1) Loading, trimming, and other related shipping expenses unless included in the ocean freight rate;

(2) Discharge costs unless included in the ocean freight rate;

(3) The cost of "dead freight";

(4) Cargo dues and taxes assessed by the importing or recipient country;

(5) Surcharges assessed by steamship conferences or carriers, unless specifically authorized by the Director;

(6) General average contributions;

(7) Stevedoring overtime and vessel crew overtime;

(8) Ship's disbursements;

(9) Any payments prohibited in § 17.6 (b) and (c); and

(10) Detention.

(k) *General financing provisions.*

When any part of ocean freight will be financed either separately or as part of the commodity contract price, the following shall apply:

(1) Ocean freight contracts must show the ocean freight rate from one loading port to one discharge port, and may provide for an increase in rate for an additional port of loading or discharge, or other option. CCC, however, will finance initially the lowest such rate or OFD, as appropriate. Increased amounts due because of the exercise of such option will be financed only after receipt of an ocean bill of lading or other evidence showing that the option was exercised.

(2) In the case of transshipment to a foreign flag vessel, CCC will finance the ocean freight or OFD, as appropriate, only to the point of transshipment, at a rate determined by the GSM, and CCC will not finance any part of the ocean freight beyond the point of transshipment unless specifically approved by the GSM. If the commodity was transported from a U.S. port and was transshipped at another U.S. port, CCC will not finance, without prior approval of the GSM, any part of the ocean freight incurred before transshipment.

(3) The ocean freight rate eligible for CCC financing and the rate used for the U.S.-flag vessel in calculating ocean freight differential shall not exceed the following rates for the category of the vessel concerned:

(i) For commodities covered by published tariff rates—the published conference contract rate;

(ii) For other commodities—the market rate prevailing at the time of request for approval as determined by the Director, but in any event not in excess of rates charged other shippers (irrespective of booking dates) for like commodities on the voyage concerned.

(4) Payment will be made for ocean freight or OFD, as appropriate, from loading points to discharge points at rates approved by the Director on Form CCC-106 in conformity with paragraph (k)(3) of this section.

(5) Freight for a vessel designated on Form CCC-106 as a U.S. flag vessel shall not be eligible for financing unless such vessel complies with the provisions of Pub. L. 87-266.

(6) Ocean freight contracts must specify that the participant shall be liable for detention of the vessel for loading delays attributable solely to the decision of the supplier of ocean transportation not to commence loading because of the failure of the participant to establish an ocean freight letter of credit in accordance with paragraph (a)(5) of this section. However, ocean freight contracts may not contain a specified detention rate. The ocean transportation supplier shall be entitled to reimbursement for detention costs for all time so lost, for each calendar day or any part of the calendar day, including Saturdays, Sundays and holidays. The period of such delay shall not commence earlier than upon presentation of the vessel at the designated loading port within the laydays specified in the ocean freight contract, and upon notification of the vessel's readiness to load in accordance with the terms of the applicable ocean freight contract. The period of such delay shall end at the time that operable irrevocable letters of credit have been established for the applicable ocean freight or the time the vessel begins loading, whichever is earlier. Time calculated as detention shall not count as laytime. Reimbursement for such detention shall be payable no later than upon the vessel's arrival at the first port of discharge.

(l) *Force majeure.* (1) The GSM will waive the requirement for the notice of arrival required by Form CCC-106 by a written notice to the supplier of ocean transportation on the receipt of evidence satisfactory to the General Sales

Manager that the vessel is lost or unable to proceed to destination after completion of loading as a result of one or more of the following causes: Damage caused by perils of the sea or other waters; collisions; wrecks; stranding without the fault of the carrier; jettison; fire from any cause; Act of God; public enemies or pirates; arrest or restraint of princes, rulers or peoples without the fault of the supplier of ocean transportation; wars; public disorders; captures; or detention by public authority in the interest of public safety. The supplier may substitute such waiver for the notice of arrival.

(2) The determination of a force majeure by the GSM shall not relieve the participant from its obligation under the Agricultural Commodities Agreement to pay CCC, when due, the dollar amount of ocean freight, plus interest (exclusive of ocean freight differential), financed by CCC.

(m) *Demurrage/despatch.* CCC will not finance demurrage and CCC will not share in despatch earnings. Owners and commodity suppliers will settle laytime accounts at load port(s) and owners and charterers will settle laytime accounts at discharge port(s). Under no circumstances shall CCC be responsible for resolving disputes involving calculation of laytime or the payment of demurrage or despatch.

(n) *Ocean freight included in the commodity contract price.* For cost and freight or c.i.f. contracts the ocean freight, or the ocean freight differential, as appropriate, will be financed only to the extent specifically provided in the applicable purchase authorization.

(o) *Separate freight contracts.* Contracts for ocean transportation, under a purchase authorization which limits delivery terms to f.o.b. or f.a.s., must be separate and apart from the contracts for the commodity.

#### § 17.9 CCC payment to suppliers.

(a) *General.* (1) The supplier shall request payment from CCC for the amount of the commodity price or the ocean freight or ocean freight differential to be financed by CCC.

(2) The supplier shall support such a request for payment by presenting to CCC the documents required by this section, the purchase authorization, and the IFB, unless such documents were previously submitted to CCC. Such documents, however, need not be submitted when and to the extent that the Controller determines that the intended purpose of a document is served by documents otherwise available to or under the control of CCC or by alternate documents specified in such determination.

(3) CCC will examine each document to ascertain that it is in accordance with this part, the purchase authorization, and the IFB. CCC will audit all the required documents to ensure accuracy, completeness, and consistency. When CCC has determined that all required documents have been submitted and that the documents are acceptable for payment, CCC will pay the supplier for the commodity price or the ocean freight or ocean freight differential to be financed by CCC which is supported by the documents.

(4) CCC is required to issue all payments by electronic transfer. Each supplier submitting documents to CCC for payment must provide the name of the company, the bank ABA number to which payment is to be made, the account number for the company at the bank, the company's Taxpayer Identification Number, and the type of account being used.

(b) *General documentation requirements.* The supplier must put the appropriate purchase authorization number on all required documents which are prepared under the supplier's control, and should arrange for the appropriate purchase authorization number to be put on all other required documents at the time of their preparation.

(c) *Documents required for payment—commodity.* The general provisions relating to such documents are as follows. Additional requirements for payment to commodity suppliers for c.& f. or c.i.f. sales are contained in paragraph (c)(8) of this section.

(1) *Supplier's certificate.* A signed original of Form CCC-329 "Supplier's Certificate" from the commodity supplier covering the net invoice price for the commodity.

(2) *Supplier's detailed invoice.* Two copies of the supplier's detailed invoice showing quantity, description, contracted price, net total invoice price expressed in dollars, the amount for which financing is requested from CCC, the amount not eligible for financing by CCC, and basis of delivery of the commodity (e.g., f.o.b. vessel). In arriving at the net invoice price there shall be deducted:

(i) All discounts from the supplier's contracted price through payments, credits, or other allowances made or to be made to the importer, the importer's agent or consignee;

(ii) All purchasing agents' commissions;

(iii) All other amounts not eligible for financing.

(3) *Additional payment.* A request for an additional payment submitted for a transaction for which all or part of the

required documents have been previously submitted to CCC shall be supported by a Form CCC-329 "Supplier's Certificate" and the supplier's detailed invoice, covering the additional amount requested. The supplier's invoice must show the date, serial number and the amount of the original invoice and the basis for the additional amount claimed.

(4) *Weight certificate.* The weight certificate shall be issued by or on authority of a State or other governmental weighing department, Chamber of Commerce, Board of Trade, Grain Exchange, or other independent organization or firm providing public weighing services. Such organization or firm must have:

(i) Qualified, impartial, paid employees who are stationed at the port facility or, if authorized under the applicable purchase authorization, other facility where weights customarily are determined, one of whom performed the weighing covered by the certificate; or

(ii) Qualified, independent, impartial, supervised, weighmasters stationed at the port facility or, if authorized under the applicable purchase authorization, other facility where weights are customarily determined, one of whom supervised the employee of such a facility in the performance of the weighing covered by the certificate.

(5) *Federal appeal inspection.* The official certificate representing the results of an appeal inspection, when included in the documents presented for payment, shall supersede any other inspection certificate required by this part, the applicable purchase authorization, the IFB or the contract.

(6) *Form CCC-359.* (i) Form FAS-359, "Declaration of Sale," signed for the GSM, is the written document by which USDA notified the supplier that the sale was approved for financing. The supplier shall submit Form FAS-359 to CCC with the documents covering the first transaction under the contract. The unit price shown on the supplier's invoice must not exceed the approved unit price shown on the Form FAS-359.

(ii) For subsequent transactions under the same contract, the supplier shall certify on the CCC copy of the detailed invoice as follows:

I hereby certify that the applicable Form FAS-359 was submitted to CCC with documents covering Invoice No.

\_\_\_\_\_ dated \_\_\_\_\_ for \$\_\_\_\_\_.

(7) *Bill of lading.* Four copies of the ocean bill of lading.

(8) *C.&f. or c.i.f. sales.* In addition to the requirements of paragraph (c)(1) through (7) of this section, the following

requirements apply for c.& f. or c.i.f. sales:

(i) Signed original of Form CCC-106.

(ii) The supplier's detailed invoice shall show a computation of the dollar amount of ocean freight differential, whenever the Form CCC-106 provides for an ocean freight differential on a cost and freight or c.i.f. sale and authorizes financing of any portion of ocean freight by CCC. In arriving at the net invoice price the supplier shall deduct the ocean freight, or portion thereof which is not being financed by CCC.

(iii) One nonnegotiable copy of the insurance certificate or policy where the cost of insurance is included in the price of the commodity to be financed by CCC.

(iv) A request for an additional payment shall also include a statement signed by the ship's master or owner (or agent of either of them) showing exercise of the higher-rated option, if the payment is stated to be due because of the exercise of a higher-rated option provided in an ocean freight contract.

(d) *Documents required for payment—ocean freight financed separately from commodity price.*

(1) *Supplier's certificate.* A signed original of Form CCC-329, "Supplier's Certificate", executed by the carrier or its agent, covering the dollar cost of ocean freight or ocean freight differential.

(2) *Ocean bill of lading.* One copy of the ocean bill of lading and, if required by the related Form CCC-106, a notice of arrival at the first port of discharge of the vessel named in the Form CCC-106. In lieu of a notice of arrival the carrier may present a waiver of the notice of arrival signed by the GSM or Controller.

(3) *Invoice.* One copy of the carrier's invoice which shows the total freight costs, the amount not eligible for financing by CCC, and the amount for which payment is requested from CCC. If the invoice relates to a U.S.-flag vessel, such invoice shall contain the following typed or stamped certification, executed by the supplier:

The undersigned hereby certifies that the vessel named herein and for which ocean freight is claimed, qualifies as a privately owned U.S.-flag commercial vessel within the requirements of Pub. L. 87-266 and is an eligible U.S.-flag vessel for the purposes of Pub. L. 664, 83rd Congress.

(4) *Form CCC-106.* Signed original of Form CCC-106.

(5) *Ocean freight contract.* One copy of the ocean freight contract.

(6) *Higher rated option.* A request for payment of any amounts claimed because of the exercise of a higher rated option following payment of a lower rated option pursuant to § 17.8(k)(1)

shall be supported by the following documents:

(i) One copy of the carrier's invoice as described in paragraph (d)(3) of this section except for the certification required therein.

(ii) The Form CCC-329, "Supplier's Certificate", for the balance claimed.

(iii) A statement signed by the ship's master, owner, or owner's agent, and signed laytime statements or other written concurrence of charterer or the charterer's agent showing the exercise of the higher rated option.

(e) *Payment of freight by CCC prior to the vessel's arrival at the discharge port.*

(1) Upon request by the supplier, CCC may pay the ocean freight or ocean freight differential to be financed by CCC before the vessel arrives at the first port of discharge if the supplier furnishes CCC financial coverage in the form of an acceptable letter of credit from a U.S. bank.

(2) The amount of security required by CCC under paragraph (e)(1) of this section may be computed by multiplying the ocean freight rate or ocean freight differential rate financed by CCC as shown on the related Form CCC-106 times either:

(i) The tonnage shown on the related bill of lading, if the bill of lading is furnished to CCC; or

(ii) The tonnage stated in the ocean freight contract (without tolerance).

(3) On receipt of an acceptable letter of credit, the Controller will issue a waiver of the notice of arrival which is required under paragraph (d)(2) of this section.

(f) *Advice of amount financed.* CCC will forward advice of payment to the participant.

#### § 17.10 Refunds and insurance.

(a) *Participant—failure to comply.* The participant shall pay in U.S. dollars promptly to CCC on demand by the General Sales Manager the entire amount financed by CCC (or such lesser amount as the GSM may demand) whenever the GSM determines that the participant has failed to comply with any agreement or commitment made by the participant in connection with the transaction financed or with the applicable Agricultural Commodities Agreement between the U.S. and the participant.

(b) *Adjustment refunds.* All claims by importers for adjustment refunds arising out of terms of the contract or out of the normal customs of the trade, including arbitration and appeal awards,

allowances, and claims for overpayment of ocean transportation, if such refunds relate to amounts financed by CCC, shall be settled by payment in U.S. dollars and such payment shall be remitted by the supplier to CCC. The remittance shall be identified with the date and amount of the original payment and the applicable purchase authorization number.

(c) *Insurance on c.i.f. sales.* The provisions of this paragraph apply only to transactions under purchase authorizations that specifically authorize c.i.f. sales in which the cost of insurance is included in the net c.i.f. invoice price of the commodity financed. When the supplier furnishes insurance in favor of or for the account of the importer, the policies or certificates of insurance shall include a loss payable clause which provides that all claims shall be paid in U.S. dollars to the Controller. Such payments shall be accompanied by advice of the purchase authorization number, the names and addresses of the supplier and importer, the nature of the claim, the quantity of the commodity involved in the claim, the date of shipment, the bill of lading number, and the name of the vessel. CCC will credit the account of the participant or will refund local currency in accordance with paragraph (e) of this section.

(d) *Refund of ineligible amounts.* If a sale has been financed and CCC determines that the sales price exceeds the price permissible under § 17.5(b)(4), or that the sale is otherwise ineligible for financing, in whole or in part, the supplier shall refund in dollars such excess price or ineligible amount to CCC promptly on demand. If not promptly refunded, such amount may be set off by CCC against monies it owes to the supplier. The making of any such refund to CCC, or any such setoff by CCC shall not prejudice the right of the supplier to challenge such determination in a court action brought against CCC for recovery of the amount refunded or set off.

(e) *Refund of local currency or reduction of amount due.* Immediately after receipt by CCC of U.S. dollar payment from suppliers, or from or for the account of the participant under this section, CCC will provide for payment to the participant of the local currency equivalent of dollars received, if such local currency has been deposited for the particular transaction, or will credit the participant's account as follows:

(1) For payments under this section, except paragraph (a), the local currency refunded will be at the exchange rate agreed to by the Government of the United States and the participant in effect at the time the local currency is paid to or for the account of the importer, except that if there has been a change in the exchange system or structure of the importing country or the destination country, such payment shall be made at the agreed exchange rate which was in effect on the date of dollar disbursement for the transaction financed, and except further that local currency shall not be paid when the dollars are to be reauthorized for replacement of the commodity.

(2) For payment under paragraph (a) of this section, the local currency refunded will be at the agreed exchange rate in effect on the date of the dollar disbursement for the transaction financed: *Provided*, that local currency will not be refunded to the extent that deposits of such currency have been made available to the participant on a grant basis.

(3) For refunds received by CCC under long-term credit agreements the participant's account shall be credited with the dollar amount refunded or otherwise recovered, and the participant notified accordingly.

#### § 17.11 Recordkeeping and access to records.

Suppliers and agents of the participant or importer shall keep accurate books, records and accounts with respect to all contracts entered into hereunder, including those pertaining to ocean transportation-related services and records of all payments by suppliers to representatives of the importer or participant, if CCC finances any part of the ocean freight. Suppliers and agents shall permit authorized representatives of the U.S. Government to have access to their premises during regular hours to inspect, examine, audit and make copies of such books, records and accounts. Suppliers and agents shall retain such records until the expiration of three years after final payment under such contracts.

Signed at Washington, D.C. on July 14, 1997.

**Christopher E. Goldthwait,**

*General Sales Manager, Foreign Agricultural Service and Vice-President, Commodity Credit Corporation.*

[FR Doc. 97-26578 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-10-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. 97-ANE-39-AD; Amendment 39-10155, AD 97-21-02]

RIN 2120-AA64

**Airworthiness Directives; Teledyne Continental Motors E-165, E-185, E-225, O-470 and IO-470 Series Reciprocating Engines**

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) that is applicable to Teledyne Continental Motors E-165, E-185, E-225, O-470 and IO-470 series reciprocating engines. This action supersedes priority letter AD 97-15-01 that currently requires removal from service of affected cylinders, and reassembly with serviceable parts. This action adds the latest revision to applicable Critical Service Bulletin (CSB), corrects references to Parts of that CSB, and lists a new contact telephone number to obtain the CSB from the manufacturer. This amendment is prompted by the availability of the new CSB revision and the need to correct the CSB references. The actions specified by this AD are intended to prevent extreme side loading of the piston, and consequent failure of the piston and engine.

**DATES:** Effective October 27, 1997.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of October 27, 1997.

Comments for inclusion in the Rules Docket must be received on or before December 9, 1997.

**ADDRESSES:** Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 97-ANE-39-AD, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may also be sent via the Internet using the following address: "9-ad-engineprop@faa.dot.gov". Comments sent via the Internet must contain the docket number in the subject line.

The service information referenced in this AD may be obtained from Teledyne Continental Motors, PO Box 90, Mobile, AL 36601; telephone toll free (888) 826-5874. This information may be

examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. **FOR FURTHER INFORMATION CONTACT:** Jerry Robinette, Aerospace Engineer, Atlanta Aircraft Certification Office, FAA, Small Airplane Directorate, Campus Building, 1701 Columbia Ave., Suite 2-160, College Park, GA 30337-2748; telephone (404) 305-7371, fax (404) 305-7348.

**SUPPLEMENTARY INFORMATION:** On July 17, 1997, the Federal Aviation Administration (FAA) issued priority letter airworthiness directive (AD) 97-15-01, applicable to Teledyne Continental Motors (TCM) new and rebuilt Model O-470 and IO-470 series engines with serial numbers (S/Ns) listed in Table 1 of TCM Critical Service Bulletin (CSB) No. CSB97-10, dated June 19, 1997; and TCM Model E-165, E-185, E-225, O-470 and IO-470 series engines, regardless of S/N, which have cylinder(s) with part number and purchase date as shown in Table 2 of TCM CSB No. CSB97-10, dated June 19, 1997. The priority letter AD requires removal from service of affected cylinders, and reassembly with serviceable parts.

That action was prompted by a report from TCM of an engine equipped with factory new cylinders with approximately 28 hours time in service (TIS) that was discovered to have high aluminum particulates during an oil analysis. Further investigation revealed the piston pin plug was experiencing increased wear, which was, in turn, traced to the roughness of the cylinder bore. A stock sweep at the factory revealed 10 additional cylinders with this condition. The cylinder bore surface finish on some cylinders is rougher than specified. This condition was caused during a manganese phosphate coating process on the cylinder barrel bore. The cylinders are exposed to the phosphate process in batches of 10 cylinders. The manganese phosphate coating provides resistance to corrosion during the first hours of operation. The problem occurred because of extended exposure of the cylinder bore to the manganese phosphate treatment which results in the surface finish being rougher than specified, although the piston pin plug will wear first; it will, in turn, wear a groove in the cylinder wall which will cause massive oil consumption in the near future. This will result in accelerated piston pin plug wear, as the piston pin plug is made of aluminum

while the cylinder barrel is made of nitrided steel. The FAA has determined that one side of the piston pin could disconnect from the piston if the wear of the pin plug becomes excessive. This condition, if not corrected, can result in extreme side loading of the piston, and consequent failure of the piston and engine.

Since issuance of the priority letter AD, the FAA has determined that the references to Parts 2A and 2B, and Appendix A of the CSB are in error, and should reference Parts 2-1(a) and 2-2. In addition, this superseding AD lists a new, toll-free contact telephone number to obtain the CSB from the manufacturer.

Also, the FAA has reviewed and approved the technical contents of the latest revision, TCM CSB No. CSB97-10A, dated July 15, 1997, that provides a list of S/Ns of new and rebuilt model O-470 and IO-470 engines with affected cylinders installed, and a list of cylinders with part number and purchase date that may be installed on E-165, E-185, E-225, O-470 and IO-470 series engines, regardless of serial number. This CSB describes procedures for removal and shipment to the factory of affected cylinders, and procedures for reassembly with serviceable parts.

Since an unsafe condition has been identified that is likely to exist or develop on other engines of this same type design, this AD supersedes priority letter AD 97-15-01 to add reference to the latest revision of the applicable CSB, correct incorrect references to parts of the applicable CSB, and list a new contact telephone number to obtain the CSB from the manufacturer. Operators that have removed affected cylinders in accordance with priority letter AD 97-15-01 or the original version of the CSB are in compliance with this AD and no further action is required. The actions are required to be accomplished in accordance with the CSB described previously.

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

**Comments Invited**

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

Communications should identify the Rules Docket number and be submitted in triplicate to the address specified under the caption ADDRESSES. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received.

Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 97-ANE-39-AD." The postcard will be date stamped and returned to the commenter.

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

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

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### §39.13 [Amended]

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

#### AD 97-21-02 Teledyne Continental Motors:

Amendment 39-10155. Docket No. 97-ANE-39-AD. Supersedes AD 97-15-01.

**Applicability:** Teledyne Continental Motors (TCM) new and rebuilt Model O-470 and IO-470 series reciprocating engines with serial numbers (S/Ns) listed in Table 1 of TCM Critical Service Bulletin (CSB) No. CSB97-10A, dated July 15, 1997; and TCM Model E-165, E-185, E-225, O-470 and IO-470 series reciprocating engines, regardless of S/N, which have cylinder(s) with part number and purchase date as shown in Table 2 of TCM CSB No. CSB97-10A, dated July 15, 1997. These engines are installed on but not limited to the following aircraft: Bellanca Models 14-19-2 and 14-19-3; Cessna Models 180, 180A through K, 182, 182A through R, 185, 185A through E, 188, 188A, 188B, 210, 210A through C, 210-5 (205), 210-5A (205A), 305A, 305C, 305D, 305F, 310, 310A through Q, E310H, E310J, 310J-1; Frontier-Aerospace, Inc. (Fletcher) Models FU-24 and FU-24A; Luscombe Aircraft Corporation Model 11A; Navion models Navion, Navion A, and Navion D through G; Prop-Jets, Inc. Models 200, 200A through C; Raytheon (formerly Beech) Models 35, A35 through P35, 35R, 35-33, 35-A355, 35-B33, 35-C33, E33, F33, 45 (YT-34), A45 (T-34A, B-45), D45 (T-34B), 95-55, 95-55A, 95-B55, 95-B55A and 95-B55B; Reims models F182P and F182Q; and Twin Commander Aircraft, Inc. Model 500-A.

**Note 1:** This airworthiness directive (AD) applies to each engine identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For engines that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe

condition has not been eliminated, the request should include specific proposed actions to address it.

**Compliance:** Required as indicated, unless accomplished previously.

To prevent extreme side loading of the piston, and consequent failure of the piston and engine, accomplish the following:

(a) Operators that have removed affected cylinders in accordance with priority letter AD 97-15-01 and TCM CSB No. CSB97-10, dated June 19, 1997, are in compliance with this AD and no further action is required

(b) For the TCM O-470 and IO-470 series engines listed by S/N in Table 1 of TCM CSB No. CSB97-10A, dated July 15, 1997, within 10 hours time in service (TIS) after the effective date of this AD, accomplish the following:

(1) Remove from service the cylinders, six each, and the piston pins, six each, in accordance with the Inspection Instructions, Part 2-1(a), of TCM CSB No. CSB97-10A, dated July 15, 1997.

(2) Obtain serviceable replacement parts and reassemble the engine in accordance with the Inspection Instructions, Part 2-2, of TCM CSB No. CSB97-10A, dated July 15, 1997.

(c) For the E-165, E-185, E-225, series engines and those O-470 and IO-470 series engines not listed by S/N in Table 1 of TCM CSB No. CSB97-10A dated July 15, 1997, within 10 hours TIS after the effective date of this AD, accomplish the following:

(1) Determine from engine log books or maintenance records if a cylinder has been replaced with a cylinder purchased in the time frames shown in Table 2 of TCM CSB No. CSB97-10A, dated July 15, 1997.

(2) If a cylinder was not replaced with a cylinder purchased during those time frames listed in the CSB, or if a cylinder is identified with the letter "M" or "P" steel stamped after the cylinder position number, as cylinders marked with "M" or "P" have a surface finish that has been found to be within specification, no further action is required. The cylinder position number is located at the 12 o'clock position on the cylinder mounting flange.

(3) If a cylinder has been replaced with a cylinder purchased during those time frames listed in the CSB, remove from service the affected cylinders and piston pins in accordance with the Inspection Instructions, Part 2-1(a) of TCM CSB No. CSB97-10A, dated July 15, 1997.

(4) Obtain serviceable replacement parts and reassemble the engine in accordance with the Inspection Instructions, Part 2-2, of TCM CSB No. CSB97-10A, dated July 15, 1997.

(d) 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. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Atlanta Aircraft Certification Office.

**Note 2:** Information concerning the existence of approved alternative methods of compliance with this airworthiness directive,

if any, may be obtained from the Atlanta Aircraft Certification Office.

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

(f) The actions required by this AD shall be done in accordance with the following TCM CSB:

Document No.	Pages	Date
CSB97-10A .....	1-11	July 15, 1997.
Total pages: 11.		

This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Teledyne Continental Motors, PO Box 90, Mobile, AL 36601; telephone toll free (888) 826-5874. Copies may be inspected at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment supersedes priority letter AD 97-15-01, issued July 17, 1997.

(h) This amendment becomes effective on October 27, 1997.

Issued in Burlington, Massachusetts, on September 30, 1997.

**James C. Jones,**

*Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 97-26797 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-13-P

**DEPARTMENT OF LABOR**

**Wage and Hour Division**

**29 CFR Part 697**

**Industries in American Samoa; Wage Order**

**AGENCY:** Wage and Hour Division, Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** Under the Fair Labor Standards Act, minimum wage rates in American Samoa are set by a special industry committee appointed by the Secretary of Labor. This document puts into effect the minimum wage rates recommended for various industry categories by Industry Committee No. 22 which met in Pago Pago, American Samoa, during the week of June 22, 1997.

**DATES:** This rule shall become effective on October 27, 1997.

Applicability date: The new minimum wage rates are effective on

October 27, 1997 unless otherwise noted.

**FOR FURTHER INFORMATION CONTACT:**

Arthur M. Kerschner, Jr., Office of Enforcement Policy, Child Labor and Special Employment Team, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, NW., Washington, D.C. 20210; telephone (202) 219-7640. This is not a toll free number. Copies of the Final Rule in alternative formats may be obtained by calling (202) 219-7605, (202) 219-4634 (TDD). The alternative formats available are large print, electronic file on computer disk and audio-tape.

**SUPPLEMENTARY INFORMATION:**

**I. Paperwork Reduction Act**

This rule contains no reporting or recordkeeping requirements which are subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104-13).

**II. Background**

Pursuant to sections 5, 6, and 8 of the Fair Labor Standards Act of 1938 (52 Stat. 1062, 1064), as amended (29 U.S.C. 205, 206, 208) and Reorganization Plan No. 6 of 1950 (3 CFR 1949-53 Comp., p. 1004), and by means of Administrative Order No. 663 (62 F.R. 14446), the Secretary of Labor appointed and convened Industry Committee No. 22 for Industries in American Samoa, referred to the Committee the question of the minimum rates of wages to be paid under section 8 of the FLSA to employees within the industries, and gave notice of a hearing to be held by the Committee.

Subsequent to an investigation and a hearing conducted in Pago Pago pursuant to the notice, the Committee filed with the Administrator of the Wage and Hour Division a report containing its findings of fact and recommendations with respect to minimum wage rates for various industry classifications. The FLSA requires that the Secretary publish this report in the **Federal Register** and further requires that the recommendations in the report be effective 15 days after publication.

Accordingly, as authorized and required by section 8 of the Fair Labor Standards Act of 1938, Reorganization Plan No. 6 of 1950 and 29 CFR 511.18, this rule hereby revises § 697.1 and 697.3 of 29 CFR part 697 to implement the recommendations of Industry Committee No. 22.

*Executive Order 12866/Section 202 of the Unfunded Mandates Reform Act of 1995 and Executive Order 12875/Small Business Regulatory Enforcement Fairness Act*

This rule is not a "significant regulatory action" within the meaning of Executive Order 12866, and no regulatory impact analysis is required. This document puts into effect the wage rates recommended by Industry Committee No. 22 which met in Pago Pago, American Samoa during the week of June 22, 1997. The Committee recommended increases over two years in various industry categories, ranging from 6 cents per hour for the shipping and transportation industry, classification B—unloading of fish from marine vessels; to 25 cents per hour for the publishing industry.

When these increases are fully implemented, wage rates will range from \$2.45 an hour (miscellaneous activities) to \$3.87 an hour (shipping and transportation, classification A, stevedoring, lighterage, and maritime shipping activities).

There are approximately 16,000 employees in the various industry classifications. Based on the number of workers whose wages must be increased to the new minimum wage levels in 1997 and/or 1998, and assuming that employees currently paid at or in excess of the new minimum wages will also receive commensurate wage increases to maintain relative pay comparability, increases in the overall annual wage bill are expected to be modest—approximately \$208,000 in 1997 and \$2.8 million in 1998. Thus this rule is not expected to result in a rule that may [1] have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; [2] create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; [3] materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or [4] raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

For reasons similar to those noted above, the rule does not require a § 202 statement under the Unfunded Mandates Reform Act of 1995. Because the Secretary has no authority to change a recommendation of the Industry Committee, compliance with Executive

Order 12875 is neither feasible nor permitted by law, and in any event, the rule is not a significant rule.

Furthermore, a resident of American Samoa is nominated by the Governor of American Samoa as a public member of the industry committee. Its representatives also provided testimony and made recommendations at the hearing.

Finally, the rule is not a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996. Although the rule will impact solely on American Samoa, its impact is not expected to be significant, for the reasons discussed above.

**Regulatory Flexibility Act**

Because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b), the requirements of the Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* pertaining to regulatory flexibility analysis, do not apply to this rule. See 5 U.S.C. 601(2).

**Administrative Procedure Act**

Good cause exists for issuance of this rule without publication 30 days in advance of its effective date, as normally required by the § 553(d) of the Administrative Procedure Act. As discussed above, § 8 of the FLSA requires that the rule be effective 15 days after publication.

**Document Preparation**

This document was prepared under the direction and control of John R. Fraser, Acting Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

**List of Subjects in 29 CFR Part 697**

American Samoa Minimum wages.

Accordingly, part 697 of chapter V of title 29, Code of Federal Regulations is amended as set forth below.

Signed at Washington, D.C. this 3rd day of Oct., 1997.

**John R. Fraser,**

*Acting Administrator, Wage and Hour Division.*

**PART 697—INDUSTRIES IN AMERICAN SAMOA**

1. The authority citation for part 697 continues to read as follows:

**Authority:** Secs. 5, 6, 8, 52 Stat. 1062, 1064; 29 U.S.C. 205, 206, 208.

2. Section 697.1 is amended by revising paragraphs(a)(1), (b)(1), (c)(1), (d)(1), (e)(1), (f)(1), (g)(1), (h)(1), (i)(1), (j)(1) and (2), (k)(1), (l)(1), (m)(1), and

(n)(1); and adding new paragraphs (o) and (p) to read as follows:

**§ 697.1 Wage rates and industry definitions.**

\* \* \* \* \*

(a) *Fish canning and processing and can manufacturing industry.* (1) The minimum wage for this industry is \$3.10 an hour effective July 1, 1996, and \$3.17 an hour effective October 27, 1998.

\* \* \* \* \*

(b) *Shipping and transportation industry.* (1) The minimum wage for classification A, stevedoring, lighterage and maritime shipping agency activities, is \$3.75 an hour effective July 1, 1996, and \$3.87 an hour effective October 27, 1998. The minimum wage for classification B, unloading of fish, is \$3.70 an hour effective July 1, 1996, and \$3.76 an hour effective October 27, 1998. The minimum wage for classification C, all other activities, is \$3.62 an hour effective July 1, 1996, and \$3.72 an hour effective October 27, 1998.

\* \* \* \* \*

(c) *Tour and travel service industry.* (1) The minimum wage for this industry is \$3.16 an hour effective on October 27, 1997, and \$3.22 an hour effective October 27, 1998.

\* \* \* \* \*

(d) *Petroleum marketing industry.* (1) The minimum wage for this industry is \$3.60 an hour effective on October 27, 1997, and \$3.73 an hour effective October 27, 1998.

\* \* \* \* \*

(e) *Construction industry.* (1) The minimum wage for this industry is \$3.30 an hour effective on October 27, 1997, and \$3.40 an hour effective October 27, 1998.

\* \* \* \* \*

(f) *Hotel industry.* (1) The minimum wage for this industry is \$2.70 an hour effective on October 27, 1997, and \$2.78 an hour effective October 27, 1998.

\* \* \* \* \*

(g) *Retailing, wholesaling and warehousing industry.* (1) The minimum wage for this industry is \$2.87 an hour effective on October 27, 1997, and \$2.94 an hour effective October 27, 1998.

\* \* \* \* \*

(h) *Ship maintenance industry.* (1) The minimum wage for this industry is \$3.15 an hour effective on October 27, 1997, and \$3.20 an hour effective October 27, 1998.

\* \* \* \* \*

(i) *Bottling, brewing and dairy products industry.*

(1) The minimum wage for this industry is \$3.01 an hour effective on

October 27, 1997, and \$3.07 an hour effective October 27, 1998.

\* \* \* \* \*

(j) *Printing industry.* (1) The minimum wage for the printing industry is \$3.25 an hour effective on October 27, 1997, and \$3.35 an hour effective October 27, 1998.

(2) The printing industry is that industry which is engaged in printing, job printing, and duplicating. This industry shall not include printing performed by an employer which publishes a newspaper, magazine, or similar publications.

(k) *Finance and insurance industry.* (1) The minimum wage for this industry is \$3.69 an hour effective on October 27, 1997, and \$3.78 an hour effective October 27, 1998.

\* \* \* \* \*

(l) *Private hospitals and educational institutions.* (1) The minimum wage for this industry is \$3.17 an hour effective on October 27, 1997, and \$3.24 an hour effective October 27, 1998.

\* \* \* \* \*

(m) *Government employees industry.* (1) The minimum wage for this industry is \$2.45 effective October 1, 1996, and \$2.57 an hour effective October 1, 1998.

\* \* \* \* \*

(n) *Miscellaneous activities industry.* (1) The minimum wage for this industry is \$2.45 an hour effective July 1, 1996.

\* \* \* \* \*

(o) *Garment manufacturing industry.* (1) The minimum wage for this industry is \$2.45 an hour effective on October 27, 1997, and \$2.55 an hour effective October 27, 1998.

(2) The garment manufacturing industry is defined as the manufacture from any material of articles of apparel and clothing made by knitting, spinning, crocheting, cutting, sewing, embroidering, dyeing, or any other processes and includes but is not limited to all clothing; men's, women's and children's suits, clothing and other products; hosiery; gloves and mittens; sweaters and other outerwear; swimwear; leather, leather goods, and related products; handkerchief, scarf, and art linen products; shirts, blouses, and underwear; uniforms and work clothing; and includes assembling, tagging, ironing, and packing apparel for shipping. This term does not include manufacturing, processing or mending of apparel in retail or service establishments, including clothing stores, laundries, and other stores.

(p) *Publishing industry.* (1) The minimum wage for the publishing industry is \$3.30 an hour effective on

October 27, 1997, and \$3.45 an hour effective October 27, 1998.

(2) The publishing industry is that industry which is engaged in the publishing of newspapers, magazines, or similar publications other than the publishing of a weekly, semiweekly or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county or counties contiguous thereto.

3. Section 697.3 is revised to read as follows:

**§ 697.3 Effective dates.**

The wage rates specified in § 697.1 shall be effective on October 27, 1997 except as otherwise specified.

[FR Doc. 97-26830 Filed 10-9-97; 8:45 am]

BILLING CODE 4510-27-P

**DEPARTMENT OF TRANSPORTATION**

**Coast Guard**

**33 CFR Part 117**

[CGD08-97-040]

**Drawbridge Operation Regulation; Gulf Intracoastal Waterway, Algiers Alternate Route, LA**

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, Eighth Coast Guard District has issued a temporary deviation from the regulation governing the operation of the Belle Chasse vertical lift span drawbridge on State Route 23 across the Gulf Intracoastal Waterway, Algiers Alternate Route at mile 3.8 at Belle Chasse, Louisiana. This deviation allows the bridge to remain closed to navigation between the hours of 4 p.m. and 6:45 p.m. on Saturday, October 25, 1997 and between the hours of 4 p.m. and 7 p.m. on Sunday, October 26, 1997. This closure is necessary to facilitate movement of vehicular traffic for the New Orleans Open House 1997 Air Show, to be held at the U.S. Naval Air Station at Belle Chasse, Louisiana.

**DATES:** The deviation is effective from 4 p.m. on October 25, 1997 until 7 p.m. on October 26, 1997.

**SUPPLEMENTARY INFORMATION:** The Belle Chasse bridge has a vertical clearance of 40 feet above mean high water in the closed-to-navigation position and 100 feet in the open-to-navigation position.

Navigation on the waterway consists primarily of tugs with tows, commercial fishing vessels, sailboats and other recreational craft. Between 150,000 and 200,000 members of the public are expected to attend the New Orleans

Open House Air Show on each day. The Louisiana Department of Transportation and Development has requested a temporary deviation from the normal operation of the bridge so that the extremely heavy volume of vehicular traffic that will be departing the Naval Air Station following the event can be expeditiously dispersed.

This deviation requires that the draw of the Belle Chasse bridge remain closed to navigation between the hours of 4 p.m. and 6:45 p.m. on Saturday, October 25, 1997 and between the hours of 4 p.m. and 7 p.m. on Sunday, October 26, 1997. Presently, the draw is required to open on signal during weekends.

Dated: September 18, 1997.

**T.W. Josiah,**

*Rear Admiral, U.S. Coast Guard Commander, Eighth Coast Guard District.*

[FR Doc. 97-26917 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-14-M

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[CA 198-0056; FRL-5907-2]

**California State Implementation Plan Revision; Interim Final Determination That State Has Corrected Deficiencies**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final determination.

**SUMMARY:** Elsewhere in today's **Federal Register**, EPA has published a notice of proposed rulemaking fully approving revisions to the California State Implementation Plan (SIP). The revisions concern a rule from the San Diego County Air Pollution Control District (SDCAPCD): Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations. Based on the proposed full approval, EPA is making an interim final determination by this action that the State has corrected the deficiencies for which sanctions clocks began on April 15, 1996. This action will defer the imposition of the offsets sanction and defer the imposition of the highway sanction. Although the interim final action is effective upon publication, EPA will take comment. If no comments are received on EPA's proposed approval of the State's submittal, EPA will finalize its determination that the State has corrected the deficiencies that started the sanctions clocks by publishing a notice of final rulemaking in the **Federal Register**. If comments are received on EPA's proposed approval and this interim final action, EPA will publish a

final rule taking into consideration any comments received.

**DATES:** Effective: October 10, 1997. Comments must be received by November 10, 1997.

**ADDRESSES:** Comments should be sent to Andrew Steckel, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, 94105-3901.

The state submittal and EPA's analysis for that submittal, which are the basis for this action, are available for public review at the above address and at the following locations:

San Diego County Air Pollution Control District, 9150 Chesapeake Drive, San Diego, CA 92123-1096

California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95814.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Bowlin, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901, (415) 744-1188.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 13, 1994, the State submitted SDCAPCD Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations. EPA published a limited approval/limited disapproval for this rule in the **Federal Register** on February 14, 1996. 61 FR 5701. EPA's disapproval action started an 18-month clock for the imposition of one sanction (followed by a second sanction 6 months later) under section 179 of the Clean Air Act (Act) and a 24-month clock for promulgation of a Federal Implementation Plan (FIP) under section 110(c) of the Act. The State subsequently submitted a revised rule on August 1, 1997. The revised rule was adopted by SDCAPCD on June 25, 1997. In the Proposed Rules section of today's **Federal Register**, EPA has proposed full approval of the State of California's submittal of SDCAPCD's Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations.

Based on the proposed approval set forth in today's **Federal Register**, EPA believes that it is more likely than not that the State has corrected the original disapproval deficiencies. Therefore, EPA is taking this interim final rulemaking action, effective on publication, finding that the State has corrected the deficiencies. However, EPA is also providing the public with an

opportunity to comment on this final action. If, based on any comments on this action and any comments on EPA's proposed full approval of the State's submittal, EPA determines that the State's submittal is not fully approvable and this final action was inappropriate, EPA will either propose or take final action finding that the State has not corrected the original disapproval deficiencies. As appropriate, EPA will also issue an interim final determination or a final determination that the deficiencies have not been corrected. Until EPA takes such action, the application of sanctions will continue to be deferred and/or stayed.

This action does not stop the sanctions clocks that started for this area on April 15, 1996. However, this action will defer the imposition of the offsets sanction and will defer the imposition of the highway sanction. See 59 FR 39832 (August 4, 1994). If EPA publishes a notice of final rulemaking fully approving the State's submittal, such action will permanently stop the sanctions clock and will permanently lift any imposed, stayed, or deferred sanctions. If EPA must withdraw the proposed full approval based on adverse comments and EPA subsequently determines that the State, in fact, did not correct the disapproval deficiencies, the sanctions consequences described in the sanctions rule will apply. See 59 FR 39832, codified at 40 CFR 52.31.

## II. EPA Action

EPA is taking interim final action finding that the State has corrected the disapproval deficiencies that started the sanctions clocks. Based on this action, imposition of the offsets sanction will be deferred and imposition of the highway sanction will be deferred until EPA's final action fully approving the State's submittal becomes effective or until EPA proposes or takes final action disapproving in whole or part the State submittal. If EPA's proposed rulemaking action fully approving the State submittal becomes final, at that time any sanctions clocks will be permanently stopped and any imposed, stayed, or deferred sanctions will be permanently lifted.

Because EPA has preliminarily determined that the State has corrected the deficiencies identified in EPA's limited disapproval action, relief from sanctions should be provided as quickly as possible. Therefore, EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for

comment before this action takes effect.<sup>1</sup> 5 U.S.C. 553(b)(3). EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. EPA has reviewed the State's submittal and, through its proposed action, is indicating that it is more likely than not that the State has corrected the deficiencies that started the sanctions clocks. Therefore, it is not in the public interest to initially impose sanctions or to keep applied sanctions in place when the State has most likely done all it can to correct the deficiencies that triggered the sanctions clocks. Moreover, it would be impracticable to go through notice-and-comment rulemaking on a finding that the State has corrected the deficiencies prior to the rulemaking approving the State's submittal. Therefore, EPA believes that it is necessary to use the interim final rulemaking process to temporarily stay or defer sanctions while EPA completes its rulemaking process on the approvability of the State's submittal. Moreover, with respect to the effective date of this action, EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this document is to relieve a restriction. See 5 U.S.C. 553(d)(1).

## III. Administrative Requirements

### A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant 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.

This action temporarily relieves sources of an additional burden potentially placed on them by the sanctions provisions of the Act. Therefore, I certify that it does not have an impact on any small entities.

<sup>1</sup> As previously noted, however, by this action EPA is providing the public with a chance to comment on EPA's determination after the effective date, and EPA will consider any comments received in determining whether to reverse such action.

### C. 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 or 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. This rule may bind State, local, and tribal governments to perform certain actions and also require the private sector to perform certain duties. The rule being proposed for approval 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 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.

### D. Submission to Congress and the General Accounting Office

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

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental regulations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401-7671q.

Dated: October 1, 1997.

**Harry Seraydarian,**

*Acting Regional Administrator.*

[FR Doc. 97-26855 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 52**

[LA-14-1-7239; FRL-5905-7]

**Approval and Promulgation of Air Quality Implementation Plans of New Source Review (NSR) Implementation Plan Addressing NSR in Nonattainment Areas; Louisiana; Louisiana Administrative Code (LAC), Title 33, Environmental Quality, Part III, Air, Chapter 5, Permit Procedures, Section 504, Nonattainment NSR Procedures****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

**SUMMARY:** The EPA is approving the State Implementation Plan (SIP) revision, submitted by the State of Louisiana for the purpose of meeting requirements of the Clean Air Act (the Act), as amended in 1990, with regard to NSR in areas that have not attained the National Ambient Air Quality Standards (NAAQS). This approval action was proposed in the **Federal Register** (FR) on October 6, 1995, and no comments were received on the proposal.

**EFFECTIVE DATE:** This action is effective on November 10, 1997.

**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Environmental Protection Agency,  
Region 6, Multimedia Planning and Permitting Division (6PD), 1445 Ross Avenue, suite 700, Dallas, Texas 75202-2733

Louisiana Department of Environmental Quality, H. B. Garlock Building, 7290 Bluebonnet Boulevard, Baton Rouge, Louisiana 70810

**FOR FURTHER INFORMATION CONTACT:** Mr. Richard A. Barrett, Air Permits Section (6PD-R), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-7227.

**SUPPLEMENTARY INFORMATION:****I. Background**

The air quality planning requirements for nonattainment new source review are set out in part D of Title I of the Act, as amended in 1990. The EPA has issued a "General Preamble" describing

EPA's preliminary views on how EPA intends to review SIPs and SIP revisions submitted under part D; including those State submittals containing nonattainment area NSR SIP requirements (see 57 FR 13498 (April 16, 1992)) and (57 FR 18070 (April 28, 1992)). Because EPA is describing its interpretations here only in broad terms, the reader should refer to the General Preamble for a more detailed discussion of the interpretations of part D advanced in this action and the supporting rationale.

Prior to EPA approval of a State's NSR SIP submission, the State may continue permitting only in accordance with the new statutory requirements for permit applications completed after the relevant SIP submittal date. This policy was explained in transition guidance memoranda from John Seitz dated March 11, 1991, "New Source Review (NSR) Program Transitional Guidance," and September 3, 1992, "New Source Review (NSR) Program Supplemental Transitional Guidance on Applicability of New Part D NSR Permit Requirements."

**II. Rulemaking Action****A. Procedural Background**

The Act requires States to observe certain procedural requirements in developing implementation plans and plan revisions for submission to EPA. Section 110(a)(2) of the Act, 42 U.S.C. 7410(a)(2), provides that each implementation plan submitted by a State must be adopted after reasonable notice and public hearing.<sup>1</sup> Section 110(l) 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.

After adequate public notice, the State of Louisiana held a public hearing on December 30, 1992, to entertain public comment on the NSR implementation plan, which replaced the emergency rules submitted to EPA on November 10, 1992. Following the public hearing, the plan was adopted by the State on February 20, 1993, and submitted to EPA on March 3, 1993, as a proposed revision to the SIP. The State submitted to EPA revisions for the Louisiana SIP to implement the NSR requirements of the Act in nonattainment areas in Louisiana. Louisiana made the SIP revision to LAC Title 33, Part III, Chapter 5, Permit Procedures, by the addition of section 504. Nonattainment New Source Review Procedures. The

SIP revision was reviewed by EPA to determine administrative completeness shortly after its submittal. The completeness review was based upon the criteria as set out at 40 CFR part 51, Appendix V. The submittal was found to be complete on July 10, 1993, and a letter dated August 3, 1993, was forwarded to the Governor indicating the completeness of the submittal and the next steps to be taken in the review process. Prior to EPA acting on these revisions, the State submitted a notice of adoption and final rule on Regulation LAC 33:III, Chapter 5, on November 15, 1993. That submittal included an amended Section 504 in order to meet the requirements mandated by sections 173 and 182 of the Act. This action applies to Section 504 of the LAC.

In this action, EPA approves the Louisiana nonattainment NSR SIP rules identified in this notice. Those sections submitted to EPA not included in the revisions specifically addressed in this action will be the subject of a future rulemaking. In this rulemaking action on the Louisiana nonattainment NSR SIP, EPA has applied its interpretations, taking into consideration the specific factual issues presented.

**B. General Nonattainment NSR Requirements**

The statutory requirements for nonattainment NSR SIPs and permitting are found at sections 172 and 173.

The Act requires all States to have submitted, at a minimum, the following nonattainment NSR provisions by November 15, 1992:

1. Provisions to assure that calculation of emissions offsets, as required by section 173(a)(1)(A), are based on the same emissions baseline used in the demonstration of reasonable further progress. Louisiana has established provisions to satisfy this requirement in LAC sections 504.F.4 and 504.F.5.

2. Provisions to allow, according to section 173(c)(1), offsets to be obtained in another nonattainment area if: the area in which the offsets are obtained has an equal or higher nonattainment classification; and emissions from the nonattainment area, in which the offsets are obtained, contribute to an NAAQS violation, in the area in which the source would construct. Louisiana has established provisions to satisfy this requirement in LAC Section 504.F.9.

3. Provisions to assure, according to section 173(c)(1), that any emissions offsets obtained in conjunction with the issuance of a permit to a new or modified source must be in effect and enforceable by the time the new or modified source is to commence

<sup>1</sup> Section 172(c)(7) of the Act provides that plan provisions for nonattainment areas shall meet the applicable provisions of section 110(a)(2).

operation. Louisiana has established provisions to satisfy this section in LAC Section 504.F.3.

4. Provisions to assure that emissions increases, from new or modified major stationary sources, are offset by real reductions in actual emissions, as required by section 173(c)(1). Louisiana has established provisions to satisfy this requirement in LAC Sections 504.D.3 and 504.F.7.

5. Provisions, according to section 173(c)(2), to prevent emissions reductions otherwise required by the Act from being credited for purposes of satisfying the part D offset requirements. Louisiana has established provisions to satisfy this section in LAC Sections 504.F.5. and 504.F.10.

6. Provisions, according to section 173(a)(5) that, as a prerequisite to issuing any part D permit, the State will require an analysis of alternative sites, sizes, production processes, and environmental control techniques for proposed sources that demonstrates the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification. Louisiana has established provisions to satisfy this requirement in LAC Section 504.D.6.

7. Provisions, according to section 173(e), that allow any existing or modified source that tests rocket engines or motors to use alternative or innovative means to offset emissions increases from firing and related cleaning, if four conditions are met: (a) the proposed modification is for expansion of a facility already permitted for such purposes; (b) the source has used all available offsets and all reasonable means to obtain offsets and sufficient offsets are not available; (c)

the source has obtained a written finding by the appropriate, sponsoring Federal agency that the testing is essential to national security; and (d) the source will comply with an alternative measure designed to offset any emissions increases not directly offset by the source.

In lieu of imposing any alternative offset measures, the permitting authority may impose an emission offset amounting to no more than 1.5 times the average cost of stationary control measures adopted in that area during the previous three years. Louisiana has established provisions to satisfy this requirement at LAC Section 504.D.7.

8. Provisions, according to section 173(a)(3), to assure that owners or operators, of each proposed new or modified major stationary source, demonstrate that all other major stationary sources, under the same ownership in the State, are in compliance with the Act. Louisiana has established provisions to satisfy this section at LAC Section 504.D.1. This provision is recodified and rewritten from LAC 33:III, Chapter 5, Section 505.H.8., which was previously approved in the **Federal Register** (47 FR 6015, February 10, 1982).

9. Provisions, according to section 173(a)(2), to assure that permits for new and modified major stationary sources to construct and operate may be issued if the proposed source is required to comply with the lowest achievable emission rate. Louisiana has established provisions to satisfy this requirement in LAC Section 504.D.2. This provision is recodified and rewritten from LAC 33:III, Chapter 5, Section 505.H.8., which was previously approved in the **Federal Register** (47 FR 6015, February 10, 1982).

10. Additionally, the State must assure that no interpollutant trading is allowed as defined in 40 CFR part 51, Appendix S, section IV, condition 3. Louisiana has established provisions to satisfy this requirement in LAC Section 504.F.1.

11. The public notice and participation requirements, previously located in Section 504, have now been placed in LAC 33:III, Chapter 5, Section 531, which will be acted on by EPA in a future rulemaking action. These requirements were located in the March 3, 1993, submittal and were subsequently moved in the November 15, 1993, submittal to Section 531. Public participation requirements have previously been approved in the SIP.

*C. Ozone*

The general nonattainment NSR requirements are found in sections 172 and 173 of the Act and must be met by all nonattainment areas. Requirements for ozone that supplement or supersede these requirements are found in subpart 2 of part D. In addition, subpart 2 includes section 182(f) which states that requirements for major stationary sources of volatile organic compounds (VOC) shall apply to major stationary sources of oxides of nitrogen (NO<sub>x</sub>) unless the Administrator makes certain determinations related to the benefits or contribution of NO<sub>x</sub> control to air quality, ozone attainment, or ozone air quality. States were required under section 182(a)(2)(C) to adopt new NSR rules for ozone nonattainment areas by November 15, 1992.

Louisiana has established major source thresholds and offset ratios for VOC and included provisions for NO<sub>x</sub> major stationary sources as follows:

Area classification	Major source threshold	Offset ratio minimum	NO <sub>x</sub> provisions
Marginal .....	100 tpy .....	1.10 to 1 .....	See paragraph below.
Moderate .....	100 tpy .....	1.15 to 1 .....	Identical to VOC.
Serious .....	50 tpy .....	1.20 to 1 .....	See paragraph below.
Severe .....	25 tpy .....	1.30 to 1 .....	Identical to VOC.
Extreme .....	Not applicable .....	Not applicable .....	Not applicable.

The EPA approved a petition for exemption from NO<sub>x</sub> requirements pursuant to section 182(f), for the marginal ozone nonattainment area of Lake Charles (Calcasieu Parish), on May 22, 1997, and which was published on May 29, 1997 (see 62 FR 29062); therefore, NO<sub>x</sub> nonattainment NSR will not be required in that area. Further, EPA approved the redesignation of the marginal ozone nonattainment area of Lake Charles (Calcasieu Parish), to attainment for ozone on April 10, 1997,

and which was published on May 2, 1997 (see 62 FR 24036).

The EPA approved a petition for exemption from NO<sub>x</sub> requirements pursuant to section 182(f), for the serious ozone nonattainment area of Baton Rouge, on January 18, 1996, and which was published on January 26, 1996 (see 61 FR 2438); therefore, NO<sub>x</sub> nonattainment NSR will not be required in that area.

Louisiana has established all of the above requirements for all other ozone nonattainment areas.

Additionally, for nonclassifiable (transitional or incomplete data) ozone nonattainment areas, State rules for the marginal area classification apply. For further information on nonclassifiable areas see, "General Preamble" 57 FR 55624 (April 16, 1992), and the "NO<sub>x</sub> supplement to the General Preamble" 57 FR 13523 (November 25, 1993).

In addition, Louisiana's plan submittal reflects appropriate modification provisions, including a *de minimis* level of 25 tons.

**D. Carbon Monoxide (CO)**

The general part D NSR permit requirements apply in CO nonattainment areas, and are supplemented by the CO requirements in subpart 3 of part D.

Louisiana has established a major source threshold of 100 tons per year,

and a minimum offset ratio of greater than 1.00 to 1 for moderate CO nonattainment areas. Louisiana has established a major source threshold of 50 tpy, and a minimum offset ratio of greater than 1.00 to 1 for serious nonattainment areas.

Louisiana has no areas designated as nonattainment for CO at this time.

**E. Particulate Matter Less Than 10 Micrometers In Diameter (PM-10)**

Pursuant to section 189(a)(2) 42 U.S.C. 7513a(a)(2), all States, with a PM-10 nonattainment area classified as moderate, were required to submit an NSR permit program SIP revision by June 30, 1992, or 18 months after the designation of such an area.

Louisiana has established major source thresholds, offset ratios, modification significance levels, and PM-10 precursor provisions as follows:

Area classification	Major source threshold	Offset ratio minimum	Significance level	Precursor provisions
Moderate .....	100 tpy .....	Greater than 1 to 1 .....	15 tpy .....	See paragraph below.
Serious .....	50 tpy .....	Greater than 1 to 1 .....	15 tpy .....	See paragraph below.

Since Louisiana has no areas designated as nonattainment for PM-10 at this time, EPA is approving the PM-10 NSR provisions for the limited purpose of strengthening the SIP and not for satisfying the part D NSR requirements for PM-10. If an area is designated nonattainment for PM-10, then the State would be required to submit provisions for PM-10 precursors unless it has sought and obtained a determination by the EPA under section 189(e).

**F. Sulfur Dioxide (SO<sub>2</sub>)**

States with SO<sub>2</sub> nonattainment areas were required to submit NSR implementation plans by May 15, 1992. States with areas that are designated or redesignated as nonattainment after the Amendments have 18 months to submit such plans.

Louisiana has established a major source threshold of 100 tpy, a minimum offset ratio of greater than 1 to 1, and a modification significance level of 40 tpy.

Louisiana has no areas designated as nonattainment for SO<sub>2</sub> at this time.

**G. Lead**

Generally, the date by which a plan must be submitted for an area is triggered by the area's nonattainment designation. For areas designated nonattainment for the primary lead NAAQS in effect at enactment of the 1990 Amendments; under section 171(b), States must submit SIPs which meet the applicable requirements of part D within 18 months of the date of enactment of the 1990 Amendments.

Louisiana has established a major source threshold of 100 tpy, a minimum offset ratio of greater than 1 to 1, and a modification significance level of 0.6 tpy.

Louisiana has no areas designated as nonattainment for Lead at this time.

**III. Final Action**

The EPA is approving the plan revisions submitted on March 3, 1993, as amended on November 15, 1993, regarding NSR. The State of Louisiana has submitted a complete plan to implement the NSR provisions of part D. Each of the program elements mentioned above were properly addressed, with the exception of PM-10 precursor requirements. Since Louisiana has no areas designated as nonattainment for PM-10 at this time, EPA is approving the PM-10 NSR provisions for the limited purpose of strengthening the SIP and not for satisfying the part D NSR requirements for PM-10. If an area is designated nonattainment for PM-10, then the State would be required to submit provisions for PM-10 precursors unless it has sought and obtained a determination by EPA under section 189(e).

Those sections submitted to EPA, not included in the revisions specifically addressed in this action, will be the subject of a future rulemaking.

Louisiana LAC 33:III.Chapter 5.Section 504 is approvable under the requirements for nonattainment area permitting regulations as outlined in 40 CFR part 51 and in part D. These revisions incorporate requirements of the Act for the construction and operation of new and modified major stationary sources of air pollutants.

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 and in relation to relevant statutory and regulatory requirements.

**IV. Executive Order (E.O.) 12866**

The Office of Management and Budget has exempted this regulatory action from E.O. 12866 review.

**V. Regulatory Flexibility**

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. See 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.

The SIP approvals under section 110 and subchapter I, part D of the 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, I certify 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 Act, preparation of a flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Act forbids EPA to base its actions concerning SIPs on such grounds. See *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

**VI. Unfunded Mandates**

Under section 202 of the Unfunded Mandates Reform Act of 1995, 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.

The EPA has determined that this 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. This Federal action approves preexisting 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.

**VII. Submission to Congress and the General Accounting Office**

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

**VIII. Petitions for Judicial Review**

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 9, 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).

**List of Subjects in 40 CFR Part 52**

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

Dated: September 30, 1997.  
**Jerry Clifford**,  
*Acting Regional Administrator.*

40 CFR part 52 is amended as follows:

**PART 52—[AMENDED]**

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

**Authority:** 42 U.S.C. 7401-7671q.

**Subpart T—Louisiana**

2. Section 52.970 is amended by adding paragraph (c)(68) to read as follows:

**§ 52.970 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(68) A revision to the Louisiana SIP addressing the nonattainment NSR program for Louisiana was submitted by the Governor of Louisiana on March 3, 1993, and November 15, 1993.

(i) Incorporation by reference.

(A) Revision to LAC, Title 33, Part III. Air, Chapter 5. Permit Procedures, by the addition of Section 504. Nonattainment New Source Review Procedures, as promulgated in the Louisiana Register, Volume 19, Number 2, 176-183, February 20, 1993; effective February 20, 1993, and submitted by the Governor on March 3, 1993.

(B) Revisions to LAC, Title 33, Part III. Air, Chapter 5. Permit Procedures, Section 504. Nonattainment New Source Review Procedures, Subsections: A., Applicability, Paragraphs A(1), A(2), A(3), A(4); D., Nonattainment New Source Requirements, Paragraph D(4); Delete G., Permit Procedures, Public Participation and Notification; Reletter H., Definitions, to G., and revise definitions for Major Modification (paragraphs: a., c.iii, c.iv, c.v.(a)(b), c.vi, c.vii), Major Stationary Source (paragraphs: a., d.i); Delete Table 1; Renumber Table 2, Major Stationary Source/Major Modification Emission Thresholds, to Table 1, and revise Footnote 1., as promulgated in the Louisiana Register, Volume 19, Number 11, 1420-1421, November 20, 1993; effective November 20, 1993, and submitted by the Governor on November 4, 1993.

(ii) Additional material.

(A) Letter dated January 7, 1994, signed by the Governor of Louisiana, which clarifies that section 504 is to be reviewed under the SIP program.

\* \* \* \* \*

[FR Doc. 97-27017 Filed 10-9-97; 8:45 am]  
**BILLING CODE 6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 271**

[FRL-5906-2]

**New Hampshire: Final Authorization of State Hazardous Waste Management Program Revisions; Correction**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Immediate final rule; correction.

**SUMMARY:** The Environmental Protection Agency published in the **Federal Register** of November 14, 1994 (59 FR 56397) the authorization of New Hampshire's Hazardous Waste Management Program Revision under the Resource Conservation and Recovery Act (RCRA). The document stated that the effective date was January 13, 1994. This was a typographical error. The correct effective date is January 13, 1995. This document corrects that error.

This document is also correcting typographical errors that were in the crosswalk listings of the federal requirements in the same immediate final rule.

**EFFECTIVE DATE:** The effective date for the immediate final rule published at 59 FR 56397 is January 13, 1995.

**FOR FURTHER INFORMATION CONTACT:** Geri Mannion, U.S. EPA Region I (CHW), J.F.K. Federal Building, Boston, Massachusetts, 02203-21, Phone (617) 565-3607.

Dated: September 24, 1997.

**John P. DeVillars**,  
*Regional Administrator, Region I.*

In the table beginning on page 56399, the following items are corrected to read as follows:

Section II: Non-HSWA Requirements Prior to Non-HSWA Cluster 1. Checklist (2) Permit Rules: Settlement Agreement, FR 39611-39623, 09/01/83.

Section III. Non-HSWA Cluster I. Checklist (13) Definition of Solid Waste, 50 FR 614-668, 01/04/85, as amended on 04/11/85 at 50 FR 14216-14220, and 50 FR 33541-33543 on 08/20/85.

Section V: Non-HSWA Cluster III. Checklist (28) Standards for Hazardous Waste Storage and Treatment Tank Systems, 51 FR 25422-25486, 07/14/86, as amended at 51 FR 29430-39431 on 08/15/86. (Non-HSWA Cluster III and HSWA Cluster I)

Section VI: Non-HSWA Cluster IV. Checklist (46) Technical Correction; Identification and Listing of Hazardous Waste, 53 FR 13382, 04/22/88.

Section VII: Non-HSWA Cluster V. Checklist (54) Permit Modifications for

Hazardous Waste Management Facilities, 53 *FR* 37912-37924, 09/28/88; as amended 10/24/88 at 53 *FR* 41649.

Section VII: Non-HSWA Cluster V. Checklist (58) Standards for Generators of Hazardous Waste; 53 *FR* 45089-45093, 11/08/88.

Section VIII: HSWA Cluster I. SI Sharing of Information With the Agency for Toxic Substances and Disease Registry, HSWA § 3019(b), 07/15/85.

[*FR* Doc. 97-27013 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-M

## FEDERAL EMERGENCY MANAGEMENT AGENCY

### 44 CFR Part 206

#### Disaster Assistance; Hazard Mitigation Grant Program

**AGENCY:** Federal Emergency Management Agency (FEMA).

**ACTION:** Notice of waiver.

**SUMMARY:** This notice states FEMA's intent to streamline the Hazard Mitigation Grant Program (HMGP) process by allowing States to use a one-time effort to apply statewide eligibility criteria to the HMGP for all disasters declared before April 7, 1997.

**DATES:** October 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Robert F. Shea, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-3619, (facsimile) (202) 646-3104.

**SUPPLEMENTARY INFORMATION:** In the past, Hazard Mitigation Grant Program (HMGP) funds were only available in counties designated as eligible by FEMA for Individual Assistance (IA) or Public Assistance (PA). Under the Stafford Act both IA and PA funds address damage or hardship resulting from the major disaster, but HMGP funds are intended to reduce the risk of future damage or hardship. As a result, FEMA has determined that the use of HMGP funds should not be limited only to counties

designated as eligible for IA or PA funds. In an effort to streamline the HMGP, FEMA will automatically designate all counties within the declared State as eligible to receive HMGP funds for all disasters declared on or after April 7, 1997.

In addition, FEMA has determined that States declared before this time should be permitted to take advantage of this policy. In order to ensure consistency in the availability of HMGP funds among all States with open disasters, FEMA is temporarily waiving its regulatory requirement at 44 CFR 206.40(d) that requires a State to request additional areas for designation within 30 days of the incident or declaration. Therefore, this notice makes public that States have until November 10, 1997, to submit to their FEMA Regional Office the open disasters for which they are requesting the designation of additional counties. For every disaster for which a State is amending the designated areas, States will have until February 9, 1998, or 18 months after the date of the disaster declaration, whichever is later, to submit HMGP project applications to the Regional Office.

(Catalog of Federal Domestic Assistance No. 83.516, Disaster Assistance)

Dated: October 2, 1997.

**James L. Witt,**

*Director.*

[*FR* Doc. 97-27000 Filed 10-9-97; 8:45 am]

BILLING CODE 6718-02-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 76

[*CS* Docket No. 95-174; FCC 96-86]

#### Uniform Cable Price-Setting Methodology

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** The Commission's amendments to 47 CFR 76.922, which

contain information collection requirements, became effective on September 4, 1997. These amendments, which were published in the **Federal Register** on March 31, 1997, relate to implementation of the rate regulation provisions of the 1992 Cable Act.

**EFFECTIVE DATE:** The amendments to 47 CFR 76.922 published at 62 *FR* 15127 became effective on September 4, 1997.

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

#### SUPPLEMENTARY INFORMATION:

1. On March 14, 1997, the Commission released a Report and Order, a summary of which was published in the **Federal Register**. See 62 *FR* 15121, March 31, 1997. The Report and Order establishes rules for an optional rate-setting methodology that would enable a cable operator to establish uniform rates for uniform cable service tiers offered in multiple franchise areas. Because the rules imposed new information collection requirements, the amendments to 47 CFR 76.922 could not become effective until approved by the Office of Management and Budget ("OMB"), and no sooner than April 30, 1997. OMB approved these rule changes on September 4, 1997.

2. The **Federal Register** summary stated that the Commission would publish a document announcing the effective date of the rule changes requiring OMB approval. The amendments to 47 CFR 76.922 became effective on September 4, 1997. This publication satisfies the statement that the Commission would publish a document announcing the effective date of the rule changes requiring OMB approval.

#### List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[*FR* Doc. 97-26786 Filed 10-9-97; 8:45 am]

BILLING CODE 6712-01-P

# Proposed Rules

Federal Register

Vol. 62, No. 197

Friday, October 10, 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 THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-251985-96]

RIN 1545-AU79

#### Source of Income From Sales of Inventory Partly From Sources Within a Possession of the United States; Also, Source of Income Derived From Certain Purchases From a Corporation Electing Section 936

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations under section 863 governing the source of income from sales of inventory produced in the United States and sold in a possession of the United States and produced in a possession of the United States and sold in the United States. It also contains proposed regulations under section 863 governing the source of income from sales of inventory purchased in a possession of the United States and sold in the United States. This document affects persons who produce (in whole or in part) inventory in the United States and sell in a possession, or produce (in whole or in part) inventory in a possession and sell in the United States, as well as persons who purchase inventory in a possession and sell in the United States. This document also contains proposed regulations under section 936 governing the source of income of a taxpayer from the sale in the United States of property purchased from a corporation that has an election under section 936 in effect. This document also provides notice of a public hearing on these proposed regulations.

**DATES:** Comments and outlines of oral comments to be presented at the public hearing scheduled for January 29, 1998,

at 10 a.m. must be received by January 8, 1998.

**ADDRESSES:** Send submissions to: CC:DOM:CORP:R (INTL-0003-95), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-251985-96), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or electronically, via the IRS Internet site at: [http://www.irs.ustreas.gov/prod/tax\\_regs/comments.html](http://www.irs.ustreas.gov/prod/tax_regs/comments.html). The public hearing will be held in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Anne Shelburne, (202) 622-3880; concerning submissions and the hearing, Ms. Evangelista Lee, (202) 622-7190 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)).

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224. Comments on the collection of information should be received by December 9, 1997. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information

may be minimized, including through the application of automated collection techniques or other forms of information technology; and

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

The collection of information requirements are in proposed § 1.863-3(f)(6). This information is required by the IRS to monitor compliance with the federal tax rules for determining the source of income from the sale of inventory produced in the United States and sold in a possession of the United States or produced in a possession of the United States and sold in the United States, or from the sale of inventory purchased in a possession of the United States and sold in the United States. The likely respondents are taxpayers who produce inventory in the United States and sell in a possession, or who produce inventory in a possession and sell in the United States, or who purchase inventory in a possession and sell in the United States. Responses to this collection of information are required to properly determine the source of a taxpayer's income from such sales.

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.

*Estimated total annual reporting burden:* 500 hours. The estimated annual burden per respondent varies from 1 hour to 5 hours, depending on individual circumstances, with an estimated average of 2.5 hours.

*Estimated number of respondents:* 200.

*Estimated annual frequency of responses:* One time per year.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

#### Background

These proposed regulations contain rules under section 863 relating to the source of income from cross-border sales of certain property. These regulations also contain rules under

section 936 relating to the source of income of a taxpayer from the sale in the United States of property purchased from a corporation that has an election under section 936 in effect. These regulations are proposed to be effective for taxable years beginning 30 days after publication of final regulations.

### Explanation of Provisions

#### *I. Income Partly From Sources Within a Possession*

##### A. Current Regulations

Section 863 authorizes the Secretary to promulgate regulations allocating or apportioning to sources within or without the United States all items of gross income, expenses, losses, and deductions other than those items specified in sections 861(a) and 862(a).

Guidance to determine the source of possession income is divided into two types of transactions: transactions described in section 863(b)(2) for property produced in the United States and sold in a possession (or vice versa), and transactions described in section 863(b)(3) for property purchased in a possession and sold in the United States (collectively, Section 863 Possession Sales).

Section 1.863-3 of the income tax regulations contains rules for determining the source of income derived from sales of certain property. These regulations were published in the **Federal Register** on November 29, 1996 (61 FR 60540), and the prior regulations were renumbered §§ 1.863-3A and 1.863-3AT. The new regulations retain the prior rules for Section 863 Possession Sales by providing in paragraph § 1.863-3(f) that taxpayers must apply the rules of § 1.863-3A(c) in allocating and apportioning income derived from sources partly within the United States and partly within a possession of the United States. These proposed regulations would modify the existing rules for allocating and apportioning income between the United States and a possession.

##### 1. Property Produced and Sold

Currently, income derived from sales of inventory produced in the United States and sold in a possession of the United States or produced in a possession of the United States and sold in the United States (Possession Production Sales), is allocated or apportioned between the United States and a possession according to one of three methods. Such income is allocated under the independent factory price method, apportioned under an apportionment method, or, with permission of the District Director,

allocated or apportioned on the basis of the taxpayer's books and records.

Under the current regulations, if an independent factory or production price (IFP) exists for Possession Production Sales, taxpayers must use the IFP method to determine the income attributable to production activities in both the sale establishing the IFP and in sales of similar products.

If an IFP does not exist, the current possessions regulations provide that the taxable income from Possession Production Sales is first computed and then apportioned between the United States and the possession. One-half of the taxable income is apportioned on the basis of the taxpayer's property within the United States and within the possession. In applying the property fraction, the taxpayer's property includes property held or used to produce income derived from Possession Production Sales. The other half of the taxpayer's taxable income is apportioned between U.S. and possession sources on the basis of the business of the taxpayer within the United States and within the possession. Currently, business of the taxpayer is measured by the sum of certain expenses, including amounts paid for labor, and the purchase of certain supplies, plus receipts from Possession Production Sales. Finally, as a third method, the existing regulations allow a taxpayer to request permission from the District Director to use the taxpayer's books and records to allocate or apportion income to sources within or without the United States if those books reflect more clearly than the other methods the taxable income derived from sources within the United States.

##### 2. Property Purchased and Sold

The second type of possession transaction governed by the existing regulations is the sale of inventory purchased in a possession and sold in the United States (Possession Purchase Sales) as described in section 863(b)(3). Under the current regulations, the income from such sales is divided between the United States and possession sources under one of two methods. The income can be apportioned, or, with permission of the District Director, allocated or apportioned on the basis of the taxpayer's books and records.

Under the apportionment method, taxable income is first determined, and then apportioned by a fraction, the numerator being the business of the taxpayer in the United States, the denominator being the total business of the taxpayer in the United States and in the possession. The fraction is

computed in the same manner as the business fraction discussed previously, except that such expenses, purchases, and sales are limited to those attributable to Possession Purchase Sales.

##### B. Issues Under Current Regulations

The IRS and Treasury believe the rules for allocating and apportioning income between the United States and the possessions of the United States should be amended to reflect certain changes made to the regulations under § 1.863-3 governing cross-border sales of inventory involving the United States and a foreign country (other than those involving possessions). Thus, for example, under the apportionment method provided in the proposed regulations, the property and business activity fractions apportioning income between the United States and a possession are modified to apportion gross income attributable to an activity, rather than to apportion net income.

The IRS and Treasury also believe certain ambiguities exist in the current regulations. The possessions rules were originally promulgated in 1926, and may not reflect current business practices. The current regulations use examples to illustrate methods for allocating or apportioning income between the United States and a possession, and should be modified to state rules.

Further, although the apportionment method for allocating Possession Production Sales income under the existing possessions regulations treats half of the income as production income, the production formula is not necessarily limited to production assets. The current inclusion of sales assets in the formula apportioning production income results in excessive income being allocated to sales activities. The production income formula should only take into account assets directly involved in production of inventory. In addition, the IRS and Treasury have reexamined the business activity fraction, and have concluded it should be revised to more clearly reflect the taxpayer's business other than production. The current fraction, for example, omits certain investments or expenses, such as marketing and advertising expenses, although income attributable in part to such expenses or investments is then included in the income apportioned by the fraction. The current regulations also take into account production expenses in the business activity fraction apportioning income from Possession Production Sales. The Service and Treasury believe that this is inappropriate in the context

of Possession Production Sales because the business activity fraction is not intended to determine the source of income attributable to production activity. In the proposed regulations, the fraction apportioning Possession Production Sales is renamed the business sales activity fraction and excludes factors reflecting production activity.

The current regulations also do not address issues in attributing to the United States or to the possession, the activities reflected in the business activity fraction. For example, the current regulations provide no guidance on whether a particular expense should be represented in the fraction as attributable to the United States or to a possession.

Accordingly, the IRS and Treasury are issuing proposed regulations under section 863 to make the possessions rules more consistent with the other regulations governing the source of income from cross-border sales of inventory, and to address certain ambiguities and problems in the existing regulations.

### C. Proposed Regulations

Section 1.863-3(f) generally retains the methods of the current regulations for dividing income between the United States and a possession of the United States, with several modifications.

#### 1. Methods to Allocate Gross Income to Activities of the Taxpayer

##### a. Property Produced and Sold

###### i. The Possession 50/50 Method

Consistent with the final regulations under § 1.863-3, paragraph (f)(2)(i)(A) of the proposed regulations makes the 50/50 method the general rule to allocate gross income from Possession Production Sales between production and business sales activity, so that the income from each type of activity can then be apportioned between U. S. and foreign sources. The taxpayer, however, may elect to apply the IFP method (described in paragraph (f)(2)(i)(B)), or, with the consent of the District Director, the books and records method (described in paragraph (f)(2)(i)(C)).

Under the possession 50/50 method, the proposed regulations allocate half of the taxpayer's gross income from Possession Production Sales to production activity and half to business sales activity. The income is then apportioned between U.S. and possession sources based on a property fraction and a business sales activity fraction. As described below, the proposed regulations make certain changes to the existing property fraction

and to the existing business activity fraction.

The proposed regulations apply the property fraction in § 1.863-3(c) to apportion the half of a taxpayer's income allocated to production activity. Thus, income is apportioned to the United States or to a possession based on the location of the taxpayer's production assets. In a change from the current regulations, and consistent with the changes made to the regulations under § 1.863-3(c), production assets are defined as tangible and intangible assets owned directly by the taxpayer that are directly used by the taxpayer to produce inventory sold in Possession Production Sales, instead of all its assets that produce income from Possession Production Sales. Production assets are included in the fraction at their adjusted tax basis.

The other half of the taxpayer's gross income is apportioned according to a business sales activity fraction. The portion of this income that is possession source income is determined by multiplying the income by a fraction, the numerator being the business sales activity of the taxpayer in the possession, and the denominator being the business sales activity of the taxpayer within the possession and outside the possession. The remaining income is sourced in the United States. Although some of the business sales activity factors not incurred in a possession may be incurred in a foreign country, Treasury and the Internal Revenue Service believe that the business sales activity fraction is only intended to source the business sales activity portion of Possession Production Sales outside the United States to the extent of business sales activity located in a possession.

The proposed regulations make some modifications to the factors in the fraction representing the business sales activity of the taxpayer. Business sales activity is measured by the sum of certain expenses, including amounts paid for labor, materials, advertising, and marketing (but excluding any expenses or other amounts that are nondeductible under section 263A, interest, and research and development), plus receipts for the sale of goods. This formula is intended to reflect better the business sales activity producing the income by including more of the factors responsible for producing that income. Cost of goods sold is also excluded from the business sales activity fraction apportioning income from Possession Production Sales, because such costs generally reflect production activity. Production activity is already represented in the

formula by the one-half of the taxpayer's income apportioned according to the location of production assets.

Finally, the proposed regulations provide more explicit guidance for attributing business sales activity between the United States and a possession. Expenses are allocated and apportioned between the United States and a possession based on the rules in §§ 1.861-8 through 1.861-14T. Gross sales are allocated to the United States or a possession based on the place of sale.

###### ii. The IFP Method

The proposed regulations make the IFP method elective, and thus eliminate any bias against taxpayers choosing to export through independent distributors. The regulations rely upon the revised regulations under § 1.863-3 for rules in applying the IFP method.

###### iii. Books and Records Method

The proposed regulations retain the books and records method of the existing regulations, permitting taxpayers to request permission from the District Director to use their books and records to determine the source of their income. The proposed regulations refer to revised § 1.863-3(b)(3) in applying the method to Possession Production Sales.

#### b. Property Purchased and Sold

##### i. The Business Activity Method

Paragraph (f)(3)(i)(A) makes the business activity method the general rule to apportion income from Possession Purchase Sales between the United States and a possession. The taxpayer may, however, elect to apply, with consent of the District Director, the books and records method.

The proposed regulations retain the structure of the existing regulations by apportioning the taxpayer's income from Possession Purchase Sales on the basis of a business activity fraction. The portion of this income that is possession source income is determined by multiplying the income by a fraction, the numerator being the business of the taxpayer in the possession, and the denominator being the business of the taxpayer within the possession and outside the possession. The remaining income is sourced in the United States.

The business activity fraction is similar to that discussed previously, used to apportion the taxpayer's income in Possession Production Sales, except that the fraction applies only to expenses, cost of goods sold, and sales attributable to Possession Purchase Sales. In addition, the business activity

fraction apportioning Possession Purchase Sales includes amounts paid for cost of goods sold. Such costs are attributed to the possession, however, only to the extent the property purchased is manufactured, produced, grown, or extracted in the possession. Treasury and the Internal Revenue Service anticipate that if a taxpayer acts in the reasonable belief that the products were manufactured in the possession, the taxpayer could act on that basis in preparing its tax return. As modified, the business activity fraction reflects the view of Treasury and the Internal Revenue Service that section 863(b)(3)'s purchase rule was intended to apply only to purchase and resale transactions, where the goods purchased are created or derived from the possession.

#### ii. Books and Records Method

The proposed regulations retain the books and records method of the existing regulations, permitting taxpayers to request permission from the District Director to use their books and records to determine the source of their income. The proposed regulations refer to revised § 1.863-3(b)(3) in applying the method to Possession Purchase Sales.

## 2. Determination of Source of Gross Income

Unlike the current regulations which provide specific rules for determining the source of income attributable to production activity and business activity only for purposes of the 50/50 method, the proposed regulations adopt rules applicable to each of the methods. Under the proposed regulations, once gross income attributable to production activity, business activity, or sales activity has been determined under one of the prescribed methods, the source of the gross income is determined separately for each type of income. The source of gross income attributable to production activity (when applying the possession 50/50 method) is determined under paragraph (c)(1), based on the location of production assets. The source of gross income attributable to sales activity (when applying the IFP method or the books and records method) is determined under paragraph (c)(2), based generally on the location of the sale. The source of gross income attributable to business sales activity (when applying the possession 50/50 method) is determined under paragraph (f)(2)(ii)(B), based on expenses, and gross sales attributable to Possession Production Sales. The source of gross income attributable to business activity (when applying the business activity

method) is determined under paragraph (f)(3)(ii), based on expenses, cost of goods sold, and gross sales attributable to Possession Purchase Sales.

## 3. Determination of Source of Taxable Income

Once the source of gross income is determined under paragraph (f)(2) or (3), taxpayers then determine the source of taxable income. Under proposed paragraph (f)(4), taxpayers must allocate or apportion under §§ 1.861-8 through 1.861-14T the amounts of expenses, losses and other deductions to gross income determined under each of the prescribed methods. In the case of amounts of expenses, losses and other deductions allocated or apportioned to gross income determined under the IFP method or the books and records method, the taxpayer must apply the rules of §§ 1.861-8 through 1.861-14T to allocate or apportion these amounts between gross income from sources within the United States and within a possession. For expenses, losses and other deductions allocated or apportioned to gross income determined under the possessions 50/50 method, taxpayers must apportion expenses and other deductions pro rata based on the relative amounts of U.S. and possession source gross income. The research and experimental (R&E) expense allocation rules in § 1.861-17 apply to taxpayers using the 50/50 method, so that the R&E set aside (described in § 1.861-17) remains available to such taxpayers.

## 4. Treatment of Gross Income Derived From Certain Purchases From a Corporation That Has an Election in Effect Under Section 936

The proposed regulations clarify that section 863 does not apply to determine the source of a taxpayer's gross income derived from a purchase of inventory from a corporation that has an election in effect under section 936, if the taxpayer's income from sales of that inventory is taken into account to determine benefits under section 936(h)(5)(C) for the section 936 corporation.

## 5. Treatment of Partners and Partnerships

The proposed regulations rely on the rules in § 1.863-3(g) for determining the appropriate treatment in transactions involving partnerships. Under those rules, the aggregate approach applies to a partnership's production and sales activity for two purposes only. First, the aggregate approach applies in determining the character of a partner's distributive share of partnership income. Second, the aggregate approach

applies in sourcing income from sales of inventory property that is transferred in-kind from or to a partnership.

## 6. Election and Reporting Rules

Under paragraph (f)(6)(i) of the proposed regulations, a taxpayer must use the 50/50 method to determine the source of income from Possession Production Sales unless the taxpayer elects to use the IFP method, or elects the books and records method. For Possession Purchase Sales, a taxpayer must use the business activity method, unless the taxpayer elects the books and records method. The taxpayer makes an election by using the method on its timely filed original tax return. That method must be used in later taxable years unless the Commissioner or his delegate consents to a change. Permission to change methods in later years will not be withheld unless the change would result in a substantial distortion of the source of income.

A taxpayer must fully explain the methodology used in applying either paragraph (f)(2) or (3), and the amount of income allocated or apportioned to U.S. and foreign sources, in a statement attached to its tax return.

### *II. Income Derived From Certain Purchases From a Corporation That Has an Election in Effect Under Section 936*

These proposed regulations clarify that where a taxpayer purchases a product from a corporation that has an election in effect under section 936, the source of the taxpayer's gross income derived from sales of that product (in whatever form sold) in the United States is U.S. source, if the taxpayer's income from sales of that product is taken into account to determine benefits under section 936(h)(5)(C)(i) for the section 936 corporation. The taxpayer's income is U.S. source without regard to whether a possession product is a component, end-product form, or integrated product. No inference should be drawn from the proposed effective date concerning the treatment of transactions involving sales of property purchased from a section 936 corporation entered into before the regulations are applicable.

### **Proposed Effective Dates**

These regulations are proposed to be effective for taxable years beginning on or after the date that is 30 days after the date of publication of final regulations.

### **Special Analyses**

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby

certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the rules of this section principally impact large multinationals who pay foreign taxes on substantial foreign operations and therefore the rules will impact very few small entities. Moreover, in those few instances where the rules of this section impact small entities, the economic impact on such entities is not likely to be significant. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

### Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely (in the manner described under the ADDRESSES caption) to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for January 29, 1998, at 10 a.m., in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit comments and an outline of topics to be discussed and the time to be devoted to each topic (in the manner described under the ADDRESSES caption of this preamble) by January 8, 1998.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### Drafting Information

The principal author of these regulations is Anne Shelburne, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

**Paragraph 1.** The authority citation for part 1 is amended by revising the entry for "Section 1.863-3", removing the entry for "Sections 1.936-4 through 1.936-7", and adding entries in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
 Section 1.863-3 also issued under 26 U.S.C. 863(a) and (b), and 26 U.S.C. 936(h). \* \* \*  
 Section 1.936-4 also issued under 26 U.S.C. 936(h).  
 Section 1.936-5 also issued under 26 U.S.C. 936(h).  
 Section 1.936-6 also issued under 26 U.S.C. 863(a) and (b), and 26 U.S.C. 936(h).  
 Section 1.936-7 also issued under 26 U.S.C. 936(h). \* \* \*

**Par. 2.** Section 1.863-3 is amended as follows:

1. Paragraph (f) is revised.
2. Paragraph (h) is amended by adding a sentence at the end of the paragraph.

The revision and addition read as follows:

#### § 1.863-3 Allocation and apportionment of income from certain sales of inventory.

\* \* \* \* \*  
 (f) *Income partly from sources within a possession of the United States—(1) In general.* This paragraph (f) relates to gains, profits, and income, which are treated as derived partly from sources within the United States and partly from sources within a possession of the United States (Section 863 Possession Sales). This paragraph (f) applies to determine the source of income derived from the sale of inventory produced (in whole or in part) by the taxpayer within the United States and sold within a possession, or produced (in whole or in part) by a taxpayer in a possession and sold within the United States (Possession Production Sales). It also applies to determine the source of income derived from the purchase of personal property within a possession of the United States and its sale within the United States (Possession Purchase Sales). A taxpayer subject to this paragraph (f) must divide gross income from Section 863 Possession Sales using one of the methods described in either paragraph (f)(2)(i) of this section (in the case of Possession Production Sales) or paragraph (f)(3)(i) of this section (in the case of Possession Purchase Sales). Once a taxpayer has elected a method, the taxpayer must separately apply that method to the applicable category of

Section 863 Possession Sales in the United States and to those in a possession. The source of gross income from each type of activity must then be determined under either paragraph (f)(2)(ii) or (3)(ii) of this section, as appropriate. The source of taxable income from Section 863 Possession Sales is determined under paragraph (f)(4) of this section. The taxpayer must apply the rules for computing gross and taxable income by aggregating all Section 863 Possession Sales to which a method in this section applies after separately applying that method to Section 863 Possession Sales in the United States and to Section 863 Possession Sales in a possession. This section does not apply to determine the source of a taxpayer's gross income derived from a sale of inventory purchased from a corporation that has an election in effect under section 936, if the taxpayer's income from sales of that inventory is taken into account to determine benefits under section 936 for the section 936 corporation. For rules to be applied to determine the source of such income, see § 1.936-6(a)(5) Q&A 7a and (b)(1) Q&A 13.

(2) *Allocation or apportionment for Possession Production Sales—(i) Methods for determining the source of gross income for Possession Production Sales—(A) Possession 50/50 method.* Under the possession 50/50 method, gross income from Possession Production Sales is allocated between production activity and business sales activity as described in this paragraph (f)(2)(i)(A). Under the possession 50/50 method, one-half of the taxpayer's gross income will be considered income attributable to production activity and the source of that income will be determined under the rules of paragraph (f)(2)(ii)(A) of this section. The remaining one-half of such gross income will be considered income attributable to business sales activity and the source of that income will be determined under the rules of paragraph (f)(2)(ii)(B) of this section.

(B) *IFP method.* In lieu of the possession 50/50 method, a taxpayer may elect the independent factory price (IFP) method. Under the IFP method, gross income from Possession Production Sales is allocated to production activity or sales activity using the IFP method, as described in paragraph (b)(2) of this section, if an IFP is fairly established under the rules of paragraph (b)(2) of this section. See paragraphs (f)(2)(ii)(A) and (C) of this section for rules for determining the source of gross income attributable to production activity and sales activity.

(C) *Books and Records method.* A taxpayer may elect to allocate gross income using the books and records method described in paragraph (b)(3) of this section, if it has received in advance the permission of the District Director having audit responsibility over its return. See paragraph (f)(2)(ii) of this section for rules for determining the source of gross income.

(ii) *Determination of source of gross income from production, business sales, and sales activity—(A) Gross income attributable to production activity.* The source of gross income from production activity is determined under the rules of paragraph (c)(1) of this section, except that the term possession is substituted for foreign country wherever it appears.

(B) *Gross income attributable to business sales activity—(1) Source of gross income.* Gross income from the taxpayer's business sales activity is sourced in the possession in the same proportion that the amount of the taxpayer's business sales activity for the taxable year within the possession bears to the amount of the taxpayer's business sales activity for the taxable year both within the possession and outside the possession, with respect to Possession Production Sales. The remaining income is sourced in the United States.

(2) *Business sales activity.* For purposes of this paragraph (f)(2)(ii)(B), the taxpayer's business sales activity is equal to the sum of—

(i) The amounts for the taxable period paid for wages, salaries, and other compensation of employees, and other expenses attributable to Possession Production Sales (other than amounts that are nondeductible under section 263A, interest, and research and development); and

(ii) Possession Production Sales for the taxable period.

(3) *Location of business sales activity.* For purposes of determining the location of the taxpayer's business activity within a possession, the following rules apply:

(i) *Sales.* Receipts from gross sales will be attributed to a possession under the provisions of paragraph (c)(2) of this section.

(ii) *Expenses.* Expenses will be attributed to a possession under the rules of §§ 1.861–8 through 1.861–14T.

(C) *Gross income attributable to sales activity.* The source of the taxpayer's income that is attributable to sales activity, as determined under the IFP method or the books and records method, will be determined under the provisions of paragraph (c)(2) of this section.

(3) *Allocation or apportionment for Possession Purchase Sales—(i) Methods*

*for determining the source of gross income for Possession Purchase Sales—(A) Business activity method.* Gross income from Possession Purchase Sales is allocated in its entirety to the taxpayer's business activity, and is then apportioned between U.S. and possession sources under paragraph (f)(3)(ii) of this section.

(B) *Books and records method.* A taxpayer may elect to allocate gross income using the books and records method described in paragraph (b)(3) of this section, subject to the conditions set forth in paragraph (b)(3) of this section. See paragraph (f)(2)(ii) of this section for rules for determining the source of gross income.

(ii) *Determination of source of gross income from business activity—(A) Source of gross income.* Gross income from the taxpayer's business activity is sourced in the possession in the same proportion that the amount of the taxpayer's business activity for the taxable year within the possession bears to the amount of the taxpayer's business activity for the taxable year both within the possession and outside the possession, with respect to Possession Purchase Sales. The remaining income is sourced in the United States.

(B) *Business activity.* For purposes of this paragraph (f)(3)(ii), the taxpayer's business activity is equal to the sum of—

(1) The amounts for the taxable period paid for wages, salaries, and other compensation of employees, and other expenses attributable to Possession Purchase Sales (other than amounts that are nondeductible under section 263A, interest, and research and development);

(2) Cost of goods sold attributable to Possession Purchase Sales during the taxable period; and

(3) Possession Purchase Sales for the taxable period.

(C) *Location of business activity.* For purposes of determining the location of the taxpayer's business activity within a possession, the following rules apply:

(1) *Sales.* Receipts from gross sales will be attributed to a possession under the provisions of paragraph (c)(2) of this section.

(2) *Cost of goods sold.* Payments for cost of goods sold will be properly attributable to gross receipts from sources within the possession only to the extent that the property purchased was manufactured, produced, grown, or extracted in the possession (within the meaning of section 954(d)(1)(A)).

(3) *Expenses.* Expenses will be attributed to a possession under the rules of §§ 1.861–8 through 1.861–14T.

(iii) *Examples.* The following examples illustrate the rules of paragraph (f)(3)(ii) relating to the determination of source of gross income from business activity:

*Example 1.* (i) U.S. Co. purchases in a possession product X for \$80 from A. A manufactures X in the possession. Without further production, U.S. Co. sells X in the United States for \$100. Assume U.S. Co. has sales and administrative expenses in the possession of \$10.

(ii) To determine the source of U.S. Co.'s gross income, the \$100 gross income from sales of X is allocated entirely to U.S. Co.'s business activity. Forty-seven dollars of U.S. Co.'s gross income is sourced in the possession. [Possession expenses (\$10) plus possession purchases (\$80) plus possessions sales (\$0), divided by total expenses (\$10) plus total purchases (\$80) plus total sales (\$100).] The remaining \$53 is sourced in the United States.

*Example 2.* (i) Assume the same facts as in *Example 1*, except that A manufactures X outside the possession.

(ii) To determine the source of U.S. Co.'s gross income, the \$100 gross income is allocated entirely to U.S. Co.'s business activity. Five dollars of U.S. Co.'s gross income is sourced in the possession. [Possession expenses (\$10) plus possession purchases (\$0) plus possession sales (\$0), divided by total expenses (\$10) plus total purchases (\$80) plus total sales (\$100).] The \$80 purchase is not included in the numerator used to determine U.S. Co.'s business activity in the possession, since product X was not manufactured in the possession. The remaining \$95 is sourced in the United States.

(4) *Determination of source of taxable income.* Once the source of gross income has been determined under paragraph (f)(2) or (3) of this section, the taxpayer must properly allocate and apportion separately under §§ 1.861–8 through 1.861–14T the amounts of its expenses, losses, and other deductions to its respective amounts of gross income from Section 863 Possession Sales determined separately under each method described in paragraph (f)(2) or (3) of this section. In addition, if the taxpayer deducts expenses for research and development under section 174 that may be attributed to its Section 863 Possession Sales under § 1.861–8(e)(3), the taxpayer must separately allocate or apportion expenses, losses, and other deductions to its respective amounts of gross income from each relevant product category that the taxpayer uses in applying the rules of § 1.861–8(e)(3)(i)(A). In the case of gross income from Section 863 Possession Sales determined under the IFP method or books and records method, a taxpayer must apply the rules of §§ 1.861–8 through 1.861–14T to properly allocate or apportion amounts of expenses,

losses and other deductions, allocated and apportioned to such gross income, between gross income from sources within and without the United States. In the case of gross income from Possession Production Sales determined under the possessions 50/50 method or gross income from Possession Purchase Sales computed under the business activity method, the amounts of expenses, losses, and other deductions allocated and apportioned to such gross income must be apportioned between sources within and without the United States pro rata based on the relative amounts of gross income from sources within and without the United States determined under those methods.

(5) *Special rules for partnerships.* In applying the rules of this paragraph (f) to transactions involving partners and partnerships, the rules of paragraph (g) of this section apply.

(6) *Election and reporting rules—(i) Elections under paragraph (f)(2) or (3) of this section.* If a taxpayer does not elect one of the methods specified in paragraph (f)(2) or (3) of this section, the taxpayer must apply the possession 50/50 method in the case of Possession Production Sales or the business activity method in the case of Possession Purchase Sales. The taxpayer may elect to apply a method specified in either paragraph (f)(2) or (3) of this section by using the method on a timely filed original return (including extensions). Once a method has been used, that method must be used in later taxable years unless the Commissioner consents to a change. Permission to change methods from one year to another year will be granted unless the change would result in a substantial distortion of the source of the taxpayer's income.

(ii) *Disclosure on tax return.* A taxpayer who uses one of the methods described in paragraph (f)(2) or (3) of this section must fully explain in a statement attached to the tax return the methodology used, the circumstances justifying use of that methodology, the extent that sales are aggregated, and the amount of income so allocated.

(h) *Effective dates.* \* \* \* However, the rules of paragraph (f) of this section apply to taxable years beginning on or after the date that is 30 days after the date of publication of final regulations.

**Par. 3.** In § 1.936-6, paragraph (a)(5) Q&A 7a is added to read as follows:

**§ 1.936-6 Intangible property income when an election out is made: Cost sharing and profit split options; covered intangibles.**

\* \* \* \* \*

(a) \* \* \*

(5) \* \* \*

*Q. 7a:* What is the source of the taxpayer's gross income derived from a sale in the United States of a possession product purchased by the taxpayer (or an affiliate) from a corporation that has an election in effect under section 936, if the income from such sale is taken into account to determine benefits under cost sharing for the section 936 corporation? Is the result different if the taxpayer (or an affiliate) derives gross income from a sale in the United States of an integrated product incorporating a possession product purchased by the taxpayer (or an affiliate) from the section 936 corporation, if the taxpayer (or an affiliate) processes the possession product or an excluded component in the United States?

*A. 7a:* Under either scenario, the income is U.S. source, without regard to whether the possession product is a component, end-product, or integrated product. Section 863 does not apply in determining the source of the taxpayer's income. This Q&A 7a is applicable for taxable years beginning on or after the date that is 30 days after the date of publication of final regulations.

\* \* \* \* \*

**Michael P. Dolan,**

*Acting Commissioner of Internal Revenue.*

[FR Doc. 97-26857 Filed 10-9-97; 8:45 am]

BILLING CODE 4830-01-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[CA 198-0056; FRL-5907-3]

### Approval and Promulgation of Implementation Plans; California State Implementation Plan Revision, San Diego County Air Pollution Control District

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve revisions to the California State Implementation Plan (SIP) which concern the control of volatile organic compound (VOC) emissions from kelp processing and bio-polymer manufacturing operations.

The intended effect of proposing approval of this rule is to regulate emissions of VOCs in accordance with the requirements of the Clean Air Act, as amended in 1990 (CAA or the Act). EPA's final action will incorporate this rule into the federally approved SIP. In addition, final action on this rule will serve as a final determination that

deficiencies in the rule (identified by EPA in a limited approval/limited disapproval action on February 14, 1996) have been corrected and that any sanctions or Federal Implementation Plan (FIP) obligations are permanently stopped. An Interim Final Determination published in today's **Federal Register** will defer the imposition of sanctions until EPA takes final action. EPA has evaluated the rule and is proposing to approve the rule under provisions of the CAA regarding EPA action on SIP submittals, SIPs for national primary and secondary ambient air quality standards, and plan requirements for nonattainment areas.

**DATES:** Comments must be received on or before November 10, 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 rule and EPA's evaluation report of the rule are available for public inspection at EPA's Region 9 office during normal business hours. Copies of the submitted rule are also available for inspection at the following locations:

San Diego County Air Pollution Control District, 9150 Chesapeake Drive, San Diego, CA 92123-1096  
California Air Resources Board, Stationary Source Division, Rule Evaluation Section, 2020 "L" Street, Sacramento, CA 95814.

**FOR FURTHER INFORMATION CONTACT:** Patricia A. Bowlin, Rulemaking Office (AIR-4), Air Division, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, CA 94105-3901, (415) 744-1188.

#### SUPPLEMENTARY INFORMATION:

##### I. Applicability

The rule being proposed for approval into the California SIP is San Diego County Air Pollution Control District (SDCAPCD) Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations. This rule was submitted by the California Air Resources Board (CARB) to EPA on August 1, 1997.

##### II. Background

On March 3, 1978, EPA promulgated a list of ozone nonattainment areas under the provisions of the Clean Air Act, as amended in 1977 (1977 CAA or pre-amended Act), that included the San Diego Area. 43 FR 8964; 40 CFR 81.305. On May 26, 1988, EPA notified the Governor of California, pursuant to section 110(a)(2)(H) of the pre-amended

Act, that the SDCAPCD's portion of the California SIP was inadequate to attain and maintain the ozone standard and requested that deficiencies in the existing SIP be corrected (EPA's SIP-Call). On November 15, 1990, the Clean Air Act Amendments of 1990 were enacted. Pub. L. 101-549, 104 Stat. 2399, codified at 42 U.S.C. 7401-7671q. In amended section 182(a)(2)(A) of the CAA, Congress statutorily adopted the requirement that nonattainment areas fix their deficient reasonably available control technology (RACT) rules for ozone and established a deadline of May 15, 1991 for states to submit corrections of those deficiencies.

Section 182(a)(2)(A) applies to areas designated as nonattainment prior to enactment of the amendments and classified as marginal or above as of the date of enactment. It requires such areas to adopt and correct RACT rules pursuant to pre-amended section 172(b) as interpreted in pre-amendment guidance.<sup>1</sup> EPA's SIP-Call used that guidance to indicate the necessary corrections for specific nonattainment areas. San Diego Area is classified as Serious<sup>2</sup>; therefore, this area was subject to the RACT fix-up requirement and the May 15, 1991 deadline.

The State of California submitted many revised RACT rules for incorporation into its SIP on August 1, 1997, including the rule being acted on in this document. This document addresses EPA's proposed action for SDCAPCD Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations. SDCAPCD adopted Rule 67.10 on June 25, 1997. This submitted rule was found to be complete on September 30, 1997 pursuant to EPA's completeness criteria that are set forth in 40 CFR part 51 Appendix V<sup>3</sup> and is being proposed for approval into the SIP.

Rule 67.10 controls the emissions of VOCs from kelp processing and bio-

polymer manufacturing operations. VOCs contribute to the production of ground-level ozone and smog. The rule was adopted as part of SDCAPCD's efforts to achieve the National Ambient Air Quality Standard (NAAQS) for ozone and in response to EPA's SIP-Call and the section 182(a)(2)(A) CAA requirement. The following is EPA's evaluation and proposed action for the rule.

### III. EPA Evaluation and Proposed Action

In determining the approvability of a VOC 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). The EPA interpretation of these requirements, which forms the basis for today's action, appears in the various EPA policy guidance documents listed in footnote 1. Among those provisions is the requirement that a VOC rule must, at a minimum, provide for the implementation of RACT for stationary sources of VOC emissions. This requirement was carried forth from the pre-amended Act.

For the purpose of assisting state and local agencies in developing RACT rules, EPA prepared a series of Control Technique Guideline (CTG) documents. The CTGs are based on the underlying requirements of the Act and specify the presumptive norms for what is RACT for specific source categories. Under the CAA, Congress ratified EPA's use of these documents, as well as other Agency policy, for requiring States to "fix-up" their RACT rules. See section 182(a)(2)(A). For source categories that do not have an applicable CTG (such as kelp processing and bio-polymer manufacturing operations), state and local agencies may determine what controls are required by reviewing the operation of facilities subject to the regulation and evaluating regulations for similar sources in other areas. Within the SDCAPCD there is only one facility that performs kelp processing and bio-polymer manufacturing operations. For this source category, the RACT determination required an evaluation of the manufacturing process and the emissions specific to this facility. The evaluation also considered the technological and economic feasibility of proposed controls at individual emission points.

Further interpretations of EPA policy are found in the Blue Book, referred to in footnote 1. In general, these guidance documents have been set forth to ensure

that VOC rules are fully enforceable and strengthen or maintain the SIP.

On February 14, 1996, EPA published a limited approval and a limited disapproval of a version of Rule 67.10 that had been adopted by SDCAPCD on June 15, 1994. The limited approval action incorporated this version of Rule 67.10 into the SIP. SDCAPCD's submitted Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations, includes the following significant changes from the current SIP:

- Deletes the exemption for any VOC with a normal boiling point of 185°C or greater.
- Deletes provision allowing fugitive liquid leaks from incorporators to contain up to 50% VOC by weight.
- Increases records retention period from two to five years.
- Deletes restriction that test periods shorter than 16 hours cannot be used to determine non-compliance.
- Requires 90% reduction VOC emissions from dryers in kelp processing lines where PG is being emitted.
- Requires 80% reduction of VOC emissions from incorporators.
- Adds EPA-approved capture efficiency test method protocol.
- Requires monthly visual inspection of system components to ensure absence of fugitive liquid leaks.

EPA has evaluated the submitted rule and has determined that it is consistent with the CAA, EPA regulations, and EPA policy. Therefore, SDCAPCD Rule 67.10, Kelp Processing and Bio-Polymer Manufacturing Operations is being proposed for approval under section 110(k)(3) of the CAA as meeting the requirements of section 110(a) and part D.

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.

### IV. Administrative Requirements

#### A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from E.O. 12866 review.

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or

<sup>1</sup> 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); "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); and the existing control technique guidelines (CTGs).

<sup>2</sup> The San Diego 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 56 FR 56694 (November 6, 1991). The San Diego Area was reclassified from Severe-15 to Serious on January 19, 1995, 60 FR 3771.

<sup>3</sup> 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).

final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

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

### C. Unfunded Mandates

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

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

### D. Submission to Congress and the General Accounting Office

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

### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401-7671q.

Dated: October 1, 1997.

**Harry Seraydarian,**

*Acting Regional Administrator.*

[FR Doc. 97-26856 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 300

[FRL-5906-7]

### National Oil and Hazardous Substances Pollution Contingency Plan National Priorities List

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of intent to delete North Hollywood Dump Superfund Site, Shelby County, Tennessee, from the National Priorities List.

**SUMMARY:** The Environmental Protection Agency, Region 4 (EPA) announces its intent to delete the North Hollywood Dump (the Site) from the National Priorities List (NPL) and requests public comment on this proposed action. The NPL constitutes Appendix B of 40 CFR part 300 which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which USEPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended. EPA and the State of Tennessee Department of Environment and Conservation (TDEC) have determined that the Site poses no significant threat to public health or the environment and, therefore, further response measures

pursuant to CERCLA are not appropriate.

**DATES:** Comments concerning this Site may be submitted on or before November 10, 1997.

**ADDRESSES:** Comments may be mailed to: Robert P. Morris, North Site Management Branch, Waste Management Division, U.S. Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, Georgia 30303-3104.

Comprehensive information on this Site is available through the public docket which is available for viewing at the North Hollywood Dump information repositories at the following locations:

Memphis-Shelby County Public Library, 1850 Peabody Avenue, Memphis, Tennessee 38104.

U.S. EPA Record Center, 61 Forsyth Street, S.W., Atlanta, Georgia 30303-3104.

### FOR FURTHER INFORMATION CONTACT:

Robert P. Morris, North Site Management Branch, Waste Management Division, U.S. Environmental Protection Agency, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, Georgia 30303-3104, (404) 562-8794 or 1-800-435-9233, ext. 28794.

### SUPPLEMENTARY INFORMATION:

#### I. Introduction

The Environmental Protection Agency (EPA), Region 4 announces its intent to delete the North Hollywood Dump (the Site) in Memphis, Shelby County, Tennessee, from the National Priorities List (NPL), Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300, and requests comments on its deletion. EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of these sites. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions in the unlikely event that conditions at the site warrant action.

The EPA will accept comments on the proposal to delete this Site for thirty days after publication of this document in the **Federal Register**.

Section II of this document explains the criteria for deleting sites from the NPL. Section III states the procedures that EPA is using for this action. Section IV discusses the North Hollywood Dump Site and explains how the Site meets the deletion criteria.

## II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that sites or releases may be deleted from, or recategorized on the NPL where no further response is appropriate. In making a determination to delete a site or release from the NPL, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

(i) Responsible parties or other parties have implemented all appropriate response actions required;

(ii) All appropriate Fund-financed responses under CERCLA have been implemented, and no further response action by responsible parties is appropriate; or

(iii) The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

Even if a site is deleted from the NPL, where hazardous substances, pollutants, or contaminants remain at the site above levels that allow for unlimited use and unrestricted exposure, EPA's policy is that a subsequent review of the site will be conducted at least every five years after the initiation of the remedial action at the site to ensure that the site remains protective public health and the environment.

## III. Deletion Procedures

The following procedures were used for the intended deletion of this Site: (1) EPA Region 4 has recommended deletion and has prepared the relevant documents; (2) The Tennessee Department of Environment and Conservation has concurred with the deletion decision; (3) Concurrent with this Notice of Intent to Delete, a local notice has been published in local newspapers and has been distributed to appropriate Federal, state, and local officials and other interested parties. This document announces a 30-day public comment period, provides an address and telephone number for submission of comments, and identifies the location of the local site repository; and (4) Region 4 has made all relevant documents available in the Regional Office and local site information repository.

Deletion of the Site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. The NPL is designed primarily for informational purposes and to assist Agency management. As mentioned in section II of this document, § 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions.

For deletion of this Site, EPA will accept and evaluate public comments on EPA's Notice of Intent to Delete before making a final decision to delete. If necessary, the Agency will prepare a Responsiveness Summary to address any significant public comments received.

A deletion occurs when the Regional Administrator places a final notice in the **Federal Register**. Generally, the NPL will reflect deletions in the final update following the Notice. Public notices and copies of the Responsiveness Summary will be made available to local residents by Region 4.

## IV. Basis for Intended Site Deletion

The following site summary provides the Agency's rationale for the proposal to delete this Site from the NPL.

### A. Background

The 70-acre North Hollywood Dump was used as a municipal dump from the 1930s until the City closed it in 1967. However, some dumping of non-chemical refuse probably continued until 1980.

### B. History

In the late 1940s, the Hayden Chemical Company used the Site to dispose of wastes generated in the production of sodium hydrochloride. Hayden later was bought out by Velsicol Chemical Corporation, which continued the practice of dumping at the Site. At one time, pesticide-contaminated sludge from a closed sewer line leading to the Velsicol plant was removed and buried in a small area known as the "Endrin Pit." The Site was also used for the disposal of other industrial wastes from plants in the Memphis area. In the 1960s, Buckeye Cellulose in Memphis sent copper-contaminated material to the Site for disposal. In 1980, the EPA found pesticides and heavy metals in surface soil, groundwater and pond sediments on the Site. The Site contained pesticides in soils at levels of concern, for example, chlordane at 160 mg/kg (the action level used for chlordane was 100 mg/kg (ppm)). Due to high community concern in the early 1980s, the State of Tennessee recommended this Site as the State's highest priority hazardous waste site. Approximately 10,000 people live within three miles of the dump site. An elementary school is situated close to the dump.

The groundwater and surface water ponds were contaminated with pesticides including chlordane and endrin. The soil was contaminated with pesticides and heavy metals including lead, copper, and arsenic. Ingestion or

direct contact with contaminated groundwater or soil posed a potential public health threat. Ingestion of contaminated fish caught from surface water on the Site also posed a potential public health risk.

The Site was addressed in two stages: removal actions and a long-term remedial phase focused on the cleanup of the entire Site.

In 1980, the EPA took an emergency action to slow the movement of contaminants from the Site. Also, the EPA installed a chain-link fence around the Site and began a program to monitor on-site wastes. In 1981, a technical assistance group made up of representatives from the State, the City of Memphis, Shelby County, local industry, and the EPA, removed some of the chemical wastes from the surface of the Site.

On October 23, 1981, the Site was proposed for the National Priorities List (NPL). The EPA then assumed the lead role from TDEC to complete investigations into the extent and nature of contamination. The Site was placed on the NPL on September 8, 1983. The Potentially Responsible Parties (PRPs) took over the study April 1, 1984. After the completion of the Supplemental Remedial Investigation and Feasibility Study (RI/FS) on September 13, 1990, the Record of Decision (ROD) was finalized.

### C. Characterization of Risk

At that time, the Site contained high levels of contaminants in soils (e.g., 52,400 ppb chlordane, 67,800 ppb heptachlor, 62.7 ppb DDT, et. al.) and sediments (e.g., 87 ppm chlordane, 56 ppm chlordane, 21 ppm heptachlor, 140 ppm lead, et. al.). The ROD required retrofitting the landfill to meet legal sanitation standards. This included: placement of a 2-foot clay cap, grading, and revegetation; drainage of an adjacent 40-acre pond known to have held contaminated sediments; installation of an approximate 3-foot cover over the contaminated sediments; and the removal of fish found to be contaminated, followed by restocking of the pond. Groundwater was to be monitored to ensure contamination levels remain within acceptable State alternative concentration levels (ACLs) which were set to be protective of surface water (e.g., 0.45 micrograms/liter ( $\mu\text{g/L}$ ) endrin, 0.51  $\mu\text{g/L}$  chlordane, 0.23  $\mu\text{g/L}$  heptachlor, et. al.). Additionally, the fenced Site was to be expanded and maintained and, restrictions on future use of the Site were put into place. TDEC concurred with the selected remedy. On August 3, 1992, the PRP, the Hollywood Dump

Steering Committee (HDSC), entered into a Consent Decree with the EPA to perform remedy design and cleanup activities at the Site. The Remedy Design (RD) was completed September 27, 1993, by the PRP's primary consultant, the Memphis Environmental Center (MEC). The PRP's Remedial Action Construction Contract was awarded to MEC on January 17, 1994. MEC began cleanup activities in early 1994. The capping and grading of the landfill and the drum removal was completed by MEC in 1995. Drainage and covering of sediments began in 1995 and were completed by MEC in December 1996.

#### *D. Operation and Maintenance*

Operation and Maintenance (O&M), including the monitoring program, is in place. The monitoring program is specific to the groundwater medium. As

stipulated in the ROD and the Consent Decree, contaminant levels in groundwater are not to exceed ACLs. The contingency alternative for groundwater exceeding ACLs is that it will be pumped from the shallow aquifer and discharged into the municipal sewer system. To date, contaminant levels in groundwater have not exceeded ACLs. Cleanup activities at the site are now complete.

Confirmational monitoring of groundwater demonstrate that no significant risk to public health or the environment is posed by materials remaining at the Site. The EPA and TDEC concur that conditions at the Site pose no unacceptable risks to human health or the environment.

#### *E. Five-Year Review*

No hazardous substances remain uncontained or exposed at the Site

above health-based levels. However, the Site is not available for unlimited use or unrestricted exposure. The first policy five-year review for this site shall be completed by January 17, 1999.

One of the three criteria for deletion specifies that EPA may delete a site from the NPL if the responsible parties or other parties have implemented all appropriate response actions required. The EPA, with the concurrence of TDEC, contends this criterion has been met. Subsequently, EPA is proposing deletion of this Site from the NPL. Documents supporting this action are available from the public docket.

Dated: September 30, 1997.

#### **A. Stanley Meiburg,**

*Deputy Regional Administrator, USEPA,  
Region 4.*

[FR Doc. 97-26644 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P

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.

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## DEPARTMENT OF AGRICULTURE

### Research, Education, and Economics

#### Notice of the 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, 5 U.S.C. App., the United States Department of Agriculture announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

**SUPPLEMENTARY INFORMATION:** The National Agricultural Research, Extension, Education, and Economics Advisory Board, which represents 30 constituent categories, as specified in section 802 of the Federal Agriculture Improvement and Reform Act of 1996 (Pub. L. No. 104-127), has scheduled a meeting on November 5-6, 1997, in Washington, D.C. The meeting agenda will focus on two key areas: (1) food and agriculture priorities for Research, Education, and Economics (REE) and its FY 2000 budget, and (2) the Fund for Rural America relevance review of Standard Project Grants and future activities of the Fund. Other agenda items include: Board recommendations on improving public understanding and appreciation of agriculture; an update on the REE Strategic Planning Task Force on agricultural facilities; and an update on the activities of the USDA Civil Rights Action Team. The Advisory Board will also discuss legislative activities related to agricultural research, extension, education, and economics and hear progress reports from Working Groups. A short orientation session will be held for newly appointed Board members on Tuesday, November 4, 1997.

**DATES:** Orientation of New Members: November 4, 1997, 5:00 to 7:00 p.m.; General Meeting: November 5-6, 1997, 9:00 a.m. to 5:00 p.m.

**PLACE:** Holiday Inn-National Airport (Crystal City), 1489 Jefferson Davis Highway, Arlington, VA 22202, Grand Ball Room.

**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. Fax: 202-720-6199, or e-mail: lshea@reeusda.gov.

Done at Washington, D.C. this 29 day of September 1997.

**I. Miley Gonzalez,**

*Under Secretary, Research, Education, and Economics.*

[FR Doc. 97-27004 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-MP-P

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## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Nicholson Land Exchange, Boise National Forest, Boise and Elmore Counties, ID

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare Environmental Impact Statement.

**SUMMARY:** The Boise National Forest will prepare an Environmental Impact Statement (EIS) to document the analysis and disclose the environmental impacts of a proposed land exchange with Thomas T. and Diana R. Nicholson.

In this exchange, the Boise National Forest would trade parcels totaling approximately 5,890 acres to the Nicholsons in exchange for parcels totaling approximately 573 acres. In order for the exchange to take place, the appraised values of the lands exchanged must be equal. Because of the different character, location, and potential uses of the different parcels, it is possible for

appraised values to be equal even when acreage figures are not. Any or all of the acres proposed for exchange may be exchanged provided the values are equal. In the event the values are not equal, either party may equalize the value by payment in cash, provided the cash equalization does not exceed 25 percent of the appraised value of the Federal lands to be conveyed in the exchange.

**DATES:** Written comments concerning the scope of the analysis described in this Notice should be received by November 14, 1997, to ensure timely consideration. No scoping meetings are planned at this time.

**ADDRESSES:** Send written comments to Sharon Paris, Project Coordinator, Boise National Forest, 1249 South Vinnell Way, Boise, ID 83709.

**FOR FURTHER INFORMATION CONTACT:** Questions concerning the proposed action and EIS should be directed to Sharon Paris at (208) 373-4157.

**SUPPLEMENTARY INFORMATION:** In September 1995, the Boise National Forest completed an Environmental Assessment (EA) titled "Nicholson #3 Land Exchange Project." This EA was distributed to the public as a predecisional EA.

Based on the information in the EA, the Boise National Forest concluded the proposal may have a significant effect on the roadless resource and decided to prepare an EIS. The proposal may result in the reduction of approximately 1,745 acres of the Mount Hienen Inventoried Roadless Area (IRA) from the National Forest System. The IRA is currently 12,390 acres. Proposals that may substantially alter the undeveloped character of an IRA require the preparation of an EIS.

The previous scoping and analysis identified that the proposed exchange would result in the reduction of approximately 1,745 acres of the Mount Heinen IRA from the National Forest System. Other potential issues may be identified during the current scoping period.

The Forest Service is seeking information and comments from Federal, State, and local agencies, as well as individuals and organizations who may be interested in, or affected by, the proposed action. The Forest Service invites written comments and suggestions on the issues related to the proposal and the area being analyzed.

Information received will be used in preparation of the draft EIS and final EIS. For the most effective use, comments should be submitted to the Forest Service within 30 days from the date of publication of this Notice in the **Federal Register**.

The Responsible Official is Robert W. Ross, Jr., Director of Recreation and Lands, Intermountain Region, Ogden, Utah. The decision to be made is whether to exchange National Forest System lands for private lands that would be of equal appraised value and of benefit to the public. The draft EIS is expected to be available for public review in February 1998, with a final EIS estimated to be completed in May 1998. The comment period on the draft EIS 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 EIS's 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 EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986), and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapter of the draft EIS. Comments may also address the adequacy of the draft EIS or the merits of the alternatives formulated and discussed in the draft EIS. 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.

Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within 10 days.

Dated: October 3, 1997.

**Jack A. Blackwell**,

*Deputy Regional Forester, Intermountain Region, USDA Forest Service.*

[FR Doc. 97-26790 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-11-M

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Big Bend Road Access, Wenatchee National Forest, Kittitas County, Washington**

**AGENCY:** Forest Service, USDA.

**ACTION:** Cancellation of an environmental impact statement.

**SUMMARY:** On May 19, 1994, a Notice of Intent (NOI) to prepare an environmental impact statement (EIS) for the Big Bend Road Access on the Cle Elum Ranger District of the Wenatchee National Forest was published in the **Federal Register** (59 FR 26205). Forest Service has combined this access with another environmental analysis process. There will be no EIS for this specific road access project. The NOI is hereby rescinded.

**FOR FURTHER INFORMATION CONTACT:** Direct questions regarding this cancellation to Susan Carter, Environmental Coordinator, Wenatchee National Forest, 215 Melody Lane, Wenatchee, Washington 98801 or telephone 509-662-4335.

Dated: October 3, 1997.

**Sonny J. O'Neal**,

*Forest Supervisor.*

[FR Doc. 97-26981 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-11-M

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### **Plum Creek Checkerboard Access Project, Wenatchee National Forest, Kittitas County, Washington**

**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 analyze and disclose the environmental impacts of a site-specific proposal to issue easements and authorize construction of roads across National Forest System (NFS) lands located in the Yakima River Basin. The action is proposed in response to an application from Plum Creek Timber Company (PCTC) who seeks legal access to approximately 45 parcels of PCTC land within the Wenatchee National Forest boundary, on the Cle Elum and Naches Ranger Districts. The proposed access locations range from approximately 5 to 20 miles south and southeast, and 5 to 25 miles north and northeast of the town of Cle Elum, Washington, and both north and south of Interstate 90, east of Snoqualmie Pass.

The purpose of the EIS will be to develop and evaluate a range of alternatives including a No Action Alternative, to respond to issues identified during the scoping process. The proposed project will be in compliance with direction in the Wenatchee National Forest Land and Resource Management Plan (March 1990) as amended by the Northwest Forest Plan (April 1994), which provides the overall guidance for management of the area. The non-Federal lands involved are covered by PCTC's Cascade Habitat Conservation Plan (1996).

The agency invites written comments on the scope of this project. In addition, the agency gives notice of this analysis so that interested and affected people are aware of how they may participate and contribute to the final decision.

**DATES:** Comments concerning the scope of this proposal must be received by November 5, 1997.

**ADDRESSES:** Submit written comments and suggestions to Sonny J. O'Neal, Forest Supervisor, Wenatchee National

Forest, 215 Melody Lane, Wenatchee, Washington 98801.

**FOR FURTHER INFORMATION CONTACT:**

Questions and comments about this EIS should be directed to Floyd Rogalski, Project Planner, Cle Elum Ranger District, 803 West Second Street, Cle Elum, Washington 98922; phone 509-674-4411, ext. 315.

**SUPPLEMENTARY INFORMATION:** The Forest Service is initiating this action in response to an application filed by PCTC. The applicant requests permanent easements across NFS lands for the purpose of constructing and maintaining access roads to approximately 45 separate parcels of land owned by the PCTC. Because these lands form a "checkerboard" ownership pattern, the parcels to be accessed are surrounded by NFS lands; no legal road access to the sections currently exists.

The applicant seeks legal access pursuant to Section 1323 of the Alaska National Interest Lands Conservation Act (ANILCA). The ANILCA directs the Forest Service to grant access to inholdings of non-Federal land within the National Forest boundary for the reasonable use and enjoyment of those lands by the landowner. The applicant has stated that it intends to manage the lands to be accessed for long term timber management under its approved Habitat Conservation Plan. The applicant intends to build roads on the authorized rights-of-way sufficient to support the intended use of the land. The proposed access involves a total of approximately 24 miles of road across 194 acres of NFS land in 45 different locations. These include the Gold Creek, Rock Creek, Little Naches, Big Creek, Little Creek, and North and South Forks and Taneum Creek drainages, all south of I-90 and Cle Elum, Washington; and lands to the east and west of Lakes Keechelus, Kachess and Cle Elum; Little Salmon La Sac Creek, Salmon La Sac Creek, Paris Creek, Boulder Creek and Fortune Creek in the Cle Elum River drainage; and the West Fork Teanway River drainage; all north of I-90 and Cle Elum, Washington. Management allocations of the NFS lands under the Northwest Forest Plan are predominately Adaptive Management Area (Snoqualmie Pass AMA) and Late Successional Reserves, with some Matrix.

A range of alternative will be considered, including a no action alternative. Other alternatives will be developed in response to issues received during scoping.

The major issues that have been identified to date include: the impact to heritage resources; the potential

reduction in the spectrum of recreational opportunities currently available; the impact on the economy of the county; the impact to the roadless areas; the impact to late-successional habitat; and the impact to water quality.

Public participation will be especially important at several points during the analysis. The Forest Service will be seeking information, comments, and assistance from Federal, State, and local agencies, Tribes, and other organizations or individuals who may be interested in or affected by the proposed action. This information will be used in preparation of the draft EIS. The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating insignificant issues or those which have been covered by a relevant previous environmental process.
4. Exploring and identifying additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e. direct, indirect, and cumulative effects and connected actions).
6. Determining potential cooperating agencies and task assignments.

Public meetings are not scheduled prior to the release of the draft EIS. Meetings will be held during the comment period between the draft and final EIS. The location of these meetings will be determined by the addresses on the project mailing list. Notice of meeting dates and locations will be published in the newspaper of record for the Wenatchee National Forest, *The Wenatchee World*, and the following localized newspapers: *Northern Kittitas County Tribune*; *Ellensburg Record*; and *Yakima Herald Republic*.

The draft EIS is expected to be filed with the Environmental Protection Agency (EPA) and to be available for public review by December, 1997. EPA will publish a notice of availability of the draft EIS in the **Federal Register**. The comment period on the draft EIS will be 45 days from the date the EPA notice appears in the **Federal Register**.

Copies of the draft EIS will be distributed to interested and affected agencies, organizations, and members of the public for their review and comment. It is very important that those interested in the management of the Wenatchee National Forest participate at that time.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First,

reviewers of a draft EIS 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 EIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir, 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, It is very important that those interested in this proposed action participate by the close of the 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 EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft EIS. Comments may also address the adequacy of the draft EIS or 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).

The final EIS is scheduled to be completed in October 1998. In the final EIS, the Forest Service is required to respond to comments and responses received during the comment period that pertain to the environmental consequences discussed in the draft EIS and applicable laws, regulations, and policies considered in making the decision regarding this proposal.

Sonny J. O'Neal, Forest Supervisor, Wenatchee National Forest, is the responsible official. The responsible official will document the decision and rationale for the decision in the Record of Decision. That decision will be subject to Forest Service appeal regulations (36 CFR part 215).

Dated: October 3, 1997.

**Sonny J. O'Neal,**

*Forest Supervisor.*

[FR Doc. 97-26982 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF AGRICULTURE****Forest Service****Northwest Sacramento Provincial Advisory Committee (PAC)**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Northwest Sacramento Provincial Advisory Committee will meet on October 22 and 23, 1997 at the conference room in the United Way Building, 2280 Benton Drive, Redding, CA. On October 22, the meeting will begin at 10:00 a.m. and adjourn at 5:00 p.m. The meeting on October 23 will resume at 8:00 a.m. and adjourn at 3:00 p.m. Agenda items to be covered include: (1) Northwest Forest Plan Implementation; (2) Evaluation of the Watershed Analysis Process; (3) Upper Clear Creek Watershed Analysis Status; and (4) public comment periods. All PAC meetings are open to the public. Interested citizens are encouraged to attend.

**FOR FURTHER INFORMATION CONTACT:** Kathy Hammond, USDA, Klamath National Forest, at 1312 Fairlane Road, Yreka, CA 96097; telephone 916-842-6131, (FTS) 700-467-1360.

Dated: October 6, 1997.

**Kathy L. Hammond,**

*PAC Coordinator.*

[FR Doc. 97-26986 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF AGRICULTURE****Grain Inspection, Packers and Stockyards Administration****United States Standards for Beans**

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice.

The Grain Inspection, Packers and Stockyards Administration (GIPSA) is revising the voluntary United States Standards for Beans by changing the name of the class Black Turtle Soup beans to Black beans and establishing a separate grade chart for Cranberry beans. These changes were requested by the industry in order to improve the usability of the United States Standards for Beans.

Section 203(c) of the Agricultural Marketing Act of 1946, as amended, directs and authorizes the Secretary of Agriculture "to develop and improve standards of quality, condition, quantity, grade, and packaging and recommend and demonstrate such standards in order to encourage

uniformity and consistency in commercial practices \* \* \*." The Grain Inspection, Packers and Stockyards Administration (GIPSA) is committed to carrying out this authority in a manner that facilitates the marketing of agricultural commodities and makes copies of official standards available upon request.

The Grain Inspection, Packers and Stockyards Administration (GIPSA) published a notice in the **Federal Register** on August 1, 1997 (62 FR 41335), that it was proposing to change the name of the class Black Turtle Soup beans to Black beans and to establish a separate grade chart for Cranberry beans.

GIPSA received only one comment in response to that notice. The Michigan Bean Shippers Association asked that GIPSA proceed with implementing the changes and stated "The changes \* \* \* will definitely be beneficial to U.S. world bean commerce." GIPSA has determined that establishing a separate grade chart for Cranberry beans and renaming the class Black Turtle Soup beans as Black beans will improve the usability of U.S. Standards for Beans.

Since these changes to the standards were recommended and reviewed by the affected trade and are consistent with current practices in the trade, they will become effective on November 10, 1997.

The United States Standards for Beans do not appear in the Code of Federal Regulations but are maintained by the U.S. Department of Agriculture. The revised United States Standards for Beans are available either by accessing GIPSA's Home Page on the Internet at: [www.usda.gov/gipsa/strulreg/standard/beans](http://www.usda.gov/gipsa/strulreg/standard/beans) or by contacting the Audiovisual, Regulatory and Training Staff, GIPSA, USDA, STOP 3649, 1400 Independence Avenue, S.W., Washington, D.C. 20250-3649; telephone (202) 720-1734; FAX (202) 720-4628.

**Authority:** 7 U.S.C. 1621 *et seq.*

Dated: October 3, 1997.

**James R. Baker,**

*Administrator.*

[FR Doc. 97-26897 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-EN-P

**DEPARTMENT OF AGRICULTURE****Grain Inspection, Packers and Stockyards Administration Pilot Program for Barge Inspection Services on Selected Rivers**

**AGENCY:** Grain Inspection, Packers and Stockyards Administration (GIPSA).

**ACTION:** Notice with comment period.

**SUMMARY:** GIPSA is announcing its intent to conduct a pilot program allowing more than one official agency to provide barge inspection services within a single geographic area on the Mississippi River and/or other selected rivers. GIPSA is requesting comments on the specific pilot programs described below, and GIPSA also is announcing that it will consider suggestions for other possible pilot programs in lieu of those listed below.

**DATES:** Comments must be postmarked, or sent by telecopier (FAX) or electronic mail by November 15, 1997.

**ADDRESSES:** Comments must be sent to Neil E. Porter, Director, Compliance Division, STOP 3604 (Room 1647-S), 1400 Independence Avenue, S.W., Washington, D.C. 20250-3604. Telecopier (FAX) users may send comments to the automatic telecopier machine at 202-690-2755, attention: Neil E. Porter.

All comments received will be made available for public inspection during regular business hours at the above address located at Room 1647-S, 1400 Independence Avenue, S.W.

**FOR FURTHER INFORMATION CONTACT:** Neil E. Porter, telephone 202-720-8262.

**SUPPLEMENTARY INFORMATION:** Sections 7(f) and 7A of the United States Grain Standards Act, as amended (Act), were amended by the U.S. Grain Standards Act Amendments of 1993 (Pub. L. 103-156) on November 24, 1993, to authorize GIPSA's Administrator to conduct pilot programs allowing more than one official agency to provide official services within a single geographic area without undermining the declared policy of the Act. The purpose of pilot programs is to evaluate the impact of allowing more than one official agency to provide official services within a single geographic area.

GIPSA considered several possible pilot programs as announced in the March 14, 1994, **Federal Register** (59 FR 11759) and the March 10, 1995, **Federal Register** (60 FR 13113). In the September 27, 1995, **Federal Register** (60 FR 49828) GIPSA announced two pilot programs, Timely Service and Open Season, starting on November 1, 1995, and ending on October 31, 1996. These two pilot programs were extended to October 31, 1999, as announced in the October 3, 1996, **Federal Register** (61 FR 51674).

The March 14, 1994, **Federal Register** Notice requested comments on a possible pilot program for barges on selected rivers or portions of rivers as defined by GIPSA. This was one of five potential pilots being considered. GIPSA received 41 comments. Seven

specifically talked about the pilot programs for barges. Of those seven, five supported the program for barges, and two did not. Subsequently, GIPSA determined that this proposed pilot program was too narrow in scope for the initial round of pilot programs.

Subsequently, some official agencies expressed their belief that a pilot program on the Mississippi River would be beneficial because there is some uncertainty over the boundary lines between official agencies along the Mississippi River. At one point GIPSA considered the boundary to be the middle of a river. Official agencies found this very difficult to work with, and GIPSA subsequently changed the boundary definition to the edge of a river. The middle of a river was viewed as an open area to be served by either contiguous official agency.

In 1993, because of flooding along the Mississippi River, GIPSA granted a temporary exception for certain types of barge inspections along portions of the Illinois, Mississippi, and Missouri Rivers. This exception made the covered river areas open to any official agency for probe sampling and inspections to expedite barge traffic. GIPSA noted no problems as a result of this exception.

In addition, some facilities located along the Mississippi River (Birds Point Terminal, Bertrand, Missouri; Peavey, St. Louis, Missouri; ADM, Winona, Minnesota; and Consolidated Grain, Caruthersville, Missouri) have received services from alternative official agencies under the existing pilot programs. There have been no significant problems resulting from the barge inspections on the Mississippi River under the existing pilot programs.

GIPSA is requesting comments on the four barge pilot program options described below.

1. Barges on the Mississippi River may be sampled by probe by any official agency; or

2. Barges on the Mississippi River may be sampled by probe at any location by the official agency designated to serve the geographic area within which the barge was loaded; or

3. Barges on all rivers may be sampled by probe by any official agency; or

4. Barges on all rivers may be sampled by probe at any location by the official agency designated to serve the geographic area within which the barge was loaded.

GIPSA will consider comments on other possible pilot programs.

Official agencies desiring to participate in this pilot program would be asked to submit their plans to provide official services under such a pilot program to Compliance Division.

This pilot program will start approximately January 1, 1998, and run concurrently with the two existing pilot programs ending October 31, 1999. During this time, GIPSA will monitor these pilot programs. If, at any time, GIPSA determines that a pilot program is having a negative impact on the official system or is not working as intended, the pilot program may be modified or discontinued.

**Authority:** Pub. L. 94-582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*).

Dated: October 6, 1997.

**Neil E. Porter,**

*Director, Compliance Division.*

[FR Doc. 97-26899 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-EN-P

## DEPARTMENT OF AGRICULTURE

### Grain Inspection, Packers and Stockyards Administration; Solicitation of Nominations for Members of the Grain Inspection Advisory Committee

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Notice to solicit nominees.

**SUMMARY:** The Grain Inspection, Packers and Stockyards Administration (GIPSA) is announcing that nominations are being sought for persons to serve on the Federal Grain Inspection Service Advisory Committee.

**SUPPLEMENTARY INFORMATION:** Under authority of section 20 of the United States Grain Standards Act (Act) Pub. L. 97-35, the Secretary of Agriculture established the Federal Grain Inspection Service (FGIS) Advisory Committee (Advisory Committee) on September 29, 1981, to provide advice to the Administrator on implementation of the Act. Section 14(c) of the United States Grain Standards Act Amendments of 1993, Pub. L. 103-156, extended the authority for the Advisory Committee through September 30, 2000.

The Advisory Committee presently consists of 15 members, appointed by the Secretary, who represent the interests of grain producers, processors, handlers, merchandisers, consumers, and exporters, including scientists with expertise in research related to the policies in section 2 of the Act. Members of the Committee serve without compensation. They are reimbursed for travel expenses, including per diem in lieu of subsistence, for travel away from their homes or regular places of business in performance of Committee service, as authorized under section 5703 of title 5, United States Code. Alternatively, travel

expenses may be paid by Committee members.

Nominations are being sought for persons to serve on the Advisory Committee to replace the five members and four alternate members whose terms expire in December 1997.

Persons interested in serving on the Advisory Committee, or in nominating individuals to serve, should contact: James R. Baker, Administrator, GIPSA, 1400 Independence Avenue, S.W., Stop 3601, Washington, D.C. 20250-3601, in writing and request Form AD-755, which must be completed and submitted to the Administrator at the above address not later than December 9, 1997.

Nominations are open to all individuals without regard to race, color, religion, sex, national origin, age, mental or physical handicap, or marital status. To ensure that recommendations of the committee take into account the needs of the diverse groups served by the Department, membership shall include, to the extent practicable, individuals with demonstrated ability to represent minorities, women, and persons with disabilities.

The final selection of Advisory Committee members and alternates will be made by the Secretary.

Dated: October 3, 1997.

**James R. Baker,**

*Administrator.*

[FR Doc. 97-26898 Filed 10-9-97; 8:45 am]

BILLING CODE 3410-EN-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:** November 10, 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**

Keene USARC, 682 Main Street,  
Keene, New Hampshire

NPA: Easter Seal Society of New  
Hampshire, Manchester, New  
Hampshire

**Janitorial/Custodial**

Craft Bros. USARC, 11 St. Anselm's  
Drive, Manchester, New Hampshire

NPA: Easter Seal Society of New  
Hampshire, Manchester, New  
Hampshire

**Janitorial/Custodial**

Grenier Field USARC, Manchester,  
New Hampshire

NPA: Easter Seal Society of New  
Hampshire, Manchester, New  
Hampshire

**Janitorial/Custodial**

Paul A. Doble USARC, 125 Cottage  
Street, Portsmouth, New Hampshire

NPA: Easter Seal Society of New  
Hampshire, Manchester, New

**Hampshire  
Janitorial/Custodial**

Raymond Bisson USARC, 70  
Rochester Hill Road, Rochester,  
New Hampshire

NPA: Easter Seal Society of New  
Hampshire, Manchester, New  
Hampshire

**Janitorial/Custodial**

Rainbow Bridge U.S. Plaza, Niagara  
Falls, New York

NPA: Niagara County Chapter,  
NYSARC, Niagara Falls, New York

**Switchboard Operation**

Veterans Affairs Medical Center, 423  
East 23rd Street, New York, New  
York

NPA: The Corporate Source, Inc., New  
York, New York

**Beverly L. Milkman,**

*Executive Director.*

[FR Doc. 97-26996 Filed 10-9-97; 8:45 am]

BILLING CODE 6353-01-P

**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:** November 10, 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  
20, July 11, 18, August 22, 1997, the  
Committee for Purchase From People  
Who Are Blind or Severely Disabled  
published notices (62 FR 33585, 37191,  
38518 and 44637) of proposed additions  
to the Procurement List.

*The following comments pertain to  
Drain Plug Assembly (2590-00-299-  
0739)*

Comments were received from the  
current contractor for the drain plug  
assembly, both through its counsel and  
through the office of a Member of  
Congress. The contractor indicated that  
addition of this item to the Procurement  
List would severely affect the company  
in that it would lose sales and have to

close a production line, with the layoff  
of several workers. The contractor also  
stated that its subcontractors for plating,  
heat treating, and painting of  
components would be affected.

The contractor claimed that the  
addition would eliminate at least one  
proven supplier of the drain plug  
assemblies, as the company could not  
afford to maintain an idle production  
line and would not be able to retool fast  
enough to meet emergency  
requirements. The contractor questioned  
the nonprofit agency's capability to  
meet emergency requirements and its  
ability to produce the assembly at a  
price comparable to that currently  
offered by the contractor, claiming that  
the addition will greatly increase the  
Government's cost to obtain the item.  
The contractor also indicated that  
addition of the item to the Procurement  
List was inconsistent with Government  
policies to increase contracting with  
small businesses.

The contractor indicated that the  
drain plug assembly represented a very  
small percentage of its Government  
sales, and thus an even smaller  
percentage of its total sales. These  
percentages are well below the level the  
Committee normally considers to  
constitute severe adverse impact on a  
contractor. In addition, we have been  
informed that demand for the assembly  
has been sharply reduced, so sales of the  
item will represent an even smaller  
amount in the future.

The nonprofit agency will be  
assembling the components of the drain  
plug assembly, so the contractor will  
have the opportunity to provide these  
components as a subcontractor and may  
not have to shut its production line, lay  
off workers, and remove itself from the  
ranks of potential suppliers of the drain  
plug assembly. Committee regulations  
encourage nonprofit agencies to  
subcontract with small businesses such  
as the commenting contractor.

Although the contractor indicated that  
its subcontractors would be providing  
information to the Committee on how  
the addition would affect them, we have  
received no such information. It would  
thus appear that any impact on these  
subcontractors is not severe.

Assessments of Government  
contractor capability normally include  
capability to meet emergency  
requirements that are in excess of  
normal demands. Nonprofit agencies  
participating in the Committee's Javits-  
Wagner-O'Day (JWOD) Program are held  
to the same capability standards as other  
Government contractors. In this case,  
the Government contracting activity  
which buys the drain plug assembly  
declined an opportunity to conduct a

capability inspection of the nonprofit agency, stating that it considered the nonprofit agency capable of producing the item. The Committee found the nonprofit agency capable based on the contracting activity's conclusion and an assessment by industrial engineers for the central nonprofit agency representing this nonprofit agency.

The Committee is required to set a fair market price for commodities, such as the drain plug assembly, which it adds to the Procurement List. The price, which is set through application of the Committee's Fair Market Pricing Policy, reflects the market for the item in question. This pricing mechanism ensures that the Government does not pay an unreasonable price for an item added to the Procurement List. In this case, the price was negotiated with the contracting activity, which believes the price is a fair one. Moreover, the negotiated price is only slightly above the contractor's current price, and below the recent contract price the contractor quoted in its comments. It is well below the high bid price the contractor also quoted.

The Committee does not believe that its addition of the drain plug assembly to the Procurement List is inconsistent with Government policy on increasing small business contracting. Like the Government's small business contracting programs, the JWOD Program is intended to increase Government contracting for its constituency. However, the JWOD Program is only a tiny fraction of the size of the Government's small business contracting programs. Consequently, the addition of the drain plug assembly to the Procurement List, though regrettable from the contractor's viewpoint, does not impair the Government's larger policy objectives for small business contracting as a whole.

*The following comments pertain to File, Folder (7530-00-990-8884)*

Comments were received in response to sales data requests sent to two companies, the current contractor for the file folder at the Ft. Worth depot and a company which supplies the folder to another Government depot. Both contractors claimed that this Procurement List addition would have a severe adverse impact on them. The current contractor for the Ft. Worth depot also indicated that it was continuing to be affected by earlier additions to the Procurement List, which had taken away business faster than the company could adapt to the losses, and submitted financial data to

support contentions about its current profitability.

The Committee decided to reduce the supply requirement being added to the Procurement List to 50 percent of the needs of the Ft. Worth depot to reduce the impact on contractors. At this level, the impact of the addition on the current contractor is below the level which the Committee normally considers to be severe adverse impact, even when any effects of previous additions and the contractor's current profitability are taken into account. The earlier impacts occurred in 1979 and 1995. The Committee notes that the current contractor's sales have risen significantly since those impacts occurred, so the Committee does not agree with the current contractor's contention that it has been unable to adapt to the losses it suffered.

The other contractor is not currently providing the folder to the Ft. Worth depot, so its objection is only to losing the opportunity to supply the folder in the future. The Committee does not consider this loss of a mere expectancy of a Government contract, by itself, to constitute severe adverse impact. In this case, because the Committee is leaving 50 percent of the Ft. Worth depot's supply requirement on the competitive market, the contractor will continue to have a chance to supply the requirement.

*The following comments pertain to Bag, T-Shirt & Bag, Produce, Star Bottom (8105)*

Comments were received from a current contractor for the bags. The contractor indicated that patents for the bags are controlled by two large oil companies which readily take action against any infringement of the patents. The contractor suggested that the patent requirements for the bags be researched before the nonprofit agency makes the bags.

Patent counsel for the nonprofit agency has researched the patents, and has advised the nonprofit agency and the Committee that the nonprofit agency's method of making the bags will not infringe the patents in question. Consequently, the Committee has concluded that the patents are not an obstacle to addition of the bags 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 additions 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**

Plug Assembly, Drain

2590-00-299-0739

Folder, File, Pressboard

7530-00-990-8884

(50% of the requirements for the GSA Fort Worth, TX depot)

Bag, T-Shirt Style

8105-00-NIB-1023

(Requirements for DeCA Regions Midwest, Northwest, Southwest, Alaska & Hawaii)

Bag, Produce, Star Bottom

8105-00-NIB-1046

(Requirements for DeCA Regions Midwest, Northwest, Southwest, Alaska & Hawaii)

#### **Service**

Janitorial/Custodial

West Los Angeles USARC, Los Angeles, California

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. 97-26997 Filed 10-9-97; 8:45 am]

BILLING CODE 6353-01-P

## COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

### Proposed Additions to the Procurement List; Correction

In the document appearing on page 51827, FR Doc. 97-26327, in the issue of October 3, 1997, in the first column, the NSN shown as 7340-00-197-1274 should read 7340-00-488-7939.

**Beverly L. Milkman,**

*Executive Director.*

[FR Doc. 97-26998 Filed 10-9-97; 8:45 am]

BILLING CODE 6353-01-P

## DEPARTMENT OF COMMERCE

### Bureau of Export Administration

#### Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

A meeting of the Information Systems Technical Advisory Committee will be held October 21 & 22, 1997, room 1617M-2, in the Herbert C. Hoover Building, 14th Street between Constitution and Pennsylvania Avenues, N.W., Washington, D.C. This Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to information systems equipment and technology.

#### October 21

*General Session* 9:00 a.m.-12:00 p.m.

1. Opening remarks by the Chairmen.
2. Comments or presentations by the public.
3. Presentation by Trusted Information Systems, Inc. on Key Recovery Methodology.
4. Discussion on Department of Commerce-Technical Advisory Committee communications.
5. Election of Committee Chairpersons.

#### October 21 & 22

*Closed Session*

6. Discussion of matters properly classified under Executive Order 12958, dealing with U.S. export control programs and strategic criteria related thereto.

The General Session of the meeting is open to the public and a limited number of seats will be available. To the extent time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate

distribution of public presentation materials to the Committee members, the Committee suggests that public presentation materials or comments be forwarded at least one week before the meeting to the address listed below: Ms. Lee Ann Carpenter, OAS/EA MS: 3886C, Bureau of Export Administration, U.S. Department of Commerce, Washington, D.C. 20230.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on October 3, 1997, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, that the series of meetings or portions of meetings of these Committees and of any Subcommittees thereof, dealing with the classified materials listed in 5 U.S.C. 552(c)(1) shall be exempt from the provisions relating to public meetings found in section 10(a)(1) and (a)(3), of the Federal Advisory Committee Act. The remaining series of meetings for portions thereof will be open to the public.

A copy of the Notice of Determination to close meetings or portions of meetings of these Committees is available for public inspection and copying in the Central Reference and Records Inspection Facility, Room 6020, U.S. Department of Commerce, Washington, D.C. For further information of copies of the minutes call Lee Ann Carpenter, 202-482-2583.

Dated: October 6, 1997.

**Lee Ann Carpenter,**

*Director, Technical Advisory Committee Unit.*

[FR Doc. 97-26990 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-DT-M

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-583-008]

#### Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review.

**SUMMARY:** On June 6, 1997, the Department of Commerce (the Department) published the preliminary results of review of the antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan (62 FR 31070). The review

covers one manufacturer/exporter, Yieh Hsing, of the subject merchandise to the United States and the period May 1, 1995 through April 30, 1996.

**EFFECTIVE DATE:** October 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or Linda Ludwig, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-4475/3833.

**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 Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations, codified at 19 CFR Part 353 (1997).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Department published an antidumping duty order on certain circular welded carbon steel pipes and tubes from Taiwan on May 7, 1984 (49 FR 19369). The Department published a notice of "Opportunity To Request Administrative Review" of the antidumping duty order for the 1995/1996 review period on May 8, 1996 (61 FR 20791). On May 24, 1996, the petitioners, Allied Tube & Conduit Corp., Wheatland Tube Company, Sawhill Tubular Corp., Division of Armco Inc., and Laclede Steel Co., filed a request for review of Yieh Hsing Enterprise Co., Ltd. (Yieh Hsing). We initiated the review of Yieh Hsing on June 25, 1996 (61 FR 32771).

On June 6, 1997, the Department published the preliminary results of the administrative review. We received comments from Yieh Hsing, and rebuttal comments from the petitioners. The Department has now completed this review in accordance with section 751 of the Act.

##### Scope of the Review

Imports covered by this review are shipments of certain circular welded carbon steel pipes and tubes. The Department defines such merchandise as welded carbon steel pipes and tubes of circular cross section, with walls not thinner than 0.065 inch and 0.375 inch or more but not over 4½ inches in outside diameter. These products are commonly referred to in the industry as "standard pipe" and are produced to various American Society for Testing

Materials specifications, most notably A-53, A-120, or A-135. Standard pipe is currently classified under Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7306.30.5025, 7306.30.5032, 7306.30.5040, and 7306.30.5055. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

#### Analysis of Comments Received

We invited interested parties to comment on the preliminary results of this administrative review. As noted above, we received timely comments from Yieh Hsing, and rebuttal comments from the petitioner.

*Comment 1:* Yieh Hsing asserts that other discounts are understated by a factor of 1000 in its home market sales listing. Yieh Hsing contends that the Department should correct this error in the final results of review. This error was not disputed by the petitioners.

*Department's Position:* We agree. During our verification of Yieh Hsing, we verified that other discounts were understated by a factor of 1000. (See January 29, 1997 verification report of Yieh Hsing, at page 10.) We have amended our calculations to reflect the correct amount for this expense.

*Comment 2:* Yieh Hsing contends that in calculating its dumping margin, the Department improperly compared U.S. prices to a 'six-month window period' surrounding each U.S. sale. Yieh Hsing asserts that the Department should follow its normal practice, and compare individual U.S. sales to normal values corresponding to the month of the U.S. sale.

Petitioners contend that normal values have not been averaged across a six month period, and that the Department correctly matched U.S. prices to normal values for the corresponding month.

*Department's Position:* We have reviewed our preliminary calculations and determined that we improperly compared U.S. sales to a weighted-average six-month period in our preliminary results. In these final results, we have amended our calculations, and based our calculations of normal value to the month corresponding to the U.S. sale.

#### Final Results of Review

As a result of this review, we preliminarily determine that a margin of 0.37 percent exists for Yieh Hsing for the period of June 1, 1995 through May 31, 1996.

The U.S. Customs Service shall assess antidumping duties on all appropriate entries. Individual differences between U.S. price and normal value may vary from the percentages stated above. The Department will issue appraisal instructions directly to the U.S. Customs Service.

Furthermore, the following deposit requirements will be effective for all shipments of certain circular welded carbon steel pipes and tubes from Taiwan entered or withdrawn from the warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided by section 751(a)(1) of the Act: (1) No cash deposit shall be required for Yieh Hsing because its weighted average margin is less than 0.5 percent and therefore *de minimis*, (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in the original less-than-fair-value (LTFV) investigation or a previous review, the cash deposit will continue to be the most recent rate published in the final determination or final results for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in the final results of these reviews or the LTFV investigation; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews or the original fair value investigation, the cash deposit rate will be 9.7%, the "all others" rate established in the LTFV investigation.

This notice also serves as a reminder to importers of their responsibility under 19 CFR 353.26(b) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). 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 violation which is subject to sanction.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: October 3, 1997.

**Robert S. LaRussa,**  
Assistant Secretary for Import  
Administration.

[FR Doc. 97-27033 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-DS-M

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### District Export Councils

**AGENCY:** Commercial Service, Commerce.

**ACTION:** Notice of opportunity to serve as a member of one of the fifty-one district export councils.

**SUMMARY:** The U.S. Department of Commerce is currently seeking expressions of interest from individuals in serving as a member of one of the fifty-one District Export Councils (DECs) nationwide. The DECs are closely affiliated with the Export Assistance Centers (EACs) of the Commercial Service. DECs combine the energies of over 1,500 exporters and private and public export service providers who volunteer their time to supply specialized expertise to small and medium-sized businesses in their local communities who are interested in exporting. DEC members volunteer at their own expense.

Providing their expertise and mentoring services, DEC members help local firms move from their first international business plan to their first export sale. The DECs create seminars that simplify trade finance, host international buyer delegations, design breakthrough exporting guides, put exporters on the Internet, and help build local partnerships that strengthen export assistance programs. Because DEC members represent both the users and providers of local export assistance services, they can identify gaps in the export services that EACs provide to U.S. businesses and thus shape EAC international trade programs to better meet local business needs.

#### Selection Process

About half of the approximately 30 positions on each of the 51 DECs will be open for nominations for the term that begins January 1, 1998, and ends December 31, 2001. Nominees are recommended by the local DEC Executive Secretary in consultation with the DEC and with other local export

promotion partners. After undergoing a review process, DEC nominees are then selected and appointed to DEC membership by the Secretary of Commerce.

#### Membership Criteria

Each DEC is interested in nominating highly-motivated people active in the local exporting community.

Membership composition on the DECs include: exporters (such as representatives from manufacturing, the services industry, and export trading companies); bankers; U.S. Small Business Administration representatives; state and local officials; and other "partners" including international lawyers and accountants as well as representatives from world trade centers, chambers of commerce, export management companies, labor and freight forwarders.

#### Deadline

Applications for nomination to a DEC must be received by the designated local DEC representative by November 1, 1997.

**FOR FURTHER INFORMATION CONTACT:** Nathanael Herman, International Trade Specialist, the Commercial Service, tel. 202-482-5956. Additional information about the DECs is also found on the National DEC Internet Home Page at <http://www.ita.doc.gov/usfcs/usf/dec>.

**Authority:** 15 U.S.C. 1501 *et seq.*, 15 U.S.C. 4721.

Dated: September 29, 1997.

**Daniel J. McLaughlin,**

*Deputy Assistant Secretary of Commerce for Domestic Operations.*

[FR Doc. 97-26985 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-FF-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-351-406]

#### Certain Agricultural Tillage Tool From Brazil; Final Results of Countervailing Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of countervailing duty administrative review.

**SUMMARY:** On July 9, 1997, the Department of Commerce ("the Department") published in the **Federal Register** its preliminary results of administrative review of the countervailing duty order on certain agricultural tillage tools from Brazil for

the period January 1, 1995 through December 31, 1995 (62 FR 36771). The Department has now completed this administrative review in accordance with section 751(a) of the Tariff Act of 1930, as amended. For information on the net subsidy for the reviewed company, and for all non-reviewed companies, please see the *Final Results of Review* section of this notice.

**EFFECTIVE DATE:** October 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Lorenza Olivas or Gayle Longest, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-2786.

#### SUPPLEMENTARY INFORMATION:

##### Background

Pursuant to 19 CFR 355.22(a), this review covers only those producers or exporters of the subject merchandise for which a review was specifically requested. Accordingly, this review covers the producer/exporter of the subject merchandise Marchesan Implementos Agrícolas, S.A. (Marchesan). This review covers the period January 1, 1995 through December 31, 1995, and five programs.

We published the preliminary results of review on July 9, 1997 (62 FR 36771) and invited interested parties to comment. We received no comments on our preliminary results.

##### Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930 ("the Act"), as amended by the Uruguay Round Agreements Act ("URAA"), effective January 1, 1995. In addition, all references to the Department's regulations are to the provisions codified at 19 CFR Part 355 (April 1997). The Department is conducting this administrative review in accordance with § 751(a) of the Act.

##### Scope of the Review

Imports covered by this review are shipments of certain round shaped agricultural tillage tools (discs) with plain or notched edge, such as colters and furrow-opener blades. During the review period, such merchandise was classifiable under item numbers 8432.21.00, 8432.29.00, 8432.80.00 and 8432.90.00 of the *Harmonized Tariff Schedule* (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

#### Analysis of Programs

##### Programs Found To Be Not Used

In the preliminary results we found that the producers and/or exporters of the subject merchandise did not apply for or receive benefits under the following programs:

1. Accelerated Depreciation for Brazilian-Made Capital Goods
2. Preferential Financing for Industrial Enterprises by Banco do Brasil (FST and EGF loans)
3. SUDENE Corporate Income Tax Reduction for Companies Located in the Northeast of Brazil
4. Preferential Financing under PROEX (formerly under Resolution 68 and 509 through FINEX)
5. Preferential Financing under FINEP

We did not receive any comments on these programs from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

##### Final Results of Review

In accordance with 19 C.F.R. 355.22(c)(4)(ii), we calculated an individual subsidy rate for the only producer/exporter subject to this administrative review. For the period January 1, 1995 through December 31, 1995, we determine the net subsidy for Marchesan to be zero percent *ad valorem*.

The Department will instruct the U.S. Customs Service (Customs) to liquidate, without regard to countervailing duties, shipments of the subject merchandise from Marchesan exported on or after January 1, 1995, and on or before December 31, 1995. The Department will also instruct Customs to collect a cash deposit of estimated countervailing duties of zero percent on all shipments of this merchandise from Marchesan, entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Because the URAA replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Act. The requested review will normally cover only those companies specifically named. Pursuant to 19 CFR § 355.22(g), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected, at the rate previously ordered.

As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. See *Federal-Mogul Corporation and The Torrington Company v. United States*, 822 F. Supp. 782 (CIT 1993) and *Floral Trade Council v. United States*, 822 F. Supp. 766 (CIT 1993) (interpreting 19 CFR § 353.22(e), the antidumping regulation on automatic assessment, which is identical to 19 CFR § 355.22(g)). Therefore, the cash deposit rates for all companies except those covered by this review will be unchanged by the results of this review.

We will instruct Customs to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 1995 through December 31, 1995, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR § 355.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)).

Dated: October 3, 1997.

**Robert S. LaRussa,**

*Assistant Secretary for Import Administration.*

[FR Doc. 97-27031 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-357-005]

#### Cold-Rolled Carbon Steel Flat-Rolled Products From Argentina; Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of countervailing duty administrative review.

**SUMMARY:** On July 17, 1997, the Department of Commerce (the Department) published in the **Federal Register** the preliminary results of its 1991 administrative review of the countervailing duty order on cold-rolled carbon steel flat-rolled products (cold-rolled steel) from Argentina. We have now completed this review and determine the total net subsidy to be 0.00 percent *ad valorem* for Propulsora and 1.84 percent *ad valorem* for all other companies. For further information on assessment of countervailing duties, see the *Final Results of Review* section of this notice.

**EFFECTIVE DATE:** October 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Richard Herring, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-4149.

#### SUPPLEMENTARY INFORMATION:

##### Background

On July 17, 1997, the Department published in the **Federal Register** (62 FR 38257) the preliminary results of its 1991 administrative review of the countervailing duty order on cold-rolled steel from Argentina (49 FR 18006; April 26, 1984). The Department has now completed this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

This review involves two producer/exporters, Sociedad Mixta Siderurgica (SOMISA) and Propulsora Siderurgica S.A.I.C. (Propulsora), which accounted for all exports of the subject merchandise from Argentina during the review period, and 20 programs. We invited interested parties to comment on the preliminary results; however, no comments were filed by any interested party.

On August 1, 1997, the Department published in the **Federal Register** the final results of changed circumstances countervailing duty reviews covering the orders on leather, wool, oil country tubular goods, and cold-rolled steel from Argentina (see *Leather From Argentina*, *Wool From Argentina*, *Oil Country Tubular Goods From Argentina*, and *Carbon Steel Cold-Rolled Flat Products From Argentina*; *Final Results of Changed Circumstances Countervailing Duty Reviews* (62 FR 41361)). In these changed circumstances

reviews, the Department determined that, based upon the ruling of the U.S. Court of Appeals for the Federal Circuit in *Ceramica Regiomontana v. United States*, 64 F.3d 1579, 1582 (Fed. Cir. 1995), it does not have the authority to assess countervailing duties on entries of merchandise covered by this order occurring on or after September 20, 1991. As a result, the effective date of the revocation of this CVD order on cold-rolled flat products from Argentina is now September 20, 1991. (This order had already been revoked, effective January 1, 1995, pursuant to Section 753 of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (see *Revocation of Countervailing Duty Orders* 60 FR 40568, August 9, 1995)). Therefore, the results of this administrative review will only apply to entries of the subject merchandise made between January 1, 1991 and September 19, 1991. (See *Final Results of Review* section of this notice).

#### Applicable Statute

The Department is conducting this administrative review in accordance with section 751(a) of the Act. Unless otherwise indicated, all citations to the statute and to the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

#### Scope of Review

Imports covered by this review include shipments of Argentine cold-rolled carbon steel flat products, whether or not corrugated or crimped; whether or not painted or varnished and whether or not pickled; not cut, not pressed, and not stamped to non-rectangular shape; not coated or plated with metal; over 12 inches in width and under 0.1875 inches in thickness whether or not in coils; as currently provided for under the following item numbers of the HTS: 7209.11.00, 7209.12.00, 7209.13.00, 7209.14.00, 7209.21.00, 7209.22.00, 7209.23.00, 7209.24.00, 7209.31.00, 7209.32.00, 7209.33.00, 7209.34.00, 7209.41.00, 7209.42.00, 7209.43.00, 7209.44.00, 7209.90.00, 7210.70.00, 7211.30.50, 7211.41.70, 7211.49.50, 7211.90.00, 7212.40.50. The HTS item numbers are provided for convenience and Customs purposes. The written description of the scope remains dispositive.

#### Calculation Methodology for Assessment and Cash Deposit Purposes

Pursuant to *Ceramica Regiomontana, S.A. v. United States*, 853 F. Supp. 431 (CIT 1994), Commerce is required to calculate a country-wide CVD rate, i.e., the all-other rate, by "weight-averaging

the benefits received by all companies by their proportion of exports to the United States, inclusive of zero rate firms and *de minimis* firms." Therefore, we first calculated a subsidy rate for each company subject to the administrative review. We then weight-averaged the rate received by each company using as the weight its share of total Argentine exports to the United States of subject merchandise. We then summed the individual companies' weight-averaged rates to determine the subsidy rate from all programs benefitting exports of subject merchandise to the United States.

Since the country-wide rate calculated using this methodology was above *de minimis*, as defined by 19 CFR § 355.7 (1994), we proceeded to the next step and examined the net subsidy rate calculated for each company to determine whether individual company rates differed significantly from the weighted-average country-wide rate, pursuant to 19 CFR § 355.22(d)(3). Propulsora had a significantly different net subsidy rate during the review period pursuant to 19 CFR § 355.22(d)(3). Therefore this company is treated separately for assessment purposes. All other companies are assigned the country-wide rate.

**Analysis of Programs**

*I. Programs Conferring Subsidies*

A. Programs Previously Determined To Confer Subsidies

1. Government Equity Infusions

In the preliminary results, we found that this program conferred countervailable benefits on the subject merchandise. We did not receive any comments on this program from the interested parties, and our review of the record has not led us to change our findings from the preliminary results. On this basis, the net subsidies for this program are as follows:

Manufacturer/exporter	Rate (percent)
Propulsora .....	0.00
All Other Companies .....	1.54

2. Rebate of Indirect Taxes (Reembolso/ Reintegro)

In the preliminary results, we found that there was no benefit from this program during the review period. We did not receive any comments on this program from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

B. New Program Found To Confer Subsidies

Regional Tariff Zones for Natural Gas

In the preliminary results, we found that this program conferred countervailable benefits on the subject merchandise. We did not receive any comments on this program from the interested parties, and our review of the record has not led us to change our findings from the preliminary results. On this basis, the net subsidies for this program are as follows:

Manufacturer/exporter	Rate (percent)
Propulsora .....	0.00
All Other Companies .....	0.30

*II. Program Found Not To Confer Subsidies*

Preferential Natural Gas Tariffs Under Resolution 192/91

In the preliminary results, we found that this program did not confer a subsidy on the subject merchandise. We did not receive any comments on this program from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

*III. Programs Found To Be Not Used*

In the preliminary results, we found that the producers and/or exporters of the subject merchandise did not apply for or receive benefits under the following programs:

1. Preferential Electricity Tariff Rates
2. Privatization Assistance Under Law 23697 and Decree 1144/92
3. Medium- and Long-Term Loans
4. Capital Grants
5. Income and Capital Tax Exemptions
6. Government Trade Promotion Programs
7. Exemption from Stamp Taxes Under Decree 186/74
8. Incentives for Trade (Stamp Tax Exemption Under Decree 716)
9. Incentive for Export
10. Export Financing Under OPRAC 1, Circular RF-21
11. Pre-Financing of Exports Under Circular RF-153
12. Loan Guarantees
13. Post-Export Financing Under OPRAC 1-9
14. Debt Forgiveness
15. Tax Deduction Under Decree 173/85

We did not receive any comments on these programs from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

*IV. Program Found Not to Exist*

Tax Concessions for the Steel Industry

We did not receive any comments on this program from the interested parties, and our review of the record has not led us to change our findings from the preliminary results.

**Final Results of the Review**

As discussed above in the *Background* section, the Department has determined that the effective date of the revocation of the countervailing duty order on cold-rolled steel is September 20, 1991. Therefore, the results of this administrative review will only apply to entries of the subject merchandise made between January 1, 1991 and September 19, 1991.

For the period of review, we determine the net subsidy to be 0.00 percent *ad valorem* for Propulsora and 1.84 percent *ad valorem* for all other companies. In accordance with 19 CFR 355.7, any rate less than 0.5 percent *ad valorem* is *de minimis*. The Department will instruct the U.S. Customs Service to liquidate, without regard to countervailing duties, all entries of subject merchandise from Propulsora made between January 1, 1991 and September 19, 1991. The Department will also instruct the U.S. Customs Service to assess a countervailing duty of 1.84 percent *ad valorem* for entries of subject merchandise from all other companies made between January 1, 1991 and September 19, 1991. Separate instructions regarding entries made on or after September 20, 1991 have already been sent to Customs. Because this countervailing duty order has been revoked, no further instructions will be sent to Customs regarding cash deposits.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)).

Dated: October 3, 1997.

**Robert S. LaRussa,**

*Assistant Secretary for Import Administration.*

[FR Doc. 97-27032 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-DS-P

**DEPARTMENT OF COMMERCE**

**National Institute of Standards and Technology**

[Docket No. 970326070-7204-02]

**Notice of Delayed Termination of Validation Services for Federal Information Processing Standards (FIPS)**

**AGENCY:** National Institute of Standards and Technology (NIST), Commerce.

**ACTION:** Notice; Delayed termination of validation services.

**SUMMARY:** The NIST Information Technology Laboratory (NIST) is terminating validation services for FIPS 21-4, COBOL; FIPS 69-1 FORTRAN; FIPS 128-2, Computer Graphics Metafile, Air Transport Association Profile (CGM (ATA)); FIPS 160, C, and FIPS 151-2, POSIX.

NIST announced by Department Organization Order 30-2B the formation of the Information Technology Laboratory (ITL). Under the new ITL organization, NIST is refocusing its program for information technology, concentrating on the development of conformance tests for emerging information technologies rather than the operation of software testing services. NIST will assist private industry and government agencies in establishing testing programs for these standards by providing NIST conformance testing materials to interested parties.

**EFFECTIVE DATE:** Validation services for FIPS 151-2, POSIX, will terminate on December 31, 1997. Validation services for FIPS 21-4, COBOL; FIPS 69-1, FORTRAN; FIPS 128-2, CGM (ATA); and FIPS 160, C, will terminate on or before September 30, 1998. These validation services will terminate before September 30, 1998, if other private industry and/or government agency testing programs have been established.

**FOR FURTHER INFORMATION OR COMMENTS CONTACT:** Ms. Lynne Rosenthal, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone (301) 975-3283, email 1sr@nist.gov.

**SUPPLEMENTARY INFORMATION:** The NIST announced on April 8, 1997, (62 FR 16788-89) that it was considering the termination of the validation services for FIPS 21-4, COBOL; FIPS 69-1, FORTRAN; FIPS 128-2 CGM (ATA); FIPS 151-2, POSIX; and FIPS 160, C. In response to comments on the April 8, 1997, announcement, NIST is delaying termination of these services to give private industry and/or government agencies more time to establish their own validation services. If private

industry and/or government agency testing programs are established before September 30, 1998, NIST may announce an earlier date for terminating services.

A Director of Conformance Testing Programs, Products, and Services is available on the World Wide Web (WWW) at the Universal Resource Locator (URL) <http://www.nist.gov/ctdirectory.html>. NIST test suites and testing procedures are distributed freely and are accessible from the Directory. Additional conformance testing information is available on the URL <http://www.itl.nist.gov/div897/ctg>.

**Authority:** Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Institute of Standards and Technology pursuant to Section 5131 of the Information Technology Management Reform Act of 1996 and the Computer Security Act of 1987, Pub. L. 104-106.

Dated: October 3, 1997.

**Elaine Bunten-Mines,**

*Director, Program Office.*

[FR Doc. 97-26878 Filed 10-9-97; 8:45 am]

**BILLING CODE 3510-CN-M'**

**COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS**

**Adjustment of Import Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Products Produced or Manufactured in Thailand**

October 6, 1997.

**AGENCY:** Committee for the Implementation of Textile Agreements (CITA).

**ACTION:** Issuing a directive to the Commissioner of Customs adjusting import limits.

**EFFECTIVE DATE:** October 14, 1997.

**FOR FURTHER INFORMATION CONTACT:** Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-5850. For information on embargoes and quota re-openings, call (202) 482-3715.

**SUPPLEMENTARY INFORMATION:**

**Authority:** Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Uruguay Round Agreements Act.

The current limits for certain categories are being adjusted, variously, for swing, carryover and carryforward.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 61 FR 66263, published on December 17, 1996). Also see 61 FR 58044, published on November 12, 1996.

The letter to the Commissioner of Customs and the actions taken pursuant to it are not designed to implement all of the provisions of the Uruguay Round Agreements Act and the Uruguay Round Agreement on Textiles and Clothing, but are designed to assist only in the implementation of certain of their provisions.

**Troy H. Cribb,**

*Chairman, Committee for the Implementation of Textile Agreements.*

**Committee for the Implementation of Textile Agreements**

October 6, 1997.

Commissioner of Customs,  
*Department of the Treasury, Washington, DC 20229.*

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 4, 1996, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool, man-made fiber, silk blend and other vegetable fiber textiles and textile products, produced or manufactured in Thailand and exported during the twelve-month period beginning on January 1, 1997 and extending through December 31, 1997.

Effective on October 14, 1997, you are directed to adjust the limits for the following categories, as provided for under the Uruguay Round Agreements Act and the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit <sup>1</sup>
Level not in a group	
239 .....	6,383,885 kilograms.
Levels in Group I	
200 .....	1,173,838 kilograms.
218 .....	19,718,381 square meters.
219 .....	5,047,742 square meters.
300 .....	4,853,176 kilograms.
301-P <sup>2</sup> .....	4,853,176 kilograms.
301-O <sup>3</sup> .....	970,636 kilograms.
313 .....	22,648,154 square meters.
314 .....	51,767,208 square meters.
315 .....	32,354,504 square meters.
317/326 .....	13,582,734 square meters.
363 .....	22,259,429 numbers.
369-D <sup>4</sup> .....	231,335 kilograms.
369-S <sup>5</sup> .....	261,134 kilograms.

Category	Adjusted twelve-month limit <sup>1</sup>	Category	Adjusted twelve-month limit <sup>1</sup>
604	770,625 kilograms of which not more than 437,223 kilograms shall be in Category 604-A <sup>6</sup> .	647/648	1,128,278 dozen.
607	3,179,632 kilograms.	<sup>1</sup> The limits have not been adjusted to account for any imports exported after December 31, 1996. <sup>2</sup> Category 301-P: only HTS numbers 5206.21.0000, 5206.22.0000, 5206.23.0000, 5206.24.0000, 5206.25.0000, 5206.41.0000, 5206.42.0000, 5206.43.0000, 5206.44.0000 and 5206.45.0000. <sup>3</sup> Category 301-O: only HTS numbers 5205.21.0020, 5205.21.0090, 5205.22.0020, 5205.22.0090, 5205.23.0020, 5205.23.0090, 5205.24.0020, 5205.24.0090, 5205.26.0020, 5205.26.0090, 5205.27.0020, 5205.27.0090, 5205.28.0020, 5205.28.0090, 5205.41.0020, 5205.41.0090, 5205.42.0020, 5205.42.0090, 5205.43.0020, 5205.43.0090, 5205.44.0020, 5205.44.0090, 5205.46.0020, 5205.46.0090, 5205.47.0020, 5205.47.0090, 5205.48.0020 and 5205.48.0090. <sup>4</sup> Category 369-D: only HTS numbers 6302.60.0010, 6302.91.0005 and 6302.91.0045. <sup>5</sup> Category 369-S: only HTS number 6307.10.2005. <sup>6</sup> Category 604-A: only HTS number 5509.32.0000. <sup>7</sup> Category 669-P: only HTS numbers 6305.32.0010, 6305.32.0020, 6305.33.0010, 6305.33.0020 and 6305.39.0000. <sup>8</sup> Category 359-H: only HTS numbers 6505.90.1540 and 6505.90.2060; Category 659-H: only HTS numbers 6502.00.9030, 6504.00.9015, 6504.00.9060, 6505.90.5090, 6505.90.6090, 6505.90.7090 and 6505.90.8090.	
611	14,206,752 square meters.		
613/614/615	48,897,839 square meters of which not more than 28,471,965 square meters shall be in Category 614 and not more than 28,471,965 square meters shall be in Categories 613/615.		
617	17,657,553 square meters.		
619	7,172,947 square meters.		
625/626/627/628/629	14,261,869 square meters of which not more than 11,324,076 square meters shall be in Category 625.		
669-P <sup>7</sup> Group II	6,823,828 kilograms.		
237, 330-359, 431-459, 630-659 and 831-859, as a group.	299,340,179 square meters equivalent.		
331/631	1,765,931 dozen pairs.		
334/634	646,569 dozen.		
335/635/835	533,121 dozen.		
336/636	342,208 dozen.		
338/339	2,001,511 dozen.		
340	309,554 dozen.		
341/641	687,533 dozen.		
342/642	617,245 dozen.		
345	326,752 dozen.		
347/348/847	857,173 dozen.		
351/651	247,031 dozen.		
359-H/659-H <sup>8</sup>	1,419,417 kilograms.		
433	10,549 dozen.		
434	13,023 dozen.		
435	58,107 dozen.		
438	20,414 dozen.		
442	21,472 dozen.		
638/639	2,293,845 dozen.		
640	533,849 dozen.		
645/646	323,545 dozen.		

**ACTION:** Notice of intent to renew information collection #3038-0016: Compliance with Requirements for Designation as a Contract Market.

**SUMMARY:** The Commodity Futures Trading Commission is planning to renew information collection 3038-0016, Compliance with Requirements for Designation as a Contract Market, which is due to expire on February 28, 1998. The information collected pursuant to this rule provides a basis for determining that the terms and conditions of a futures contract reflect current commercial practices and that the contract serves an economic purpose. In compliance with the Paperwork Reduction Act of 1995, the Commission solicits comments to:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including the validity of the methodology and assumptions used;
- (2) evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;
- (3) enhance the quality, utility, and clarity of the information to be collected; and
- (4) minimize the burden of the collection of the information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**DATES:** Comments must be received on or before December 9, 1997.

**ADDRESSES:** Persons wishing to comment on this information collection should contact the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418-5160.

*Title:* Compliance with Requirements for Designation as a Contract Market.

*Control Number:* 3038-0016.

*Action:* Extension.

*Respondents:* Contract Markets.

*Estimated Annual Burden:* 500 hours.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,  
 Troy H. Cribb,  
 Chairman, Committee for the Implementation of Textile Agreements.  
 [FR Doc. 97-27011 Filed 10-9-97; 8:45 am]

**BILLING CODE 3510-DR-F**

**COMMODITY FUTURES TRADING COMMISSION**

**Public Information Collection Requirement**

**AGENCY:** Commodity Futures Trading Commission.

Respondents	Regulation (17 CFR)	Estimated number of respondents	Annual responses	Est. avg. hours. per response
Contract Markets	1.50 5.2	1 1	1 1	250 250

Issued in Washington, D.C. on October 3, 1997.  
**Jean A. Webb,**  
*Secretary to the Commission.*  
 [FR Doc. 97-26895 Filed 10-9-97; 8:45 am]  
 BILLING CODE 6351-01-M

**COMMODITY FUTURES TRADING COMMISSION**

**Public Information Collection Requirement**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Intent to Renew Information Collection #3038-0035—Rules Relating to the Offer and Sale of Foreign Futures and Foreign Options.

**SUMMARY:** The Commodity Futures Trading Commission is planning to renew information collection 3038-

0035, Rules Relating to the Offer and Sale of Foreign Futures and Foreign Options which is due to expire on February 28, 1998. The information collected pursuant to this rule is intended to detect fraud in the offer and sale of foreign futures and foreign options to people located in the United States. In compliance with the Paperwork Reduction Act of 1995, the Commission solicits comments to:

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including the validity of the methodology and assumptions used;
- (2) evaluate the accuracy of the agency's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;
- (3) enhance the equality, utility, and clarity of the information to be collected; and
- (4) minimize the burden of the collection of the information on those who are to respond,

including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**DATES:** Comments must be received on or before December 9, 1997.

**ADDRESSES:** Persons wishing to comment on this information collection should contact the CFTC Clearance Officer, 1155 21st Street NW, Washington, DC 20581, (202) 418-5160.

*Title:* Rules Relating to the Offer and Sale of Foreign Futures and Foreign Options.

*Control Number:* 3038-0035.

*Action:* Extension.

*Respondents:* FCMs, IBs, CPOs, CTAs and APs.

*Estimated Annual Burden:* 3186 hours.

Respondents	Regulation (17 CFR)	Estimated number of respondents	Annual responses	Est. avg. hours per response
FCMs, IBs, CPOs, CTAs, and APs .....	30.4	560	560	1.00
	30.5	136	136	1.00
	30.6	440	440	.50
	30.7	120	120	.50
	30.8	120	1,440	1.00
	30.10	120	120	4.00

Issued in Washington, D.C. on October 3, 1997.  
**Jean A. Webb,**  
*Secretary to the Commission.*  
 [FR Doc. 97-26896 Filed 10-9-97; 8:45 am]  
 BILLING CODE 6351-01-M

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**Meeting of the Task Force on Defense Reform**

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of a meeting of the Task Force on Defense Reform (the Task Force). The meeting will be open to the public. One purpose of the meeting is to meet with the labor unions representing federal employees in DoD. In addition, time will be set aside for anyone who wishes to address the Task Force with ideas about streamlining, restructuring, and reengineering OSD and other components or elements of the Department of Defense.

The Task Force on Defense Reform was established to make recommendations to the Secretary of Defense and Deputy Secretary of

Defense on alternatives for organizational reforms, reductions in management overhead, and streamlined business practices in the Department of Defense, with emphasis on the Office of the Secretary of Defense, the Defense Agencies and the DoD Field Activities, and the Military Departments.

**DATES:** Tuesday, October 21, 1997, at 3:30 P.M.

**ADDRESSES:** Room 3E869, the Pentagon, Washington, DC. Seating is limited. Must call Ms. Lynn Cline at the number listed in **FOR FURTHER INFORMATION** section below to arrange for access to Pentagon.

**FOR FURTHER INFORMATION CONTACT:** Contact Ms. Lynn Cline, Task Force on Defense Reform, Room 3C965, Pentagon, Washington, DC 20301. Telephone: (703) 614-7522. Interested parties should call Ms. Cline before 1:00 p.m., Tuesday, October 21, 1997.

Dated: October 6, 1997.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 97-26891 Filed 10-9-97; 8:45 am]

BILLING CODE 5000-04-M

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[FERC-500]

**Information Collection Submitted for Review and Request for Comments**

October 3, 1997.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of submission for review by the Office of Management and Budget (OMB) and request for comments.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) has submitted the energy information collection listed in this notice to the Office of Management and Budget (OMB) for review under provisions of Section 3507 of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13). Any interested person may file comments on the collection of information directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to an earlier **Federal Register** notice of May

28, 1997 (62 FR 28842) and has made this notation in its submission to OMB.

**DATES:** Comments regarding this collection of information are best assured of having their full effect if received within 30 days of this notification.

**ADDRESSES:** Address comments to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission, Desk Officer, 726 Jackson Place, NW., Washington, D.C. 20503. A copy of the comments should also be sent to Federal Energy Regulatory Commission, Division of Information Services, Attention: Mr. Michael Miller, 888 First Street NE., Washington, D.C. 20426.

**FOR FURTHER INFORMATION CONTACT:** Michael P. Miller may be reached by telephone at (202) 208-1415, by fax at (202) 273-0873, and by e-mail at mmiller@ferc.fed.us.

#### SUPPLEMENTARY INFORMATION:

##### Description

The energy information collection submitted to OMB for review contains:

1. *Collection of Information:* FERC-500, "Application for License for Water Projects With More Than 5MW Capacity".

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* OMB No. 1902-0058. The Commission is now requesting that OMB approve a three-year extension of the current expiration date, with no changes to the existing collection. There is a decrease in the reporting burden due to a decrease in the number of applicants filing with the Commission. These are mandatory collection requirements.

4. *Necessity of Collection of Information:* Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing the provisions of the Federal Power Act (FPA). The information reported under Commission identifier FERC-500 is filed in accordance with Sections 4(e), 9, 14, 15 of the FPA. The FPA as amended by the Electric Consumers Protection Act (ECPA) (Pub. L. 99-495, 100 Stat. 1243, Oct. 16, 1986) authorizes the Commission to issue licenses for hydroelectric projects on the waters over which Congress has jurisdiction and for non-federal hydroelectric power plants as amended by the Act. ECPA also revised the language of the FPA concerning environmental issues and requires the Commission in its licensing activities to give equal consideration to preserving environmental quality. The

information is collected in the form of a written application for a license and is used by the Commission staff to determine the broad impact of the license application.

5. *Respondent Description:* The respondent universe currently comprises on average, 6 applicants for a hydro electric license.

6. *Estimated Burden:* 4,992 total burden hours, 6 respondents, 1 response annually, 832 hours per response (average).

7. *Estimated Cost Burden to Respondents:* 4,992 hours=2,087 hours per year × \$110,000 per year=\$263,115.

**Statutory Authority:** Sections 4(e), 9, 14, and 15 of the Federal Power Act (FPA), 16, U.S.C. 791a *et seq.*

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26971 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

#### DEPARTMENT OF ENERGY

##### Federal Energy Regulatory Commission

##### Information Collection Submitted for Review and Request for Comments (FERC-505)

October 3, 1997.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of submission for review by the Office of Management and Budget (OMB) and request for comments.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) has submitted the energy information collection listed in this notice to Office of Management and Budget (OMB) for review under provisions of Section 3507 of the Paperwork Reduction Act of 1995 (Pub. L. 104-13). Any interested person may file comments on the collection of information directly with OMB and should address a copy of those comments to the Commission as explained below. The Commission received no comments in response to an earlier **Federal Register** notice of May 28, 1997 (62 FR 28843) and has made this notation in its submission to OMB.

**DATES:** Comments regarding this collection of information are best assured of having their full effect if received on or before November 10, 1997.

**ADDRESSES:** Address comments to Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Federal Energy Regulatory Commission, Desk Officer, 726 Jackson

Place, NW., Washington, DC 20503. A copy of the comments should also be sent to Federal Energy Regulatory Commission, Division of Information Services, Attention: Mr. Michael Miller, 888 First Street, NE., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:** Michael P. Miller may be reached by telephone at (202) 208-1415, by fax at (202) 273-0873, and by e-mail at mmiller@ferc.fed.us.

#### SUPPLEMENTARY INFORMATION:

##### Description

The energy information collection submitted to OMB for review contains:

1. *Collection of Information:* FERC-505 "Application for License for Water Projects 5MW capacity or Less".

2. *Sponsor:* Federal Energy Regulatory Commission.

3. *Control No.:* OMB No. 1902-0115. The Commission is now requesting that OMB approve a three-year extension of the current expiration date, with no changes to the existing collection. There is a decrease in the reporting burden due to a decrease in the number of applicants filing with the Commission. These are mandatory collection requirements.

4. *Necessity of Collection of Information:* Submission of the information is necessary to enable the Commission to carry out its responsibilities in implementing the provisions of the Federal Power Act (FPA). The information reported under Commission identifier FERC-505 is filed in accordance with Sections 4(e), 9, 14, 15 (FPA). Authority for the application and license process is made in accordance with the Commission's defined role as mandated under provisions of the Federal Power Act and the Energy Security Act of 1980. Submission of the data is necessary to fulfill the requirements of Sections 9 and 10(a) of the FPA in order for the Commission to make the required finding that the proposal is economically, technically, and environmentally sound, and is best adapted to the comprehensive plan of development of the water resources of the region. Further Congress has authorized the Commission to exempt certain small hydroelectric projects from the licensing requirements imposed by this provision. Under Section 405(d) of the Public Utilities Regulatory Policies Act of 1978, the Commission in its discretion (by rule or order) grant an exemption in whole or in part from the requirement (including the licensing requirements) of Part I of the Federal Power Act to small hydroelectric power

projects having a proposed installed capacity of 5,000 kilowatts or less. The information is collected in the form of a written application for a license and is used by the Commission staff to determine the broad impact of the license application.

5. *Respondent Description:* The respondent universe currently comprises on average, 10 applicants for a hydro electric license.

6. *Estimated Burden:* 1,690 total burden hours, 10 respondents, 1 response annually, 169 hours per response (average).

7. *Estimated Cost Burden to Respondents:* 1,690 hours ÷ 2,087 hours per year × \$110,000 per year = \$89,075.

**Statutory Authority:** Sections 4(e), 9, 10, 14 and 15 of the Federal Power Act (FPA), 16 U.S.C. Sections 791a *et seq.* and Section 408 Energy Security Act of 1980 (42 U.S.C. 8701).

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26972 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-5-008]

#### Algonquin Gas Transmission Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Algonquin Gas Transmission Company (Algonquin) tendered for filing as part of its FERC Gas Tariff Volume No. 1 the following tariff sheets to be effective November 1, 1997:

Seventh Revised Sheet No. 40  
Second Revised Sheet No. 658  
Third Revised Sheet No. 659  
Second Revised Sheet No. 660  
Third Revised Sheet No. 686  
Fifth Revised Sheet No. 688  
Third Revised Sheet No. 714  
Original Sheet No. 715  
Sheet Nos. 716-798

Algonquin states that the purpose of this filing is to comply with the Commission's Letter Order issued on June 16, 1997, in Docket No. RP97-5-006, which approved Algonquin's pro forma tariff sheets implementing the Order No. 587-C Standards for Business Practices of Interstate Natural Gas Pipelines issued March 4, 1997 and directed Algonquin to file actual tariff sheets at least 30 days prior to the designated November 1, 1997, effective date.

Algonquin states that copies of this filing were served on firm customers of

Algonquin and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26919 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. RP97-90-003 and RP97-99-004]

#### Algonquin LNG, Inc.; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Algonquin LNG, Inc. (ALNG), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, First Revised Sheet No. 83 to be effective November 1, 1997.

ALNG states that the purpose of this filing is to comply with the Commission's Letter Order issued on July 3, 1997, in Docket Nos. RP97-90-001 and RP97-99-002, which required ALNG to incorporate by reference the GISB standards as approved in the Commission's Order No. 587-C Standards for Business Practices of Interstate Natural Gas pipelines issued March 4, 1997.

ALNG states that copies of this filing were served on firm customers of ALNG and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are

available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26942 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-110-005]

#### Black Marlin Pipeline Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Black Marlin Pipeline Company (Black Marlin), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, with an effective date of November 1, 1997:

First Revised Sheet No. 107A  
First Revised Sheet No. 107B  
First Revised Sheet No. 109  
First Revised Sheet No. 111  
Third Revised Sheet No. 112  
First Revised Sheet No. 112A  
Second Revised Sheet No. 132  
First Revised Sheet No. 134  
First Revised Sheet No. 135  
Third Revised Sheet No. 136  
First Revised Sheet No. 136A  
Second Revised Sheet No. 201A

Black Marlin states that on April 29, 1997, in Docket No. RP97-110-002, it submitted pro forma changes to the General Terms and Conditions of its Tariff (April 29, filing) in compliance with the requirements of Order No. 587-C issued March 4, 1997 in Docket No. RM96-1-004. The April 29 Filing included pro forma tariff changes to implement Gas Industry Standards Board standards to become effective August 1, 1997, relating to Black Marlin's Internet web page, as well as tariff changes relating to revised and new business standards to become effective November 1, 1997. The April 29, filing also included an alternate version of Sheet No. 201A which did not incorporate specific data dictionaries into Black Marlin's Tariff. The pro forma tariff changes, with the exception of the changes reflected on the alternate tariff sheet, were approved by Letter Order dated June 13, 1997 (June 13, order).

Black Marlin states that the instant filing is submitted in compliance with the June 13, order to implement the approved tariff changes to become effective November 1, 1997. In addition, Black Marlin proposes to incorporate by reference the data dictionaries published in the July 31, 1997, Version

1.2 implementation guides, insofar as such data dictionaries are necessary to implement the new business standards accepted by the Commission in Order No. 587-C. Because the Version 1.1 implementation guides do not include the data dictionaries necessary to implement the standards, Black Marlin is proposing to reference the data dictionaries set forth in the Version 1.2 implementation guides. These guides contain the only published source of the data dictionaries necessary to implement the standards adopted in Order No. 587-C, such as package ID. Black Marlin is not asking for authority to pre-implement any other standards which may be included in the Version 1.2 implementation guides, but which the Commission has not yet adopted.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26945 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP98-13-000]

#### Boundary Gas, Inc.; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 2, 1997, Boundary Gas, Inc. (Boundary), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet to become effective November 1, 1997:

First Revised Sheet No. 17

Boundary states that the primary purpose of this filing is to revise Boundary's tariff to reflect recent changes to the Boundary Phase 2 Gas Sales Agreement (Sales Agreement), which is incorporated into Boundary's tariff. This filing is designed to provide

for a one-year time limitation on claiming billing errors and the implementation of a pipeline rate refund mechanism. Boundary also states that copies of this filing were served upon all customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26964 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-139-007]

#### Caprock Pipeline Company; Notice of Tariff Filing

October 6, 1997.

Take notice that on October 1, 1997, Caprock Pipeline Company (Caprock) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Third Revised Sheet No. 29A, to be effective November 1, 1997.

Caprock states that this tariff sheet is being filed to comply with the OPR's Letter Orders issued June 6, July 2, and July 29, 1997, requiring the filing of actual tariff sheets, the correction of pagination errors, the inclusion of GISB Standard 4.3.6 pertaining to the publication of information on the Internet and the adoption of the GISB Model Trading Partner Agreement.

Caprock states that copies of the filing were served upon Caprock's jurisdictional customers, interested public bodies, and all parties to the proceedings.

Any person desiring to protest with reference to this filing should file a

protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26948 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-63-006]

#### Colorado Interstate Gas Company; Notice of Tariff Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Colorado Interstate Gas Company (CIG), tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the tariff sheets listed in Appendix A to the filing, to be effective November 1, 1997.

CIG states that the purpose of this compliance filing is to conform CIG's tariff to requirements of the order issued June 6, 1997 in Docket No. RP97-63-003 and Order No. 587-C.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26940 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP98-11-000]

**Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff**

October 6, 1997.

Take notice that on October 1, 1997, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets to become effective November 1, 1997:

Twenty-second Revised Sheet No. 25  
 Twenty-second Revised Sheet No. 26  
 Twenty-second Revised Sheet No. 27  
 Twenty-third Revised Sheet No. 28

Columbia states that this periodic filing is being submitted in accordance with Section 36.2 of the General Terms and Conditions (GTC) of its Tariff. GTC Section 36, Transportation Costs Rate Adjustment (TCRA), enables Columbia to adjust its current TCRA rate prospectively on a periodic and annual basis to take into account prospective change in Account No. 858 costs. As explained below, in this filing Columbia proposes to adjust its Current Operational TCRA Rate, as defined in GTC Section 36.4 to include the payments associated with the lease agreement between Columbia and Texas Eastern Transmission Corporation (TETCO). Article I, Section G, of the approved Stipulation II in Docket No. RP95-408 gives Columbia the authority to include and collect the subject lease payments in and through its TCRA mechanism contingent upon the approval of the lease agreement in Columbia's Docket No. CP96-213 (Market Expansion Application).

Columbia states further that copies of this filing have been mailed to all of its customers and affected state regulatory commissions.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the

Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,***Secretary.*

[FR Doc. 97-26963 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP97-162-004]

**Cove Point LNG Limited Partnership; Notice of Tariff Compliance Filing**

October 6, 1997.

Take notice on October 1, 1997, Cove Point LNG Limited Partnership (Cove Point) tendered for filing to become a part of Cove Point's FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets to be effective November 1, 1997:

Second Revised Sheet No. 99  
 Second Revised Sheet No. 127  
 Second Revised Sheet No. 136

Cove Point states that these tariff sheets are being filed to comply with the Commission's Office of Pipeline Regulation's letter order of June 25, 1997, requiring incorporation of GISB definitions approved by Order No. 587-C and requiring certain other GISB standards to be incorporated through tariff language or by reference, but not by both means.

Cove Point states that copies of the filing were served upon Cove Point's customers and interested state regulatory commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,***Secretary.*

[FR Doc. 97-26956 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP97-145-005]

**Crossroads Pipeline Company; Notice of Compliance Filing**

October 6, 1997.

Take notice that on September 30, 1997, Crossroads Pipeline Company (Crossroads) tendered for filing as part of its FERC Gas Tariff, Tariff Sheet Nos. 26, 39, 66 and 76.

Crossroads asserts that this filing is being made to comply with the letter order of June 18, 1997, which accepted Tariff Sheet Nos. 26, 39, 66 and 76 for filing and directed that they be refiled at least 30 days before the November 1, 1997, effective date.

Crossroads states that the purpose of its filing is to reflect changes to its tariff to implement as of November 1, 1997, the new and revised standards approved by the Gas Industry Standards Board and incorporated into the Commission's Regulations.

Crossroads states further that copies of the filing were served on its current firm and interruptible customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's regulations. Protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make protestants parties to the proceeding. Copies of Crossroads' filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,***Secretary.*

[FR Doc. 97-26952 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP97-58-008]

**East Tennessee Natural Gas Company; Notice of Compliance Filing**

October 6, 1997.

Take notice that on October 1, 1997, East Tennessee Natural Gas Company (East Tennessee), tendered for filing as

part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of November 1, 1997:

Third Revised Sheet No. 169  
Third Revised Sheet No. 176  
First Revised Sheet No. 282

East Tennessee states that these sheets are filed in compliance with the Commission's June 19, 1997, Letter of the Office of Pipeline Regulation in the above-referenced dockets (June 19, Letter Order). In accordance with the June 19, Letter Order, East Tennessee requests an effective date of November 1, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Copies of this filing are on file with the Commission and available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26934 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-20-010]

#### El Paso Natural Gas Company; Notice of Changes In FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, El Paso Natural Gas Company (El Paso), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1-A, the following tariff sheets, effective November 1, 1997.

Second Revised Sheet No. 202A  
Second Revised Sheet No. 202B

El Paso states that the tariff sheets are being filed to implement the scheduling and invoicing standards from the second phase (Round 2) of the Gas Industry Standards Board (GISB) standards Order No. 587-C.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C.

20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26931 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-21-006]

#### Florida Gas Transmission Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Florida Gas Transmission Company (FGT) tendered for filing as part of its FERC GAS Tariff, Third Revised Volume No. 1, the following tariff sheets:

Fifth Revised Sheet No. 102B  
Fifth Revised Sheet No. 116  
Fifth Revised Sheet No. 117  
Fifth Revised Sheet No. 117A  
Third Revised Sheet No. 123  
Fifth Revised Sheet No. 133A  
Third Revised Sheet No. 160  
Original Sheet No. 160A

FGT states that on April 29, 1997, in Docket No. RP97-21-004, it submitted pro forma changes to the General Terms and Conditions of its Tariff (April 29 Filing) in compliance with the requirements of Order No. 587-C issued March 4, 1997 in Docket No. RM96-1-004. The April 29, filing included pro forma tariff changes to implement Gas Industry Standards Board standards to become effective August 1, 1997, relating to FGT's Internet web page, as well as tariff changes relating to revised and new business standards to become effective November 1, 1997. The April 29, filing also included an alternate version of Sheet No. 102B which did not incorporate specific data dictionaries into FGT's Tariff. The pro forma tariff changes, with the exception of the changes reflected on the alternate tariff sheet, were approved by Letter Order dated June 16, 1997 (June 16 Order).

FGT states that the instant filing is submitted in compliance with the June 16, order to implement the approved

tariff changes to become effective November 1, 1997. In addition, FGT proposes to incorporate by reference the data dictionaries published in the July 31, 1997, Version 1.2 implementation guides, insofar as such data dictionaries are necessary to implement the new business standards accepted by the Commission in Order No. 587-C. Because the Version 1.1 implementation guides do not include the data dictionaries necessary to implement the standards, FGT is proposing to reference the data dictionaries set forth in Version 1.2 implementation guides. These guides contain the only published source of the data dictionaries necessary to implement the standards adopted in Order No. 587-C, such as package ID, FGT is not asking for authority to pre-empt any other standards which may be included in the Version 1.2 implementation guides, but which the Commission has not yet adopted.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26932 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. TM97-1-130-002]

#### Gas Transport, Inc., Notice of Report of Refunds

October 6, 1997.

Take notice that on June 18, 1997, Gas Transport, Inc. (Gas Transport), tendered for filing with the Commission its Refund Report made in compliance with the Commission's Order issued May 28, 1997, in the above referenced docket. The Commission directed Gas Transport to refund to its customers any Annual Charge Adjustment (ACA) surcharge amounts collected in excess of the Commission approved \$0.0020

per Dth rate for the period from October 1, 1996, through March 31, 1997.

Gas Transport states that it charged all of its customers during that period an IT rate of 9.0 cents per Dth, which is discounted from the maximum IT rate of 13.5 per Dth. Gas Transport applied its discount first to the ACA surcharge and then to Gas Transport's IT base rate. Accordingly, Gas Transport did not collect any ACA amounts from any of its customers during the relevant period and thus refunds are not appropriate.

Gas Transport states that copies of the report are being served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before October 14, 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. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26965 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-153-007]

#### Granite State Gas Transmission, Inc.; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Granite State Gas Transmission, Inc. (Granite State), tendered for filing a part of its FERC Gas Tariff, Third Revised Volume No. 1, the revised tariff sheets listed below in for effectiveness on November 1, 1997:

Second Substitute First Revised Sheet No. 202

Substitute First Revised Sheet No. 205

Substitute First Revised Sheet No. 210

Substitute First Revised Sheet No. 211

Substitute First Revised Sheet No. 273

Substitute First Revised Sheet No. 274

Substitute First Revised Sheet No. 305

According to Granite State, the purpose of its filing is to make effective as of November 1, 1997, the revised

tariff sheets listed above which were submitted to the Commission *pro forma* on July 28, 1997, pursuant to an order issued June 26, 1997 in Docket No. RP97-153-002 which required Granite State to refile the above tariff sheets for review for their compliance with Order No. 587-C and particularly GISB Standards Version 1.1.

Granite State states that copies of its filing were served on its firm and interruptible customers, the regulatory agencies of the States of Maine, Massachusetts and New Hampshire, and the intervenor in Docket No. RP97-137-000.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26954 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-178-006]

#### Kern River Gas Transmission Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Kern River Gas Transmission Company (Kern River) tendered as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets for filing, to be effective on November 1, 1997:

Second Revised Sheet No. 73

Third Revised Sheet No. 94

First Revised Sheet No. 94-A

Second Revised Sheet No. 95

Second Revised Sheet No. 98

Second Revised Sheet Nos. 128-139, Sheet Nos. 140-199

First Revised Sheet No. 504-A

Kern River states that the purpose of this filing is to comply with the Commission's order issued on June 27, 1997 in the above-listed docket (Order). The Order accepted Kern River's *pro forma* tariff sheets that were submitted

May 1, 1997 to comply with the Commission's directives in Order No. 587-C, subject to some minor modifications.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26957 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-142-006]

#### K N Interstate Gas Transmission Company; Notice of Tariff Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, K N Interstate Gas Transmission Co. (KNI), tendered for filing as part of its FERC the following revised tariff sheet(s), to be effective November 1, 1997:

Third Revised Volume No. 1-B

Second Revised Sheet No. 89A

First Revised Volume No. 1-D

Second Revised Sheet No. 71A

KNI states that the above referenced tariff sheets are being filed to comply with the OPR's letter order issued July 3, 1997, requiring the filing of actual tariff sheet(s). In addition, reference is also being included to KNI's adoption of the GISB Model Trading Partner Agreement.

KNI states that copies of the filing were served upon KNI's jurisdictional customers, interested public bodies, and all parties to the proceedings.

Any person desiring to protest with reference to this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All such motions or protests

must be filed as provided in Section 154.210 of the Commission's Regulations. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of this filing are on file with the Commission and available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26949 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-541-000]

#### K N Interstate Gas Transmission Co.; Notice of Request for Partial Waiver

October 6, 1997.

Take notice that on September 30, 1997, K N Interstate Gas Transmission Co. (K N Interstate), pursuant to Rule 207(a)(5) of the Rules of Practice and Procedure of the Commission, 18 CFR 385.207(a)(5), tendered for filing a request for authorization to waive certain requirements of Section 29, Second Revised Volume No. 1-B, of K N Interstate's tariff.

K N Interstate states that the purpose of the request is to provide a one-time reduction of an Operational Flow Order (OFO) penalty that was imposed on UtiliCorp Inc. (UtiliCorp), in December of 1996 and January of 1997.

K N Interstate states that copies of the filing have been served upon mainline transportation and storage shippers and affected state regulatory bodies.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before October 14, 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. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26962 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-144-007]

#### K N Wattenberg Transmission Limited Liability Co.; Notice of Tariff Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, K N Wattenberg Transmission Limited Liability Company (Wattenberg), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following revised tariff sheet, to be effective November 1, 1997:

Third Revised Sheet No. 66A

Wattenberg states that this tariff sheet is being filed to comply with the OPR's Letter Orders issued June 2, June 26, and July 28, 1997, requiring the filing of actual tariff sheets, the correction of pagination errors, the inclusion of GISB Stand 4.3.6 pertaining to the publication of information on the Internet and the adoption of the GISB Model Trading Partner Agreement.

Wattenberg states that copies of the filing were served upon Wattenberg's jurisdictional customers, interested public bodies, and all parties to the proceedings.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26951 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. PR97-6-000]

#### Louisiana Intrastate Gas Company, L.L.C.; Notice of Informal Settlement Conference

October 6, 1997.

Taken notice that an informal settlement conference in the above-captioned proceeding will be held on Wednesday, October 15, 1997, at 1:00 p.m. in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Attendance will be limited to the parties and staff. For additional information, please contact Fred Ni at (202) 208-2218.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26911 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. MT96-30-001]

#### Mid Louisiana Gas Company; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Mid Louisiana Gas Company (Mid Louisiana) filed to be included in its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets:

Substitute Fifth Revised Sheet No. 131

Mid Louisiana states that the purpose of the filing of the Substitute Revised Tariff Sheet is to correct insignificant textual errors discovered in FIFTH REVISED SHEET No. 131, the redlined version of which was textually correct when filed.

Pursuant to Section 154.7(a)(7) of the Commission's Regulations, Mid Louisiana respectfully requests waiver of Section 154.207 of the Regulations in order to permit the tendered tariff sheet to become retroactively effective October 20, 1996, as submitted.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's

Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this compliance filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26907 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. MT98-1-000]

#### Mid Louisiana Gas Company; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Mid Louisiana Gas Company (Mid Louisiana) tendered for filing in its FERC Gas Tariff, Third Revised Volume No. 1, the following tariff sheets to become effective November 1, 1997:

Sixth Revised Sheet No. 131

Mid Louisiana states that the purpose of the filing of the Revised Tariff Sheet is to update its tariff to reflect recent changes in shared personnel and facilities.

Pursuant to Section 154.7(a)(7) of the Commission's Regulations, Mid Louisiana respectfully requests waiver of any requirement of the Regulations in order to permit the tendered tariff sheet to become effective November 1, 1997, as submitted.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are

available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26908 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-151-006]

#### Mid Louisiana Gas Company; Notice of Proposed Changes In FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Mid Louisiana Gas Company (Mid Louisiana) tendered for filing to be included in its FERC Gas Tariff, Third Revised Volume No. 1, the following Tariff Sheets, with an effective date of November 1, 1997:

Substitute Second Revised Sheet No. 77

Substitute Third Revised Sheet No. 78

Substitute Third Revised Sheet No. 79

Substitute Second Revised Sheet No. 87

Second Revised Sheet No. 166

Mid Louisiana asserts that the purpose of this filing is to comply with the Commission's Letter Order, dated July 15, 1997 in Docket No. RP97-151-002 wherein the Commission directed Mid Louisiana to revise previously submitted PRO FORMA sheets to reflect version numbers for certain GISB standards incorporated by Mid Louisiana into its tariff provisions by reference and to include GISB Standard 2.3.31 by reference.

The modifications evidenced on the enclosed tariff sheets reflect Mid Louisiana's compliance with such directives. The sheet(s) are submitted as directed in FERC Order No. 587-C (78 FERC ¶ 61,231) with an effective date of November 1, 1997.

Any person desiring to protest said compliance filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Copies of this compliance filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26953 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-59-009]

#### Midwestern Gas Transmission Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Midwestern Gas Transmission Company (Midwestern), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with an effective date of November 1, 1997:

Second Revised Sheet No. 85

Third Revised Sheet No. 110A

Second Revised Sheet No. 188

Midwestern states that these sheets are filed in compliance with the Commission's June 16, 1997, Order on Compliance Filing in the above-referenced dockets (June 16 Order). Midwestern Gas Transmission Company, 79 FERC ¶ 61,350 (1997). In accordance with the June 16, Order, Midwestern requests an effective date of November 1, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Copies of this filing are on file with the Commission and available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26935 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket No. RP97-73-008]

**Mississippi River Transmission; Notice  
of Proposed Changes in FERC Gas  
Tariff**

October 6, 1997.

Take notice that on October 1, 1997, Mississippi River Transmission Corporation (MRT), tendered for filing as part of its FERC Gas Tariff, Third Revised Volume No. 1, the tariff sheets listed below to be effective November 1, 1997.

Second Revised Sheet No. 71  
Second Revised Sheet No. 72  
Third Revised Sheet No. 73  
Second Revised Sheet No. 74  
Substitute Fourth Revised Sheet No. 80  
Second Revised Sheet No. 83  
Third Revised Sheet No. 118  
Fourth Revised Sheet No. 120  
Third Revised Sheet No. 149  
Fifth Revised Sheet No. 224  
Third Revised Sheet No. 225

MRT states that the purpose of this filing is to comply with the letter order issued in this docket on June 13, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,***Secretary,*

[FR Doc. 97-26941 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket No. CP96-53-000, et al.]

**NE Hub Partners, L.P.; Notice of  
Availability of Engineering and  
Geotechnical Report Prepared by  
AGM, Inc., for the Proposed TIOGA  
Gas Storage Project**

October 6, 1997.

The staff of the Federal Energy Regulatory Commission (Commission) contracted with AGM, Inc. (AGM), an engineering and geotechnical firm, to analyze issues associated with NE Hub Partners, L.P.'s (NE Hub) proposal in the above referenced docket. As a contract deliverable, AGM prepared an Engineering and Geotechnical Report (EG Report) dated April 23, 1997.

The EG Report has been placed in the public files of the FERC. A limited number of copies of the EG Report are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, 888 First Street, N.E., Room 2A, Washington, D.C. 20426, (202) 208-1371.

Copies of the EG Report have been mailed to all parties to this proceeding.

Any person wishing to comment on the EG Report may do so. To ensure consideration prior to a Commission decision on the proposal, it is important that we receive your comments before the date specified below. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send two copies of your comments to: Lois Cashell, Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Room 1A, Washington, D.C. 20426.
- Reference Docket No. *CP96-53-000*; and
- Mail your comments so that they will be received in Washington, DC on or before *November 3, 1997*.

Comments will be considered by the Commission but will not serve to make the commentator a party to the proceeding. Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).

**Lois D. Cashell,***Secretary,*

[FR Doc. 97-26906 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket No. RP97-22-008]

**Northern Border Pipeline Company;  
Notice of Compliance Filing**

October 6, 1997.

Take notice that on October 1, 1997, Northern Border Pipeline Company (Northern Border) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, certain revised tariff sheets to become effective November 1, 1997:

Northern Border states that this filing is made to comply with the letter order of the Commission dated June 2, 1997, in which the Commission directed Northern Border to file tariff sheets to implement the revised and new business practices standards. Because the Version 1.1 implementation guides do not include the data dictionaries necessary to implement the standards, Northern Border is proposing to utilize the data dictionaries set forth in the Version 1.2 implementation guides. These guides contain the only published source of the data dictionaries necessary to implement the standards adopted in Order No. 587-C, such as Package ID.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,***Secretary,*

[FR Doc. 97-26933 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
Commission

[Docket No. RP97-17-007]

**Northern Natural Gas Company; Notice  
of Compliance Filing**

October 6, 1997.

Take notice that on October 1, 1997, Northern Natural Gas Company

(Northern), tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets proposed to become effective on November 1, 1997.

Third Revised Sheet No. 204  
Fourth Revised Sheet No. 258  
Third Revised Sheet No. 260  
First Revised Sheet No. 263D  
First Revised Sheet No. 263E  
Second Revised Sheet No. 264  
Second Revised Sheet No. 268  
First Revised Sheet No. 301

Northern states that the instant filing is made in compliance with the Commission's Order Accepting Tariff Sheets, Subject To Conditions, issued on June 16, 1997 in Docket No. RP97-17-005 and to comply with the Gas Industry Standards Board (GISB) standards reflected in Order No. 587-C.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. All protests will be considered by the Commission in determining the appropriate action to be taken in this proceeding, but will not serve to make Protestant a party to the proceeding. Copies of this filing are on file with the Commission and are available for inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26929 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-134-007]

#### Pacific Gas Transmission Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on September 30, 1997, Pacific Gas Transmission Company (PGT) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1-A: Fifth Revised Sheet No. 52; First Revised Sheet Nos. 81A.03 and 81A.06, Third Revised Sheet No. 132, Second Revised Sheet Nos. 133 through 135, Third Revised Sheet No. 137 and Second Revised Sheet No. 144, to be effective November 1, 1997.

PGT asserts the purpose of this filing is to comply with the Office of Pipeline Regulation's June 10, 1997, Letter Order in Docket No. RP97-134-004, pursuant to Section 375.307(e)(5) of the Commission's Regulations, conforming PGT's tariff to Gas Industry Standards Board business practices as set forth in Order No. 587-C in Docket Nos. RM96-1-000, *et al.*

PGT further states a copy of this filing has been served upon its jurisdictional customers and interested state regulatory agencies, as well as the official service list compiled by the Secretary in the above-referenced proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practices and Procedure. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26946 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-136-007]

#### Paiute Pipeline Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Paiute Pipeline Company (Paiute) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1-A, the following tariff sheets, to become effective November 1, 1997:

Second Revised Sheet No. 54  
Second Revised Sheet No. 56B  
Original Sheet No. 56C  
First Revised Sheet No. 58A  
Second Revised Sheet No. 58B  
Second Revised Sheet No. 61  
Original Sheet No. 61A  
Fourth Revised Sheet No. 62  
First Revised Sheet No. 63B  
Second Revised Sheet No. 63C  
First Revised Sheet No. 89  
Second Revised Sheet No. 104  
First Revised Sheet No. 104A

Paiute indicates that the purpose of the instant filing is (1) to formally effectuate changes to the General Terms and Conditions of Paiute's tariff that are necessary to comply with Order No. 587-C, which changes were proposed by Paiute in a pro forma tariff sheet filing submitted on May 1, 1997 in Docket No. RP97-136-002 and approved in a letter order issued June 10, 1997, and (2) to comply with the June 10, letter order which required certain revisions to Paiute's pro forma tariff sheets filed on May 1, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26947 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-4-009]

#### Panhandle Eastern Pipe Line Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective November 1, 1997:

Third Revised Sheet No. 239  
First Revised Sheet No. 239A  
Third Revised Sheet No. 339

Panhandle asserts that the purpose of this filing is to comply with the Commission's Letter Order issued on June 18, 1997 in Docket No. RP97-4-007, which accepted the pro forma tariff sheets filed by Panhandle on May 1, 1997. That filing implemented the standards promulgated by the Gas Industry Standards Board, which were adopted by the Commission in Order No. 587-C in Docket No. RM96-1-004, Standards for Business Practices of

Interstate Natural Gas Pipelines. The tariff sheets submitted reflect the pro forma tariff language accepted by the Commission and also incorporate by reference Standard 1.3.23 in compliance with the June 18, 1997, order and Standard 4.3.6, which was proposed for inclusion in Panhandle's tariff subsequent to the submission of the pro forma tariff sheets and accepted by the Commission's letter order dated July 21, 1997 in Docket No. RP97-4-008 effective August 1, 1997.

Panhandle states that copies of this filing are being served on all affected customers, applicable state regulatory agencies and parties to this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26915 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. OA96-141-004]

#### Rochester Gas & Electric Corporation; Notice of Filing

October 6, 1997.

Take notice that on August 11, 1997, Rochester Gas & Electric Corporation tendered for filing its refund report 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 October 16, 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. 97-26909 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-224-009]

#### Sea Robin Pipeline Company; Notice of Proposed Changes to FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Sea Robin Pipeline Company (Sea Robin) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised Tariff sheets in compliance with the Commission's Order No. 587-C and the Commission's June 27, 1997, Order in this docket, to become effective November 1, 1997:

Third Revised Sheet No. 14  
Third Revised Sheet No. 17  
Third Revised Sheet No. 25  
First Revised Sheet No. 30a  
Second Revised Sheet No. 32  
Third Revised Sheet No. 34  
Fourth Revised Sheet No. 35  
Second Revised Sheet No. 42  
Third Revised Sheet No. 95

On July 17, 1996, the Commission issue Order No. 587 in Docket No. RM96-1-000 which revised the Commission's Regulations governing interstate natural gas pipelines to require such pipelines to follow certain standardized business practices issued by the Gas Industry Standards Board (GISB) and adopted by the Commission in said Order (18 CFR 284.10(b)). On March 4, 1997, the Commission Order No. 587-C to implement additional GISB Standards. On June 27, 1997, the Commission issued an order accepting Sea Robin's filing subject to certain conditions. The June order required Sea Robin to submit a compliance filing to incorporate into its tariff specific language from GISB standards and definitions addressing OBAs, package Ids, operational flow orders, intra-day nominations, rankings, imbalance penalties and the standard international unit of gas measurement. In addition, Sea Robin has changed the reference to the version number of Standard 4.3.6 from 1.1 to 1.0. Sea Robin requests an effective date of November 1, 1997.

Sea Robin states that such effective date is appropriate because it is consistent with Sea Robin's April 30, tariff filing, and the timeline established in Order No. 587-C.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedures.

All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26959 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-143-007]

#### T C P Gathering Co.; Notice of Tariff Filing

October 6, 1997.

Take notice that on October 1, 1997, T C P Gathering Co. (TCP), tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following revised tariff sheets, to be effective November 1, 1997:

Fourth Revised Sheet No. 103  
First Revised Sheet No. 103A

TCP states that the above referenced tariff sheets are being filed to comply with the OPR's letter orders issued June 10, July 2, and July 28, 1997, requiring the filing of actual tariff sheet(s), the correction of certain pagination errors, the inclusion of GISB Standard 4.3.6 pertaining to the publication of information on the Internet and the adoption of the GISB Model Trading Partner Agreement.

TCP states that copies of the filing were served upon TCP's jurisdictional customers, interested public bodies, and all parties to the proceedings.

Any person desiring to protest with reference to this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the

Commission's Rules of Practice and Procedure. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. All protests filed with the Commission will be considered by it in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26950 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP96-312-006]

#### Tennessee Gas Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, Tennessee Gas Pipeline Company (Tennessee) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheet to become effective on November 1, 1997:

Eighteenth Revised Sheet No. 30

Tennessee states that the above tariff sheet is being filed to implement a negotiated rate contract pursuant to the Commission's Statement of Policy on Alternatives to Traditional Cost-of-service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines issued January 31, 1996, at Docket Nos. RM95-6-000 and RM96-7-000.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26913 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-60-009]

#### Tennessee Gas Pipeline Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Tennessee Gas Pipeline Company (Tennessee), tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets:

Third Revised Sheet No. 400

Fourth Revised Sheet No. 412

Third Revised Sheet No. 503

Tennessee states that these sheets are filed in compliance with the Commission's June 25, 1997, Order on Order No. 587-C Compliance Filing in the above-referenced dockets (June 25 Order). Tennessee Gas Pipeline Company, 79 FERC ¶ 61,381 (1997). In accordance with the June 25 Order, Tennessee requests an effective date of November 1, 1997.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to this proceeding. Copies of this filing are on file with the Commission and available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26937 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-3-008]

#### Texas Eastern Transmission Corporation; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Texas Eastern Transmission Corporation, tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the following tariff sheets, with an effective date of November 1, 1997:

Fifth Revised Sheet No. 434

Second Revised Sheet No. 435

Third Revised Sheet No. 436

Third Revised Sheet No. 487A

Third Revised Sheet No. 488

Third Revised Sheet No. 489

Third Revised Sheet No. 681

Texas Eastern states that the purpose of this filing is to comply with the Commission's letter order issued on June 2, 1997, in Docket No. RP97-3-006, which approved Texas Eastern's pro forma tariff sheets implementing the Order No. 587-C Standards for Business Practices of Interstate Natural Gas pipelines issued March 4, 1997 and directed Texas Eastern to file actual tariff sheets at least 30 days prior to the designated November 1, 1997, effective date.

Texas Eastern states that copies of the filing were served on firm customers of Texas Eastern's and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26914 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-183-006]

#### Texas Gas Transmission Corporation; Notice of Filing of Tariff Sheets

October 6, 1997.

Take notice that on October 1, 1997, Texas Gas Transmission Corporation (Texas Gas) tendered for filing, as part of its FERC Gas Tariff, First Revised Volume No. 1:

Third Revised Sheet No. 147

Second Revised Sheet No. 148

Second Revised Sheet No. 149

First Revised Sheet No. 206C

First Revised Sheet No. 206D

Seventh Revised Sheet No. 207

First Revised Sheet No. 207A

Original Sheet No. 207B

Texas Gas states that the instant filing is being made to comply with the Commission's Order dated June 30, 1997, in response to Texas Gas's April 28, 1997, filing regarding GISB Standards in accordance with Order Nos. 587-C and 587-D.

Texas Gas copies of the tariff sheets are being served upon Texas Gas's jurisdictional customers and interested state commissions, and all parties on the official service list in Docket No. RP97-183.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests should be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26958 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-237-006]

#### TransColorado Gas Transmission Company; Notice of Proposed Changes In FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, TransColorado Gas Transmission Company (TransColorado) tendered for filing its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, to become effective November 1, 1997:

Third Revised Sheet No. 203

Original Sheet No. 203.01

TransColorado states that the above tariff sheets are being filed to implement the scheduling and invoicing standards from the second phase (Round 2) of the Gas Industry Standards Board (GISB) standards Order No. 587-C.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission,

888 First Street N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26960 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### TransColorado Gas Transmission Company; Notice of Proposed Changes in FERC Gas Tariff

October 6, 1997.

Take notice that on October 1, 1997, TransColorado Gas Transmission Company (TransColorado) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1-A, the following tariff sheets, to become effective October 1, 1997:

Eighth Revised Sheet No. 30

TransColorado states that the above tariff sheet is being filed to implement negotiated rate contracts pursuant to the Commission's Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines issued January 31, 1996 at Docket Nos. RM95-6-000 and RM96-7-000.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington D.C. 20426, in accordance with Section 385.211 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are

available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26961 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-18-009]

#### Transwestern Pipeline Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Transwestern Pipeline Company (Transwestern), tendered for filing to become part of Transwestern's FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets proposed to be effective November 1, 1997:

22 Revised Sheet No. 5B  
Fifth Revised Sheet No. 49  
Fifth Revised Sheet No. 70  
Seventh Revised Sheet No. 80A  
Original Sheet No. 80A.01  
Fifth Revised Sheet No. 80B  
First Revised Sheet No. 81C  
Second Revised Sheet No. 81E  
Third Revised Sheet No. 149

Transwestern states that the instant filing reflects changes to Transwestern's Tariff in compliance with the requirements of Order No. 587-C and the June 27 Order.

Transwestern states that copies of the filing were served upon Transwestern's customers and interested State Commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26930 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****[Docket No. RP97-6-009]****Trunkline Gas Company; Notice of Compliance Filing**

October 6, 1997.

Take notice that on October 1, 1997, Trunkline Gas Company (Trunkline) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to be effective November 1, 1997:

Sixth Revised Sheet No. 155  
Seventh Revised Sheet No. 167  
First Revised Sheet No. 167A  
Original Sheet No. 167B  
Second Revised Sheet No. 242A

Trunkline asserts that the purpose of this filing is to comply with the Commission's Letter Order issued on June 11, 1997 in Docket No. RP97-6-006, which accepted the pro forma tariff sheets filed by Trunkline on May 1, 1997. That filing implemented the standards promulgated by the Gas Industry Standards Board, which were adopted by the Commission in Order No. 587-C in Docket No. RM96-1-004, Standards for Business Practices of Interstate Natural Gas Pipelines. The tariff sheets submitted reflect the pro forma tariff language accepted by the Commission and also incorporate by reference Standard 4.3.6, which was proposed for inclusion in Trunkline's tariff subsequent to the submission of the pro forma tariff sheets and accepted by the Commission's letter order dated July 23, 1997 in Docket No. RP97-6-007 effective August 1, 1997.

Trunkline states that copies of this filing are being served on all affected customers, applicable state regulatory agencies and parties to this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public

inspection in the Public Reference Room.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26920 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****[Docket No. RP97-156-004]****Viking Gas Transmission Company; Notice of Compliance Filing**

October 6, 1997.

Take notice that on September 30, 1997, Viking Gas Transmission Company (Viking) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following actual tariff sheets:

Third Revised Sheet No. 40  
First Revised Sheet No. 41A  
Third Revised Sheet No. 49  
Second Revised Sheet No. 51  
Third Revised Sheet No. 87 (incorporating Standard 4.3.6)  
Fourth Revised Sheet No. 87 (incorporating Standards 1.2.5, 1.2.7, 1.3.7, 1.3.24-1.3.31, 1.3.33, 1.3.34, 5.3.22)

For Sheet No. 87 that incorporates Standard 4.3.6, Viking proposes an effective date of August 1, 1997. For the remaining sheets including Sheet No. 87 that incorporates Standards 1.2.5, 1.2.7, 1.3.7, 1.3.24-1.3.31, 1.3.33, 1.3.24, and 5.3.22, Viking proposes an effective date of November 1, 1997.

Viking states that the purpose of this filing is to comply with the Letter Order issued by the Office of Pipeline Regulation, Rate Review Branch II, on June 11, 1997. The June 11, 1997 Letter Order directed Viking to file actual tariff sheets when it filed to comply with Order No. 587-C, Standards for Business Practices of Interstate Natural Gas Pipelines, Docket No. RM96-1-004, FERC Regulations Preambles ¶131,050 (1997), issued on March 4, 1997.

Order No. 587-C required pipelines to make pro forma tariff filings to implement the GISB practices and standards by May 1, 1997. Viking filed prop forma tariff sheets when it made its May 1, 1997, filing to comply with Order No. 587-C.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules of Practice and Procedure. All such protests should be filed in accordance with Section 154.210 of the

Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

**Lois D. Cashell,**  
*Secretary.*

[FR Doc. 97-26955 Filed 10-9-97; 8:45 am]  
BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****[Docket Nos. RP89-183-075 and RP98-12-000]****Williams Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff**

October 6, 1997.

Take notice that on October 1, 1997, Williams Natural Gas Company (WNG), tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheets, with the proposed effective date of November 1, 1997:

Twenty Third Revised Sheet No. 6A  
Second Revised Sheet Nos. 8E and 8F

WNG states that this filing is being made pursuant to Article 14, of the General Terms and Conditions of its FERC Gas Tariff, Second Revised Volume No. 1. WNG hereby submits its fourth quarter, 1997, report to take-or-pay buyout, buydown and contract reformation costs and gas supply related transition costs, and the application or distribution of those costs and refunds.

WNG states that a copy of its filing was served on all participants listed on the service lists maintained by the Commission in the dockets referenced above and on all of WNG's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest this filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party

must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26912 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-62-007]

#### Wyoming Interstate Company; Notice of Compliance Filing

October 6, 1997.

Take notice that on October 1, 1997, Wyoming Interstate Company LTD. (WIC), tendered for filing to become part of its FERC Gas Tariff, Second Revised Volume No. 2, the tariff sheets listed in Appendix A to the filing, to be effective November 1, 1997.

WIC states that the purpose of this compliance filing is to confirm WIC's tariff to requirements of the order issued June 13, 1997 in Docket No. RP97-62-003 and Order No. 387-C.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26939 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP97-93-006]

#### Young Gas Storage Company Ltd.; Notice of Tariff Compliance Filing

October 6, 1997.

Take notice that on September 30, 1997, Young Gas Storage Company LTD.

(Young), tendered for filing to become part of its FERC gas Tariff, Original Volume No. 1, the tariff sheets listed in Appendix A to the filing, to be effective November 1, 1997.

Young states that the purpose of this compliance filing is to conform Young's tariff to requirements of the order issued July 1, 1997 in Docket No. RP97-93-004 and Order No. 587-C

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room.

**Lois D. Cashell,**

*Secretary.*

[FR Doc. 97-26943 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER96-1712-000, et al.]

#### Florida Power Corp., et al.; Electric Rate and Corporate Regulation Filings

October 6, 1997.

Take notice that the following filings have been made with the Commission:

##### 1. Florida Power Corporation

[Docket No. ER96-1712-000]

Take notice that on September 12, 1997, Florida Power Corporation tendered for filing an amendment in the above-referenced docket.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 2. New York State Electric & Gas Corporation

[Docket No. ER97-4621-000]

Take notice that on September 15, 1997, New York State Electric & Gas Corporation (NYSEG), tendered for filing Service Agreements between NYSEG and the parties listed below:

Market Responsive Energy, Inc.  
New Energy Ventures, Inc.  
Equitable Power Services Company  
Williams Energy Services Company

NYSEG requests waiver of the Commission's sixty-day notice requirements and an effective date of September 15, 1997, for the Service Agreements. NYSEG has served copies of the filing on The New York State Public Service Commission and on the Customers.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 3. Fitchburg Gas and Electric Light Company

[Docket No. ER97-4622-000]

Take notice that on September 12, 1997, Fitchburg Gas and Electric Light Company (Fitchburg), tendered for filing a service agreement whereby it takes service under its own open access transmission tariff presently on file with the Commission in Docket No. OA97-635-000.

Fitchburg requested a waiver of the Commission's 30-day notice period, proposing the service agreement to be effective July 9, 1996. A copy of the service agreement has also been filed with the Massachusetts Department of Public Utilities.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 4. Wisconsin Public Service Corporation

[Docket No. ER97-4624-000]

Take notice that on September 16, 1997, Wisconsin Public Service Corporation tendered for filing executed service agreement with Western Power Services, Inc., under its CS-1 Coordination Sales Tariff.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 5. Florida Power & Light Company

[Docket No. ER97-4625-000]

Take notice that on September 16, 1997, Florida Power & Light Company filed an unexecuted Service Agreement with Oglethorpe Power 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 August 18, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

##### 6. Wisconsin Public Service Corporation

[Docket No. ER97-4626-000]

Take notice that on September 16, 1997, Wisconsin Public Service Corporation tendered for filing executed service agreement with National Gas &

Electric L.P., under its CS-1 Coordination Sales Tariff.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 7. Louisville Gas and Electric Company

[Docket No. ER97-4627-000]

Take notice that on September 16, 1997, Louisville Gas and Electric Company tendered for filing copies of service agreements between Louisville Gas and Electric Company and Electric Clearinghouse, Inc., under Rate GSS.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 8. Louisville Gas and Electric Company

[Docket No. ER97-4628-000]

Take notice that on September 16, 1997, Louisville Gas and Electric Company tendered for filing copies of a service agreement between Louisville Gas and Electric Company and Electric Clearinghouse, Inc., under Rate GSS.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 9. Golden Spread Electric Cooperative, Inc.

[Docket No. ER97-4629-000]

Take notice that on September 16, 1997, Golden Spread Electric Cooperative, Inc. (Golden Spread), tendered its Special Facilities Agreement with Tri-County Electric Cooperative, Inc. (Tri-County) pursuant to § 35.13 of the Commission's Regulations. The Special Facilities Agreement between Golden Spread and Tri-County provides for the construction and ownership of a 115/12.47 kV substation to be located outside of Guymon, Oklahoma. The charges associated with the construction and ownership of this facility will be recovered by Golden Spread from Tri-County pursuant to Rider A of Rate Schedule FERC No. 22. The filing will not effect a rate increase or decrease to Golden Spread's Members.

Copies of this filing were served upon Golden Spread's jurisdictional customers, the Public Utility Commission of Texas, and the Oklahoma Corporation Commission.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 10. Washington Water Power

[Docket No. ER97-4630-000]

Take notice that on September 16, 1997, Washington Water Power, tendered for filing with the Federal Energy Regulatory Commission

pursuant to 18 CFR 35.13, an executed Service Agreement under WWP's FERC Electric Tariff Revised Volume No. 9 with Tillamook People's Utility District. WWP requests waiver of the prior notice requirement and requests an effective date of June 11, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 11. Northeast Utilities Service Company

[Docket No. ER97-4631-000]

Take notice that on September 16, 1997, Northeast Utilities Service Company (NUSCO), tendered for filing, a Service Agreement with New Energy Ventures, Inc. (NEV), under the NU System Companies' System Power Sales/Exchange Tariff No. 6.

NUSCO states that a copy of this filing has been mailed to NEV.

NUSCO requests that the Service Agreement become effective August 18, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 12. Northeast Utilities Service Company

[Docket No. ER97-4632-000]

Take notice that on September 16, 1997, Northeast Utilities Service Company (NUSCO), on behalf of its operating affiliates, The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, Holyoke Power and Electric Company and Public Service Company of New Hampshire, tendered for filing a Service Agreement with Williams Energy Ventures, Inc. (Williams), under the Northeast Utilities System Companies' Sale for Resale Tariff No. 7, Market Based Rates. NUSCO requests an effective date of August 31, 1997.

NUSCO states that a copy of its submission has been mailed or delivered to Williams.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 13. Northeast Utilities Service Company

[Docket No. ER97-4633-000]

Take notice that on September 16, 1997, Northeast Utilities Service Company (NUSCO), tendered for filing, a Service Agreement with Williams Energy Services Company (Williams) under the NU System Companies' System Power Sales/Exchange Tariff No. 6.

NUSCO states that a copy of this filing has been mailed to Williams.

NUSCO requests that the Service Agreement become effective August 31, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 14. Northeast Utilities Service Company

[Docket No. ER97-4634-000]

Take notice that on September 16, 1997, Northeast Utilities Service Company (NUSCO), on behalf of its operating affiliates, The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, Holyoke Power and Electric Company and Public Service Company of New Hampshire, tendered for filing a Service Agreement with New Energy Ventures, Inc. (NEV), under the Northeast Utilities System Companies' Sale for Resale Tariff No. 7, Market Based Rates. NUSCO requests an effective date of August 18, 1997.

NUSCO states that a copy of its submission has been mailed or delivered to NEV.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 15. NEV, L.L.C.; NEV East, L.L.C.; NEV California, L.L.C.; NEV Midwest, L.L.C.

[Docket No. ER97-4636-000; Docket No. ER97-4652-000; Docket No. ER97-4653-000; Docket No. ER97-4654-000]

Take notice that on September 16, 1997, NEV, L.L.C.; NEV East, L.L.C.; NEV California, L.L.C.; and NEV Midwest, L.L.C., filed an Application Requesting Acceptance of Proposed Market-Based Rate Schedules, Waiver of Certain Regulations and Blanket Approvals. The proposed rate schedules would allow each applicant to sell capacity and energy to eligible customers at market-based rates.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

#### 16. Florida Power & Light Company

[Docket No. ER97-4637-000]

Take notice that on September 17, 1997, Florida Power & Light Company (FPL), tendered for filing an Amendment Number Two to the Network Service Agreement between FPL and the Florida Municipal Power Agency. This Amendment Number Two adds the City of Vero Beach, Florida as a Network Member. FPL proposes to make the Amendment Number Two effective August 26, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

**17. Union Electric Company**

[Docket No. ER97-4638-000]

Take notice that on September 15, 1997, Union Electric Company (UE), tendered for filing the Ninth Amendment to the Interchange Agreement dated June 28, 1978, between Associated Electric Cooperative, Incorporated and UE. UE asserts that the Amendment primarily provides for the addition and termination of delivery points and amends an interconnection point.

UE requests that the filing be permitted to be effective October 1, 1997.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

**18. Arizona Public Service Company**

[Docket No. ER97-4639-000]

Take notice that on September 17, 1997, Arizona Public Service Company (APS), tendered for filing Service Agreements under APS FERC Electric Tariff, Original Volume No. 3 with Tucson Electric Power Company and Coral Power, L.L.C.

A copy of this filing has been served on the Arizona Corporation Commission, Tucson Electric Power Company and Coral Power, L.L.C.

*Comment date:* October 20, 1997, in accordance with Standard Paragraph E at the end of this notice.

**19. Northern States Power Company (Minnesota Company)**

[Docket No. ER97-4640-000]

Take notice that on September 17, 1997, Northern States Power Company (Minnesota) (NSP) tendered for filing a Non-Firm Point-to-Point Transmission Service Agreement and a Short-Term Firm Transmission Service Agreement between NSP and Constellation Power Source, Inc.

NSP requests that the Commission accept both the agreements effective August 20, 1997, and requests waiver of the Commission's notice requirements in order for the agreements to be accepted for filing on the date requested.

*Comment date:* October 20, 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. 97-26966 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission****Notice of Surrender of License**

October 6, 1997.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

- a. *Type of Application:* Surrender of License.
- b. *Project No.:* 7664-023.
- c. *Date Filed:* August 29, 1997.
- d. *Applicant:* Island Power Company, Inc.
- e. *Name of Project:* Clark Canyon Dam.
- f. *Location:* On Beaverhead River, in Beaverhead County, Montana.
- g. *Filed Pursuant to:* Federal Power Act, 16 USC Section 791(a)—825(r).
- h. *Applicant Contact:* Jay R. Bingham, President, Island Power Company, Inc., 5160 Wiley Post Way, Suite 200, Salt Lake City, UT 84116, (801) 532-2520.
- i. *FERC Contact:* Regina Saizan, (202) 219-2673.
- j. *Comment Date:* November 20, 1997.
- k. *Description of Application:* The licensee seeks to surrender its license because it is not financially feasible to construct the project.
- l. This notice also consists of the following standard paragraphs: B, C1, and D2.

B. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protests, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments,

protests, or motions to intervene must be received on or before the specified comment date for the particular application.

C1. Filing and Service of Responsive Documents—Any filings must bear in all capital letters the letter "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

D2. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Lois D. Cashell,**  
Secretary.  
[FR Doc. 97-26910 Filed 10-9-97; 8:45 am]

BILLING CODE 6717-01-M

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-5980-4]

**Agency Information Collection Activities Under OMB Review; New Source Performance Standards for Nitric Acid Plants**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: New Source Performance Standards for Nitric Acid Plants, Subpart G OMB Control Number 2060-0019, expiration date: 12/31/97. The ICR describes the nature of the information collection and its expected burden and

cost; where appropriate, it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before November 10, 1997.

**FOR FURTHER INFORMATION OR A COPY CALL:** Sandy Farmer at EPA, (202) 260-2740, and refer to EPA ICR No. 1056.06.

**SUPPLEMENTARY INFORMATION:**

*Title:* Standards of Performance for Nitric Acid Plants, Subpart G; OMB Control No. 2060-0019; EPA ICR No. 1056.06. This is a request for an extension of a currently approved collection.

*Abstract:* This ICR contains recordkeeping and reporting requirements that are mandatory for compliance with 40 CFR part 60.70, subpart G, Standards of Performance for Nitric Acid Plants. This information is used by the Agency to identify sources subject to the standards and to insure that the best demonstrated technology is being properly applied. The standards require periodic recordkeeping to document process information relating to the sources' ability to meet the requirements of the standard and to note the operation conditions under which compliance was achieved. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The **Federal Register** Notice required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on 6/18/97 62 FR 33068; no comments were received.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 42 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This include the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Nitric and Plants.

*Estimated Number of Respondents:* 32.

*Frequency of Response:* semi-annual and on occasion.

*Estimated Total Annual Hour Burden:* 1,516 hours.

*Estimated Total Annualized Cost Burden:* \$3,268,000.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1056.06 and OMB Control No. 2060-0019 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OPPE Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460.

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA 725 17th Street, NW, Washington, DC 20530.

Dated: October 6, 1997.

**Joseph Retzer,**

*Director, Regulatory Information Division.*

[FR Doc. 97-27014 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-M

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-5908-3]

**Agency Information Collection Activities Under OMB Review; National Emission Standards for Magnetic Tape Manufacturing Operations**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3507(a)(1)(D)), this notice announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: 40 CFR part 61 Subpart EE—Magnetic Tape Manufacturing Operations, OMB Control Number 2060-0326, expiration date: 12/31/97. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before November 10, 1997.

**FOR FURTHER INFORMATION OR A COPY CALL:** Sandy Farmer at EPA, (202) 260-2740, and refer to EPA ICR No. 1678.03.

**SUPPLEMENTARY INFORMATION:**

*Title:* National Emission Standards for Magnetic Tape Manufacturing Operations (OMB Control No. 2060-0326; EPA ICR No. 1678.03, expiring 12/31/97). This is a request for extension of a currently approved collection.

*Abstract:* The Administrator has judged that Hazardous Air Pollutant (HAP) emissions from magnetic tape manufacturing operations cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare. Owners/operators of affected magnetic tape manufacturing operations must notify EPA of construction, modification, startups, shut downs, date and results of initial performance test and provide semiannual reports of excess emissions. They must also develop startup, shutdown, malfunction plans and develop a quality control plan for their continuous monitoring system. Affected facilities also must provide notification of compliance status and report quarterly monitoring exceedances.

In order to ensure compliance with the standards promulgated to protect public health, adequate reporting and recordkeeping is necessary. In the absence of such information enforcement personnel would be unable to determine whether the standards are being met on a continuous basis, as required by the Clean Air Act.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. The **Federal Register** Notice required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on June 18, 1997 and no comments were received.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 7042 person hours. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing

and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Magnetic Tape Manufacturing Operations.

*Estimated Number of Respondents:* 13.

*Frequency of Response:* 2.

*Estimated Number of Responses:* 26.

*Estimated Total Annual Hour Burden:* 7042 person hours.

*Estimated Total Annualized Cost Burden:* \$89,400.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to EPA ICR No. 1678.03 and OMB Control No. 2060-0326 in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OPPE Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460 and Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503

Dated: October 6, 1997.

**Joseph Retzer,**

*Director, Regulatory Information Division.*  
[FR Doc. 97-27016 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-5485-2]

### Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared September 08, 1997 Through September 12, 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) 564-71653.

An explanation of the ratings assigned to draft environmental impact

statements (EISs) was published in FR dated April 11, 1997 (62 FR 16154).

### Draft EISs

ERP No. D-BLM-K67044-CA Rating EC2, Soledad Mountain Open Pit Leap Leach Gold Mine Project, Construction and Operation, Plan-of-Operations Approval, Mojave, Kern County, CA.

*Summary:* EPA expressed environmental concerns with the lack of full disclosure of environmental impacts from proposed or possible future sale of aggregate, underground mining, and impacts to local water and air quality from mining and processing operations.

ERP No. D-FAA-G12002-NM Rating EC2, Southwest Regional Spaceport (SRS) Development and Operation Project, Commercial Space Vehicles Launching Facility, Licensing, Sierra and Dona Ana Counties, NM.

*Summary:* EPA expressed environmental concerns and requested additional information on land use change, policy, and management conflict.

ERP No. D-NPS-K61144-HI Rating LO, Ala Kahakai "Trail By the Sea" National Trail Study, Implementation, Hawaii Island, Hawaii County, HI.

*Summary:* EPA expressed lack of objection on the proposed project.

ERP No. D-SFW-L64045-00 Rating LO, Grizzly Bear (*Ursus arctos horribilus*) Recovery Plan in the Bitterroot Ecosystem, Implementation, Endangered Species Act, Proposed Special Rule 10(j) Establishment of a Nonessential Experimental Population of Grizzly Bears in the Bitterroot Area, Rocky Mountain, Blaine, Camas, Boise, Clearwater, Custer, Elmore, Idaho, Lemhi, Shoshone.

*Summary:* Based on an abbreviated review EPA does not foresee having any environmental objections to the proposed project.

ERP No. DA-DOE-K03007-CA Rating EC2, Petroleum Production at Maximum Efficient Rate, Updated Information for the Sale of Naval Petroleum Reserve No. 1 (NPR-1 also called "Elk Hills") Amendment of Kern County General Plan, Elk Hills, Kern County, CA.

*Summary:* EPA expressed environmental concerns regarding projected air quality impacts with the disposition of EPA-regulated polychlorinated biphenyls in storage or in use at the facility, and projected impacts to biological resources. EPA asked to be notified of the final disposition of regulated PCB materials at the facility and encouraged the Department of Energy to work with the US Fish and Wildlife Service on mitigation recommendations in the EIS to reduce projected impacts to biological

resources, particularly Federally-listed species.

### Final EISs

ERP No. F-AFS-L65287-OR, Little River (DEMO) Demonstration of Ecosystem Management Options Timber Sale, Implementation Umpqua National Forest, North Umpqua Ranger District, Douglas County, OR.

*Summary:* Review of the Final EIS was not deemed necessary. No formal comment letter was sent to the preparing agency.

ERP No. F-NAS-E12005-00, 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, Edward Air Force Base, CA.

*Summary:* EPA continues to prefer the SSC for rocket motor testing based on the lesser noise impacts affecting private property.

ERP No. FS-AFS-L65202-ID, Katka Peak Timber Sale and Road Construction, Implementation, New Information from Interior Columbia Basin Ecosystem Management Project, to implement Ecosystem Restoration Treatment, Bonners Ferry Ranger District, Idaho Panhandle National Forests, Boundary County, ID.

*Summary:* Review of the Final EIS was not deemed necessary. No formal comment letter was sent to the preparing agency.

Dated: October 7, 1997.

**B. Katherine Biggs,**

*Associate Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 97-27024 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-U

## ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-5485-1]

### 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 September 29, 1997 Through October 03, 1997 Pursuant to 40 CFR 1506.9.

EIS No. 970378, FINAL EIS, AFS, MT, Beaverhead Forest Plan Riparian Amendment, Implementation, Beaverhead-Deerlodge National Forest, Beaverhead, Madison, Silver

Bow, Deer Lodge and Gallatin Counties, MT, Due: November 10, 1997, Contact: Peri Surenram (406) 683-3900.

EIS No. 970379, FINAL EIS, AFS, OR, Summit Fire Recovery Forest Restoration Project, Implementation, Malheur National Forest, Long Creek Ranger District, Grant County, OR, Due: November 10, 1997, Contact: Robert Hammond (541) 575-3000.

EIS No. 970380, DRAFT EIS, AFS, UT, Spruce Ecosystem Recovery Project, Implementation, Dixie National Forest, Cedar City Ranger District, Iron County, UT, Due: November 24, 1997, Contact: Phil Eisenhauer (801) 865-3200.

EIS No. 970381, DRAFT EIS, IBR, CA, Hamilton City Pumping Plant, Fish Screen Improvement Project, COE Section 10 and 404 Permits, Central Valley, Butte, Colusa, Glenn and Tehama Counties, CA, Due: November 24, 1997, Contact: Lauren Carly (916) 934-7066.

EIS No. 970382, DRAFT EIS, FHW, VA, Outer Connector Study Transportation Improvement, from I-95, US 17 and VA-3, Funding, COE Section 10 and 404 Permits, Stafford and Spotsylvania Counties, VA, Due: November 28, 1997, Contact: Roberto Fonseca-Martinez (804) 281-5100.

EIS No. 970383, DRAFT EIS, MMS, TX, LA, Western Planning Area, Proposed Western Gulf of Mexico 1997-2002 (5-Year Program) Outer Continental Shelf (OSC) Oil and Gas Sales 171, 174, 177 and 180, Lease Offering, Offshore Marine Environmental and Coastal Counties/Parishes of Texas and Louisiana, Due: November 24, 1997, Contact: Archie P. Melancon (703) 787-5471.

EIS No. 970384, DRAFT EIS, FHW, NY, Judd Road Connector Transportation Improvements, Funding and COE Section 404 Permit, Village of New York Mills, Towns of New Hartford and Whitestown, Oneida County, NY, Due: November 24, 1997, Contact: Harold J. Brown (518) 431-4127.

EIS No. 970385, DRAFT SUPPLEMENT, NOA, AK, Juneau Consolidated Facility, Additional Information, Space for the University of Alaska Fairbanks School of Fisheries and Ocean Science (UAF), Possible Site Lena Point, Fisheries Management Operation, 'Vision for 2005', Juneau, AK, Due: November 25, 1997, Contact: John Gorman (907) 586-7641.

EIS No. 970386, FINAL EIS, USN, DC, Naval Sea Systems Command Headquarters (NAVSEA), Base Realignment and Closure Action, Relocation from Arlington, VA to Washington Navy Yard (WNY) in

southeast Washington, DC, Due: November 10, 1997, Contact: Hank Riek (202) 685-3064.

EIS No. 970387, FINAL EIS, FRC, ME, Lower Penobscot River Basin Hydroelectric Project, Application for Licensing for three hydroelectric projects: Basin Mills (FERC. No. 10981), Stillwater (FERC. No. 2712) and Milford (FERC. No. 2534), Penobscot County, ME, Due: November 10, 1997, Contact: Ronald McKittrick (202) 219-2783.

EIS No. 970388, SECOND FINAL SUPPLE, DOE, NM, Waste Isolation Pilot Plant Disposal Phase, Updated Information, Disposal of Transuranic Waste, Carlsbad, NM, Due: November 10, 1997, Contact: Harold Johnson (505) 234-7349.

EIS No. 970389, FINAL EIS, BLM, NV, Florida Canyon Mine Expansion Project and Comprehensive Reclamation Plan, Construction and Operation of New Facilities and Expansion of Existing Gold Mining Operations in Imlay Mining District, Plan-of-Operation Approval and Right-of-Way Permit Issuance, Pershing County, NV, Due: November 10, 1997, Contact: Ken Loda (702) 623-1500.

Dated: October 7, 1997.

**B. Katherine Biggs,**

*Associate Director, NEPA Compliance Division, Office of Federal Activities.*

[FR Doc. 97-27025 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-U

**ENVIRONMENTAL PROTECTION AGENCY**

[PF-768; FRL-5748-5]

**Notice of Filing of Pesticide Petitions**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the filing of a pesticide petition proposing a regulation establishing an exemption from the requirement for a tolerance for residues of *Bacillus thuringiensis* Cry1, Cry2 and Cry3 classes of proteins and the genetic material necessary for the production of these proteins in or on all raw agricultural commodities. This notice includes a summary of the petition that was prepared by the petitioner, Monsanto Company.

**DATES:** Comments, identified by the docket control number PF-768, must be received on or before November 10, 1997.

**ADDRESSES:** By mail submit written comments to: Public Information and

Records Integrity Branch (7506C), Information Resources and Services Division, Office of Pesticides Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person bring comments to: Rm. 1132, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under "SUPPLEMENTARY INFORMATION." No confidential business information should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). CBI should not be submitted through e-mail. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments will be available for public inspection in Rm. 1132 at the address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Mike Mendelsohn, Biopesticides and Pollution Prevention Division (7501W), Office of Pesticide Programs, U.S. Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: 5th floor CS #1, 2800 Crystal Drive, Arlington, VA 22202, Telephone No. 703-308-8715, e-mail: mendelsohn.mike@epamail.epa.gov.

**SUPPLEMENTARY INFORMATION:** EPA has received pesticide petitions as follows proposing the establishment and/or amendment of regulations for residues of certain pesticide chemicals in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that these petitions contain data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

The official record for this notice of filing, as well as the public version, has been established for this notice of filing under docket control number [PF-768] (including comments and data

submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located at the address in "ADDRESSES" at the beginning of this document.

Electronic comments can be sent directly to EPA at:  
opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment 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 the docket number [PF-768] and appropriate petition number. Electronic comments on this notice may be filed online at many Federal Depository Libraries.

#### List of Subjects

Environmental protection, Agricultural commodities, Food additives, Feed additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: September 29, 1997.

#### Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs

#### Summaries of Petitions

Petitioner summaries of the pesticide petitions are printed below as required by section 408(d)(3) of the FFDCFA. The summaries of the petitions were prepared by the petitioners and represent the views of the petitioners. EPA is publishing the petition summaries verbatim without editing them in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

#### Monsanto Company

PP 7F4888

EPA has received a pesticide petition (PP 7F4888) from the Monsanto Company, 700 Chesterfield Parkway, North, St. Louis, MO 63198. The petition proposes, pursuant to section 408 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. section 346a

(d), to amend 40 CFR part 180 by establishing an exemption from the requirement for a tolerance for residues of the plant pesticides consisting of *Bacillus thuringiensis* Cry1, Cry2, and Cry3 classes of proteins and the genetic material necessary for the production of these proteins in or on all raw agricultural commodities.

EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the petition. Additional data may be needed before EPA rules on the petition.

Monsanto has stated that analytical methods of detection and measurement of the Cry1, Cry2, and Cry3 classes of proteins are not needed since they are petitioning for exemptions from the requirement for a tolerance on the basis of mammalian safety.

As required by section 408(d) of the FFDCFA, as recently amended by the Food Quality Protection Act, Monsanto included in the petition a summary of the petition and authorization for the summary to be published in the **Federal Register** in a notice of receipt of the petition. The summary represents the views of Monsanto; EPA, as mentioned above, is in the process of evaluating the petition. As required by section 408(d)(3), EPA is including the summary as a part of this notice of filing. EPA may have made minor edits to the summary for the purpose of clarity.

This unit summarizes information cited by Monsanto Company to support the proposed tolerance exemption for *Bacillus thuringiensis* Cry1, Cry2, and Cry3 classes of proteins and the genetic material necessary for the production of these proteins when used as plant-pesticide active ingredients.

#### A. *Bacillus thuringiensis* Cry1, Cry2, and Cry3 Protein Uses

The Environmental Protection Agency (EPA) has approved the commercial use of the *Bacillus thuringiensis* Cry1Ab, Cry1Ac, and Cry3A proteins as expressed in genetically engineered corn, cotton, and potato, respectively. The Agency has concluded that these Cry protein plant pesticides pose no foreseeable risks to human health and has granted exemptions from the requirement of a tolerance for these substances. A Cry2Aa plant pesticide is currently under review at EPA.

The first *Bacillus thuringiensis* Cry protein exemptions from tolerance were limited to a specific Cry protein as expressed in a single crop, such as Cry3A in potato and Cry1Ac in cotton.

More recently, in approving Monsanto's Cry1Ab expressed in corn (61 FR 40340, August 2, 1996) and Dekalb's Cry1Ac expressed in corn (62 FR 17720, April 11, 1997), EPA established a broad tolerance exemption for Cry1Ab and Cry1Ac proteins, respectively, in or on all plant raw agricultural commodities.

In the future, many *Bacillus thuringiensis* Cry proteins are expected to be expressed in a wide variety of plants for insect protection. This petition provides the scientific bases for the generic human health safety determination that Cry1, Cry2, and Cry3 classes of proteins as expressed in plants pose no foreseeable human health risks. Accordingly, all *Bacillus thuringiensis* Cry1, Cry2, and Cry3 proteins as expressed in plants are proposed to be exempt from the requirement for a tolerance.

#### B. Product Identity and Chemistry

*Bacillus thuringiensis* Cry proteins are named according to their similarity to established holotype proteins. Cry proteins with similar amino acid sequences are grouped together. Cry proteins with the same Arabic numeral (e.g., Cry1) share at least a 45 percent amino acid sequence identity. Those with the same Arabic numeral and upper case letter (e.g., Cry1A) share at least a 75 percent sequence identity. The same Arabic numeral and upper and lower case letter (e.g., Cry1Ab) designates a greater than 95 percent sequence identity. Therefore, one of the principal scientific rationales for this petition is that it applies safety conclusions from testing one or a few representative Cry proteins to a broader, but closely related, group of proteins that by definition share significant amino acid sequence identity.

To qualify for an exemption from tolerance, amino acid sequence analysis data must be provided to verify that the protein has been correctly classified as belonging to one of the "exempt" classes of Cry proteins (i.e., Cry1, Cry2, or Cry3). It should also be confirmed that the Cry protein exhibits no significant amino acid sequence homology with known food allergens based on a comparison with sequences contained in public domain databases. Information concerning the *Bacillus thuringiensis* holotype protein nomenclature and a continuously updated database of *Bacillus thuringiensis* holotype proteins can be found on the world wide web at <http://epunix.biols.susx.ac.uk/Home/Neil-Crickmore/Bt/holo.html>.

To ensure that this petition has broad applicability, it covers *Bacillus*

*thuringiensis* Cry proteins that are naturally occurring or that have been genetically modified by deletion, substitution, and/or insertion of amino acid sequences, provided that the protein exhibits at least 45 percent amino acid sequence identity with a Cry protein from an "exempt" class of Cry protein. If the protein has been modified by the insertion of amino acids from a non-exempt source (e.g., a source other than a Cry1, Cry2 or Cry3 protein), those inserted amino acid sequences may comprise no greater than five percent of the total amino acid sequence of the Cry protein.

#### C. Mammalian Toxicological Profile

There currently exists an extensive body of scientific data demonstrating the safety of Cry proteins. A review of the literature establishes that many different Cry proteins have been evaluated in a variety of mammalian toxicology tests over the past 35 years. No adverse effects have been observed in mammals upon oral exposure to any of these Cry proteins.

Oral dietary exposure is the only significant route by which humans can be exposed to Cry protein plant pesticides. Dermal and inhalation exposures are anticipated to be negligible because Cry proteins are produced within the plant, are not exuded, and are not volatile. To assess the implications of human dietary exposure to *Bacillus thuringiensis* Cry proteins, EPA has asked registrants to submit results of an acute oral mammalian toxicology study (oral LD<sub>50</sub>) and an *in vitro* digestibility study. These tests have been conducted using a microbially produced *Bacillus thuringiensis* protein that has been shown to be equivalent to the plant-expressed protein.

No treatment-related adverse effects have been observed in any of the acute oral mammalian toxicity studies conducted with microbially produced Cry1Ab, Cry1Ac, Cry2A, and Cry3A proteins. Six oral gavage studies in mice established the LD<sub>50</sub> to be >3,280 mg/kg to >5,200 mg/kg for these proteins. Based on these results there is a safety factor of greater than 50,000 for human dietary exposure to Cry1Ab and Cry1Ac proteins in corn or cottonseed, greater than one million for Cry3A protein in potato, and greater than two million for Cry1Ac protein in tomato. Because all of the testing of *Bacillus thuringiensis* plant pesticides has yielded negative results, no further mammalian toxicology testing (beyond acute and digestibility studies) has been required to support registration and exemptions from tolerance.

The no observed effect level (NOEL) for Cry1Ab was > 0.45 mg/kg/day in a 28-day repeated dose oral toxicity study in mice and > 0.06 mg/kg/day in a 31-day repeated dose study in rabbits. Treatment doses in the 28-day and 31-day studies were estimated to be 1,000 to 4,000 times the maximum anticipated human exposure from consuming tomatoes genetically engineered to produce Cry1Ab (Noteborn et al. Food Safety of Transgenic Tomatoes Expressing the Insecticidal Crystal Protein Cry1Ab from *Bacillus thuringiensis* and the Marker Enzyme APH(3') II. Med. Fac. Landbouww. Univ. Gent, 58/4b, 1993). Based on the lack of toxic effects and the large margins of safety for both acute and 30-day exposures, these Cry proteins pose no foreseeable risks to human health. Moreover, these proteins are unlikely to cause endocrine effects because they exhibit no structural or functional similarity to estrogen or estrogen-mimic compounds.

EPA has stated that when proteins are toxic, they are known to act via acute mechanisms and at very low dose levels (Sjoblad et al. "Toxicological Considerations for Protein Components of Biological Pesticide Products," *Regulatory Toxicology and Pharmacology*, 15:3-9, 1992). The Cry proteins tested so far are judged to be nontoxic to mammals. Monsanto believes that the acute toxicity data on these representative Cry proteins and the extensive data base on microbial *Bacillus thuringiensis* products supports a broader conclusion: All Cry proteins classified by their amino acid sequence to be Cry1, Cry2, or Cry3 are highly unlikely to be toxic to humans.

In the future, crops may be modified to express significantly higher levels of Cry proteins than are expressed in the currently commercialized varieties. This does not alter the favorable safety conclusions for Cry proteins. The existing toxicology studies, showing no effects at the limit dose, would still support the exemption from the requirement for a tolerance and the conclusion that a tolerance is not necessary to protect human health.

Further scientific evidence for the safety of Cry proteins is that they have been shown to be rapidly degraded under conditions simulating the human gastrointestinal tract. Results of seven *in vitro* assays conducted with representative Cry1, Cry2, and Cry3 proteins indicate that the proteins are rapidly degraded, usually within 30 seconds. These results support the broader conclusion that members of these groups of Cry proteins (that share significant amino acid sequence

identity) are likely to be rapidly degraded following ingestion by humans.

The demonstrated rapid degradation of Cry protein following ingestion minimizes the potential for an allergenic reaction. By comparison, food allergens generally persisted in the gastrointestinal model, whereas common food proteins with no allergenic history degraded rapidly in simulated gastric fluid (Metcalfe et al. "Assessment of the Allergenic Potential of Foods Derived from Genetically Engineered Crop Plants," *Critical Rev. in Food Science and Nutrition*, 36(s):S165-S186, 1996). Searches of allergen sequence databases have shown no significant matches with the Cry proteins. Cry proteins do not share characteristics often exhibited by known food allergens. Unlike many known food allergens, the Cry proteins as expressed in plants are present in relatively low concentrations, and are heat labile. In addition, in the greater than 30 year history of commercial use, there have been no reported cases of allergenic reactions to the microbial *Bacillus thuringiensis* products (61 FR 40430, August 2, 1996).

Results of testing microbial *Bacillus thuringiensis* preparations for oral mammalian toxicity over the past 35 years demonstrate the total lack of acute, subchronic, and chronic oral toxicity associated with *Bacillus thuringiensis* microbial pesticides. These findings are directly relevant to this petition because these microbial preparations contain genes encoded for the production of at least four different classes of Cry proteins, including seven Cry1 proteins and two each of the Cry2, and Cry3 proteins.

*Bacillus thuringiensis* microbial products were first registered in 1961 and have been applied continuously since then for an expanding number of uses in agriculture, disease vector control, and forestry. No reports of adverse effects have involved or implicated Cry proteins as the causative agent, nor have any of these effects been considered significant in view of the quality assurance safeguards that are in place for microbial products. Moreover, in establishing the existing tolerance exemptions for Cry protein plant pesticides, EPA has stated that FIFRA section 6(a)2 reports claiming allergic reactions "were not due to *Bacillus thuringiensis* itself or any of the Cry toxins."

The genetic material necessary for the production of *Bacillus thuringiensis* Cry proteins are nucleic acids (DNA) which comprise the genetic material encoding the proteins and the regulatory regions

associated with the genes. Regulatory regions are the genetic material that control the expression of the genetic material encoding the Cry proteins, such as promoters, terminators, introns, and enhancers. DNA is common to all forms of plant and animal life, and there are no known instances of where nucleic acids have been associated with toxic effects related to their consumption. No mammalian toxicity is expected from dietary exposure to the genetic material necessary for the production of any *Bacillus thuringiensis* proteins, including the Cry1, Cry2, and Cry3 classes of proteins. EPA has also proposed an exemption from the requirement for a tolerance for residues of nucleic acids produced in plants as part of a plant pesticide active ingredient (59 FR 60542, November 23, 1994).

#### D. Aggregate Exposure

Exposure to Cry1, Cry2, and Cry3 proteins via dermal exposure or inhalation is unlikely given that these plant pesticides are contained in the plant, are not exuded and are not volatile. Therefore, worker and bystander exposure resulting from plant pesticides will be negligible, and would be unlikely to add measurably to any worker or bystander exposure resulting from microbial or other *Bacillus thuringiensis* formulations. Movement of the plant pesticides to drinking water is highly unlikely given that Cry proteins are known to rapidly degrade in the soil.

#### E. Cumulative Exposure

Consideration of a common mode of toxicity is not appropriate given that there is no indication of mammalian toxicity of Cry proteins in microbial or other formulations and no information that indicates that toxic effects would be cumulative with any other compounds. Mammals are not susceptible to Cry proteins. This may be explained, in part, by the fact that conditions required for the complex steps in the mode of action do not exist in mammals. As anticipated, immunocytochemical analyses of Cry1A have revealed no comparable binding sites in mammals. Monsanto is not aware of any other substances that may be related, via a common mechanism of toxicity, to the proteins that are the subject of the proposed exemption.

#### F. Safety Determination

1. *U.S. population in general.* The lack of toxicity and the rapid digestibility of Cry proteins provides evidence for the lack of toxicity and allergenicity and supports an exemption

from the requirement of a tolerance for the *Bacillus thuringiensis* Cry1, Cry2, and Cry3 classes of proteins. These proteins have been used in microbial insecticide formulations that have been registered by the EPA and commercially available since the early 1960s.

Accordingly, the available information supports a finding that there is a reasonable certainty that no harm will result to the U.S. population in general from aggregate dietary exposure to the Cry1, Cry2, and Cry3 classes of proteins.

2. *Infants and Children.* *Bacillus thuringiensis* Cry proteins are expressed in plants to protect the plant from insect damage. Therefore, nondietary exposure to infants and children is not expected. The lack of toxicity of Cry proteins and history of safe use of *Bacillus thuringiensis* microbial pesticides provides reasonable certainty that no harm will result to infants and children from aggregate dietary exposure to Cry1, Cry2, and Cry3 classes of proteins. Accordingly, there is no need to apply an additional safety factor for infants and children.

#### G. Existing Tolerances

Exemptions from the requirement for a tolerance have been granted by EPA for Cry1Ab and Cry1Ac and the genetic material necessary for their production in all plant raw agricultural commodities (61 FR 40340, August 2, 1996 and 62 FR 17720, April 11, 1997, respectively) and for Cry3A and the genetic material necessary for its production in potatoes (60 FR 21725, May 3, 1995).

[FR Doc. 97-27012 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-F

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-5908-7]

### Agency Information Collection Activities; OMB Responses

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** This notice announces the Office of Management and Budget's (OMB) responses to Agency clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

**FOR FURTHER INFORMATION CONTACT:** Sandy Farmer (202) 260-2740, please refer to the appropriate EPA Information Collection Request (ICR) Number.

#### SUPPLEMENTARY INFORMATION:

#### OMB Responses to Agency Clearance Requests

##### OMB Approvals

EPA ICR No. 1495.04; FIFRA Reregistration Fees; was approved 09/19/97; OMB No. 2070-0101; expires 09/30/2000.

EPA ICR No. 0940.15; Ambient Air Quality Surveillance Revision; was approved 09/30/97; OMB No. 2060-0084; expires 03/31/99.

EPA ICR No. 0184.05; Vehicle Emission Control Defect Survey Questionnaire; was approved 08/27/97; OMB No. 2060-0047; expires 08/31/2000.

EPA ICR No. 1680.02; Combined Sewer Overflow Policy; was approved 09/19/97; OMB No. 2040-0170; expires 09/30/2000.

EPA ICR No. 0783.36; Application for Motor Vehicle Emission Certification and Fuel Economy Labeling, SFTP Amendment; was approved 08/27/97; OMB No. 2060-0104; expires 08/31/98.

EPA ICR No. 1810.01; Obtaining Unbilled Grant Expenses from Grant Recipients; was approved 09/15/97; OMB No. 2030-0037; expires 09/30/2000.

EPA ICR No. 1797.01; NSPS for Petroleum Storage Liquid Vessels—40 CFR 60, Subpart K; was approved 09/22/97; OMB No. 2020-0009; expires 09/30/2000.

EPA ICR No. 1204.07; Submission of Unreasonable Adverse Effects Information under FIFRA Section 6(a)(2); was approved 09/24/97; OMB No. 2070-0039; expires 09/30/2000.

EPA ICR No. 0278.06; Supplemental Distribution of a Registered Pesticide Product; was approved 09/19/97; OMB No. 2070-0044; expires 09/30/2000.

EPA ICR No. 1214.04; Pesticide Product Registration Maintenance Fee; was approved 09/19/97; OMB No. 2070-0100; expires 09/30/2000.

EPA ICR No. 0155.06; Certification of Pesticide Applicators—40 CFR Part 171; was approved 09/30/97; OMB No. 2070-0029; expires 09/30/2000.

EPA ICR No. 1230.09; Prevention of Significant Deterioration Non-Attainment Area New Source Review; was approved 09/30/97; expires 09/30/2000.

EPA ICR No. 1038.09; Invitation for Bids and Request for Proposals; was approved 09/30/97; OMB No. 2030-0006; expires 09/30/2000.

*Notice of Short Term Extensions*

EPA ICR No. 1718.01; Regulations for Fuels and Fuels Additives, Fuel Quality Regulations for Highway Diesel Fuel Sold in 1993 and Later Calendar Years (Interim Final Rule); OMB No. 2060-0308; expiration date was extended from 10/31/97 to 03/31/98.

EPA ICR No. 1425.03; Application for Reimbursement of Local Governments; OMB No. 2050-0077; expiration date was extended from 9/30/97 to 03/31/98.

Dated: October 6, 1997.

**Joseph Retzer,**

*Division Director, Regulatory Information Division.*

[FR Doc. 97-27015 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-M

**ENVIRONMENTAL PROTECTION AGENCY**

[FRL-5908-1]

**State Program Requirements; Revision of the Approved National Pollutant Discharge Elimination System (NPDES) Program in Oklahoma**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of revision of the Oklahoma Pollutant Discharge Elimination System under the Clean Water Act.

**SUMMARY:** The Environmental Protection Agency (EPA), Region 6, provides notice that the approved program for the State of Oklahoma under the National Pollutant Discharge Elimination System (NPDES) program has been revised. The requirements for revising authorized state programs are found in Volume 40 Code of Federal Regulations (CFR) section 123.62. The revised program provides Oklahoma Department of Environmental Quality (ODEQ) the authority to issue general permits under the OPDES permitting program; and changes the enforcement program to include authority for the Oklahoma Ordinance Works Authority (OOWA).

**DATES:** This revision was approved by the EPA Region 6 Administrator on September 11, 1997.

**ADDRESSES:** The revised Oklahoma program documents are available to the public during normal business hours, Monday through Friday, excluding holidays, at:

EPA Region 6, 12th Floor Library, 1445 Ross Avenue, Dallas, Texas 75202, (214) 665-7513

ODEQ Headquarters, Department of Environmental Quality, Water Quality Division, 1000 N.E. 10th Street,

Oklahoma City, Oklahoma 73117-1212.

**FOR FURTHER INFORMATION CONTACT:** Ms. Wilma Turner at the EPA address listed above or by calling (214) 665-7516; or Norma Aldridge at the ODEQ address listed above or by calling (405) 271-5205.

Part or all of the State's revised program (which comprises approximately 2260 pages) may be copied at the ODEQ office in Oklahoma City, or EPA office in Dallas, at a minimal cost per page. A paper copy of the entire submission may be obtained from the ODEQ office in Oklahoma City for a \$339 fee (the cost of the changed pages only is \$121.55). An electronic copy of the documents stored on computer disk will be provided at no cost to interested parties who supply three disks to ODEQ for that purpose, with a self-addressed, stamped mailing container. The disks must be new, 3.5" high density/double-sided microdisks. The documents will be copied to the disks in WordPerfect 6.0.

**SUPPLEMENTARY INFORMATION:** Section 402 of the Clean Water Act (Act) created the NPDES program under which EPA may issue permits for the point source discharge of pollutants to waters of the United States under conditions required by the Act. Section 402 also provides that EPA may authorize a State to administer an equivalent state program upon a showing the State has authority and a program sufficient to meet the Act's requirements.

The approved state program, i.e., the Oklahoma Pollutant Discharge Elimination System (OPDES) program, is a partial program which operates *in lieu of* the EPA administered NPDES program pursuant to section 402 of the CWA. The OPDES program is administered by the Oklahoma Department of Environmental Quality (ODEQ). The basic requirements for revising approved state programs are listed in 40 CFR section 123.62. EPA Region 6 considers the documents submitted by the State of Oklahoma complete at the time of this notice and believes they comply with the regulations found at 40 CFR part 123. These changes to the Oklahoma program were explained in the **Federal Register** Notice (61 FR 65047) approving the OPDES program, and are not considered to be significant. Therefore, EPA has approved the OPDES program revision as described by the Oklahoma Department of Environmental Quality. As of this Notice EPA will transfer administration of its general permits to ODEQ [except for those discharges which are not under the jurisdiction of

ODEQ, see *Scope and Summary of the OPDES Permitting Program* in 61 FR 65047].

**Changes to the Approved OPDES Documents**

The **Federal Register** Notice of EPA's approval of the OPDES program (61 FR 65047) restricted approval of the OPDES program with respect to enforcement authority for the Oklahoma Ordinance Works Authority (OOWA) facility, and ODEQ's general permitting authority:

"5. Oklahoma Ordinance Works Authority (OOWA). EPA will retain enforcement authority for OOWA (NPDES permit No. OK0034568), located in Pryor, Oklahoma, and all industries served by this facility. ODEQ is legally responsible for implementing the pretreatment program at OOWA.

6. Authority over EPA issued general permits: EPA will retain authority to administer general permits in accordance with 40 CFR 123.1. As explained in the **Federal Register** Notice proposing approval of the OPDES program, Oklahoma is revising its statutes and regulations to provide the Executive Director of the Oklahoma Department of Environmental Quality with the full authority to issue general permits under the OPDES program. This revision of Oklahoma Law is to ensure that the Oklahoma general permitting program is consistent with the requirements of 40 CFR 123.25(c)."

ODEQ has now restructured its oversight of the OOWA facility's pretreatment program to ensure separation of responsibility from its NPDES enforcement activities. The Memorandum of Agreement, the Program Description and the Enforcement Management System have been changed to reflect these separations of responsibilities from each other. These changes in responsibility and procedures are reflected in those documents and are available to the public.

With regard to general permitting authority, the State of Oklahoma has revised its statutes to provide the Director of ODEQ with the authority to issue general permits in a manner consistent with the requirements of 40 CFR part 123. The revision of Oklahoma's statutes was done through that State's public legislative process. The program documents (i.e., the Memorandum of Agreement, the Program Description and the Attorney General's Statement) have been revised to reflect this new authority and procedures. These changes, along with the new statutory authority are available to the public.

In the interim EPA has continued to administer the general permits which it had issued or proposed prior to 1996 program authorization in Oklahoma. Permittees under those general permits will be notified that administration of those general permits is being transferred to the State agency. The address for Notices of Intent and Termination and compliance data under those general permits which are to be transferred to the state will be: ODEQ Water Quality Division, 10th floor, 1000 N.E. 10th Street, Oklahoma City, Oklahoma 73117-1212.

Questions on those general permits should be directed to Dave Farrington of the ODEQ. Mr. Farrington may be contacted at the address above or by telephoning (405) 271-5205 ext. 118.

An additional change has been made to the MOA that clarifies ODEQ's authority over Standard Industrial Classification (SIC) Code 13. This change to the MOA clarifies that ODEQ is the permitting authority over SIC groups 1321 and 1389 where the discharges are not associated with an exploration or production site. This is a specific clarification of the scope of the program as listed below in part 2.

#### **Scope of the OPDES Program and Clarifications on EPA Authority and Oversight**

EPA continues to be the NPDES authority for the following discharges:

1. *Agricultural industries* regulated by the Oklahoma Department of Agriculture including concentrated animal feeding operations and silviculture. EPA will remain the NPDES permitting authority for all point source discharges associated with agricultural production, services, silviculture, feed yards, livestock markets and animal wastes.

2. *Oil and Gas exploration and production* related industries and pipeline operations regulated by the Oklahoma Corporation Commission. EPA will retain NPDES authority over these industries and their discharges to surface waters of the state.

3. *Discharges in Indian Country.* The State of Oklahoma does not seek jurisdiction over Indian Country. EPA will retain NPDES authority to regulate discharges in Indian Country (as defined in 18 U.S.C. 1151). The State of Oklahoma has undertaken steps to revise regulation 252:605-1-3(c) clarifying ODEQ does not seek to issue authorized OPDES permits to discharges in Indian Country. EPA and ODEQ will work together with tribal authorities to resolve questions of permitting authority for individual discharges.

4. *Discharges of radioactive materials* regulated by the federal government [i.e. those radioactive materials covered by the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et. seq.)]. EPA does not have the authority to approve the OPDES program to regulate radioactive wastes governed by the Atomic Energy Act. The regulatory authority for radioactive materials will remain under the jurisdiction of the U.S. Department of Energy and the Nuclear Regulatory Commission. [Some industrial discharges which contain very low level radioactive wastes (e.g., manufacturers of watches may discharge trace amounts of radium, and hospital wastes sometimes contain iodine isotopes) are not regulated under the Atomic Energy Act and may be regulated by EPA; upon authorization of the OPDES program, the authority to regulate those discharges may become the responsibility of ODEQ.]

5. *Status of applications, proposed permits, contested permit actions, and unresolved EPA enforcement actions:* Except for the files listed below, all pending NPDES permit applications and issued NPDES permits under jurisdiction of ODEQ were transferred to Oklahoma. In accordance with the signed MOA, EPA retains temporary authority for all proposed permits until final issuance; permits contested under evidentiary hearing proceedings until those are resolved; and compliance files and authority for all open enforcement orders until such time as ODEQ has issued parallel orders or EPA has resolved the enforcement action.

#### **Other Federal Statutes**

##### *A. National Historic Preservation Act*

EPA, ODEQ and the State Historic Preservation Officer consulted under the requirements of section 106 of the National Historic Preservation Act (NHPA) on the original approval of the OPDES program. [Regulations outlining the requirements of a section 106 consultation on a federal undertaking are found at 36 CFR part 800.] In the consultation, EPA, the SHPO and ODEQ outlined procedures by which the SHPO will confer on permit actions likely to affect historic properties. These processes are reflected in a memorandum of understanding signed by EPA and the SHPO on EPA's oversight role and objection procedures on permits when the two state agencies can not agree on the protection of historic properties. The EPA/ODEQ MOA includes conditions for EPA and ODEQ to follow to ensure that the requirements of the consultation with the SHPO are met. Based on the

previous consultation, EPA believes that this program revision will not have any effect on historic properties or sites listed or eligible for listing in the National Register of Historic Places. EPA has provided notice of this program revision to the SHPO.

##### *B. Endangered Species Act*

EPA, ODEQ and the U.S. Fish and Wildlife Service consulted under section 7 of the Endangered Species Act (ESA) on the original approval of the OPDES program. Regulations controlling consultation under ESA section 7 are codified at 50 CFR part 402. In the consultation, EPA, the Service, and ODEQ outlined procedures by which ODEQ and FWS, will confer on permits which are likely to affect federally listed species. These processes are reflected in a Memorandum of Understanding between the State and FWS. In addition, a consultation agreement was reached between EPA and FWS on EPA's oversight role and objection procedures when ODEQ and FWS cannot agree on the protection of species in an individual State permit action. These conditions are reflected in the EPA/ODEQ MOA. Based on the previous consultation, EPA believes this proposed revision of the OPDES program will have no effect on federally listed species. Notice of this program revision has been sent to the Service.

##### *C. Small Business Regulatory Enforcement Fairness Act*

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

##### *D. Regulatory Flexibility Act*

After review of the facts presented in this document, I hereby certify, pursuant to the provisions of 5 U.S.C. 605(b), that this action will not have a significant impact on a substantial number of small entities. This revision of the Oklahoma NPDES permit program will merely allow the ODEQ to issue general permits under the previously approved program; and to perform NPDES enforcement oversight over the OOWA facility.

I hereby authorize this revision of the OPDES program in accordance with 40 CFR 123.

Dated: September 11, 1997.

**Jerry Clifford,**

*Acting Regional Administrator.*

[FR Doc. 97-27021 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection(s) being Reviewed by the Federal Communications Commission

October 2, 1997.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, Public Law 104-13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; and ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

**DATES:** Written comments should be submitted on or before November 9, 1997. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all comments to Judy Boley, Federal Communications Commissions, Room 234, 1919 M St., NW., Washington, DC 20554 or via internet to [jboley@fcc.gov](mailto:jboley@fcc.gov).

**FOR FURTHER INFORMATION CONTACT:** Judy Boley at 202-418-0214 or via internet at [jboley@fcc.gov](mailto:jboley@fcc.gov).

**OMB Approval No.:** 3060-0795.

**Title:** ULS TIN Registration and FCC Form 606.

**Form No.:** FCC Form 606.

**Type of Review:** Extension of a currently approved collection.

**Respondents:** Individuals or households; business or other for-profit entities; not-for-profit institutions; state, local or tribal government.

**Number of Respondents:** 411,000.

**Estimated Hour Per Response:** 1 hour.

**Frequency of Response:** One time filing requirement.

**Estimated Total Annual Burden:** 411,000 hours.

**Needs and Uses:** The Wireless Telecommunications Bureau (WTB) is currently developing a Universal Licensing System (ULS) expected to be implemented in mid November 1997. This ULS will eventually replace 10 separate licensing databases and provide for universal licensing forms and data collection for the many services that the Wireless Bureau provides.

The ULS will be driven by applicants Taxpayer Identification Number (TIN), which could be a Social Security Number or an Employer Identification Number. We are requesting an extension of the emergency approval to require existing licensees to provide WTB with their TIN and list of call signs in order to populate ULS and establish a unique sequential number for each licensee. A licensee may have multiple licenses under different names and addresses all covered under the same TIN number. Only one unique sequential number will be assigned to cover all of the licensee licenses which could be in various names, radio services and addresses. The actual TIN will not be displayed to the public, but instead, the unique sequential number will be used to service inquiries.

The WTB strongly encourages submission of this information electronically and has developed an interactive electronic application for this purpose which is the FCC Form 606. A series of public notices will be issued and this information will be collected gradually, by radio service.

The information collected in the application will be used to populate the ULS and to assign a unique identifier to each licensee for interaction with the ULS. Assignment of the unique identifier will be automatically generated by the system. This information will also be used to match records in the licensing database to the Collection System records to validate payment for applications and for Debt Collection purposes.

**OMB Approval No.:** 3060-0793.

**Title:** Procedures for States Regarding Lifeline Consents, Adoption of Intrastate Discount Matrix for Schools and

Libraries, and Designation of Eligible Telecommunications Carriers.

**Form No.:** N/A.

**Type of Review:** Extension of a currently approved collection.

**Respondents:** Business or other for-profit entities; state, local or tribal government.

**Number of Respondents:** 890.

**Estimated Hour Per Response:** 1.25 hours.

**Frequency of Response:** On occasion filing requirement; annually.

**Estimated Total Annual Burden:** 1,120 total annual burden hours for all collections.

**Needs and Uses:** On May 8, 1997, the Commission released Federal-State Joint Board on Universal Service, Report and Order, CC Docket No. 96-45, FCC 97-157 (Order). In that Order, the Commission adopted rules providing funding for discounts to eligible schools and libraries. The Commission also adopted rules mandating that state commissions designate common carriers as eligible telecommunications carriers for service areas selected by state commissions in accordance with section 214(e). In a Public Notice, the Common Carrier Bureau announced procedures states must follow in order to receive universal service support.

**OMB Approval No.:** 3060-0756.

**Title:** Procedural Requirements and Policies for Commission Processing of InterLATA Services Under Section 271 of the Communications Act.

**Form No.:** N/A.

**Type of Review:** Extension of a currently approved collection.

**Respondents:** Business or other for-profit entities.

**Number of Respondents:** 75.

**Estimated Hour Per Response:** 250 hours (avg).

**Frequency of Response:** On occasion filing requirement.

**Estimated Total Annual Burden:** 18,820 total annual burden hours for all collections.

**Needs and Uses:** In a Public Notice released 9/19/97, the Commission revised various procedural requirements and policies relating to the Commission's processing of Bell operating company applications to provide in-region, interLATA services pursuant to section 271 of the Communications Act of 1934, as amended. Section 271 provides for applications on a state-by-state basis. The Public Notice requires that applicants file an original and 11 copies of each application, together with one copy on a computer diskette. The applications each will consist of a stand-alone, principal document (Brief

in Support of Application) with supporting documentation such as records of state proceedings, interconnection agreements, affidavits, etc. Each application will also include written consultations from state regulatory commissions and the U.S. Department of Justice.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[FR Doc. 97-26876 Filed 10-9-97; 8:45 am]

BILLING CODE 6712-01-F

## FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 90-571; DA 97-2146]

### Notice of Telecommunications Relay Services (TRS) Applications for State Certification Accepted

Released: October 3, 1997.

Notice is hereby given that the states listed below have applied to the Commission for State Telecommunications Relay Service (TRS) Certification. Current state certifications expire July 25, 1998. Applications for certification, covering the five year period of July 26, 1998 to July 25, 2003, must demonstrate that the state TRS program complies with the Commission's rules for the provision of TRS, pursuant to Title IV of the Americans with Disabilities Act (ADA), 47 U.S.C. 225. These rules are codified at 47 CFR 64.601-605.

Copies of applications for certification are available for public inspection at the Commission's Common Carrier Bureau, Network Services Division, Room 235, 2000 M Street, N.W., Washington, D.C., Monday through Thursday, 8:30 AM to 3:00 PM (closed 12:30 to 1:30 PM) and the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C., daily, from 9:00 AM to 4:30 PM. Interested persons may file comments with respect to the first group of applications on or before November 21, 1997; the second group on or before, December 5, 1997; and the third group, on or before December 12, 1997. Comments should reference the relevant state file number of the state application that is being commented upon. One original and five copies of all comments must be sent to William F. Caton, Acting Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Two copies also should be sent to the Network Services Division, Common Carrier Bureau, 2000 M Street, N.W., Room 235, Washington, D.C. 20554.

A number of state TRS programs currently holding FCC certification have failed to apply for recertification. Applications received after October 1, 1997, for which no extension has been requested before October 1, 1997, must be accompanied by a petition explaining the circumstances behind the late-filing and requesting acceptance of the late-filed application.

#### *First Group of Applicants (Comments due November 21, 1997)*

File No: TRS-97-07  
Applicant: Virginia Department for the Deaf and Hard of Hearing  
State of Virginia

File No. TRS-97-08  
Applicant: Tennessee Regulatory Authority  
State of Tennessee

File No. TRS-97-09  
Applicant: Illinois Commerce Commission  
State of Illinois

File No. TRS-97-10  
Applicant: Nevada Rehabilitation Division  
State of Nevada

File No. TRS-97-11  
Applicant: Kentucky Public Service Commission  
State of Kentucky

File No. TRS-97-12  
Applicant: Washington Department of Social and Health Services  
State of Washington

File No. TRS-97-13  
Applicant: Arizona Council for the Hearing Impaired  
State of Arizona

File No. TRS-97-14  
Applicant: Delaware Public Service Commission  
State of Delaware

File No. TRS-97-15  
Applicant: Mississippi Public Service Commission  
State of Mississippi

#### *Second Group of Applicants (Comments due December 5, 1997)*

File No. TRS-97-16  
Applicant: Pennsylvania Public Utilities Commission  
State of Pennsylvania

File No. TRS-97-17  
Applicant: Division of Public Utilities  
State of Utah

File No. TRS-97-18  
Applicant: Office of Information Resources South Carolina Budget and Control Board  
State of South Carolina

File No. TRS-97-19  
Applicant: Public Utilities Commission

State of Maine  
File No. TRS-97-20  
Applicant: Board of Public Utilities  
State of New Jersey  
File No. TRS-97-21  
Applicant: Department of Budget and Management  
State of Maryland  
File No. TRS-97-22  
Applicant: Department of Employment Division of Vocational Rehabilitation  
State of Wyoming

File No. TRS-97-23  
Applicant: Department of Public Utilities  
State of Massachusetts

File No. TRS-97-24  
Applicant: Missouri Public Service Commission  
State of Missouri

File No. TRS-97-25  
Applicant: Telecommunications Regulatory Board of Puerto Rico  
Territory of Puerto Rico

#### *Third Group of Applicants (Comments due December 12, 1997)*

File No. TRS-97-26  
Applicant: Indiana Telephone Relay Access Corporation  
State of Indiana

File No. TRS-97-27  
Applicant: Kansas Relay Service, Inc.  
State of Kansas

File No. TRS-97-28  
Applicant: Oklahoma Telephone Association, Inc.  
State of Oklahoma

File No. TRS-97-29  
Applicant: Governor's Committee on Telecommunications Access Service  
State of Montana

File No. TRS-97-30  
Applicant: Department of Public Service  
State of Vermont

File No. TRS-97-31  
Applicant: Idaho Public Utilities Commission  
State of Idaho

File No. TRS-97-32  
Applicant: Public Utilities Commission  
State of Colorado

File No. TRS-97-33  
Applicant: Department of Human Services  
State of South Dakota

File No. TRS-97-34  
Applicant: Iowa Utilities Board  
State of Iowa

File No. TRS-97-35  
Applicant: Public Service Commission  
State of West Virginia  
File No. TRS-97-44  
Applicant: Wisconsin Department of Administration  
State of Wisconsin

File No. TRS-97-45  
 Applicant: Minnesota Department of  
 Public Service  
 State of Minnesota

For further information, contact Al  
 McCloud, (202) 418-2499,  
 amcloud@fcc.gov, or Andy Firth, (202)  
 418-2224 (TTY), afirth@fcc.gov, at the  
 Network Services Division, Common  
 Carrier Bureau, Federal  
 Communications Commission.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[FR Doc. 97-26877 Filed 10-9-97; 8:45 am]

BILLING CODE 6712-01-P

## FEDERAL COMMUNICATIONS COMMISSION

### Public Information Collection Approved by Office of Management and Budget

October 3, 1997.

The Federal Communications  
 Commission (FCC) has received Office  
 of Management and Budget (OMB)  
 approval for the following public  
 information collection pursuant to the  
 Paperwork Reduction Act of 1995,  
 Public Law 96-511. An agency may not  
 conduct or sponsor a collection of  
 information unless it displays a  
 currently valid control number. Not  
 withstanding any other provisions of  
 law, no person shall be subject to any  
 penalty for failing to comply with a  
 collection of information subject to the  
 Paperwork Reduction Act (PRA) that  
 does not display a valid control number.  
 Questions concerning the OMB control  
 numbers and expiration dates should be  
 directed to Judy Boley, Federal  
 Communications Commission, (202)  
 418-0214.

### Federal Communications Commission

*OMB Control No.:* 3060-0783.

*Expiration Date:* 9/30/2000.

*Title:* Coordination Notification  
 Requirements on Frequencies Below  
 512 MHz—Section 90.176.

*Form No.:* N/A.

*Estimated Annual Burden:* 975 annual  
 hour; average .25 hours per response. 15  
 respondents reply daily for 3,900 annual  
 responses.

*Description:* Section 90.176 requires  
 each Private Land Mobile frequency  
 coordinator to provide within one  
 business day, a listing of their frequency  
 recommendations to all other frequency  
 coordinators in their respective pool,  
 and, if requested, an engineering  
 analysis. They must provide the  
 applicant name, frequency or  
 frequencies recommended; antenna

locations and heights; the effective  
 radiated power; the emission types;  
 service area description and the date  
 and time of the recommendation. The  
 requirement is necessary to avoid  
 situations where harmful interference is  
 created because two or more  
 coordinators recommend the same  
 frequency in the same area at  
 approximately the same time to  
 different applicants.

*OMB Control No.:* 3060-0795.

*Expiration Date:* 12/31/1997.

*Title:* Universal Licensing System  
 (ULS) Taxpayer Identification Number  
 (TIN) Registration.

*Form No.:* FCC 606.

*Estimated Annual Burden:* 411,000  
 annual hours; 1 hour per respondent;  
 411,000 respondents.

*Description:* FCC Form 606 will be  
 used by each licensee to provide WTB  
 with their TIN and a list of their call  
 signs to populate the ULS and establish  
 a unique sequential number for each  
 licensee. WTB will issue a services of  
 public notices stating our intentions and  
 request that each licensee provide their  
 TIN. This will be done gradually by  
 radio service, until all existing licensees  
 have been notified.

Federal Communications Commission.

**William F. Caton,**

*Acting Secretary.*

[FR Doc. 97-26875 Filed 10-9-97; 8:45 am]

BILLING CODE 6712-01-F

## FEDERAL MARITIME COMMISSION

[Docket No. 97-17]

### Portman Square Limited—Possible Violations of Section 10(a)(1) of the Shipping Act of 1984; Order of Investigation and Hearing

Portman Square Limited ("Portman  
 Square") is a tariffed and bonded non-  
 vessel-operating common carrier  
 ("NVOCC"), located at Sixth Floor,  
 Silver Tech Tower, 26 Cheung Lee  
 Street, Chiwan, Hong Kong. Portman  
 Square holds itself out as a NVOCC  
 pursuant to its ATFI tariff FMC-001,  
 filed January 29, 1996. Emerson Li, a  
 resident of Hong Kong, is reported to be  
 Managing Director of Portman Square.

Portman Square currently maintains a  
 NVOCC bond, No. 102229, in the  
 amount of \$50,000 with the Intercargo  
 Insurance Company, 1450 East  
 American Lane, 20th Floor,  
 Schaumburg, Illinois 60173. Pursuant to  
 Rule 24 of Portman Square's tariff,  
 Distribution Publications, Inc., 7996  
 Capwell Drive, Oakland, California,  
 serves as the U.S. resident agent for  
 service of process.

It appears that in at least forty-one  
 (41) instances occurring between  
 January 10, 1997 and March 11, 1997,  
 Portman Square obtained transportation  
 on Hyundai Merchant Marine Co. Ltd.  
 ("Hyundai") vessels by accessing a  
 service contract allegedly entered into  
 by Take Ace Co. Ltd. ("Take Ace"). Take  
 Ace executed Hyundai SC No. 96-5343  
 on April 24, 1996, and certified to  
 Hyundai that it was the cargo owner.<sup>1</sup>  
 There is no indication, however, that  
 the service contract has been utilized at  
 any time for the transportation of goods  
 in which Take Ace retains any beneficial  
 interest.<sup>2</sup>

From documents obtained from U.S.  
 consignees, it appears Portman Square  
 is in fact the real shipper and party for  
 whose account the ocean transportation  
 was provided. During the period May  
 1996 through April 1997, over 230  
 shipments were transported by Hyundai  
 pursuant to service contract No. 96-  
 5343. All of these shipments are  
 believed to have originated with  
 Portman Square, and were handled in  
 the United States by the NVOCC's  
 regular destination agents. In each of the  
 above shipments, Portman Square  
 issued its own NVOCC or "house" bill  
 of lading, and thus had a direct role in  
 a scheme of misdescribing the  
 commodity to the transporting ocean  
 common carrier. These shipments  
 originated in Hong Kong and the  
 People's Republic of China, and were  
 destined primarily for Los Angeles and  
 New York for delivery through Portman  
 Square's U.S. agents.

In each of the 41 instances cited  
 herein, the commodity was described to  
 the ocean common carrier as  
 "kitchenware", "lighting fixture",  
 "patio furniture", or "KD furniture".  
 Other contemporaneous documentation,  
 such as house bills of lading, arrival  
 notices, and U.S. Customs entry  
 documentation prepared by the  
 customhouse broker, reflect that  
 Portman Square was fully cognizant that  
 the shipments actually consisted of  
 footwear, computer parts, sunglasses,  
 plastic flatware, polystone figurines,  
 clocks, and used household goods.  
 Portman Square or its agents  
 nonetheless made payment to the ocean  
 common carrier on the basis of the  
 inaccurate commodity shown and  
 declared on the bill of lading when  
 issued.

<sup>1</sup> The Commission's service contract records  
 reflect that Emerson Li executed the Hyundai  
 service contract on behalf of Take Ace.

<sup>2</sup> In fact, the Journal of Commerce PIERS database  
 reports that no shipments were recorded on behalf  
 of shipper Take Ace prior to May 1996 nor  
 subsequent to the expiration of Hyundai's service  
 contract on April 30, 1997.

Section 10(a)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1709(a)(1), prohibits any person knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means, to obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable. Under section 13 of the 1984 Act, 46 U.S.C. app. § 1712, a person is subject to a civil penalty of not more than \$25,000 for each violation knowingly and willfully committed, and not more than \$5,000 for other violations.<sup>3</sup> Section 23 of the 1984 Act, 46 U.S.C. app. § 1721 further provides that a common carrier's tariff may be suspended for a period not to exceed one year for violations of section 10(a)(1) of the 1984 Act.

Now therefore, it is ordered, That pursuant to sections 10, 11, 13, and 23 of the 1984 Act, 46 U.S.C. app. §§ 1709, 1710, 1712, and 1721, an investment is instituted to determine:

(1) Whether Portman Square Limited violated section 10(a)(1) of the 1984 Act by directly or indirectly obtaining transportation at less than the rates and charges otherwise applicable through the means of misdescription of the commodities actually shipped;

(2) Whether, in the event violations of section 10(a)(1) of the 1984 Act are found, civil penalties should be assessed against Portman Square Limited and, if so, the amount of penalties to be assessed;

(3) Whether, in the event violations of section 10(a)(1) of the 1984 Act are found, the tariff of Portman Square Limited should be suspended; and

(4) Whether, in the event violations are found, an appropriate cease and desist order should be issued.

It is further ordered, That a public hearing be held in this proceeding and that this matter be assigned for hearing before an Administrative Law Judge of the Commission's Office of Administrative Law Judges at a date and place to be hereafter determined by the Administrative Law Judge in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the Presiding Administrative Law Judge only after consideration has been given by the parties and the Presiding

Administrative Law Judge to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

It is further ordered, That Portman Square Limited is designated a Respondent in this proceeding;

It is further ordered, That the Commission's Bureau of Enforcement is designated a party to this proceeding;

It is further ordered, That notice of this Order be published in the Federal Register, and a copy be served on parties of record;

It is further ordered, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 CFR 502.72;

It is further ordered, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on parties of record;

It is further ordered, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 CFR 502.118, and shall be served on parties of record; and

It is further ordered, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, the initial decision of the Administrative Law Judge shall be issued by October 5, 1998 and the final decision of the Commission shall be issued by February 2, 1999.

By the Commission.

**Joseph C. Polking,**

Secretary.

[FR Doc. 97-26976 Filed 10-9-97; 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. The notices also will 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 October 28, 1997.

**A. Federal Reserve Bank of Dallas** (Genie D. Short, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *Smith Mustang Ltd.*, Rio Vista, Texas; Lowell Smith, Jr., General Partner; to acquire voting shares of Mustang Financial Corporation, Rio Vista, Texas, and thereby indirectly acquire First State Bank of Rio Vista, Rio Vista, Texas.

Board of Governors of the Federal Reserve System, October 7, 1997.

**William W. Wiles,**

Secretary of the Board.

[FR Doc. 97-27029 Filed 10-9-97; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will 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

<sup>3</sup>These penalties are increased 10 percent for any violations occurring after November 7, 1996. See, *Inflation Adjustment of Civil Penalties*, 61 Fed. Reg. 52704 (October 8, 1996).

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 November 7, 1997.

**A. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. *First National Security Company*, DeQueen, Arkansas; to acquire 100 percent of the voting shares of First Financial Corporation of Idabel, Idabel, Oklahoma, and thereby indirectly acquire First State Bank of Idabel, Idabel, Oklahoma.

**B. Federal Reserve Bank of San Francisco** (Pat Marshall, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. *City National Corporation*, Beverly Hills, California; to acquire 100 percent of the voting shares of Harbor Bancorp, Long Beach, California, and thereby indirectly acquire Harbor Bank, Long Beach, California.

Board of Governors of the Federal Reserve System, October 7, 1997.

**William W. Wiles,**

*Secretary of the Board.*

[FR Doc. 97-27028 Filed 10-9-97; 8:45 am]

BILLING CODE 6210-01-F

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[INFO-98-01]

**Proposed Data Collections Submitted for Public Comment and Recommendations**

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 639-7090.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques for other forms of information technology. Send comments to Wilma Johnson, CDC Reports Clearance Officer, 1600 Clifton Road, MS-D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

**Proposed Projects**

1. The National Home and Hospice Care Survey (NHHCS)—(0920-0298)—Revision—The National Home and Hospice Care survey (NHHCS) was

conducted in 1992, 1993, 1994, 1996, and 1997. It is part of the Long-Term Care component of the National Health Care Survey. Section 306 of the Public Health Service Act states that the National Center for Health Statistics "shall collect statistics on health resources \* \* \* [and] utilization of health care, including utilization of \* \* \* services of hospitals, extended care facilities, home health agencies, and other institutions." NHHCS data are used to examine this most rapidly expanding sector of the health care industry. Data from the NHHCS are used widely by the health care industry and policy makers for such diverse analyses as the need for various medical supplies; minority access to health care; and planning for the health care needs of the elderly. The NHHCS also reveals detailed information on utilization patterns, as needed to make accurate assessments of the need for and costs associated with such care. Data from earlier NHHCS collections have been used by the Congressional Budget Office, the Bureau of Health Professionals, the Maryland Health Resources Planning Commission, the National Association for Home Care, and by several newspapers and journals. Additional uses are expected to be similar to the uses of the National Nursing Home Survey. NHHCS data cover: baseline data on the characteristics of hospices and home health agencies in relation to their patients and staff, Medicare and Medicaid certification, costs to patients, sources of payment, patients' functional status and diagnoses. Data collection is planned for the period July–November, 1998. Survey design is in process now. Sample selection and preparation of layout forms will precede the data collection by several months. The total costs to respondents is estimated at \$194,000.

Respondents	Number of respondents	Number of responses/respondents	Average burden/response (in hrs.)	Total burden (in hrs.)
Agency Questionnaire .....	1350	1	0.333	450
Current Patient Sampling List .....	1350	1	0.333	450
Current Patient Questionnaire .....	1350	6	0.25	2025
Discharged Patient Sampling List .....	1350	1	0.50	675
Discharged Patient Questionnaire .....	1350	6	0.25	2025
Total .....				5625

2. Provider Survey of Partner Notification and Partner Management Practices following Diagnosis of a Sexually-Transmitted Disease—New—The National Center for HIV, STD, and TB prevention, Division of STD

Prevention, CDC is proposing to conduct a national survey of physician's partner management practices following the diagnosis of a sexually-transmitted disease. Partner notification, a technique for controlling the spread of

sexually-transmitted diseases is one of the five key elements of a long standing public health strategy to control sexually-transmitted infections in the U.S. At present, there is very little knowledge about partner notification

practices outside public health settings despite the fact that most STD cases are seen in private health care settings. No descriptive data currently exist that allow the Centers for Disease Control and Prevention to characterize partner notification practices among the broad range of clinical practice settings where STDs are diagnosed, including acute or urgent care, emergency room, or primary and ambulatory care clinics. The existing literature contains descriptive studies of partner notification in public health clinics, but no baseline data exist as to the practices of different physician specialties across different practice settings.

The CDC proposes to fill that gap through a national sample survey of 7300 office managers and physicians who treat patients with STDs in a wide variety of clinical settings; a 70% completion rate is anticipated (n=5110 surveys). This survey will provide the baseline data necessary to characterize infection control practices, especially

partner notification practices, for syphilis, gonorrhea, HIV, and chlamydia and the contextual factors that influence those practices. Findings from the proposed national survey of office managers and physicians will assist CDC to better focus STD control and partner notification program efforts and to allocate program resources appropriately. Without this information, CDC will have little information about STD treatment, reporting, and partner management services provided by physicians practicing in the U.S. With changes underway in the manner in which medical care is delivered and the move toward managed care, clinical functions typically provided in the public health sector will now be required of private medical providers. At present, CDC does not have sufficient information to guide future STD control efforts in the private medical sector.

Data collection will involve a mail survey of practicing physicians. The questionnaire mailing will be followed

by a reminder postcard after one week, a second mailing to non-respondents at three weeks, telephone follow-up with non-respondents at five weeks, and a final certified mailing of the survey to non-respondents at eight weeks. A study specific computerized tracking and reporting system will monitor all phases of the study. Receipt of the completed questionnaire or a refusal will be logged into this computerized control system to ensure that respondents who return the survey are not contacted with reminders.

Estimated cost to respondents and government based on an average pay rate of \$25/hour, the estimated total cost burden for office managers to answer Section 1 is \$10,650. Based on an average pay rate of \$70/hour, the estimated cost burden for physicians is \$94,640. Thus the total cost burden for the data collection effort is estimated to be \$105,290.

Respondents	Sections	Number of respondents	Number of responses/respondent	Average burden/response (in hrs.)	Total burden (in hrs.)
Office Managers .....	Section 1	7300	1	.08	584
Physicians .....	Sections 2-4	5110	3	.03	460
Physicians .....	Section 5-10	5110	6	.20	6132
Total .....					7176

Dated: October 6, 1997.

**Wilma G. Johnson,**

*Acting Associate Director for Policy Planning And Evaluation, Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-26983 Filed 10-9-97; 8:45 am]

BILLING CODE 4163-18-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Centers for Disease Control and Prevention**

[30DAY-01-98]

**Agency Forms Undergoing Paperwork Reduction Act Review**

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance

Office on (404) 639-7090. Send written comments to CDC, Desk Officer; Human Resources and Housing Branch, New Executive Office Building, Room 10235; Washington, DC 20503. Written comments should be received within 30 days of this notice.

**Proposed Projects**

1. Prenatal HIV Prevention Survey: Knowledge, Attitudes And Practices of Health Care Providers Serving Pregnant Women Regarding HIV Counseling and Testing and the Use Of Zidovudine (ZDV) During Pregnancy—New—This is a new data collection. The purpose of this survey is to assess the knowledge, attitudes, and practices of health care providers serving pregnant women regarding HIV counseling and testing and use of ZDV during pregnancy. Data will be collected and reported to CDC to describe:

(1) providers' current practices in providing prenatal care to HIV-infected women, offering HIV counseling and

testing to pregnant women, and offering ZDV to HIV-infected pregnant women; (2) providers' knowledge of the ACTG 076 results and PHS perinatal transmission guidelines; (3) providers' attitudes regarding HIV counseling and testing of pregnant women; and, (4) providers' knowledge and experience in the use of ZDV in treating HIV-infected pregnant women.

The intended population to be studied is physicians and nurse-midwives providing prenatal care in four areas (State of Connecticut, potential population approximately 685; State of North Carolina, potential population approximately 1,500; Dade County, FL, potential population approximately 500; Brooklyn, NY, potential population approximately 260) where institutions are currently conducting a CDC-funded study related to implementation of the PHS guidelines to prevent perinatal transmission of HIV. The total annual burden hours are 685.

Respondents	Number of respondents	Number of responses/respondent	Avg. burden/response (in hrs.)
Census .....	2,659	1	0.05
Questionnaire (Pilot Study) .....	462	1	0.233
Questionnaire (Survey) .....	1,902	1	0.2333

2. Workshop Evaluation Component of the CDC's Prevention Marketing Initiative Local Demonstration Site Project—New—The Centers for Disease Control and Prevention, National Center for HIV, STD, and TB Prevention, Division of HIV/AIDS Prevention, Behavioral Intervention Research Branch is planning to conduct a series of studies as part of the evaluation of a five-city HIV prevention demonstration program. The program involves the integration of social marketing strategies and community participation in an effort to develop and implement HIV prevention activities.

Charged with developing programs for those 25 years of age and younger,

community groups in the local demonstration sites chose to segment the target audience even further, and to mount a variety of types of interventions. Decisions about segmentation and the nature of local interventions were based on formative research conducted in each community. It is hoped that this demonstration project will result in reductions in HIV risk behavior among members of the target audiences, as well as in enhanced collaboration among individuals and organizations in the participating communities.

To evaluate the effectiveness of two components of the intervention, questionnaire data will be collected

from people under 25 years old and from some parents in the demonstration communities. These data will be collected immediately before and after the Skills-Building Workshops, one month later, and six months later. In addition, questionnaire data will be collected once from individuals contacted through Outreach programs. These data will supplement a survey (announced in the **Federal Register** on 8/27/96) designed to assess the full program's coverage of the target population. Total annual burden hours are 2,798.

Respondents	Number of respondents	Number of responses/respondents	Avg. burden/response (in hrs.)
Parental consent .....	1845	1	0.083
Teen consent/assent .....	<sup>2</sup> 3,168	1	0.0833
Pre/post questionnaire (intervention group) .....	<sup>3</sup> 1,584	2	0.3333
Post questionnaire (control group) .....	<sup>4</sup> 1,584	1	0.3333
Follow-up questionnaire .....	42,640	1	0.3333

<sup>1</sup> 528 (ultimately needed per site) × 2 sites (whose target audiences are underage) plus 317 (<sup>3</sup>/<sub>5</sub> × 528 for the one site that has not received IRB permission to waive parental consent and will train underage youth and some 18 and 19 year olds).

<sup>2</sup> 528 × 5 sites × 1.2 (to allow for 20% loss to follow-up).

<sup>3</sup> <sup>1</sup>/<sub>2</sub> × 3,168.

<sup>4</sup> 529 × 5.

3. Preventive Health and Health Services Block, Annual applications and reports—(0920-0106)—Extension—In 1994, OMB approved the collection of information provided in the grant applications and annual reports for the Preventive Health and Health Services Block Grant (0920-0106). This approval expires on September 30, 1997. CDC is requesting extension of OMB clearance for this legislatively mandated information collection.

The information collected through the applications from the official State health agencies is required from section 1905 of the Public Health Service Act. This is no change in the proposed information collection from previous years. The information collected from the annual reports is required by section 1906, specifically the requirement for uniform data sets matching the uses of funds. Minor modifications to some individual uniform data sets for chronic

diseases, as well as some other program areas, have been made to maintain consistency with performance measures developed as a result of the Government Performance and Results Act. Overall, this request reflects a 25% reduction in the collection burden to the grantees (States). The total burden hours are 5490.

Respondents	Number of respondents	Number of responses/respondents	Avg. burden/response (in hrs.)
Annual Applications .....	61	1	30
Annual Reports .....	61	1	60

Dated: October 3, 1997.

**Wilma G. Johnson,**

*Acting Associate Director for Policy Planning and Evaluation, Centers for Disease Control and Prevention (CDC).*

[FR Doc. 97-26984 Filed 10-9-97; 8:45 am]

BILLING CODE 4163-18-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. 97N-0115]

**SEF, P.A.; Revocation of U.S. License No. 1166**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the revocation of the establishment license (U.S. License No. 1166) and the product licenses issued to SEF, P.A., doing business as National Health Guard, Inc., for the manufacture of Whole Blood and Red Blood Cells (RBC's). SEF, P.A., did not respond to a notice of opportunity for a hearing on a proposal to revoke its licenses.

**DATES:** The revocation of the establishment license (U.S. License No. 1166) and the product licenses is effective October 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Dano B. Murphy, 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 revoking the establishment license (U.S. License No. 1166) and product licenses issued to SEF, P.A., doing business as National Health Guard, Inc., 1885 West Commercial Blvd., suite 140, Fort Lauderdale, FL 33309, for the manufacture of Whole Blood (CPDA-1) and RBC's including frozen, deglycerolized, frozen rejuvenated, and rejuvenated deglycerolized RBC's.

On February 13, 1996, FDA attempted to inspect the SEF, P.A., facility located at 1820 North University Dr., Plantation, FL. The facility was found to be vacant. A visit that same day to the firm's previous business address, 1885 West Commercial Blvd., suite 140, Fort Lauderdale, FL, found that location to be vacant as well. On February 28, 1996, the owner of SEF, P.A., stated that all the firm's equipment was stored in a warehouse in Miami, FL. The owner also indicated that he would voluntarily surrender the firm's license because

SEF, P.A. was no longer in operation and there were no plans to resume operations. On June 17, 1996, FDA successfully contacted the owner by telephone and he indicated that he no longer desired to relinquish the license. Further attempts to contact the owner on July 2 and 29, 1996, were unsuccessful. On both occasions, messages were left with the answering party that were never replied to by the owner.

FDA sent a certified, return-receipt letter dated November 1, 1996, to the firm's owner. The letter stated that under 21 CFR 601.5(b) a license may be revoked when the Commissioner of Food and Drugs finds that: (1) Authorized FDA employees after reasonable efforts have been unable to gain access to an establishment or a location for the purposes of carrying out an inspection, or (2) manufacturing of products or of a product has been discontinued to an extent that a meaningful inspection or evaluation cannot be made. The letter provided the firm's owner notice of FDA's intent to revoke U.S. License No. 1166 and announced FDA's intent to offer an opportunity for a hearing.

Under 21 CFR 12.21(b), FDA published in the **Federal Register** of April 9, 1997 (62 FR 17193), a notice of opportunity for a hearing on a proposal to revoke the licenses of SEF, P.A. In the notice, FDA explained that the proposed license revocation was based on the inability of FDA employees to conduct a meaningful inspection of the facility because it was no longer in operation and noted that documentation in support of the license revocation had been placed on file for public examination with the Dockets Management Branch (HFA-305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1-23, Rockville, MD 20857. The notice provided the firm 30 days to submit a written request for a hearing and 60 days to submit any data and information justifying a hearing. The notice provided other interested persons with 60 days to submit comments on the proposed revocation. The firm did not respond within the 30-day time period with a written request for a hearing. The 30-day time period, prescribed in the notice of opportunity for a hearing and in the regulation, may not be extended. No comments were received from any other parties.

Accordingly, under 21 CFR 12.38, section 351 of the Public Health Service Act (42 U.S.C. 262), and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Biologics Evaluation and Research (21

CFR 5.68), the establishment license (U.S. License No. 1166) and the product licenses issued to SEF, P.A. are revoked, effective October 10, 1997.

Dated: September 25, 1997.

**Kathryn C. Zoon,**

*Director, Center for Biologics Evaluation and Research.*

[FR Doc. 97-26987 Filed 10-9-97; 8:45 am]

BILLING CODE 4160-01-F

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Center for Research Resources; Closed Meetings**

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Center for Research Resources Special Emphasis Panel (SEP) meetings:

*Name of SEP:* Biomedical Research Technology (Telephone Conference Call).

*Date:* November 3, 1997.

*Time:* 12:00 p.m.

*Place:* National Institutes of Health, 6507 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892-7965.

*Contact Person:* Dr. D.G. Patel, Scientific Review Administrator, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda 20892-7965, (301) 435-0820.

*Purpose/Agenda:* To evaluate and review grant applications.

*Name of SEP:* Biomedical Research Technology (Telephone Conference Call).

*Date:* November 4, 1997.

*Time:* 12:00 p.m.

*Place:* National Institutes of Health, 6507 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892-7965.

*Contact Person:* Dr. D.G. Patel, Scientific Review Administrator, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda 20892-7965, (301) 435-0820.

*Purpose/Agenda:* To evaluate and review grant applications.

*Name of SEP:* Biomedical Research Technology (Telephone Conference Call).

*Date:* November 5, 1997.

*Time:* 12:00 p.m.

*Place:* National Institutes of Health, 6507 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892-7965.

*Contact Person:* Dr. D.G. Patel, Scientific Review Administrator, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda 20892-7965, (301) 435-0820.

*Purpose/Agenda:* To evaluate and review grant applications.

*Name of SEP:* Biomedical Research Technology (Telephone Conference Call).

*Date:* November 7, 1997.

*Time:* 12:00 p.m.

*Place:* National Institutes of Health, 6507 Rockledge Drive, MSC 7965, Room 6018, Bethesda, MD 20892-7965.

*Contact Person:* Dr. D.G. Patel, Scientific Review Administrator, 6705 Rockledge Drive, MSC 7965, Room 6018, Bethesda 20892-7965, (301) 435-0820.

*Purpose/Agenda:* To evaluate and review grant applications.

These meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the application and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. (Catalog of Federal Domestic Assistance Program No. 93.371, Biomedical Research Technology, National Institutes of Health, HHS)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26886 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Heart, Lung, and Blood Institute; Meeting of the Sickle Cell Disease Advisory Committee

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the Sickle Cell Disease Advisory Committee, National Heart, Lung, and Blood Institute, November 14, 1997. The meeting will be held at the National Institutes of Health, Rockledge II, Conference Room 9104, 6701 Rockledge Drive, Bethesda, Maryland 20892.

The entire meeting will be open to the public from 9:00 a.m. to adjournment, to discuss recommendations on the implementation and evaluation of the Sickle Cell Disease Program. Attendance by the public will be limited to space available.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Executive Secretary in advance of the meeting.

Dr. Clairce D. Reid, Executive Secretary, Sickle Cell Disease Advisory Committee, Division of Blood Diseases and Resource, NHLBI, Two Rockledge Center, Suite 10160, 6701 Rockledge Drive, Bethesda, Maryland 20892, (301) 435-0080, will furnish substantive program information, a summary of the meeting, and a roster of the committee members.

(Catalog of Federal Domestic Assistance Program No. 93.839, Blood Diseases and

Resources Research, National Institutes of Health)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26888 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Child Health and Human Development; Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Child Health and Human Development Special Emphasis Panel (SEP) meeting:

*Name of SEP:* NICHD Training Grant Review.

*Date:* October 22-23, 1997.

*Time:* October 22-8:00 a.m.-5:00 p.m.; October 23-8:00 a.m.-adjournment.

*Place:* Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, Maryland 20910.

*Contact Person:* Gopal M. Bhatnagar, Ph.D., Scientific Review Administrator, DSR, 6100 Executive Boulevard, Room 5E01, Bethesda, Maryland 20892. Telephone: 301-496-1485.

*Purpose/Agenda:* To evaluate and review research grant applications.

This meeting will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. The discussion of these applications could reveal confidential trade secrets of commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than 15 days prior to the meeting due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program Nos. [93.864, Population Research and No. 93.865, Research for Mothers and Children], National Institutes of Health, HHS)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26881 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Arthritis and Musculoskeletal and Skin Diseases, Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel (SEP) meeting:

*Name of SEP:* NIAMS SEP SCOR Review.

*Date:* November 17-18, 1997.

*Time:* November 17-8:00 a.m.-5:00 p.m.; November 18-8:00 a.m.—adjournment.

*Place:* Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Bethesda, Maryland 20815.

*Contact Person:* Aftab A. Ansari, Ph.D., Scientific Review Administrator, Natcher Building, 45 Center Drive, Rm 5AS25U, Bethesda, Maryland 20892-6500, Telephone: 301-594-4952.

*Purpose/Agenda:* To evaluate and review research grant applications.

This meeting will be closed in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. The discussion of these applications could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. [93.846, Project Grants in Arthritis, Musculoskeletal and Skin Diseases Research], National Institutes of Health, HHS)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26882 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Neurological Disorders and Stroke; Division of Extramural Activities; Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting:

*Name of Committee:* National Institute of Neurological Disorders and Stroke *Special Emphasis Panel.*

*Date:* December 4, 1997.

*Time:* 10:00 a.m.

*Place:* National Institutes of Health, 7550 Wisconsin Avenue, Room 9C10, Bethesda, MD 20892.

*Contact:* Dr. Lillian Pubols, Chief, Scientific Review Branch, NINDS, National Institutes of Health, 7550 Wisconsin Avenue, Room 9C10, Bethesda, MD 20892, (301) 496-9223.

*Purpose/Agenda:* To review and evaluate a grant application.

The meeting will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program No. 93.853, Clinical Research Related to Neurological Disorders; No. 93.854, Biological Basis Research in the Neurosciences)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26885 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Institute of Mental Health; Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings of the National Institute of Mental Health Special Emphasis Panel:

*Agenda/Purpose:* To review and evaluate grant applications.

*Committee Name:* National Institute of Mental Health Special Emphasis Panel.

*Date:* October 8, 1997.

*Time:* 6 p.m.

*Place:* Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Michael D. Hirsch, Parklawn Building, Room 9-101, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301, 443-3936.

*Committee Name:* National Institute of Mental Health Special Emphasis Panel.

*Date:* October 8, 1997.

*Time:* 7 p.m.

*Place:* Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Michael D. Hirsch, Parklawn Building, Room 9-101, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301, 443-3936.

*Committee Name:* National Institute of Mental Health Special Emphasis Panel.

*Date:* October 8, 1997.

*Time:* 7:30 p.m.

*Place:* Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Michael D. Hirsch, Parklawn Building, Room 9-101, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301, 443-3936.

*Committee Name:* National Institute of Mental Health Special Emphasis Panel.

*Date:* October 8, 1997.

*Time:* 8 p.m.

*Place:* Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

*Contact Person:* Michael D. Hirsch, Parklawn Building, Room 9-101, 5600 Fishers Lane, Rockville, MD 20857, Telephone: 301, 443-3936.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5 U.S.C. Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This notice is being published less than fifteen days prior to the meetings due to the urgent need to meet timing limitations imposed by the review and funding cycle.

(Catalog of Federal Domestic Assistance Program Number 93.242, 93.281, 93.282)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26887 filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Division of Research Grants; Closed Meetings

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following Division of Research Grants Special Emphasis Panel (SEP) meetings:

*Purpose/Agenda:* To review individual grant applicants.

*Name of SEP:* Microbiological and Immunological Sciences.

*Date:* November 3, 1997.

*Time:* 11:30 a.m.

*Place:* NIH, Rockledge 2, Room 4186, Telephone Conference.

*Contact Person:* Dr. Gerald Liddel, Scientific Review Administrator, 6701 Rockledge Drive, Room 4186, Bethesda, Maryland 20892, (301) 435-1150.

*Name of SEP:* Chemistry and Related Sciences.

*Date:* November 18, 1997.

*Time:* 12:30 p.m.

*Place:* NIH, Rockledge 2, Room 4172, Telephone Conference.

*Contact Person:* Dr. Donald Schneider, Scientific Review Administrator, 6701

Rockledge Drive, Room 4172, Bethesda, Maryland 20892, (301) 435-1727.

*Name of SEP:* Biological and Physiological Sciences.

*Date:* November 19, 1997.

*Time:* 2:00 p.m.

*Place:* NIH, Rockledge 2, Room 5124, Telephone Conference.

*Contact Person:* Dr. Everett Sinnott, Scientific Review Administrator, 6701 Rockledge Drive, Room 5124, Bethesda, Maryland 20892, (301) 435-1016.

*Name of SEP:* Chemistry and Related Sciences.

*Date:* December 10-12, 1997.

*Time:* 8:00 p.m.

*Place:* Radisson Hotel, Lansing, MI.

*Contact Person:* Dr. Richard Panniers, Scientific Review Administrator, 6701 Rockledge Drive, Room 5106, Bethesda, Maryland 20892, (301) 435-1166.

The meetings will be closed in accordance with the provisions set forth in secs. 552b(c)(4) and 552b(c)(6), Title 5, U.S.C.

Applications and/or proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications and/or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(Catalog of Federal Domestic Assistance Program Nos. 93.306, 93.333, 93.337, 93.393-93.396, 93.837-93.844, 93.846-93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: October 3, 1997.

**LaVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26884 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Office of Research on Women's Health; Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the Advisory Committee on Research on Women's Health (ACRWH) to be held November 17, 1997 at the Bethesda Marriott (formerly Pooks Hill Marriott), Bethesda, Maryland 20892. The entire meeting will be open to the public from 8:30 a.m. to adjournment at 12:00 p.m. The purpose of the meeting will be for the Committee to provide advice to the Office of Research on Women's Health (ORWH) on its research agenda and to provide recommendations regarding ORWH activities. Attendance by the public will be limited to space available.

The agenda will include an update on ORWH activities and programs to meet

the mandates of the office, and a report from the Special Ad Hoc Working Group on the Women's Health Initiative. The Committee will also discuss ongoing activities to update the NIH research agenda on women's health, including the national meeting, "Beyond Hunt Valley: Research on Women's Health for the 21st Century." The national meeting is the culmination of a series of public hearings and scientific workshops held in Philadelphia, Pennsylvania, New Orleans, Louisiana, and Santa Fe, New Mexico, and will be conducted November 17-19, 1997 at the Bethesda Marriott.

Joyce Rudick, Acting Executive Secretary, ACRWH, and Acting Deputy Director, ORWH, Office of the Director, NIH, Building 1, Room 201, Bethesda, Maryland 20892, 301/402-1770, 301/402-1798 (Fax), will furnish the meeting agenda, roster of Committee members, and substantive program information upon request.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Ms. Rudick in advance of the meeting.

Dated: October 3, 1997.

**LeVerne Y. Stringfield,**

*Committee Management Officer, NIH.*

[FR Doc. 97-26883 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Statement of Organization, Functions, and Delegations of Authority

Part N, National Institutes of Health, of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (40 FR 22859, May 27, 1975, as amended most recently at 62 FR 47509, September 9, 1997, and redesignated from Part HN as Part N at 60 FR 56606, November 9, 1995), is amended to reflect the reorganization of the intramural research support services within the NIH. The reorganization transfers the intramural research support services function from the National Center for Research Resources (NCRR)(HNR) to the Office of Research Services (ORS)(HNAM5). (1) In ORS, the Division of Intramural Research Services (DIRS) is established; (2) the following organizations are transferred in their entirety from NCRR to DIRS/ORS and their functional statements are

revised: (a) Biomedical Engineering and Instrumentation Program, (b) Veterinary Resources Program, (c) Medical Arts and Photography Branch, and (d) Library Branch; (3) the functional statement for NCRR is revised; and (4) in the NCRR's Office of the Director: (a) the Office of Human Resources and Information Technologies (OHRIT) is established, (b) two offices from the Office of Administration (OA) are transferred to OHRIT, (c) the OA is retitled as the Office of Finance and Administration and its functional statement is revised, and (d) in the Office of Science Policy, the Office of Science and Health Reports is abolished.

Section HN-B, Organization and Functions, is amended as follows:

(1) Under the heading Office of the Director (NA, formerly HNA), Office of Management (NAM, formerly HNAM), insert the following:

Division of Intramural Research Services (NAM57, formerly HNAM57). Plans and conducts a centralized program of intramural research services for the NIH throughout the planning, performance, and reporting of research projects as follows: (1) collaborates with intramural scientists on applications of engineering, mathematics, and the physical sciences in biomedical research; works with intramural scientists to predict technological needs and to develop appropriate solutions, including theoretical and experimental models and novel instrumentation; and provides comprehensive services for fabrication, maintenance, modification, repair, sale, and lease of scientific equipment; (2) provides a centralized laboratory animal care and use program offering comprehensive veterinary, technical, and diagnostic support services; (3) provides comprehensive research library support to NIH scientific, clinical and management programs through an extensive collection of books and journals, access to electronic information resources, and staff assistance and consultation in information handling and retrieval; and (4) provides a complete visual communications program utilizing design, graphics, medical illustration, photography, and video recording for documentation of medical research programs and data for all NIH information dissemination needs.

Biomedical Engineering and Instrumentation Program (NAM572, formerly HNAM572). Contributes to the advancement of NIH research in applications of engineering, mathematics and the physical sciences through (1) collaborations with NIH scientists in areas such as measurement, imaging, mathematical modeling, and

design of specialized equipment; (2) proposing and developing theoretical and experimental methods, including instrumentation, to meet long-term needs of the NIH IRP; and (3) providing prompt, convenient, cost-efficient, high-quality technical support services, such as construction, maintenance, modification, repair, sale, and lease of scientific equipment.

Veterinary Resources Program (NAM 573, formerly HNAM573). Contributes to the advancement of NIH research through the application of laboratory animal sciences by (1) consultative and collaborative interaction with NIH intramural researchers; (2) provision of fully characterized laboratory animal models; and (3) provision of a full range of professional and technical support and diagnostic services, facilities, and other resources required for laboratory animal care.

Medical Arts and Photography Branch (NAM574, formerly HNAM574). Contributes to the advancement of NIH research by (1) creating products that visually communicate scientific data, research accomplishments, and NIH programs to the scientific community and the general public; (2) producing publications, exhibits, and audiovisual presentations through a variety of services including design, graphics, video production, medical illustration, micro- and macro-photography, public affairs and patient photography; and (3) providing staff assistance in planning and coordination of visual communication needs.

Library Branch (NAM575, Formerly HNAM575). (1) Serves as the primary literature, referral, and information resource for the administrative, scientific, and clinical staff of NIH; (2) interprets information needs to support the NIH research program; (3) acquires, organizes, manages, maintains, and services a collection of materials to meet these information needs; (4) provides access to needed information not directly acquired by the Library; (5) provides professional assistance to NIH personnel in identifying, retrieving, and critically appraising information resources available locally or in electronic form; (6) provides translation, instruction, reference, and mediated search services; and (7) provides leadership and consultative services to NIH personnel in organization and management of print and electronic information.

(2) Under the heading National Center for Research Resources (NR, formerly HNR) is revised as follows:

National Center for Research Resources (NR, formerly HNR). Administers, fosters, and supports

research for the development and support of multi-categorical research resources needed on an institutional, regional, national, or international basis for health-related research. Programs are carried out through: (1) research grants, research and development contracts, and individual and institutional research training awards; (2) cooperation and collaboration with organizations and institutions engaged in multi-categorical research resources activities; and (3) collection and dissemination of information on research and findings in these areas.

Office of Human Resources and Information Technologies (NR18, formerly HNR18). (1) Plans, evaluates and implements the Center's human resources management and information technology services; (2) maintains liaison with the NIH Office of Human Resource Management and the Office of the NIH Chief Information Officer; (3) develops long-range plans for information technology within the Center, including the development and execution of an information technology budget, policies and procedures; (4) provides management support, training and advice on personal computer matters and participates with NIH planning groups to develop new technologies for common program improvements; (5) provides a full range of human resources planning and support services, including staffing, classification, employee development, benefits administration, awards, and management of the employee performance system; and (6) consults with Center managers on methods and techniques for developing human resources to their maximum capabilities and productivity.

Office of Finance and Administration (NR14, formerly HNR14). (1) Plans, evaluates and executes all aspects of the Center's financial management and administrative services; (2) formulates, presents and executes budget; (3) advises the Director and staff on financial management matters; (4) maintains liaison with the NIH Office of Financial Management and Office of Administration, and ensures compliance with all instructions and policies related to financial management and administration; (5) provides management analysis and advice; and (6) interprets and implements new or revised administrative policies and regulations affecting the overall mission of the Center and NIH/HSS policies and procedures.

The following organizations are abolished and their respective functional statements are removed in their entirety: Biomedical Engineering

and Instrumentation Program (NR4, formerly HNR4), Veterinary Resources Program (NR5, formerly HNR5), Medical Arts and Photography Branch (NR6, formerly HNR6), Library Branch (NR7, formerly HNR7), and Office of Science and Health Reports (NR152, formerly HNR152).

Dated: September 25, 1997.

**Ruth L. Kirschstein,**

*Acting Director, National Institutes of Health.*

[FR Doc. 97-26890 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Statement of Organization, Functions, and Delegations of Authority

Part N, National Institutes of Health, of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (40 FR 22859, May 27, 1975, as amended most recently at 62 FR 47509, September 9, 1997, and redesignated from Part HN as Part N at 60 FR 56605, November 9, 1995), is amended as set forth below to reflect the reorganization of the National Cancer Institute as follows: (1) the Division of Cancer Control and Population Science (DCCPS) and DCCPS's Office of the Director are established; (2) the Division of Cancer Prevention and Control is retitled to the Division of Cancer Prevention (DCP), its functional statement is revised, and the DCP's Office of the Director functional statement is revised; (3) the Division of Cancer Treatment, Diagnosis and Centers is retitled to the Division of Cancer Treatment and Diagnosis and its functional statement is revised; (5) in the Office of the Director, the Office of Centers, Training and Resources is established; and (6) in the Office of the Director, the Office of Special Populations Research is established.

Section N-B, Organization and Functions, under the heading National Cancer Institute (NC, formerly HNC) is amended as follows:

(1) The following is inserted:

Division of Cancer Control and Population Science (NCD, formerly HNCD). (1) Plans and directs an extramural program of cancer and population science research for the Institute; (2) serves as the Institute focal point for extramural research in the following areas: epidemiology and cancer genetics, behavioral sciences and cancer surveillance; (3) develops and supports multidisciplinary research

training and career development in cancer control; (4) provides leadership in setting national priorities for research in the areas central to cancer control and in conducting regulatory program reviews to assess the impact of funded initiatives; and (5) coordinates program activities with other Divisions, Institutes, or Federal and state agencies, and establishes liaison with professional and voluntary health agencies, cancer centers, labor organizations, cancer organizations and trade associations.

Office of the Director (NCD1, formerly HNCD1). (1) Plans, develops, directs, and coordinates the Institute's research activities related to cancer control and population science conducted through independent and cooperative studies and programs with cancer centers, universities, state and other health agencies, private industry and other Federal agencies; (2) develops and maintains liaison with public health groups and agencies, cancer centers, public and professional educational organizations, labor organizations, trade and professional associations, voluntary health organizations, healthcare delivery and managed-care organizations, and regulatory agencies in order to facilitate communication, information exchange, and cooperation; (3) collaborates with other divisions, offices, institutes, and/or national and international research organizations in projects and activities related to cancer control; (4) plans, develops, directs and coordinates the Institute's research activities related to cancer survivors; and (5) disseminates relevant research information to the lay and professional communities.

(2) The title and functional statement for the Division of Cancer Prevention and Control (NC4, formerly NHC4) and its Office of the Director (NC41, formerly HNC41) are replaced with the following:

Division of Cancer Prevention (NC4, formerly HNC4). (1) Plans and directs an extramural program of cancer prevention research for the Institute; (2) develops and supports research training and career development in cancer prevention; (3) coordinates program activities with other Divisions, Institutes, or Federal and state agencies, and establishes liaison with professional and voluntary health agencies, cancer centers, labor organizations, cancer organizations, healthcare delivery and managed-care organizations, and trade associations; and (4) coordinates community-based clinical research in cancer prevention and dissemination of cancer treatment practice through a consortium of community clinical centers.

Office of the Director (NC41, formerly HNC41). (1) Plans, develops, directs, and coordinates the Institute's research activities related to prevention in community clinical oncology centers, conducted through independent and cooperative studies and programs with cancer centers, universities, state and other health agencies private industry and other Federal agencies; (2) develops and maintains liaison with public health groups and agencies, cancer centers, public and professional educational organizations, labor organizations, trade and professional associations, voluntary health organizations, and regulatory agencies in order to facilitate communication, information exchange, and cooperation; (3) collaborates with other Divisions, Offices, Institutes, and/or national and international research organizations in projects and activities related to cancer prevention; and (4) disseminates relevant prevention, early detection, psychosocial, and rehabilitation information to the lay and professional communities.

(3) The title and functional statement for the Division of Cancer Treatment, Diagnosis and Centers (NCB, formerly HNCB) are replaced with the following:

Division of Cancer Treatment and Diagnosis (HNCB). (1) Plans, directs and coordinates a program of extramural preclinical and clinical cancer treatment research as well as research conducted in cooperation with other Federal agencies with the objective of curing or controlling cancer in man by utilizing treatment modalities singly or in combination; (2) administers targeted research and development programs in the areas of drug development, diagnosis, biological response modifiers and radiotherapy development; and (3) serves as the national focal point for information and data on experimental and clinical studies related to cancer treatment and for the distribution of such information to appropriate scientists and physicians.

(4) In the Office of the Director (NC1, formerly HNC1) the following are inserted:

Office of Centers, Training and Resources (NC18, formerly HNC18). (1) Plans, directs, coordinates, evaluates and supports extramural grant programs that relate to the broad scientific objectives of each extramural Division and that are designed to develop and enhance cancer research in academic and research institutions; (2) through the extramural funding of specialized and/or broad multidisciplinary centers devoted to the basic, clinical and populations sciences, advances the knowledge and understanding of the

causes, mechanisms, diagnosis and treatment of cancer and promotes transitional research or the movement of discoveries in the laboratory into patient and population research settings; (3) assists extramural research efforts through support of the improvement, renovation, and construction of research facilities; (4) provides training opportunities for health professionals in order to create a national cadre of highly skilled individuals capable of transferring research discoveries to applications in cancer diagnosis, treatment, and prevention; and (5) establishes program priorities, allocates resources, integrates the projects of various branches, evaluates program effectiveness relative to the goals and objectives of the Institute, and represents the program area in management and scientific decision-making meetings within the Institute.

Office of Special Populations Research (NC19, formerly HNC19). (1) Provides leadership, coordination, and advice to the Director, NCI, on research related to minorities and special populations; (2) serves as the Institute's focal point for programs addressing scientific questions pertinent to minority and ethnic populations as well as the elderly and medically underserved; (3) provides advice and assistance to the Institute Director, Division Directors, and other senior staff concerning the development, conduct and research focus of programs pertaining to or affecting special populations; (4) collaborates and consults, as necessary, with appropriate Institute, NIH, and other Federal and non-federal agencies and organizations interested or engaged in research on special populations; and (5) develops concepts for new programs that would be implemented by the scientific divisions of the Institute.

Dated: September 30, 1997.

**Harold Varmus,**

*Director, National Institutes of Health.*

[FR Doc. 97-26889 Filed 10-9-97; 8:45 am]

BILLING CODE 4140-01-M

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## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-4235-N-24]

### 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:** October 10, 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) 708-2565, (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: October 2, 1997.

**Fred Karnas, Jr.,**

*Deputy Assistant Secretary for Economic Development.*

[FR Doc. 97-26762 Filed 10-9-97; 8:45 am]

BILLING CODE 4210-29-M

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Notice of Receipt of Applications for Permit

The following applicants have 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:* Golden Studio Animals, Inc, Sarasota, FL, PRT-834534.

The applicant requests a permit to export and re-import a captive-born Bengal tiger (*Panthera tigris tigris*) and progeny of the animals currently held by the applicant and any animals acquired in the United States by the applicant to/from worldwide locations to enhance the survival of the species through conservation education. This notification covers activities by the applicant over a three year period.

*Applicant:* John Ariel Bradshaw, Ogden, UT, PRT-835151.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

*Applicant:* St. Louis Zoological Park, St. Louis, MO, PRT-834539.

The applicant requests a permit to import biological samples from wild and captive born Black and white lemur (*Varecia variegata variegata*) from Reserve Naturelle Integrale No. 1, Parc Zoologique de Ivoloina, and Parc Botanique et Zoologique de Tsimbazaza in Madagascar for the purpose of enhancement through scientific research.

*Applicant:* Cleveland Metroparks Zoo, Cleveland, OH, PRT-834809.

The applicant requests a permit to import one female Clouded leopard (*Neofelis nebulosa*) from Belfast Zoo, Northern Ireland for the purpose of enhancement of the species through captive propagation and conservation education.

*Applicant:* Omaha's Henry Doorly Zoo, Omaha, Nebraska, PRT-835175.

The applicant requests a permit to import one female Siberian tiger (*Panthera tigris altaica*) from Emmen Zoo, The Netherlands for the purpose of enhancement of the species through captive propagation.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 430, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

The public is invited to comment on the following application for permits to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) and the regulations governing marine mammals (50 CFR 18).

*Applicant:* Arrowhead Bluffs Museum, Wabash, MN, PRT-826912.

*Permit Type:* Public Display.

*Name and Number of Animals:* polar bear (*Ursus maritimus*), 1.

*Summary of Activity to be Authorized:* The applicant has requested a permit to import a polar bear hide and skull sport-hunted in Canada and donated to the facility for the purpose of public display at the Arrowhead Bluffs Museum.

*Source of Marine Mammals:* sport-hunted in Canada by an affiliate of the Arrowhead Bluffs Museum.

*Period of Activity:* Up to five years from issuance date of the permit, if issued.

*Applicant:* University of Alaska Museum, Fairbanks, AK, PRT-832903.

*Type of Permit:* Import for Scientific Research.

*Name and Number of Animals:* Walrus (*Odobenus rosmarus*), polar bear (*Ursus maritimus*), and sea otter (*Enhydra lutris*); up to a total of 200 samples per year.

*Summary of Activity to be Authorized:* The applicant has requested a permit for the import of legally collected samples of walrus, polar bear and sea otter from Canada and Russia for scientific research purposes including exchange of material with other researchers. Specimens are to be acquired by salvage from subsistence hunting and beach-cast carcasses as well as acquired from agents of the foreign governments who are conducting authorized research on these species. The applicant is also seeking authorization for re-import of specimens of these species legally collected in the United States, accessioned in the Muesum, and exported to foreign researchers for scientific purposes.

*Source of Marine Mammals:* salvage and authorized research as described above.

*Period of Activity:* Up to five years from issuance date of the permit, if issued.

Concurrent with the publication of this notice in the **Federal Register**, the Office of Management Authority is forwarding copies of the applications listed above to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

*Applicant:* Federick Studler, Jr., Conestoga, PA, PRT-834952.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the McClintock Channel polar bear population, Northwest Territories, Canada for personal use.

*Applicant:* Gregory Wambold, Poway, CA, PRT-834978.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted prior to April 30, 1994, from the Lancaster Sound polar bear population, Northwest Territories, Canada for personal use.

*Applicant:* Randy Deeter, Anchorage, AK, PRT-834963.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted prior to April 30, 1994,

from the Lancaster Sound polar bear population, Northwest Territories, Canada for personal use.

*Applicant:* Lawrence Carlson, Ham Lake, MN, PRT-832105.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the McClintock Channel polar bear population, Northwest Territories, Canada for personal use.

Written data or comments, requests for copies of any of these complete applications, or requests for a public hearing on this application should be sent to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 N. Fairfax Drive, Room 430, Arlington, Virginia 22203, telephone 703/358-2104 or fax 703/358-2281 and must be received within 30 days of the date of publication of this notice. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with the application 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 above address within 30 days of the date of publication of this notice.

Dated: October 6, 1997.

**MaryEllen Amtower**,  
*Acting Chief, Branch of Permits, Office of Management Authority.*  
[FR Doc. 97-26979 Filed 10-9-97; 8:45 am]  
BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Proposed Policy on Giant Panda Permits

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of reopening of comment period.

**SUMMARY:** The U.S. Fish and Wildlife Service gives notice that the comment period on the proposed policy for issuance of permits for import of giant panda will be reopened for 30 days to obtain further comments.

**DATES:** Public comments received on or before November 10, 1997 will be considered by the Service.

**ADDRESSES:** Comments may be submitted to the Chief of the Office of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax

Drive, Room 430, Arlington, Virginia 22203.

**FOR FURTHER INFORMATION CONTACT:**

Kenneth Stansell, Chief, Office of Management Authority, at the above address, or call (703) 358-2093; fax (703) 358-2280.

**SUPPLEMENTARY INFORMATION:** The Service published a notice reopening the comment period on the proposed policy for issuance of permits for import of giant panda on July 1, 1997 (62 FR 35518-19). The comment period ended September 29, 1997. The Service received a request from the World Wildlife Fund, Washington, D.C., to extend the comment period to allow submission of information from two events; the International Symposium on Environmental Protection and City Development of the 21st Century (September 23-28) in Chengdu and the Ministry of Forestry/WWF Workshop on Giant Panda Reintroduction (September 24-28). The results of these meetings were not available before the close of the previous comment period but may be important to the policy development. Interested organizations and the public are invited to comment on the results from these meetings or on any other issues related to panda conservation.

**Authority:** This notice was prepared under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: October 3, 1997.

**Jamie Rappaport Clark,**

*Director.*

[FR Doc. 97-26848 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Issuance of Permit for Marine Mammals

On July 31, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 147, Page 41072, that an application had been filed with the Fish and Wildlife Service by Robert Keeler, Douglas, WY for a permit (PRT-832324) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken prior to April 30, 1994, from the Gulf of Boothia population, Northwest Territories, Canada for personal use.

Notice is hereby given that on September 26, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On July 31, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 147, Page 41072, that an application had been filed with the Fish and Wildlife Service by Harry Donald Nicholson, Corsicana, TX (PRT-832095) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken prior to April 30, 1994, from the Lancaster Sound population, Northwest Territories, Canada for personal use.

Notice is hereby given that on September 26, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On August 7, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 152, Page 42590, that an application had been filed with the Fish and Wildlife Service by Joseph Cafmeyer, Taylor, MI (PRT-832734) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken prior to April 30, 1994, from the Baffin Bay population, Northwest Territories, Canada for personal use.

Notice is hereby given that on September 26, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On July 17, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 137, Page 38320, that an application had been filed with the Fish and Wildlife Service by Christopher Harvey, Ormond Beach, FL (PRT-829688) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, from the Southern Beaufort Sea population, Northwest Territories, Canada for personal use.

Notice is hereby given that on September 23, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

On August 7, 1997, a notice was published in the **Federal Register**, Vol. 62, No. 152, Page 42590, that an application had been filed with the Fish and Wildlife Service by William Shields, Reno, NV (PRT-830610) to import a sport-hunted polar bear (*Ursus maritimus*) trophy, taken prior to April 30, 1994, from the Northern Beaufort Sea population, Northwest Territories, Canada for personal use.

Notice is hereby given that on September 24, 1997, as authorized by the provisions of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*) the Fish and Wildlife Service authorized the requested permit subject to certain conditions set forth therein.

Documents and other information submitted for these applications are available for review by any party who submits a written request to the U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Rm. 430, Arlington, Virginia 22203. Phone (703) 358-2104 or Fax (703) 358-2281.

Dated: October 6, 1997.

**Mary Ellen Amtower,**

*Acting Chief, Branch of Permits, Office of Management.*

[FR Doc. 97-26978 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[WO220-1020-01-241A]

#### OMB Approval Number 1004-0019; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) On April 8, 1997, BLM published a notice in the **Federal Register** (61 FR 16864) requesting comment on this proposed collection. The comment period ended on June 9, 1997. BLM received no (0) comments from the public in response to that notice. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM clearance officer at the telephone number listed below. The Office of Management and Budget is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration, your comments and suggestions on the requirement should be made directly to the Office of Management and Budget, Interior Department Desk Officer (1004-0119), Office of information and Regulatory Affairs, Washington, D.C., 20503, telephone (202) 395-7340. Please provide a copy of your comments to the Bureau Clearance Officer (WO-630),

1849 C St. N.W., Mail Stop 401 LS,  
Washington D.C. 20420.

**Nature of Comments**

We specifically request your comments on the following:

1. Whether the collection of information is necessary for proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting information, including the validation of the methodology and assumption used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical and other forms of information technology.

*Title:* 43 CFR 45120.3-3, Range Improvement Permit.

*OMB approval number:* 1004-0019.

*Abstract:* The Bureau of Land Management is proposing to renew the approval of an information collection for an existing rule at 43 CFR 4120.3-3. The rule provides for public rangeland grazing permittees or lessees to apply for BLM approval to construct or maintain removable or temporary range improvements on the public rangeland allotments that are necessary for livestock management or to facilitate handling livestock. The form is used to apply for approval to install the improvement and documents the records for the service life of the improvement.

*Bureau Form Number:* Form 4120-7.

*Frequency:* On occasion.

*Description of Respondents:* Respondents are applicants requesting permission to construct range improvements on public lands.

*Estimated completion time:* 20 minutes.

*Annual responses:* 60.

*Annual burden hours:* 20.

*Collection clearance officer:* Carole Smith, (202) 452-0367.

Dated: October 7, 1997.

**Carole Smith,**

*Bureau of Land Management Information Clearance Officer.*

[FR Doc. 97-26994 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-84-M

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[WO-310-1310-01-24 1A]

**OMB Approval Number 1004-0135; Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act**

The Bureau of Land Management (BLM) has submitted the proposed collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 3501 *et seq.*) On March 28, 1996, the BLM published a notice in the **Federal Register** (61 FR 13869) requesting comments on the collection. The comment period ended May 28, 1996. No comments were received. Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the BLM Clearance Officer at the telephone number listed below.

OMB is required to respond to this request within 60 days but may respond after 30 days. For maximum consideration your comments and suggestions on the requirement should be made within 30 days directly to the Office of Management and Budget, Interior Department Desk Officer (1004-0135), Office of Information and Regulatory Affairs, Washington, D.C. 20503, telephone (202) 395-7340. Please provide a copy of your comments to the Bureau Clearance Officer (WO-630), 1849 C St., N.W., Mail Stop 401 LS, Washington, D.C. 20420.

**Nature of Comments**

We specifically request your comments on the following:

1. Whether the collection of information is necessary for the proper functioning of the Bureau of Land Management, including whether the information will have practical utility;
2. The accuracy of BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the burden of collecting the information on those who are to respond, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

*Title:* Sundry Notices and Reports on Wells.

*OMB Approval Number:* 1004-0135.

*Abstract:* Data submitted by oil and gas operators is used for agency approval of specific additional operations on a well and to report the completion of such additional work.

*Bureau Form Number:* 3160-5.

*Frequency:* On occasion.

*Description of Respondents:*

Operators and operating rights owners of Federal and Indian (except Osage) oil and gas leases.

*Estimated completion time:* 25 minutes.

*Annual Responses:* 34,000.

*Annual Burden Hours:* 14, 166.

*Bureau Clearance Officer:* Carole Smith, (202) 452-0367.

Dated: October 7, 1997.

**Carole Smith,**

*Bureau of Land Management Information Clearance Officer.*

[FR Doc. 97-26995 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-84-M

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[OR-014-08-3110-00-H040 GP7-0315]

**Notice of Direct Sale of Public Lands in Klamath County, OR**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of direct sale of public lands in Klamath County, Oregon.

**SUMMARY:** The following described lands have been determined to be suitable for disposal by direct sale under Section 203 of the Federal Land Policy Land Management Act of 1976, 43 U.S.C. 1713, at not less the appraised fair market value of \$645,000.

**Willamette Meridian**

T. 37 S., R. 9 E.	
Sec. 4-SW <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 9-NW <sup>1</sup> / <sub>4</sub> NW <sup>1</sup> / <sub>4</sub> , NE <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> .....	80.00
Sec. 35-SE <sup>1</sup> / <sub>4</sub> NE <sup>1</sup> / <sub>4</sub> .....	40.00
T. 37 S., R. 10 E.	
Sec. 12-S <sup>1</sup> / <sub>2</sub> SE <sup>1</sup> / <sub>4</sub> .....	80.00
Sec. 13-NE <sup>1</sup> / <sub>4</sub> NW <sup>1</sup> / <sub>4</sub> .....	40.00
T. 37 S., R. 11 <sup>1</sup> / <sub>2</sub> -E.	
Sec. 13-E <sup>1</sup> / <sub>2</sub> NW <sup>1</sup> / <sub>4</sub> .....	80.00
Sec. 14-SE <sup>1</sup> / <sub>4</sub> NE <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 17-SE <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 20-NE <sup>1</sup> / <sub>4</sub> SE <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 21-W <sup>1</sup> / <sub>2</sub> NE <sup>1</sup> / <sub>4</sub> , SE <sup>1</sup> / <sub>4</sub> NE <sup>1</sup> / <sub>4</sub> , N <sup>1</sup> / <sub>2</sub> NW <sup>1</sup> / <sub>4</sub> , SW <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> , N <sup>1</sup> / <sub>2</sub> SE <sup>1</sup> / <sub>4</sub> , SE <sup>1</sup> / <sub>4</sub> SE <sup>1</sup> / <sub>4</sub> .....	360.00
Sec. 22-W <sup>1</sup> / <sub>2</sub> SW <sup>1</sup> / <sub>4</sub> .....	80.00
Sec. 26-NE <sup>1</sup> / <sub>4</sub> NW <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 27-NW <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> .....	40.00
Sec. 28-SW <sup>1</sup> / <sub>4</sub> NE <sup>1</sup> / <sub>4</sub> , W <sup>1</sup> / <sub>2</sub> NW <sup>1</sup> / <sub>4</sub> , SE <sup>1</sup> / <sub>4</sub> NW <sup>1</sup> / <sub>4</sub> , NW <sup>1</sup> / <sub>4</sub> SW <sup>1</sup> / <sub>4</sub> .....	200.00
Sec. 29-SE <sup>1</sup> / <sub>4</sub> NE <sup>1</sup> / <sub>4</sub> , E <sup>1</sup> / <sub>2</sub> SW <sup>1</sup> / <sub>4</sub> , E <sup>1</sup> / <sub>2</sub> SE <sup>1</sup> / <sub>4</sub> .....	200.00

T. 37 S., R. 11 E.	
Sec. 29-N $\frac{1}{2}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$	120.00
Sec. 30-N $\frac{1}{2}$ SE $\frac{1}{4}$ .....	80.00
Total .....	1,600.00

The above described land is hereby segregated from appropriation under the public land laws, including the mining laws, but not from sale under the above cited statute, for 270 days or until the title transfer is completed or the segregation is terminated by publication in the **Federal Register**, which ever occurs first.

These lands are difficult and uneconomic to manage as part of the public lands and are not suitable for management by another Federal agency. No significant resource values will be affected by this disposal. The sale is consistent with the Bureau of Land Management's planning for the lands involved and the public interest will be served by the sale. Sale of these lands will contribute to reducing the land sale commitment the Klamath Falls Resource Area incurred with the acquisition of the Wood River Ranch.

Purchaser must be U.S. citizens, 18 years of age or older, a state or state instrumentality authorized to hold property, or a corporation authorized to own real estate in the state in which the land is located.

The land is being offered by direct sale to the American Land Conservancy, a California public benefit corporation using the Direct sale procedures authorized under 43 CFR 2711.3-3. Direct sale is appropriate because the American Land Conservancy assisted the Bureau of Land Management in acquiring the north half of the Wood River Ranch.

The terms, conditions, and reservations, applicable to the sale are as follows:

1. A right-of-way for ditches and canals will be reserved to the United States under 43 U.S.C. 945.
2. The mineral interests being offered for conveyance have not known mineral value. The acceptance of a direct sale offer will constitute an application for conveyance of the mineral estate, with the exception of the Oil, Gas and Geothermal interests which will be reserved to the United States in accordance with Section 209 of the Federal Land Policy and Management Act of 1976. Direct purchasers must submit a non refundable \$50.00 filing fee for the conveyance of the mineral estate upon request of the Bureau of Land Management.
3. Patents will be issued subject to all valid existing rights and reservations of record.

If the lands identified in this notice are not sold, they will be offered competitively on a continuing basis until sold. Sealed bids will be accepted at the Klamath Falls Resource Area Office during regular business hours. All bids will be opened the first Wednesday of the month beginning on March 4, 1998. To be considered, bids must be received by 10:00 AM on the day of the bid opening.

Detailed informational concerning the sale, including the reservations, sale procedures and conditions, and planning and environmental documents, is available at the Klamath Falls Resource Area Office 2795 Anderson Ave. Building 25, Klamath Falls, Oregon 97603 (541/883-6916).

This notice is for information purposes only and is not appealable to the Interior Board of Land Appeals. The environmental assessment prepared for the disposal of these public lands evaluated disposal by sale or exchange. The decision of the Klamath Falls Area Manager, issued on May 13, 1994, was to dispose of the above, and other, public lands by exchange to the American Land Conservancy, with subsequent sale to the Thomas Lumber Company or direct sale to the American Land Conservancy. That decisions was protested and subsequently appealed to the Department of the Interior Board of Land Appeals. The appeal was resolved by the appellants and the Bureau of Land Management agreeing to a settlement which removed 560 acres of public land from the proposed disposal.

**A. Barron Bail,**

*Area Manager, Klamath Falls Resource Area.*  
[FR Doc. 97-26969 Filed 10-9-97; 8:45 am]  
BILLING CODE 4310-33-M

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

[NV-942-07-1420-00]

**Filing of Plats of Survey; Nevada**

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice.

**SUMMARY:** The purpose of this notice is to inform the public and interested State and local government officials of the filing of Plats of Survey in Nevada.

**EFFECTIVE DATES:** Filing is effective at 10:00 a.m. on the dates indicated below.

**FOR FURTHER INFORMATION CONTACT:** Robert H. Thompson, Acting Chief, Cadastral Survey, Bureau of Land Management (BLM), Nevada State Office, 850 Harvard Way, P.O. Box

12000, Reno, Nevada 89520, 702-785-6541.

**SUPPLEMENTARY INFORMATION:**

1. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on July 31, 1997:

The plat, in six (6) sheets, representing the dependent resurvey of a portion of the south, east, west and north boundaries, a portion of the subdivisional lines, and a portion of the subdivision-of-section lines of sections 1 and 24, and the subdivision and further subdivision of certain sections, and the metes-and-bounds survey of portions of U.S. Highway 50 right-of-way, in sections 5 and 6, Township 14 North, Range 19 East, of the Mount Diablo Meridian, in the State of Nevada, under Group No. 743, was accepted July 29, 1997.

This survey was executed to meet certain administrative needs of the U.S. Forest Service.

2. The Plat of Survey at of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on August 14, 1997:

The plat, representing the dependent resurvey of a portion of the south boundary and a portion of the subdivisional lines of Township 17 South, Range 63 East, of the Mount Diablo Meridian, in the State of Nevada, under Group No. 733, was accepted August 12, 1997.

This survey was executed to meet certain administrative needs of Clark County.

3. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on August 14, 1997:

The plat, in eleven (11) sheets, representing the dependent resurvey of a portion of the east boundary of Township 18 South, Range 62 East, a portion of the south boundary and a portion of the subdivisional lines, and the subdivision of certain sections, Township 18 South, Range 63 East, of the Mount Diablo Meridian, in the State of Nevada, under Group No. 733, was accepted August 12, 1997.

This survey was executed to meet certain administrative needs of Clark County.

4. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada on August 14, 1997:

The plat, in three (3) sheets, representing the dependent resurvey of a portion of the east boundary of Township 19 South, Range 62 East, and a portion of the subdivisional lines of Township 19 South, Range 63 East, of

the Mount Diablo Meridian, in the State of Nevada, under Group No. 733, was accepted August 12, 1997.

This survey was executed to meet certain needs of Clark County.

5. The Plat of Survey of the following described lands was officially filed at the Nevada State Office, Reno, Nevada, on September 11, 1997:

The plat, representing the entire survey record of the corrective resurvey of a portion of the subdivision-of-section lines of section 18, Township 14 North, Range 25 East, of the Mount Diablo Meridian, in the State of Nevada, under Group No. 762, was accepted September 9, 1997.

This survey was executed to meet certain needs of the Bureau of Land Management.

6. The above-listed surveys are now the basic records for describing the lands for all authorized purposes. These surveys have been placed in the open files in the BLM Nevada State Office and are available to the public as a matter of information. Copies of the surveys and related field notes may be furnished to the public upon payment of the appropriate fees.

Dated: September 30, 1997.

**Robert H. Thompson,**

*Acting Chief Cadastral Surveyor, Nevada.*

[FR Doc. 97-26968 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-HC-P

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Native American Graves Protection and Repatriation Review Committee: Meeting

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is hereby given in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix (1988), that a meeting of the Native American Graves Protection and Repatriation Review Committee will be held on January 29, 30, and 31, 1998, in Washington, DC.

The Committee will meet in the Ambassador Room of the Embassy Row Hilton Hotel; telephone: (202) 265-1600, fax: (202) 328-7526. Meetings will begin each day at 8:30 am and conclude not later than 5:00 pm.

The Native American Graves Protection and Repatriation Review Committee was established by Public Law 101-601 to monitor, review, and assist in implementation of the inventory and identification process and repatriation activities required under

the Native American Graves Protection and Repatriation Act.

The agenda for this meeting will include: development of a list of persons from which the Secretary will appoint the seventh member of the committee; Federal compliance with the statute; disposition of culturally unidentifiable human remains; and the status of national implementation.

The meeting will be open to the public. However, facilities and space for accommodating members of the public are limited. Persons will be accommodated on a first-come, first-served basis. Some lodging will be available at the Embassy Row Hilton Hotel. Please mention that you will be attending the NAGPRA Review Committee Meeting. Any member of the public may file a written statement concerning matters to be discussed with Dr. Francis P. McManamon, Departmental Consulting Archeologist.

Persons wishing further information concerning this meeting, or who wish to submit written statements may contact Dr. Francis P. McManamon, Departmental Consulting Archeologist, National Park Service (2275), 1849 C St. NW, Washington, DC 20240; telephone: (202) 343-8161. Transcripts of the meeting will be available for public inspection approximately eight weeks after the meeting at the office of the Departmental Consulting Archeologist, 800 North Capitol St., NW, Suite 340, Washington, DC.

Dated: September 29, 1997.

**Francis P. McManamon,**

*Departmental Consulting Archeologist,*

*Manager, Archeology and Ethnography Program.*

[FR Doc. 97-26870 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-70-F

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Notice of Intent to Repatriate Cultural Items From the Island of Hawaii in the Possession of the Bernice Pauahi Bishop Museum, Honolulu, HI

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the Bernice Pauahi Bishop Museum, Honolulu, HI which meet the definition of "unassociated funerary objects" under Section 2 of the Act.

The 53 cultural items include pieces or fragments of burial kapa cloth, a stick, an amulet, cordage, gourd water bottles, coconut cups, wooden bowls, a burial mat, a float net, a canoe part, fishhooks, pieces of matting, and netting samples.

In 1889, 30 items including pieces or fragments of burial kapa cloth, a stick, an amulet, cordage, gourd water bottles, coconut cups, and wooden bowls were purchased by the Bishop Museum from Joseph S. Emerson as part of the original collections of the Bishop Museum. In 1904, additional kapa fragments were received by the Bishop Museum from Mr. Emerson. Catalog information lists their locality as Hawaii.

In 1929, eleven items including pieces of burial kapa, cordage, and a burial mat were received in an exchange with Mr. Theodore T. Dranga. Catalog information lists their locality as Hawaii.

In 1931, four items including a pillow, a container, a float net, and a canoe part were donated to the Bishop Museum by Ms. Marcia Brown Richards. Catalog information lists their locality as Hawaii.

In 1939, one item consisting of burial kapa fragments was donated to the Bishop Museum by Mr. Julius S. Rodman. Catalog information lists their locality as Hawaii.

In 1940, three items including two fishhooks and kapa samples were donated to the Bishop Museum by Mr. Keith K. Jones. Catalog information lists their locality as Hawaii.

In 1960, one item consisting of kapa samples were donated to the Bishop Museum by Mrs. Cy Gillette. Catalog information lists their locality as Hawaii.

In 1985, three items including samples of mat, cordage, and netting were collected by Bishop Museum staff from burial sites in Kalala, Kohala, HI.

Based on known Native Hawaiian tradition and practices, these items are consistent with Native Hawaiian funerary objects. Consultation evidence presented by Hui Malama I Na Kupuna O Hawai'i Nei supports the conclusion that these items were placed with human remains.

Officials of the Bishop Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(B), these 53 cultural items are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the Bishop Museum have also determined

that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity which can be reasonably traced between these items and the Hawai'i Island Burial Council, Hui Malama I Na Kupuna O Hawai'i Nei, and the Office of Hawaiian Affairs.

This notice has been sent to officials of the Hawai'i Island Burial Council, Hui Malama I Na Kupuna O Hawai'i Nei, and the Office of Hawaiian Affairs. Representatives of any other Native Hawaiian organization that believes itself to be culturally affiliated with these objects should contact Janet Ness, Registrar, Bernice Pauahi Bishop Museum, 1525 Bernice Street, Honolulu, HI 96817; telephone: (805) 848-4105 before November 10, 1997. Repatriation of these objects to Hui Malama I Na Kupuna O Hawai'i Nei on behalf of Hawai'i Island Burial Council may begin after that date if no additional claimants come forward.

Dated: October 2, 1997.

**Francis P. McManamon,**

*Departmental Consulting Archeologist,  
Manager, Archeology and Ethnography  
Program.*

[FR Doc. 97-26874 Filed 10-9-97 ; 8:45 am]

BILLING CODE 4310-70-F

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## DEPARTMENT OF THE INTERIOR

### National Park Service

#### **Notice of Inventory Completion for Native American Human Remains From O'ahu County, HI in the Control of the United States Fish and Wildlife Service, Honolulu, HI**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003 (d), of the completion of an inventory of human remains from O'ahu County, HI in the control of the United States Fish and Wildlife Service, Honolulu, HI.

A detailed assessment of the human remains was made by U.S. Fish and Wildlife and Bishop Museum professional staff, in consultation with representatives of Hui Malama I Na Kupuna O Hawai'i Nei

In 1923 and 1924, human remains representing a minimum of seven individuals were recovered from the Hawaiian Islands known as Nihoa and Necker by members of the Tanager Expeditions who were collecting a wide variety of scientific specimens for the Bishop Museum. No known individuals were identified. No associated funerary objects are present.

Based on material culture and radiocarbon dates, the islands of Nihoa and Necker were occupied by Native Hawaiian people between 1000-1500 A.D. Oral tradition and archeological research indicates Native Hawaiian people occupied the islands of Nihoa and Necker during this period.

Consultation evidence presented by representatives of Hui Malama I Na Kupuna O Hawai'i Nei identifies the islands of Nihoa and Necker as within the precontact territory of Native Hawaiian people.

Based on the above mentioned information, officials of the U.S. Fish and Wildlife Service have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of a minimum of seven individuals of Native American ancestry. Officials of the U.S. Fish and Wildlife Service have also determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and Hui Malama I Na Kupuna O Hawai'i Nei.

This notice has been sent to officials of Hui Malama I Na Kupuna O Hawai'i Nei, Office of Hawaiian Affairs, and the Kauai/Nihoa Island Burial Council. Representatives of any other Native Hawaiian organization that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Jerry Leinecke, Project Leader, Hawaiian and Pacific Islands National Wildlife Refuge Complex, P.O. Box 50167, Honolulu, HI 96850; telephone: (808) 541-1201, fax (808) 541-1216, before November 10, 1997. Repatriation of the human remains to Hui Malama I Na Kupuna O Hawai'i Nei may begin after that date if no additional claimants come forward.

Dated: October 2, 1997.

**Francis P. McManamon,**

*Departmental Consulting Archeologist,  
Manager, Archeology and Ethnography  
Program.*

[FR Doc. 97-26873 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-70-F

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## DEPARTMENT OF THE INTERIOR

### National Park Service

#### **Notice of Intent to Repatriate Cultural Items in the Possession of the Peabody Essex Museum, Salem, MA**

**AGENCY:** National Park Service, Interior.

**ACTION:** Notice.

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the Peabody Essex Museum which meets the definition of "unassociated funerary objects" under Section 2 of the Act.

The three cultural items are a tapa shroud, and two tapa samples. The tapa shroud is comprised of two sheets of black tapa and three sheets of undyed tapa secured along one edge with tapa stitches. The first tapa sample consists of a square sheet with watermarks and brown dye on one side. The second tapa sample consists of a rectangular fragment with watermarks and black dye on one side.

Between 1823 and 1855, the tapa shroud was collected by Stephen Reynolds. In 1917, SW. Phillips purchased the Reynolds collection from a Mr. Wilmarth and donated it to the Peabody Essex Museum.

In 1921, Bishop Museum records indicate that a piece of tapa may have been donated by Robert VanDeusen of Kinderhook, NY. The first tapa sample was cut from this piece of tapa and was acquired by Marcia Brown Bishop prior to 1938. The Peabody Essex Museum purchased this tapa sample as part of the Marcia Brown Bishop collection in 1966.

In 1929, tapa from a burial cave at Kohala, HI was received by the Bishop Museum as part of an exchange with Ted T. Dranga. The second tapa sample was cut from the burial cave tapa in the collections of the Bishop Museum and obtained by Marcia Brown Bishop prior to 1938. In 1966, the Peabody Essex Museum purchased this tapa sample from Ms. Bishop.

Consultation with representatives of Hui Malama I Na Kupuna O Hawai'i Nei, Ka Lahui Hawai'i, and the Office of Hawaiian Affairs indicates these items were very likely used as burial tapa and made specifically for that purpose.

Officials of the Peabody Essex Museum have determined that, pursuant to 25 U.S.C. 3001 (3)(B), these three cultural items are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the Peabody Essex Museum have also determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity which can be reasonably traced between these items and Hui Malama I Na Kupuna O Hawai'i

Nei, Ka Lahui Hawai'i, and the Office of Hawaiian Affairs.

This notice has been sent to officials of Hui Malama I Na Kupuna O Hawai'i Nei, Ka Lahui Hawai'i, and the Office of Hawaiian Affairs. Representatives of any other Native Hawaiian organization that believes itself to be culturally affiliated with these objects should contact Dan L. Monroe, Executive Director, Peabody Essex Museum, East India Square, Salem, MA 01970; telephone (508) 745-1876, fax (508) 744-6776 before [thirty days following publication in the Federal Register]. Repatriation of these objects to Hui Malama I Na Kupuna O Hawai'i Nei, Ka Lahui Hawai'i, and the Office of Hawaiian Affairs may begin after that date if no additional claimants come forward.

The National Park Service is not responsible for the determinations within this notice.

Dated: October 3, 1997.

**Francis P. McManamon,**

*Departmental Consulting Archeologist,  
Manager, Archeology and Ethnography  
Program.*

[FR Doc. 97-26871 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-70-F

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### **Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects From Iowa in the Possession of the Office of the State Archaeologist, University of Iowa, Iowa City, IA**

**AGENCY:** National Park Service

**ACTION:** Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003 (d), of the completion of an inventory of human remains and associated funerary objects from Iowa in the possession of the Office of the State Archaeologist, University of Iowa, Iowa City, IA.

A detailed assessment of the human remains was made by the Office of the State Archaeologist of Iowa professional staff in consultation with representatives of the Iowa Tribe of Kansas and Nebraska, the Iowa Tribe of Oklahoma, and the Otoe-Missouria Tribe of Oklahoma.

During the 1920s to the 1950s, human remains representing eight individuals were removed from an unknown site south of Dorchester, IA by Mr. Paul Cota and donated to Luther College, Decorah, IA. In 1990, these human remains were

transferred to the Office of the State Archaeologist of Iowa. No known individuals were identified. No associated funerary objects are present. Although the exact site is unknown, the area south of Dorchester has numerous Oneota sites. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based dimorphic characteristics is consistent with known Oneota remains.

In 1943, human remains representing one individual were removed from site 13AM108, Allamakee County, IA possibly by H.P. Field. At an unknown date these remains were donated to Luther College, Decorah, IA and in 1987 were transferred to the Office of the State Archaeologist of Iowa Burials Program. No known individuals were identified. The fourteen associated funerary objects include a piece of flaking debris, ten Oneota pot sherds, a bison scapula, a beaver femur, and an incomplete sacrum from a medium-sized mammal.

In 1953, human remains representing two individuals were removed from an unknown site near New Albin, IA by H.P. Field and donated in 1960 to Marshall McKusick, Professor of Anthropology at the University of Iowa. At an unknown date, these remains were transferred from the Department of Anthropology to the Office of the State Archaeologist of Iowa. No known individuals were identified. No associated funerary objects are present. Although the exact site is unknown, the area around New Albin has numerous Oneota sites. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based dimorphic characteristics is consistent with known Oneota remains.

In the mid-1950s, human remains representing three individuals were removed from an unknown site in Allamakee County, IA by a game warden with the Iowa Department of Natural Resources. These remains were given to Robert Bray, Effigy Mounds National Monument. In the 1960s, Mr. Bray took these remains to the University of Missouri's Lyman Archaeological Research Center, Miami, MO. In 1993, these remains were transferred to the Office of the State Archaeologist of Iowa. No known individuals were identified. No associated funerary objects are present. Although the exact site is unknown, Allamakee County has numerous Oneota sites. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based

dimorphic characteristics is consistent with known Oneota remains.

In 1957, human remains representing eight individuals were removed from site 13WD6, Woodbury County, IA during salvage excavations conducted by the Northwest Chapter of the Iowa Archeological Society and placed in the Sanford Museum, Cherokee, IA. In 1979, these remains were transferred to the Office of the State Archaeologist of Iowa. No known individuals were identified. No associated funerary objects are present.

In the 1950s or 1960s, human remains representing two individuals were removed from the surface of an eroding river bank on site 13WD8, Woodbury County, IA by Ruth Thornton. In 1989, these remains were transferred to the Office of the State Archaeologist of Iowa Burials Program. No known individuals were identified. No associated funerary objects are present.

In 1960, human remains representing a minimum of 29 individuals were removed from site 13AM43, Allamakee County, IA during a road construction project by Marshall McKusick, University of Iowa and Robert Bray, Effigy Mounds National Monument. Sixteen of these individuals were transferred at an unknown date from the Department of Anthropology, University of Iowa to the Office of the State Archaeologist of Iowa. Thirteen of these individuals went to Effigy Mounds and later in the 1960s Robert Bray took them to the University of Missouri's Lyman Archaeological Research Center, Miami, MO. In 1994, these thirteen individuals were transferred to the Office of the State Archaeologist of Iowa. In 1987, additional fragments from this excavation were found in the collections of Luther College and transferred to the Office of the State Archaeologist of Iowa. No known individuals were identified. No associated funerary objects are present.

In 1964, human remains representing thirteen individuals were removed from site 13AM103, Allamakee County, IA by Marshall McKusick, University of Iowa. At an unknown date, these remains were transferred from the University of Iowa Department of Anthropology to the Office of the State Archaeologist of Iowa. No known individuals were identified. The five associated funerary objects include a bipoint chert knife, three mortuary pots, and a bison scapula hoe.

Around 1965, human remains representing one individual from an unknown site were donated to the University of Iowa Geology Department by an unknown individual. In 1992, the human remains were transferred to the

Office of the State Archaeologist of Iowa Burials Program. A note accompanying the remains suggest an Oneota affiliation "Oneota skull from pot hunter Alamakee [sic] Co., Ia." No known individual was identified. No associated funerary objects are present. The degree of bone preservation and overall appearance, such as cranial morphology and metric features, are consistent with known Oneota remains.

Around 1967, human remains representing three individuals were removed from an eroding bank at site 13AM269, Allamakee County, IA by Ramon and Darlene Gengler. In 1987, these human remains were transferred to the Office of the State Archaeologist of Iowa Burials Program. No known individuals were identified. The two associated funerary objects include a pot sherd and a copper tube.

In 1972, human remains representing one individual was removed from site 13DM101, Des Moines County, IA during an archeological excavation conducted by Dean Straffin, Parsons College, Fairfield, IA. In 1994, these remains were transferred to the Office of the State Archaeologist of Iowa Burials Program. No known individual was identified. No associated funerary objects are present.

In 1987, human remains representing seven individuals from northeast Iowa were transferred from Luther College to the Office of the State Archaeologist of Iowa Burials Program. No further collection information is available. No known individuals were identified. No associated funerary objects are present. Although the exact site is unknown, northeast Iowa has numerous Oneota sites. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based dimorphic characteristics is consistent with known Oneota remains.

In 1987 and 1995, human remains representing five individuals from site 13AM1, Allamakee County were transferred from Luther College to the Office of the State Archaeologist of Iowa Burials Program. No further collection information is available. No known individuals were identified. No associated funerary objects are present.

In 1988, human remains representing one individual from an unknown site were transferred from Luther College to the Office of the State Archaeologist of Iowa Burials Program. No further collection information is available. No known individual was identified. No associated funerary objects are present. The degree of bone preservation and overall appearance are consistent with known Oneota remains.

In 1988, human remains representing one individual were removed from a cache pit at site 13WD55, Woodbury County by the Office of the State Archaeologist of Iowa. No known individual was identified. No associated funerary objects are present.

In 1993 and 1994, human remains representing six individuals were removed from site 13WD8 during initial examination and salvage excavation of a flood-damaged portion of the site by the Office of the State Archaeologist personnel. No known individuals were identified. No associated funerary objects are present.

In 1994, human remains representing one individual were removed from site 13AM200, Allamakee County during excavation of a cache pit by the Office of the State Archaeologist of Iowa. No known individual was identified. No associated funerary objects are present.

In 1995, human remains representing one individual from the surface of site 13AM16, Allamakee County were transferred from Luther College to the Office of the State Archaeologist of Iowa. At an unknown date, these remains were donated to Luther College by Gavin Sampson. No known individual was identified. No associated funerary objects are present.

In 1995, human remains representing two individuals were removed from site 13LA1, Louisa County, IA from midden and cache pit features during a University of Illinois field school and transferred to the Office of the State Archaeologist of Iowa Burials Program. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing six individuals were removed from site 13AM60, Allamakee County by an unknown person. In 1988, these remains were transferred from Luther College to the Office of the State Archaeologist of Iowa Burials Program. No known individuals were identified. No associated funerary objects are present. Site 13AM60 has been identified as an Oneota village and cemetery site based on material culture and site organization. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based dimorphic characteristics is consistent with known Oneota remains.

At an unknown date, human remains representing three individuals were removed from an unknown site in Lyon County by an unnamed person. In 1995, these remains were transferred to the Office of the State Archaeologist of Iowa Burials Program by Doug Pfeil who had

been given the remains by a person wishing to remain anonymous. No known individuals were identified. The eleven likely associated funerary objects are shell-tempered pot sherds. The degree of bone preservation and overall appearance, such as cranial morphology, dental health, and expression of gender-based dimorphic characteristics is consistent with known Oneota remains.

The above listed human remains and associated funerary objects have been identified as having been removed from Oneota sites within the State of Iowa based on archeological surveys of the areas and the types of associated funerary objects present. These areas have been further identified as Oneota sites based on ethnohistorical evidence, material culture similarities, and historical maps. The Ioway and the Otoe-Missouria peoples have been culturally affiliated with the Oneota based on continuities of material culture, and historical documents. Oral history evidence presented by representatives of the Iowa Tribe of Kansas and Nebraska, the Iowa Tribe of Oklahoma, and the Otoe-Missouria Tribe of Oklahoma further indicate Oneota affiliation with these present day tribes.

Based on the above mentioned information, officials of the Office of the State Archaeologist have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of 104 individuals of Native American ancestry. Officials of the Office of the State Archaeologist have also determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 32 objects listed above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Office of the State Archaeologist have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity which can be reasonably traced between these Native American human remains and associated funerary objects and the Iowa Tribe of Kansas and Nebraska, the Iowa Tribe of Oklahoma, and the Otoe-Missouria Tribe of Oklahoma.

This notice has been sent to officials of the Iowa Tribe of Kansas and Nebraska, the Iowa Tribe of Oklahoma, and the Otoe-Missouria Tribe of Oklahoma. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Shirley Schermer, Burials Program Director, Office of the State Archaeologist, 303 Eastlawn,

University of Iowa, Iowa City, IA 52242; telephone: (319) 335-2400, before November 10, 1997. Repatriation of the human remains and associated funerary objects to the Iowa Tribe of Kansas and Nebraska, the Iowa Tribe of Oklahoma, and the Otoe-Missouria Tribe of Oklahoma may begin after that date if no additional claimants come forward. Dated: October 3, 1997.

**Francis P. McManamon,**

*Departmental Consulting Archeologist,  
Manager, Archeology and Ethnography  
Program.*

[FR Doc. 97-26872 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-70-F

## DEPARTMENT OF THE INTERIOR

### Bureau of Reclamation

#### Ecosystem Roundtable Meeting

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** The Ecosystem Roundtable (a subcommittee of the Bay-Delta Advisory Council) (BDAC) will meet to discuss the following issues: a summary of the proposed funding package for the 1997 Category III funds; and the process and schedule for the Restoration Coordination Program and Category III funds in the future. Interested persons may make oral statements to the Ecosystem Roundtable or may file written statements for consideration.

**DATES:** The Ecosystem Roundtable will meet from 9:30 am to 12:30 pm on Tuesday, October 28, 1997.

**ADDRESSES:** The Ecosystem Roundtable will meet in Room 1131, 1416 Ninth Street, Sacramento, CA.

**CONTACT PERSON FOR MORE INFORMATION:** For the Ecosystem Roundtable meeting contact Kate Hansel, CALFED Bay-Delta Program, at (916) 657-2666. If reasonable accommodation is needed due to a disability, please contact the Equal Employment Opportunity Office at (916) 653-6952 or TDD (916) 653-6934 at least one week prior to the meeting.

**SUPPLEMENTARY INFORMATION:** The San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta system) is a critically important part of California's natural environment and economy. In recognition of the serious problems facing the region and the complex resource management decisions that must be made, the state of California and the Federal government are working together to stabilize, protect, restore, and enhance the Bay-Delta system. The

State and Federal agencies with management and regulatory responsibilities in the Bay-Delta system are working together as CALFED to provide policy direction and oversight for the process.

One area of Bay-Delta management includes the establishment of a joint State-Federal process to develop long-term solutions to problems in the Bay-Delta system related to fish and wildlife, water supply reliability, natural disasters, and water quality. The intent is to develop a comprehensive and balanced plan which addresses all of the resource problems. This effort, the CALFED Bay-Delta Program (Program), is being carried out under the policy direction of CALFED. The CALFED Bay-Delta Program is exploring and developing a long-term solution for a cooperative planning process that will determine the most appropriate strategy and actions necessary to improve water quality, restore health to the Bay-Delta ecosystem, provide for a variety of beneficial uses, and minimize Bay-Delta system vulnerability. A group of citizen advisors representing California's agricultural, environmental, urban, business, fishing and other interests who have a stake in finding long term solutions for the problems affecting the Bay-Delta system has been chartered under the Federal Advisory Committee Act (FACA) as the BDAC to advise CALFED on the program mission, problems to be addressed, and objectives for the CALFED Bay-Delta Program. BDAC provides a forum to help ensure public participation, and will review reports and other materials prepared by CALFED staff. BDAC has established a subcommittee called the Ecosystem Roundtable to provide input on annual work plans to implement ecosystem restoration projects and programs.

Minutes of the meetings will be maintained by the CALFED Bay-Delta Program, Suite 1155, 1416 Ninth Street, Sacramento, CA 95814, and will be available for public inspection during regular business hours, Monday through Friday within 30 days following the meeting.

Dated: October 6, 1997.

**Roger Patterson,**

*Regional Director, Mid-Pacific Region.*

[FR Doc. 97-26980 Filed 10-9-97; 8:45 am]

BILLING CODE 4310-94-M

## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation, Criminal Justice Information Services

#### Agency Information Collection Activities: Proposed Collection: Comment Request

**ACTION:** Notice of information collection under review: Analysis of law enforcement officers killed and assaulted.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until December 9, 1997.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time should be direct to SSA Paul J. Gans (phone number and address listed below). If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact SSA Paul J. Gans, 304-625-4830, FBI, CJIS, Statistical Unit, PO Box 4142, Clarksburg WV 26302-9921. Overview of this information collection:

(1) Type of information collection: Extension of Current Collection.

(2) The title of the form/collection: Analysis of Law Enforcement Officers Killed and Assaulted.

(3) The agency form number, if any, and applicable component of the

Department sponsoring the collection. Form: I-728. Federal Bureau of Investigation, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as brief abstract. Primary: State and Local Law Enforcement Agencies. Collection will be printed in English and Spanish. This collection is needed to provide data regarding Law Enforcement Officers Killed and Assaulted throughout the United States. Data is analyzed, tabulated, and published in the comprehensive annual "Law Enforcement Officers Killed and Assaulted".

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 17,145 agencies; 500 estimated annual responses [zero reports are not required]; and with an average completion time of 1 hour per report per responding agency.

(6) An estimate of the total public burden (in hours) associated with this collection: 500 hours annually.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G. Street, NW., Washington, DC 20530.

Dated: October 6, 1997.

**Robert B. Briggs,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 97-26944 Filed 10-9-97; 8:45 am]

BILLING CODE 4410-02-M

## DEPARTMENT OF JUSTICE

### Office of Justice Programs

#### Office of Juvenile Justice and Delinquency Prevention

#### Agency Information Collection Activities: Proposed Collection; Comment Request

**ACTION:** Notice of information collection under emergency review; 1996 national youth gang survey.

The Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention has submitted the following information collection request to the Office of Management and Budget (OMB) for emergency review and approval in accordance with the emergency review procedures of the Paperwork Reduction Act of 1995. The regular 60 day notice for this information collection was published in the **Federal Register** on

June 10, 1997. Neither the Department of Justice or the Office of Juvenile Justice and Delinquency Prevention received any comments from the public.

The purpose of this notice is to allow an additional 30 days for public comment until November 10, 1997. During this same time period, emergency review and approval of this information collection has been requested from OMB by October 8, 1997. If granted, the emergency approval is only valid for 45 days. All comments should be directed to OMB, Office of Information and Regulatory Affairs: Attention: Mr. Patrick Boyd, 202-395-5871, Department of Justice Desk Officer, Washington, DC 20530.

The Department of Justice request written comments and suggestions from the public and affected agencies concerning the proposed information collection. Your comments should address one or more of the following four points:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including though 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.

Overview of the information collection:

1. *Type of information collection:* New Collection.

2. *Title of information collection:* 1996 National Youth Gang Survey.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* None. Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, United States Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary—State or Local law enforcement agencies (mainly, police and sheriff's departments, and in rare cases, state law enforcement agencies). Other—None. This collection of information will gather information

related to youth and their activities for research and assessment purposes.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:*

Survey—Version A: 4,000 respondents;

5 minutes to respond

Survey—Version B: 4,000 respondents;

10 minutes to respond

6. *An estimate of the total public burden (in hours) associated with the collection:* 1,000 hours.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Justice Management Division, Information Management and Security Staff, Suite 850, Washington Center Building, 1001 G Street, NW, Washington, DC 20530.

Dated: October 6, 1997.

**Robert B. Briggs,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 97-26977 Filed 10-9-97; 8:45 am]

BILLING CODE 4410-18-M

## DEPARTMENT OF LABOR

### Bureau of International Labor Affairs

#### U.S. National Administrative Office; National Advisory Committee for the North American Agreement on Labor Cooperation; Notice of Open Meeting by Teleconference

**AGENCY:** Office of the Secretary, Labor.

**ACTION:** Notice of open meeting by teleconference, October 31, 1997.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act (Pub. L. 94-463), the U.S. National Administrative Office (NAO) gives notice of a meeting of the National Advisory Committee for the North American Agreement on Labor Cooperation (NAALC), which was established by the Secretary of Labor.

The Committee was established to provide advice to the U.S. Department of Labor on matters pertaining to the implementation and further elaboration of the NAALC, the labor side accord to the North American Free Trade Agreement (NAFTA). The Committee is authorized under Article 17 of the NAALC.

The Committee consists of 12 independent representatives drawn from among labor organizations, business and industry, and educational institutions.

**DATES:** The Committee will meet on October 31, 1997 from 1:00 p.m. to 3:00 p.m. The meeting will be by teleconference.

**ADDRESSES:** U.S. Department of Labor, 200 Constitution Avenue NW., Room C-5515 (Seminar Room 1A), Washington, DC 20210. The meeting is open to the public on a first-come, first served basis.

**FOR FURTHER INFORMATION CONTACT:** Irasema Garza, designated Federal Officer, U.S. NAO, U.S. Bureau of International Labor Affairs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4327, Washington, DC 20210. Telephone 202-501-6653 (this is not a toll free number).

**SUPPLEMENTARY INFORMATION:** Please refer to the notice published in the **Federal Register** on December 15, 1994 (59 FR 64713) for supplementary information.

Signed at Washington, DC, on October 6, 1997.

**Irasema T. Garza,**

*Secretary, U.S. National Administrative Office.*

[FR Doc. 97-27005 Filed 10-9-97; 8:45 am]

BILLING CODE 4510-28-M

## DEPARTMENT OF LABOR

### Employment Standards 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) [44 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 Employment Standards Administration is soliciting comments concerning two information collections: (1) Notice of Issuance of Insurance Policy, Form CM-921; and (2) Request for Employment Information, Form CA-1027. Copies of the proposed information collection requests can be obtained by contacting the office listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before

December 10, 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.

**ADDRESSEES:** Contact Ms. Margaret Sherrill at the U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-3201, Washington, D.C. 20210, telephone (202) 219-7601. The Fax number is (202) 219-6592. (These are not toll-free numbers.)

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Sections 423 of the Federal Mine Safety and Health Act of 1977, as amended specifies that a responsible coal mine operator (RMO) must be insured and outlines the requirements for each contract of insurance, including civil penalties to which a RMO is subject provided prescribed procedures are not followed. In addition, 20 CFR Part V, Subpart C, 726.208-213 requires that each insurance carrier shall report each policy and endorsement issued, canceled, or reviewed with respect to RMOs to the OWCP, Division of Coal Mine Workers' Compensation, and that separate reports shall be submitted for multiple operators so covered. The CM-921 is completed by the insurance carrier and forwarded to the Department for review.

##### II. Current Actions

The Department of Labor (DOL) seeks extension of approval to collect this information in order to carry out its responsibility to meet the statutory requirements to identify those RMOs who have secured insurance for payment of Black Lung benefits.

*Type of Review:* Extension.

*Agency:* Employment Standards Administration.

*Title:* Notice of Issuance of Insurance Policy.

*OMB Number:* 1215-0059.

*Agency Numbers:* CM-921.

*Affected Public:* Business or other for-profit; State, Local or Tribal Government.

*Total Respondents:* 60.

*Frequency:* Annually.

*Total Responses:* 4,000.

*Average Time Per Response for Reporting:* 10 minutes.

*Estimated Total Burden Hours:* 667.

*Total Burden Cost (capital/startup):* 0.

*Total Burden Cost (operating/maintenance):* \$1,600,000.

##### I. Background

Payment of Compensation for partial disability to injured Federal employees is required under 5 U.S.C. 8106. This section also requires the Office of Workers' Compensation to obtain information regarding a claimant's earnings during a period of eligibility to compensation. The CA-1027 is used to obtain earnings information for an individual employed by a private employer and is used as criteria for determining the claimants entitlement to compensation benefits.

##### II. Current Actions

The Department of Labor (DOL) seeks extension of approval to collect this information in order to carry out its responsibility to meet the statutory requirements of the Federal Employees' Compensation Act to determine the appropriate level of benefits.

*Type of Review:* Extension.

*Agency:* Employment Standards Administration.

*Title:* Request for Employment Information.

*OMB Number:* 1215-0105.

*Agency Numbers:* CA-1027.

*Affected Public:* Business or for profit.

*Total Respondents:* 1,000.

*Frequency:* On occasion.

*Total Responses:* 1,000.

*Average Time Per Response for Reporting:* 15 minutes.

*Estimated Total Burden Hours:* 250.

*Total Burden Cost (capital/startup):* 0.

*Total Burden Cost (operating/maintenance):* \$320,000.

Dated: October 6, 1997.

**Cecily A. Rayburn,**

*Director, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.*

[FR Doc. 97-27006 Filed 10-9-97; 8:45 am]

BILLING CODE 4510-27-M

## DEPARTMENT OF LABOR

Employment Standards  
Administration; Wage and Hour  
DivisionMinimum 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, N.W., Room S-3014, Washington, D.C. 20210.

**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 publication in the **Federal Register** are in parentheses following the decisions being modified.

*Volume I*

New Hampshire  
NH970001 (Feb. 14, 1997)  
NH970007 (Feb. 14, 1997)  
New Jersey  
NJ970003 (Feb. 14, 1997)  
NJ970004 (Feb. 14, 1997)  
NJ970007 (Feb. 14, 1997)

*Volume II*

District of Columbia  
DC97001 (Feb. 14, 1997)  
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Maryland  
MD970021 (Feb. 14, 1997)  
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MD970036 (Feb. 14, 1997)  
MD970048 (Feb. 14, 1997)  
MD970056 (Feb. 14, 1997)  
MD970059 (Feb. 14, 1997)

## Pennsylvania

PA970005 (Feb. 14, 1997)  
PA970007 (Feb. 14, 1997)  
PA970008 (Feb. 14, 1997)  
PA970009 (Feb. 14, 1997)  
PA970010 (Feb. 14, 1997)

PA970012 (Feb. 14, 1997)  
PA970015 (Feb. 14, 1997)  
PA970019 (Feb. 14, 1997)  
PA970021 (Feb. 14, 1997)  
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PA970028 (Feb. 14, 1997)  
PA970029 (Feb. 14, 1997)  
PA970031 (Feb. 14, 1997)  
PA970035 (Feb. 14, 1997)  
PA970040 (Feb. 14, 1997)  
PA970054 (Feb. 14, 1997)

## Virginia

VA970008 (Feb. 14, 1997)  
VA970015 (Feb. 14, 1997)  
VA970035 (Feb. 14, 1997)  
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VA970054 (Feb. 14, 1997)  
VA970055 (Feb. 14, 1997)  
VA970058 (Feb. 14, 1997)  
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VA970104 (Feb. 14, 1997)  
VA970105 (Feb. 14, 1997)

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## Alabama

AL970008 (Feb. 14, 1997)  
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AL970042 (Feb. 14, 1997)

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FL970032 (Feb. 14, 1997)

## Georgia

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GA970073 (Feb. 14, 1997)  
GA970089 (Feb. 14, 1997)

*Volume IV*

## Illinois

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IL970003 (Feb. 14, 1997)  
IL970006 (Feb. 14, 1997)  
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IL970012 (Feb. 14, 1997)  
IL970013 (Feb. 14, 1997)  
IL970014 (Feb. 14, 1997)  
IL970016 (Feb. 14, 1997)  
IL970018 (Feb. 14, 1997)  
IL970026 (Feb. 14, 1997)

## Michigan

MI970001 (Feb. 14, 1997)  
MI970066 (Feb. 14, 1997)  
MI970067 (Feb. 14, 1997)  
MI970068 (Feb. 14, 1997)  
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MI970070 (Feb. 14, 1997)  
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MI970075 (Feb. 14, 1997)  
MI970076 (Feb. 14, 1997)  
MI970077 (Feb. 14, 1997)

## Wisconsin

WI970017 (Feb. 14, 1997)  
WI970021 (Feb. 14, 1997)  
WI970033 (Feb. 14, 1997)

WI970049 (Feb. 14, 1997)

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AR970003 (Feb. 14, 1997)

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IA970005 (Feb. 14, 1997)

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KS970012 (Feb. 14, 1997)

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*Volume VI*

Alaska

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WA970005 (Feb. 14, 1997)

WA970006 (Feb. 14, 1997)

WA970008 (Feb. 14, 1997)

WA970011 (Feb. 14, 1997)

WA970013 (Feb. 14, 1997)

*Volume VII*

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CA970088 (Feb. 14, 1997)

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CA970098 (Feb. 14, 1997)

CA970099 (Feb. 14, 1997)

CA970100 (Feb. 14, 1997)

CA970101 (Feb. 14, 1997)

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CA970112 (Feb. 14, 1997)

CA970113 (Feb. 14, 1997)

CA970114 (Feb. 14, 1997)

CA970115 (Feb. 14, 1997)

Hawaii

HI970001 (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 country.

The general wage determinations issued under 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, DC 20402, (202) 512-1800.

When ordering hard-copy subscription(s), be sure to specify the States(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 States covered by each volume. Throughout the remainder of the year, regular weekly updates are distributed to subscribers.

Signed at Washington, DC this 3rd Day Of October 1997.

**Carl Poleskey,**

*Chief, Branch of Construction Wage Determinations.*

[FR Doc. 97-26664 Filed 10-9-97; 8:45 am]

BILLING CODE 4510-27-M

**NUCLEAR REGULATORY COMMISSION**

[Docket No. 50-255]

**In the Matter of Consumers Energy Company (Palisades Plant); Exemption**

**I**

Consumers Energy Company (the licensee) is the holder of Facility Operating License No. DPR-20 which authorizes operation of the Palisades Plant. The Palisades facility is a pressurized-water reactor located at the licensee's site in Van Buren County, Michigan. The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Commission now or hereafter in effect.

**II**

Pursuant to 10 CFR 50.12(a), "Specific exemptions," the Commission may

grant exemptions from the requirements of the regulations of this part (1) which are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) where special circumstances are present.

Section II.G. of 10 CFR Part 50, Appendix J, Option A, defines Type B tests as "tests intended to detect local leaks and to measure leakage across each pressure-containing or leakage-limiting boundary \* \* \*," which includes air lock door seals.

Section III.D.2.(b)(ii) of 10 CFR Part 50, Appendix J, Option A, requires air locks opened during periods where containment integrity is not required to undergo a full air lock pressure test at the end of such periods.

Section III.D.2.(b)(iii) of 10 CFR Part 50, Appendix J, Option A, requires air locks opened during periods where containment integrity is required to undergo a full air lock pressure test within 3 days after being opened.

**III**

By letters dated January 10, 1996, and February 20, 1997, the licensee requested an exemption from 10 CFR Part 50, Appendix J, Option A, Sections III.D.2.(b)(ii) and III.D.2.(b)(iii), for Type B testing of the emergency escape air lock. Specifically, this exemption would permit the licensee to perform a door seal contact verification check in lieu of the final pressure test required by Appendix J following opening the air lock doors for post-test restoration or seal adjustment.

The exemption request is necessary due to the original design of the emergency escape air lock. During special testing in 1992, the licensee showed that the annulus between the door seals could not be successfully tested without the door strongback installed even at pressures as low as 2 psig. This testing, along with information from the vendor, confirms that between-the-seal pressure testing on the emergency escape air lock doors cannot be properly measured or evaluated if the door strongbacks are not installed. Similarly, the inner door does not fully seal with the reverse-direction pressure of a full air lock pressure test unless the strongback is installed.

Since the removal of the inner door strongback after pressure testing requires the outer door to be opened, a between-the-seals test of the outer door would be required by the regulation. This test would require the installation of a strongback on the outer door. Further, full pressure testing or the pressure induced by the strongback may

cause the seals to take a set. It is therefore necessary to open both doors (one at a time) after any pressure testing to ensure full seal contact, and there is a potential need to readjust the seals to restore seal contact.

As an alternative to a final pressure test required by Appendix J for verification of door seal functionality, the licensee has proposed a final door seal contact verification. This seal performance verification is completed following the full pressure air lock test, after the removal of the inner door strongback, and just prior to final closure of the air lock doors. The requested exemption would not affect compliance with the present requirement to perform a full pressure emergency escape air lock test at 6-month intervals. It would also not affect the requirement to perform a full pressure emergency escape air lock test within 72 hours of opening either door during periods when containment integrity is required. The seal contact check replaces the pressure test required by Appendix J for the door opening(s) and/or seal adjustments associated with restoration from the required full pressure tests.

The licensee has performed additional low pressure between-the-seals testing on the escape lock door seals to measure seal leak rates at low initial pressures and without the door strongbacks installed, to see if such tests would yield useful results. The tests indicated that meaningful between-the-seals testing is not possible with the present design of the escape air lock, without strongbacks installed.

The licensee has also considered possible modifications to the existing emergency escape air lock doors in an attempt to identify other methods of complying with the Appendix J requirements. The modifications that were considered were:

*1. Modify the Seal Design or Change the Seal Material*

A proposal was received from the air lock vendor to perform testing of different seal shapes and materials. This was later withdrawn. The vendor believes, and the licensee concurs, that the seal material and shape currently in use are reliable and adequate to maintain containment integrity. Simply changing the seal material or shape would be unlikely to allow meaningful between-the-seals tests with strongbacks removed.

*2. Perform Door Modifications by Removing the Doors and Altering the Sealing Surfaces*

Minor modifications were considered for the door mechanisms in conjunction with reconfigured sealing surfaces. This modification has never been performed by the air lock vendor and would be experimental. There is no guarantee that these efforts would be successful in allowing Palisades to perform between-the-seals testing. The cost of this modification is estimated by the licensee to be roughly equal to performing an air lock retrofit, as described below.

*3. Perform an Air Lock Retrofit Which Would Include Removing and Replacing the Doors, the Ends of the Bulkhead, and the Door Mechanisms*

The doors would be replaced with doors of a design whose seals can be tested per Appendix J without additional restraint or subsequent seal restoration. The mechanisms would be updated for smoother operation but their function would not be altered.

The only viable alternative found was the replacement of the air lock doors, which the licensee has estimated would cost a minimum of \$700,000. The licensee states that the cost of performing the modification is not warranted because no increase in plant or public safety would be realized. The other modifications to the present doors or seals would not ensure adequate performance improvement for unrestrained between-the-seals testing.

During its review, the staff questioned whether post-test seal adjustment or "fluffing" was necessary because the door seals were too old or worn out to rebound properly to their original shape after leakage rate testing or whether past fluffing had damaged the seals, such that replacement of the seals could result in acceptable between-the-seals testing. The licensee's response, dated February 20, 1997, stated that the seals are replaced approximately every 3 years and that the seals have not exceeded their service lives. Also, the licensee stated that fluffing has not damaged the seals, as indicated by continued successful Type B tests on both the emergency escape air lock and on the personnel air lock, on whose seals fluffing is also performed.

The licensee's proposed test methods deviate from the requirements of Appendix J in two ways:

- (1) The seals are not leakage rate tested after opening the doors for post-test restoration, such as removing the strongbacks; and
- (2) The seals are not leakage rate tested after being adjusted (e.g., fluffed).

The following quotation from American National Standard ANSI/ANS-56.8-1994, "Containment System Leakage Testing Requirements," is pertinent. Section 3.3.4.2 states, in part:

An airlock test shall be performed whenever repairs or adjustments have been performed that affect the leakage rate characteristics of the airlock. Opening of the airlock for the purpose of removing airlock testing equipment following an airlock test does not require further testing of the airlock.

The quoted provisions have been endorsed by the staff through Regulatory Guide 1.163, "Performance-Based Containment Leak-Test Program," dated September 1995, for plants following Option B of Appendix J. Although Palisades follows Option A of Appendix J for Type B and C leakage tests, in this case the quoted provisions represent a valid technical position that may be used to help establish a basis for granting an exemption from the requirements of Option A of Appendix J.

Therefore, concerning deviation (1) described above, the staff's technical position is that leakage rate testing is not necessary after opening the doors for post-test restoration. Option A of Appendix J requires a leakage rate test after opening a door, with the idea that the door opening is a relatively isolated event. Requiring another test immediately after a valid test simply because the door was opened again to remove test equipment is not necessary to meet the intent of the regulation, especially if it leads to an infinite series of tests, as in this case. Thus, deviation (1) is acceptable as part of an exemption from Option A of Appendix J.

Concerning deviation (2) above, there is considerable evidence that post-test seal adjustment should not necessitate a follow-up leakage rate test in this case. The present practice ensures proper door seal contact prior to final door closure. The performance of this door seal contact check has led to the successful completion of subsequent emergency escape air lock full pressure tests since the procedural practice began in 1987. Also, no ILRT in that period has failed because of emergency escape air lock door seal leakage. Based on these results, the air lock doors have been proven to function as designed using current methods of testing and maintenance, including seal contact checks. Alternatives would only provide approximately the same level of protection for public health and safety as currently exists. Continuing with the current methods of testing will not result in undue risk to public health and safety and is consistent with the common defense and security. Further,

the underlying purpose of between-the-seals testing is to verify the seal integrity after an air lock door is opened or its seals adjusted. The seal contact check performed on the emergency escape air lock door seals serves this purpose and ensures the doors are sealing properly. Therefore, application of the regulation to perform between-the-seals leakage rate tests after seal adjustment is not necessary in this case to achieve the underlying purpose of the rule.

#### IV

Accordingly, the Commission concludes that the licensee's proposal to perform seal contact testing instead of Type B leakage rate between-the-seals testing on the emergency escape air lock door seals is acceptable. There is reasonable assurance that the containment leakage limiting function will be maintained.

The licensee's request cites the special circumstances of 10 CFR 50.12, Sections (a)(2)(ii) and (a)(2)(iii), as the basis for the exemption. Appendix J to 10 CFR Part 50 requires full pressure tests following air lock door openings. The licensee stated that the proposed alternate seal contact verification check will ensure that the air lock doors are sealing properly. The licensee also stated that the only viable alternative to the proposed exemption would be to perform an air lock retrofit that would involve a significant cost to the licensee. The Commission concludes that the special circumstances of 10 CFR 50.12(a)(2)(ii) are present in that application of the regulation in these particular circumstances is not necessary to achieve the underlying purpose of the rule.

#### V

Accordingly, the Commission has determined, pursuant to 10 CFR 50.12(a), that this exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. The Commission further determines that special circumstances as provided in 10 CFR 50.12(a)(2)(ii) are present justifying the exemption.

Therefore, the Commission hereby grants the exemption from 10 CFR Part 50 Appendix J, Option A, Sections III.D.2.(b)(ii) and III.D.2.(b)(iii), to the extent that leakage rate testing is not necessary after opening the emergency escape air lock doors for post-test restoration or post-test adjustment of the airlock door seals.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have

a significant effect on the quality of the human environment (62 FR 34720).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 30th day of September 1997.

For the Nuclear Regulatory Commission.

**Frank J. Miraglia,**

*Acting Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 97-26991 Filed 10-9-97; 8:45 am]

BILLING CODE 7590-01-P

#### NUCLEAR REGULATORY COMMISSION

[Docket No. 030-01788]

#### National Institutes of Health; Issuance of Director's, Decision Under 10 CFR § 2.206, Correction

This document corrects a notice appearing in the **Federal Register** of September 24, 1997 (62 FR 50018) concerning the issuance of a Director's Decision on a petition requesting that the Director, Office of Nuclear Material Safety and Safeguards take action with respect to the National Institutes of Health.

1. On page 50025, third column, second full paragraph, fifth line, the date reading "July 14, 1997" is corrected to read "July 14, 1995."

2. On page 50027, second column, first full paragraph, line 13 is corrected to read "1300µCi of P-32. The person with the".

Dated at Rockville, Maryland, this 6th day of October, 1997.

For the Nuclear Regulatory Commission.

**David L. Meyer,**

*Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration.*

[FR Doc. 97-26892 Filed 10-9-97; 8:45 am]

BILLING CODE 7590-01-P

#### NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-282, 50-306, and 72-10]

#### Northern States Power Company, Prairie Island Nuclear Plant, Units 1 and 2 Prairie Island Independent Spent Fuel Storage Installation; Receipt of Petition For Director's Decision Under 10 CFR 2.206

Notice is hereby given that by a Petition filed pursuant to 10 CFR 2.206 on August 26, 1997, Prairie Island Coalition (Petitioner) requested that the NRC (1) suspend Northern States Power Company's (the licensee) Materials License No. SNM-2506 for cause under

Section 50.100 of Title 10 of the *Code of Federal Regulations* (10 CFR 50.100) until all material issues regarding the maintenance, unloading, and decommissioning processes and procedures, as described in the Petition and a similar Petition filed on May 28, 1997, by the Prairie Island Indian Community, have been adequately addressed and resolved, and until the maintenance and unloading processes and procedures in question are safely demonstrated under the scrutiny of independent third-party review of the TN-40 cask seal maintenance and unloading procedure; (2) determine that the licensee violated 10 CFR 72.122(f) by using a cask design that requires periodic seal maintenance and emergency seal replacement that must be performed in the plant storage pool; (3) determine that the licensee violated 10 CFR 72.122(h) by using a cask that must be placed into the pool for necessary maintenance and/or unloading procedures; (4) determine that the licensee violated 10 CFR 72.122(l) by loading casks and storing them before the licensee had procedures adequate to safely unload and decommission the TN-40 casks; (5) determine that the licensee violated 10 CFR 72.130 by using the TN-40 cask and failing to make provisions capable of accomplishing the removal of radioactive waste and contaminated materials at the time the independent spent fuel storage installation (ISFSI) is permanently decommissioned; (6) determine that the licensee violated 10 CFR 72.11 by failing to provide and include complete and accurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submissions regarding cask maintenance and unloading issues; (7) determine that the licensee violated 10 CFR 72.12 by deliberately and knowingly submitting incomplete and inaccurate material information regarding maintenance and unloading of TN-40 casks in the application for the Prairie Island ISFSI and in subsequent submissions regarding cask maintenance and unloading issues; (8) require that the licensee pay a substantial penalty for each cask loaded in violation of NRC regulations; (9) administer such other sanctions for the alleged violations of NRC regulations as the NRC deems necessary and appropriate; (10) provide Petitioner the opportunity to participate in a public review of maintenance, unloading, and decommissioning processes and procedures in question and an opportunity to comment on draft

findings after investigation by the NRC; (11) order modification of the licensee's Technical Specifications for the Prairie Island ISFSI to ensure a demonstrated ability to in fact safely maintain, unload, and decommission TN-40 casks; (12) review the licensee's processes and procedures for maintenance, unloading, and decommissioning, and if the licensee does not possess capability to unload casks, order the licensee to build a "Hot Shop" for air unloading of casks and transfer of the fuel; (13) initiate a formal rulemaking proceeding to solicit information and review current information regarding thermal shock and corrosion inherent in dry cask storage and usage and to define the parameters of degradation acceptable under 10 CFR 72.122(h); (14) initiate a formal rulemaking proceeding to define the parameters of retrievability required under 10 CFR 72.122(l); and (15) initiate a formal rulemaking proceeding for amendment of current licenses and rules for prospective licensing proceedings to require demonstration of a safe cask unloading ability before a cask may be used at an ISFSI.

The Petition has been referred to the Director of the Office of Nuclear Reactor Regulation. As provided by 10 CFR 2.206, further action will be taken within a reasonable time. Regarding the requests for formal rulemaking proceedings as detailed in Items 13, 14, and 15 in the Petition, the NRC staff is reviewing these requests in accordance with 10 CFR 2.802, "Petition for Rulemaking."

A copy of the Petition is available for inspection at the Commission's Public Document Room at 2120 L Street, NW., Washington, DC, and at the local public document room located at the Minneapolis Public Library, Technology and Science Department, 300 Nicollet Mall, Minneapolis, MN.

Dated at Rockville, Maryland, this 2nd day of October 1997.

For the Nuclear Regulatory Commission.

**Samuel J. Collins,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 97-26992 Filed 10-9-97; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Regulatory Guides; Issuance, Availability

The Nuclear Regulatory Commission has issued six new guides in its Regulatory Guide Series. This series has been developed to describe and make

available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the Commission's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

The new regulatory guides provide guidance on methods acceptable to the NRC staff on complying with the NRC's regulations for promoting high functional reliability and design quality in software used in safety systems of nuclear power plants. The guides endorse industry consensus standards of the Institute of Electrical and Electronics Engineers. The guides and the standards they endorse are Regulatory Guide 1.168, "Verification, Validation, Reviews, and Audits for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," which endorses IEEE Std 1012-1986, "IEEE Standard for Software Verification and Validation Plans," and IEEE Std 1028-1988, "IEEE Standard for Software Reviews and Audits"; Regulatory Guide 1.169, "Configuration Management Plans for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," endorses IEEE Std 828-1990, "IEEE Standard for Software Configuration Management Plans," and ANSI/IEEE Std 1042-1987, "IEEE Guide to Software Configuration Management"; Regulatory Guide 1.170, "Software Test Documentation for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," which endorses IEEE Std 829-1983, "IEEE Standard for Software Test Documentation"; Regulatory Guide 1.171, "Software Unit Testing for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," which endorses IEEE Std 1008-1987, "IEEE Standard for Software Unit Testing"; Regulatory Guide 1.172, "Software Requirements Specifications for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," which endorses IEEE Std 830-1993, "IEEE Recommended Practice for Software Requirements Specifications"; and Regulatory Guide 1.173, "Developing Software Life Cycle Processes for Digital Computer Software Used in Safety Systems of Nuclear Power Plants," which endorses IEEE Std 1074-1995, "IEEE Standard for Developing Software Life Cycle Processes."

Comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time. Written comments may be submitted to the

Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Regulatory guides are available for inspection at the Commission's Public Document Room, 2120 L Street NW., Washington, DC. Single copies of regulatory guides, both active and draft guides, may be obtained free of charge by writing the Office of Administration, Attn: Printing, Graphics and Distribution Branch, USNRC, Washington, DC 20555-0001, or by fax at (301) 415-5272. Issued guides may also be purchased from the National Technical Information Service on a standing order basis. Details on this service may be obtained by writing NTIS, 5285 Port Royal Road, Springfield, VA 22161. Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 15th day of September 1997.

For the Nuclear Regulatory Commission.

**Malcolm R. Knapp,**

*Acting Director, Office of Nuclear Regulatory Research.*

[FR Doc. 97-26993 Filed 10-9-97; 8:45 am]

BILLING CODE 7590-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 22841; 812-10796]

### Blanchard Funds, et al.; Notice of Application

October 6, 1997.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under section 6(c) of the Investment Company Act of 1940 (the "Act") from section 15(a) of the Act.

**SUMMARY OF APPLICATION:** Signet Banking Corporation ("Signet"), parent of Virtus Capital Management, Inc. ("Adviser"), has entered into an agreement and plan of merger with First Union Corporation ("First Union"). The indirect change in control of the Adviser will result in the assignment, and thus the termination, of the existing advisory contracts between Blanchard Funds ("Blanchard"), The Virtus Funds ("Virtus"), Blanchard Precious Metals Fund, Inc. ("Precious Metals") (collectively, the "Funds") and the Adviser. The order would permit the implementation, without shareholder approval, of new investment advisory

agreements for a period of up to 120 days following the date of the change in control of the Adviser (but in no event later than April 30, 1998). The order also would permit the Adviser to receive all fees earned under the new advisory agreements following shareholder approval.

**APPLICANTS:** Blanchard, Virtus, Precious Metals, and the Adviser.

**FILING DATES:** The application was filed on September 23, 1997.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SAC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 31, 1997, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, c/o Evergreen Keystone Investment Services Inc., 200 Berkeley Street, Boston, Massachusetts 02116.

**FOR FURTHER INFORMATION CONTACT:** John K. Forst, Attorney Advisor, at (202) 942-0569, or Mary Kay Frech, Branch Chief, at (202) 942-0564 (Office of Investment Company Regulation, Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. 202-942-8090).

### Applicants' Representations

1. Blanchard and Virtus are Massachusetts business trusts registered under the Act as open-end management investment companies. Precious Metals is a Maryland corporation also registered under the Act as an open-end management investment company. Blanchard and Virtus currently offer six and eight series (the "Portfolios"), respectively, to the public. The Adviser, a wholly-owned subsidiary of Signet, is an investment adviser registered under the Investment Advisers Act of 1940. The Funds and the Adviser have

entered into sub-advisory agreements for certain Portfolios.<sup>1</sup>

2. On July 18, 1997, First Union entered into an agreement and plan of merger with Signet, under which Signet would be merged with and into First Union in exchange for shares of common stock of First Union (the "Transaction"). As a result of the Transaction, Signet will become a wholly-owned subsidiary of First Union and the Adviser will remain a wholly-owned subsidiary of Signet. Applicants expect consummation of the Transaction on November 1, 1997.

3. Applicants request an exemption to permit implementation, prior to obtaining shareholder approval, of new investment advisory agreements between each Fund and the Adviser, on behalf of each of the Funds, and new sub-advisory agreements between the Adviser and each appropriate subadviser (collectively, "New Agreements"). The requested exemption will cover an interim period of not more than 120 days beginning on the date the Transaction is consummated and continuing through the date on which each New Agreement is approved or disapproved by the shareholders of each Portfolio or Precious Metals, but in no event later than April 30, 1998 (the "Interim Period"). Applicants state that the New Agreements will be identical in substance to the existing investment advisory agreements ("Existing Agreements"). The aggregate contractual rate chargeable for the advisory services under each New Agreement will remain the same as under the relevant Existing Agreement.

4. On September 16, 1997, the boards of trustees of Blanchard and Virtus, and the board of directors of Precious Metals (collectively, the "Boards") held in-person meetings to evaluate whether the terms of the New Agreements are in the best interests of the Funds and their shareholders. At the meetings, a majority of the members of the Boards, including a majority of members who are not "interested persons" of the Funds, as that term is defined in section 2(a)(19) of the Act (the "Independent Trustees"), voted in accordance with section 15(c) of the Act to approve the New Agreements and to submit the New Agreements to the shareholders of each

<sup>1</sup> The following firms serve as subadvisers to the respective Funds under sub-advisory agreements with the Funds and the Adviser: Mellon Capital Management Corporation (for the Blanchard Asset Allocation and Global Growth Funds); United States Trust Company of New York (for the Blanchard Flexible Tax-Free Bond Fund); Cavelti Capital Management Ltd (for Precious Metals); Trend Capital Management, Inc. (for The Style Manager Fund and The Style Manager; Large Cap Fund).

of the Funds at meeting expected to be held on or about February 2, 1998 (the "Meetings").

5. Applicants expect that proxy materials for the Meetings will be mailed on or about December 12, 1997. Applicants believe that the requested relief is necessary to permit continuity of investment management for the Funds during the Interim Period and to prevent disruption of the services for the Funds.

6. Applicants also request an exemption to permit the Adviser to receive from each Fund, upon approval by their respective shareholders, all fees earned under the New Agreements during the Interim Period. Applicants state that the fees paid during the Interim Period will be unchanged from the fees paid under the Existing Agreements.

7. Applicants propose to enter into an escrow arrangement with an unaffiliated financial institution. The fees payable to the Adviser during the Interim Period under the New Agreements will be paid into an interest-bearing escrow account maintained by the escrow agent. The escrow agent will release the amounts held in the escrow account (including any interest earned): (a) To the Adviser only upon approval of the relevant New Agreement by the shareholders of the Funds; or (b) to the relevant Fund if the Interim period has ended and its New Agreement has not received the requisite shareholder approval. Before any such release is made, the Independent Trustees of the Funds will be notified.

### Applicants' Legal Analysis

1. Section 15(a) of the Act provides, in pertinent part, that it is unlawful for any person to serve as an investment adviser to a registered investment company, except pursuant to a written contract that has been approved by the vote of a majority of the outstanding voting securities of the investment company. Section 15(a) further requires the written contract to provide for its automatic termination in the event of its "assignment." Section 2(a)(4) of the Act defines "assignment" to include any direct or indirect transfer of a contract by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor.

2. Applicants state that, following the completion of the Transaction, Signet will become a wholly-owned subsidiary of First Union. Applicants believe, therefore, that the Transaction will result in an "assignment" of the Existing Agreements and that the Existing Agreements will terminate by their

terms upon consummation of the Transaction.

3. Rule 15a-4 provides, in pertinent part, that if an investment advisory contract with an investment company is terminated by an assignment in which the adviser does not directly or indirectly receive a benefit, the adviser may continue to serve for 120 days under a written contract that has not been approved by the company's shareholders, provided that: (a) The new contract is approved by that company's board of directors (including a majority of the non-interested directors); (b) the compensation to be paid under the new contract does not exceed the compensation that would have been paid under the contract most recently approved by the company's shareholders; and (c) neither the adviser nor any controlling person of the adviser "directly or indirectly receives money or other benefit" in connection with the assignment. Applicants state that because of the benefits to Signet, the Adviser's parent, arising from the Transaction, applicants may not rely on rule 15a-4.

4. Section 6(c) provides that the SEC may exempt any person, security, or transaction from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that the requested relief meets this standard.

5. Applicants note that the terms and timing of the Transaction were determined by First Union and Signet and arose primarily out of business considerations beyond the scope of the Act and unrelated to the Funds and the Adviser, including the time needed to obtain federal and state banking approvals for the Transaction. Applicants submit that it is in the best interests of shareholders to avoid any interruption in services to the Funds and to allow sufficient time for the consideration and return of proxies and to hold a shareholder meeting.

6. Applicants submit that the scope and quality of services provided to the Funds during the Interim Period will not be diminished. During the Interim Period, the Adviser would operate under the New Agreements, which would be substantively the same as the Existing Agreements, except for their effective dates. Applicants submit that they are not aware of any material changes in the personnel who will provide investment management services during the Interim Period. Accordingly, the Funds should receive,

during the Interim Period, the same advisory services, provided in the same manner, at the same fee levels, and by substantially the same personnel as they received before the Transaction.

7. Applicants contend that the best interests of shareholders of the Funds would be served if the Adviser receives fees for its services during the Interim Period. Applicants state that the fees are a substantial part of the Adviser's total revenues and, thus, are essential to maintaining its ability to provide services to the Funds. In addition, the fees to be paid during the Interim Period will be unchanged from the fees paid under the Existing Agreements, which have been approved by the shareholders of each respective Fund.

#### **Applicants' Conditions**

Applicants agree as conditions to the issuance of the exemptive order requested by the application that:

1. The New Agreements will have substantially the same terms and conditions as the Existing Agreements, except for their effective dates.
2. Fees earned by the Adviser in respect of the New Agreements during the Interim Period will be maintained in an interest-bearing escrow account, and amounts in the account (including interest earned on such paid fees) will be paid (a) to the Adviser in accordance with the new Agreements, after the requisite approvals are obtained, or (b) to the respective Fund, in the absence of such approval with respect to such Fund.
3. The Fund will hold meetings of shareholders to vote on approval of the new Agreements on or before the 120th day following the termination of the Existing Agreements (but in no event later than April 30, 1998).
4. Either First Union or the Adviser will bear the costs of preparing and filing the application, and costs relating to the solicitation of the shareholder approval of the Funds necessitated by the Transaction.

5. The Adviser will take all appropriate steps so that the scope and quality of advisory and other services provided to the Funds during the Interim Period will be at least equivalent, in the judgment of the Boards, including a majority of the Independent Trustees, to the scope and quality of services previously provided. If personnel providing material services during the Interim Period change materially, the Adviser will apprise and consult with the Boards to assure that the Boards, including a majority of the Independent Trustees of the Funds, are satisfied that the services provided will not be diminished in scope or quality.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-26900 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-M

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 35-26763]

### **Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")**

October 3, 1997.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by October 27, 1997, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

#### **Columbia Gas System, Inc. (70-8925)**

The Columbia Gas System, Inc. ("Columbia"), a registered holding company, its service company subsidiary, Columbia Gas System Service Corporation, its liquified natural gas subsidiary, Columbia LNG Corporation, its trading subsidiary, Columbia Atlantic Trading Corporation, all located at 12355 Sunrise Valley Drive, Suite 300, Reston, Virginia 20191-3458; Columbia's five distribution subsidiaries, Columbia Gas of Ohio, Inc., Columbia Gas of

Pennsylvania, Inc., Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Commonwealth Gas Services, Inc., all located at 200 Civic Center Drive, Columbus, Ohio 43215; Columbia's two transmission subsidiaries, Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company, located at 1700 MacCorkle Avenue, S.E., Charleston, West Virginia 25314; Columbia's exploration and production subsidiary, Columbia Natural Resources, Inc., 900 Pennsylvania Avenue, Charleston, West Virginia 25302; Columbia's propane distribution subsidiaries, Commonwealth Propane, Inc. and Columbia Propane Corporation, both located at 9200 Arboretum Parkway, Suite 140, Richmond, Virginia 23236; Columbia's energy services and marketing subsidiaries, Columbia Energy Services Corporation ("Columbia Energy"), Columbia Service Partners, Inc. and Columbia Energy Marketing Corporation, all located at 121 Hill Pointe Drive, Suite 100, Canonsburg, Pennsylvania 15317; Columbia's network services subsidiary, Columbia Network Services Corporation ("CNS") and CNS' subsidiary, CNS Microwave, Inc., both located at 1600 Dublin Road, Columbus, Ohio 43215-1082; and Columbia's other subsidiaries, Tristar Ventures Corporation, Tristar Capital Corporation, Tristar Pedrick Limited Corporation, Tristar Pedrick General Corporation, Tristar Binghamton Limited Corporation, Tristar Binghamton General Corporation, Tristar Vineland Limited Corporation, Tristar Vineland General Corporation, Tristar Rumford Limited Corporation, Tristar Georgetown Limited Corporation, Tristar Georgetown General Corporation, Tristar Fuel Cells Corporation, TVC Nine Corporation, TVC Ten Corporation and Tristar System, Inc., all located at 205 Van Buren, Herndon, Virginia 22070, have filed a post-effective amendment to their joint application-declaration under sections 6(a), 7, 9(a), 10 and 12(b) of the Act and rules 45 and 53.

By order dated December 23, 1996 (HCAR No. 26634) ("Order"), the Commission authorized the Applicants to establish their internal and external financing program, through December 31, 2001. In particular, the Order authorized Columbia, its existing nonutility subsidiaries and any nonutility subsidiaries established before December 31, 2001, to enter into guarantee arrangements, obtain letters of credit, and otherwise provide credit support for their respective subsidiaries in amounts of up to \$500 million ("Guaranties"). Columbia and its existing and future nonutility

subsidiaries now propose to increase the amount of Guaranties to \$2 billion.

Columbia wants to increase its investments in non-rate regulated businesses, particularly gas marketing operations, and will use the Guaranties to support these activities. Columbia notes that, in May 1997, Columbia Energy entered into an agreement to purchase and market the offshore natural gas production for the Kerr-McGee Corporation ("Kerr-McGee") of approximately 250 Mmcf per day. Columbia Energy will manage all of Kerr-McGee's United States natural gas marketing activities including scheduling, nominating, balancing pipeline transportation and providing financial risk management services. Also, Columbia Energy purchased Pennunion Energy Services L.L.C. ("Pennunion"), an energy marketing subsidiary of the Pennzoil Company. The Pennunion acquisition will add sales of 2. Bcf per day.

#### **Conectiv, Inc. (70-9069)**

Conectiv, Inc. ("Conectiv"), 800 King Street, Wilmington, Delaware 19899, a Delaware corporation not currently subject to the Act, has filed an application-declaration under sections 6(a), 7, 8, 9(a), 10, 11, and rules 80 through 91, 93 and 94 under the Act.

Conectiv proposes to acquire, by means of the Mergers described below ("Mergers"), all of the issued and outstanding common stock of Delmarva Power & Light Company ("Delmarva") and Atlantic Energy, Inc. ("Atlantic"). Conectiv makes four other requests. Following the Mergers, Conectiv will register under section 5 of the Act.

First, Conectiv requests that Support Conectiv ("Support Conectiv") be designated as a subsidiary service company under rule 88 of the Act.<sup>1</sup> Second, Conectiv requests approval of the terms of the service agreement among companies in the Conectiv system and Support Conectiv. Third, Conectiv seeks Commission approval for it to acquire the gas properties of Delmarva and to continue to operate Delmarva as a combination utility. Fourth, Conectiv seeks Commission approval for it to acquire the nonutility activities, businesses and investments of Delmarva and Atlantic.

Delmarva is a public utility company which provides electric service in Delaware, Maryland and Virginia and gas service in Delaware. As of December 31, 1996, Delmarva provided electric utility service to approximately 442,000 customers in an area encompassing about 6,000 square miles in Delaware (253,000 customers), Maryland (169,000

<sup>1</sup> Support Conectiv will be incorporated before the consummation of the Mergers to serve as the service company for the Conectiv system.

customers) and Virginia (20,000 customers), and gas utility service to approximately 100,000 customers in an area consisting of about 275 square miles in northern Delaware.

For the year ended December 31, 1996, Delmarva's operating revenues on a consolidated basis were approximately \$1,160 million, of which approximately \$981 million were derived from electric operations, \$114 million from gas operations and \$65 million from other operations. Consolidated assets of Delmarva and its subsidiaries at December 31, 1996 were approximately \$2,979 million, consisting of approximately \$2,536 million in identifiable electric utility property, plant and equipment; approximately \$219 million in identifiable gas utility property, plant and equipment; and approximately \$224 million in other corporate assets.

As of December 31, 1996 Delmarva owned gas property consisting of a liquefied natural gas plant located in Wilmington, Delaware with a storage capacity of 3.045 million gallons and a maximum daily sendout capacity of 49,898 Mcf per day. This facility is used primarily as a peak-shaving facility for Delmarva's gas customers. Delmarva also owns four natural gas city gate stations at various locations in its gas service territory. These stations have a total contract sendout capacity of 125,000 Mcf per day. Delmarva has 111 miles of transmission mains (including 11 miles of joint-use gas pipelines that are used 10% for gas distribution and 90% for electricity production), 1,539 miles of distribution mains and 1,091 miles of service lines. The Delmarva gas facilities are located exclusively in New Castle County, Delaware.

Delmarva has seven direct nonutility subsidiaries: Delmarva Industries, Inc., Delmarva Energy Company, Delmarva Services Company, Conectiv Services, Inc., Conectiv Communications, Inc., Delmarva Capital Investments, Inc. and East Coast Natural Gas Cooperative, L.L.C. ("ECNG").<sup>2</sup>

<sup>2</sup> Delmarva Industries, Inc. and Delmarva Energy Company participate in oil and gas exploration and development opportunities.

Delmarva Services Company owns and finances an office building that it leases to Delmarva and/or its affiliates. Delmarva Services Company also owns approximately 2.9% of the common stock of Chesapeake Utilities Corporation, a publicly-traded gas utility company with gas utility operations in Delaware, Maryland and Florida.

Conectiv Services, Inc. acquires and operates service businesses primarily involving heating, ventilation and air conditioning sales, installation and servicing, and other energy-related activities.

Conectiv Communications, Inc. provides a full-range of retail and wholesale telecommunications services.

Delmarva Capital Investments, Inc. is a holding company for a variety of unregulated investments.

ECNG is a limited liability company in which Delmarva holds a 1/7th interest, is engaged in gas related activities.

On December 31, 1996, Delmarva's nonutility subsidiaries and investments constituted approximately 4 percent of the consolidated assets of Delmarva and its subsidiaries.

Delmarva also has a nonutility subsidiary trust, Delmarva Power Financing I ("DPF I"), which was formed in 1996 in connection with the issuance by Delmarva of Cumulative Quarterly Income Preferred Securities.

Atlantic is a public utility holding company that claims an exemption from regulation by the Commission under section 3(a)(1) from all provisions of the Act except section 9(a)(2).

The principal subsidiary of Atlantic is Atlantic City Electric Company ("ACE"). ACE is itself a holding company which claims exemption from regulation by the Commission under section 3(a)(1) from all provisions of the Act except section 9(a)(2). ACE is engaged in the generation, transmission, distribution and sale of electric energy. ACE serves a population of approximately 476,000 customers in a 2,700 square-mile area of Southern New Jersey.

ACE currently has one utility subsidiary, Deepwater Operating Company ("Deepwater"). Deepwater operates generating facilities in New Jersey for ACE. Deepwater owns no physical assets. Prior to the closing of the Mergers, the employees of Deepwater will become employees of ACE. ACE also has a nonutility subsidiary trust, Atlantic Capital I ("ACI"), which was formed in 1996 in connection with the issuance by ACE of Cumulative Quarterly Income Preferred Securities.

On a consolidated basis, Atlantic's operating revenues for the calendar year ended December 31, 1996 were approximately \$980 million, and its total assets as of December 31, 1996 were approximately \$2,671 million.

Atlantic has two direct nonutility subsidiaries, Atlantic Energy International, Inc. ("AEII") and AEE.<sup>3</sup>

At December 31, 1996, Atlantic's nonutility subsidiaries and investments constituted approximately 8.2 percent of the consolidated book value of the assets of Atlantic and its subsidiaries.

Conectiv has no operations other than those contemplated by the Merger Agreement to accomplish the Mergers. At present, Conectiv's common stock,

consisting of 1,000 issued and outstanding shares, is owned by Delmarva and Atlantic, each of which owns 500 shares.

The merger agreement, dated as of August 9, 1996, as amended and restated as of December 26, 1996 ("Merger Agreement"), provides for Atlantic to be merged with and into Conectiv. Also under the Merger Agreement, DS Sub, Inc., a direct subsidiary of Conectiv ("DS Sub"), will be merged with and into Delmarva.<sup>4</sup>

Conectiv will be a public utility holding company and will have two direct utility subsidiaries, Delmarva and ACE, whose only nonutility subsidiaries will be the two trusts: DPF I and ACI. Delmarva's and Atlantic's other direct subsidiaries will also become direct subsidiaries of Conectiv. Support Conectiv will be incorporated as a service company for the Conectiv system.

Conectiv proposes to convert each issued and outstanding share of Delmarva common stock into the right to receive one share of Conectiv common stock ("Conectiv Common Stock"). Each issued and outstanding share of Atlantic common stock shall be converted into the right to receive 0.75 shares of Conectiv Common Stock and 0.125 shares of Class A common stock of Conectiv ("Conectiv Class A Common Stock").<sup>5</sup>

The Mergers will have no effect on the shares of preferred stock of Delmarva issued and outstanding at the time of the consummation of the Mergers, each series of which and each share of which will remain unchanged. Atlantic has no shares of preferred stock outstanding.

<sup>4</sup> DS Sub has been incorporated as a direct transitory subsidiary of Conectiv established to effectuate the Delmarva Merger. The authorized capital stock of DS Sub consists of 1000 shares of common stock, \$0.01 par value, all of which is held by Conectiv. DS Sub has not had, and prior to the closing of the Mergers will not have, any operations other than the activities contemplated by the Merger Agreement necessary to accomplish the combination of DS Sub and Delmarva.

<sup>5</sup> The proposed use of two classes of common stock addresses the difference in Delmarva's and Atlantic's evaluations of the growth prospects of, and uncertainties associated with deregulation of, the regulated electric utility business of Atlantic. The Conectiv Class A Common Stock has been created to track the performance of the currently regulated electric utility businesses of ACE. This stock will be issued only to the holders of the Atlantic Common Stock, thereby giving the current holders of Atlantic Common Stock a proportionately greater opportunity to share in the growth prospects of, and a proportionately greater exposure to the uncertainties associated with deregulation of, the regulated electric utility business of Atlantic. The proposed Conectiv Class A Common Stock will have full voting rights with the Conectiv Common Stock.

Conectiv proposes that the Commission authorize Support Conectiv as the system service company. Support Conectiv will provide the Conectiv system companies with a variety of administrative, management, engineering, construction, environmental and support services, either directly or through agreements with associate or nonassociate companies, as needed.

Support Conectiv will enter into a service agreement with most, if not all, companies in the Conectiv system. Support Conectiv's authorized capital stock will consist of up to 3,000 shares of common stock, \$1 par value per share. Conectiv will hold all issued and outstanding shares of Support Conectiv common stock.

Support Conectiv and its associate companies' cost and allocation methods will conform with the "at costs" requirements of section 13 and rules under the Act.

Conectiv also requests authority to provide, directly, or through one or more of its subsidiaries, retail services to residential, commercial and industrial customers. Retail services include energy analysis, project management, design and construction, energy efficient equipment installation and maintenance, facilities management services, environmental services and compliance, fuel procurement, and other similar kinds of managerial and technical services.<sup>6</sup>

Conectiv further requests authority, after consummation of the Mergers for a period of 24 months from the effective date of the Mergers, to transfer certain assets such as real property used for administrative purposes and information technology equipment and software from Delmarva or ACE at cost to Support Conectiv.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-26905 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-M

<sup>6</sup> Conectiv states that the retail services may specifically include: (1) service lines repair/extended warranties; (2) surge protection; (3) appliance merchandising/repair/extended warranties; (4) utility bill insurance; and (5) incidental and reasonably necessary products and services related to the choice, purchase or consumption of any of these products and services.

<sup>3</sup> AEII brokers used utility equipment to developing countries, and provides utility consulting services related to the design of substations and other utility infrastructure. AEE is a holding company for Atlantic's non-regulated subsidiaries.

**SECURITIES AND EXCHANGE COMMISSION**

[Rel. No. IC-22840; 812-10550]

**Reich & Tang Distributors L.P., et al.,  
Notice of Application**

October 3, 1997.

AGENCY: Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 2(a)(35), 22(d), and 26(a)(2) of the Act and rule 22c-1 under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit certain unit investment trusts to impose sales charges on a deferred basis and waive the deferred sales charge in certain cases.

**APPLICANTS:** Reich & Tang Distributors L.P. (the "Sponsor"), Equity Securities Trust, Mortgage Securities Trust, Municipal Securities Trust, New York Municipal Trust, A Corporate Trust, Schwab Trusts, any future unit investment trust sponsored or co-sponsored by the Sponsor or an entity controlled by or under common control with the Sponsor (collectively, the "Trusts"), and any future series of the Trusts.

**FILING DATE:** The application was filed on March 7, 1997, and amended on April 26, 1997, and September 30, 1997.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 28, 1997, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's request, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street N.W., Washington, D.C. 20549. Applicants, c/o Reich & Tang Distributors L.P., 600 Fifth Avenue, New York, New York 10022, Attention: Peter J. DeMarco.

**FOR FURTHER INFORMATION CONTACT:** Lawrence W. Pisto, Senior Attorney, at (202) 942-0527 or Mercer E. Bullard, Branch Chief, at (202) 942-0564 (Division of Investment Management,

Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street N.W., Washington, D.C. 20549, tel. 202-942-8090.

**Applicants' Representations**

1. Each of the Trusts is a unit investment trust consisting of one or more series ("Series") registered under the Act and sponsored, co-sponsored or to be sponsored by the Sponsor. Each Series is created by a trust indenture among the Sponsor, a banking institution or trust company as a trustee, and, as the case may be, an evaluator. The Sponsor acquires a portfolio of securities which it deposits with the trustee in exchange for certificates representing units of fractional undivided interest in the portfolio ("Units"). The Units are offered to the public by the Sponsor, underwriters, and dealers at a public offering price which, during the initial offering period, is based upon the aggregate market value of the underlying securities plus a front-end sales charge. The sales charge currently ranges from 2.95% to 5.5% of the public offering price, generally depending on the terms of the underlying securities. The maximum charge is usually subject to reduction in compliance with rule 22d-1 under the Act under certain stated circumstances disclosed in the prospectus, such as for volume purchases.

2. Applicants request an order to the extent necessary to permit them to impose a deferred sales charge ("DSC") instead of a front-end sales charge, and waive the DSC under certain circumstances. Under applicants' proposal, a portion of the DSC will be collected "up-front," *i.e.*, immediately upon purchase of Units, and the balance will be collected subsequently in equal installments ("Installment Payments").<sup>1</sup> In order to ensure that sufficient cash is available to make Installment Payments, the Trust may hold securities the proceeds from the maturity or sale of which may be used to make the Payments. Installment Payments will be collected from unitholders by withholding the Payment amount from unitholders' distributions on the Units, from proceeds of Unit redemptions or sales by the unitholder, or by reducing

the number of Units held by the unitholder. The Installment Payments will be passed by the trustee to the Sponsor at the time they are collected. The trustee may advance an Installment Payment if, for example, it is due immediately before a dividend or interest payment is due on portfolio securities. The trustee will be reimbursed when the Installment Payment is collected from the unitholder.

3. When a unitholder redeems or sells Units, the balance of the unitholder's Installment Payments on the redeemed Units will be deducted from the proceeds of the redemption or sale. When calculating the amount due, it will be assumed that Units on which the DSC has been paid in full are redeemed first. With respect to Units on which the DSC has not been fully paid, the DSC will be applied on the assumption that Units held for the longest time are redeemed or sold first. Under certain circumstances, the sponsor may waive the DSC in connection with redemptions or sales of Units. These circumstances will be disclosed in the prospectus for the relevant Series and implemented in accordance with rule 22d-1, under the Act.

4. Each Series offering Units subject to a DSC will include in its prospectus the disclosure required in Form N-1A relating to deferred sales charges, modified as appropriate to reflect the differences between unit investment trusts and open-end investment companies. The prospectus also will disclose any security that may be included in the portfolio for purposes of paying the DSC from the maturity or sale proceeds, and that the securities will be sold *pro rata* or that a specific security will be designated for sale.

**Applicants' Legal Analysis**

1. Section 4(2) of the Act defines a "unit investment trust" as an investment company which "issues only redeemable securities." Section 2(a)(32) defines a *redeemable security* as a security that, upon its presentation to the issuer, entitles the unitholder to receive approximately his or her proportionate share of the issuer's current net assets, or the cash equivalent of those assets. Rule 22c-1, promulgated under section 22(c) of the Act, requires that the price of a redeemable security issued by a registered investment company for purposes of sale, redemption, and repurchase be based on the security's current net asset value. To the extent that an Installment Payment may be deemed to cause unitholders to receive less than net asset value upon

<sup>1</sup> For example, assuming a one-year Trust with a \$1,000 price for 100 Units and a 2.95% DSC, the Sponsor would collect \$10.00 (1.00%) up-front, and the remaining balance of \$19.50 (1.95%) in 10 equal monthly payments of \$1.95.

redemption, applicants request relief from section 2(a)(32) and rule 22c-1.

2. Section 22(d) and rule 22d-1 require an investment company and its principal underwriter and dealer to sell securities only at a current public offering price described in the investment company's prospectus, with the exception of sales of redeemable securities at prices which reflect scheduled variations in the "sales load." Section 2(a)(35) defines the term *sales load* as the difference between the sales price and the portion of the proceeds invested by the depositor or trustee. Applicants request relief from sections 2(a)(35) and 22(d) to the extent that the DSC may be paid in installments rather than upon purchase.

3. Applicants believe that the provisions of section 22(d), rule 22d-1 and section 2(a)(35), taken together, are intended to prevent (1) riskless trading in investment company securities due to backward pricing, (2) disruption of orderly distribution by dealers selling shares at a discount, and (3) discrimination among investors resulting from different prices charged to different investors. Applicants believe the proposed DSC program will present none of these abuses. Applicants contend that the deduction of the Installment Payments is consistent with the policy of forward pricing. Applicants also contend that the amount, computation and timing of the DSC will promote fair treatment of all unitholders, while permitting the Trusts to offer unitholders the advantage of having a larger portion of their purchase amount invested immediately. Applicants further note that the DSC program will be disclosed in the prospectus of each Series and available on the same terms to all investors. Finally, applicants state that any waiver of the DSC will be disclosed in the prospectus of each Series and implemented in accordance with rule 22d-1.

4. Section 26(a)(2), in relevant part, prohibits a trustee or custodian of a unit investment trust from collecting from the trust as an expense any payment to the trust's depositor or principal underwriter. Because the trustee's payment of the DSC to the Sponsor may be deemed to be an expense under section 26(a)(2)(C), applicants request relief from that section to the extent necessary to permit the trustee to collect DSC payments and disburse them to the Sponsor. Applicants believe that the relief is appropriate because the DSC is more properly characterized as a sales load than as an "expense."

5. Section 6(c) authorizes the SEC to exempt any person or transaction from

any provision of the Act or any rule under the Act to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants believe that their proposal meets this standard.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Any DSC imposed on Units issued by a Series will comply with the requirements of rule 6c-10(a) (1) through (3) under the Act.

2. Each Series offering Units subject to a DSC will include in its prospectus the disclosure required in Form N-1A relating to deferred sales charges, modified as appropriate to reflect the differences between unit investment trusts and open-end investment companies.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-26904 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-M

#### SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-22839; 812-10672]

#### TCW International Equity Limited Partnership, et al.; Notice of Application

October 3, 1997.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for an order under section 17(b) of the Investment Company Act of 1940 (the "Act") granting an exemption from section 17(a) of the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit certain limited partnerships to transfer all of their assets to corresponding series of a registered investment company in exchange for the series' shares, which then will be distributed *pro rata* to partners of the partnerships.

**APPLICANTS:** TCW International Equity Limited Partnership, TCW Japan Limited Partnership, TCW Value Opportunities Fund (collectively, the "Partnerships"), TCW Galileo Funds, Inc. (the "Company"), TCW Asset Management Company ("TAMCO"), and TCW Funds Management, Inc. (the "Adviser").

**FILING DATES:** The application was filed on May 16, 1997, and amendments to the application were filed on August 15, 1997, and October 2, 1997.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 28, 1997, and should be accompanied by proof of service on applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 5th Street, N.W., Washington, DC 20549. Applicants, 865 South Figueroa Street, Suite 1800, Los Angeles, California 90017.

**FOR FURTHER INFORMATION CONTACT:** Brian T. Hourihan, Senior Counsel, at (202) 942-0526, or Mary Kay Frech, Branch Chief, (202) 942-0564 (Office of Investment Company Regulation, Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington D.C. 20549 (tel. (202) 942-8090).

#### Applicants' Representations

1. TCW International Equity Limited Partnership was organized as a California limited partnership on August 19, 1993; TCW Japan Limited Partnership was organized as a Delaware limited partnership on May 2, 1995; and TCW Value Opportunities Fund was organized as a California limited partnership on May 16, 1996. The Partnerships permit investors to purchase and redeem Partnership interests ("Units") at net asset value on a monthly basis. The Partnerships are not registered under the Act in reliance on section 3(c)(1) of the Act. The offerings of the Units were structured as private placements under section 4(2) of the Securities Act of 1933 (the "Securities Act"), and Regulation D promulgated under the Securities Act. Units are sold to institutional investors and high net worth individuals.

2. TAMCO, a wholly owned subsidiary of the TCW Group, Inc., serves as the sole general partner of the

Partnerships and has exclusive responsibility for their overall management, control, and administration. TAMCO, an investment adviser registered under the Investment Advisers Act of 1940, also serves as investment manager with respect to the Partnerships' assets.

3. The Company, a Maryland corporation, is an open-end investment company registered under the Act. Currently, the Company offers thirteen series (the "Existing Funds"). The Company proposes to offer three additional series (the "New Funds"), each of which will correspond to a Partnership in terms of investment objective and policies.

4. The Company has entered into an advisory agreement with the Adviser, a wholly-owned subsidiary of the TCW Group, Inc., pursuant to which the Adviser, an investment adviser registered under the Investment Advisers Act of 1940, will render advisory services to the New Funds. The Adviser will provide services that are substantially the same as those TAMCO currently renders to the corresponding Partnership. The officers of TAMCO serving as portfolio managers of the Partnerships also serve as officers of the Adviser and will serve as portfolio managers of the corresponding New Funds.

5. Applicants propose that, pursuant to an Agreement and Plan of Exchange (the "Plan"), each of the New Funds will acquire assets from its corresponding Partnership in exchange for New Fund shares (the "Exchanges"). New Fund shares delivered to the Partnerships in the Exchanges will have an aggregate net asset value equivalent to the net asset value of the assets transferred by the Partnerships to the Company (except for the effect of certain organizational expenses paid by each New Fund, as discussed below). Upon consummation of the Exchanges, each Partnership will distribute the New Fund shares to its respective partners, with each partner receiving shares having an aggregate net asset value equivalent to the net asset value of the Units held by the partner prior to the Exchange (except for the effect of certain organizational expenses paid by the New Funds and the effect of any assets retained by a Partnership to pay accrued expenses). Each Plan permits the Partnership to retain sufficient assets to pay any Partnership-accrued expenses and retain any assets that a New Fund is not permitted to purchase or that are reasonably determined to be unsuitable for it. No liabilities of a Partnership will be transferred to its corresponding New Fund; all known liabilities, other than

accrued expenses discussed above, will be paid by each Partnership prior to the transfer of its assets to the corresponding New Fund. The general partner, TAMCO, will be responsible for any unknown liabilities of each Partnership. Assets retained by each Partnership that are not needed to pay expenses will be distributed *pro rata* to the partners. After payment of any accrued expenses from retained assets, each Partnership will be liquidated and dissolved.

6. The expenses of the Exchanges will be borne by TAMCO. Organizational expenses, up to a maximum of \$50,000 per New Fund, will be paid by the New Funds and amortized over five years. Organizational expenses in excess of \$50,000 per New Fund will be paid by the Adviser. Any unamortized organizational expenses associated with the organization of the New Funds at the time the Adviser withdraws its initial investment in the Company will be borne by the Adviser, not the New Funds. Through October 31, 1998, the Adviser will place a limit on the annual expenses of each New fund. This limit is generally intended to cap New Fund expense ratios at levels projected to be incurred during 1997 and 1998 by the Partnerships.

7. The board of directors of the Company (the "Board") and TAMCO have considered the desirability of the Exchanges from the respective points of view of the Company and the Partnerships, and all members of the Board (including all of the independent directors) and TAMCO have approved the Exchanges and concluded that: (i) the terms of the Exchanges have been designed to meet the criteria contained in section 17(b) of the Act; (ii) the Exchanges are desirable as a business matter from the respective points of view of the Company and the Partnerships; (iii) the Exchanges are in the best interests of the Company and the Partnerships; (iv) the Exchanges are reasonable and fair, do not involve overreaching, and are consistent with the policies of the Act; (v) the Exchanges are consistent with the policies of the Company and the Partnerships; and (vi) the interests of existing shareholders in the Company and existing partners in the Partnerships will not be diluted as a result of the exchanges. These findings, and the basis upon which the findings were made, have been fully recorded in the minute books of the Company and TAMCO.

8. The Exchanges will not be effected until (i) the Company's registration statement has been filed; (ii) the Company and the Partnerships have received a favorable opinion of counsel

with respect to the tax consequences of the Exchanges; and (iii) the SEC has issued the requested order.

#### Applicants' Legal Analysis

1. Section 17(a) of the Act prohibits any affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal from selling to or purchasing from the registered investment company any security or other property. Section 2(a)(3) of the Act defines an *affiliated person* as, among other things, any person directly or indirectly controlling, controlled by, or under common control with, such other person; any officer, director, partner, copartner or employee of such other person; or, if such other person is an investment company, any investment adviser of the investment company. Each Partnership is an affiliated person of an affiliated person of the Company because TAMCO, the general partner of the Partnerships, and the Adviser are under common control. Thus, the proposed Exchanges may be deemed to be prohibited under section 17(a) of the Act.

2. Section 17(b) of the Act authorizes the SEC to exempt any person from one or more of the provisions of section 17(a) if the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned and the proposed transaction is consistent with the policy of each registered investment company concerned and the general purposes of the Act.

3. Applicants believe that the proposed Exchanges satisfy the requirements of section 17(b). Applicants state that Shares issued by each New Fund will have an aggregate net asset value equal to the value of the assets acquired from its corresponding Partnership. Applicants also state that because Shares will be issued at their net asset value and only nominal Shares will be outstanding when the Exchanges are effected, the Company shareholders will not be diluted. In addition, applicants state that the investment objective and policies of each New Fund are substantially similar to its corresponding Partnership and that after the Exchanges, the limited partners will hold substantially the same assets as Company shareholders as they held as limited partners. In this sense, applicants submit that the Exchanges can be viewed as a change in the form in which assets are held, rather than a disposition giving rise to section 17(a) concerns.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-26903 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Agency Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meeting during the week of October 13, 1997.

A closed meeting will be held on Tuesday, October 14, 1997, at 10:30 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (4), (8), (9)(A) and (10) and 17 CFR 200.402(a) (4), (8), (9)(i) and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Hunt, as duty officer, voted to consider the items listed for the closed meeting in a closed session.

The subject matter of the closed meeting scheduled for Tuesday, October 14, 1997, at 10:30 a.m., will be:

Institution of injunctive actions.

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: October 7, 1997.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 97-27097 Filed 10-8-97; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### United States Properties, Inc.; Order of Suspension of Trading

October 7, 1997.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of United States Properties, Inc. ("USPI"). Questions have been raised regarding the accuracy of assertions by USPI, and by others, in documents sent to and statements made to market-makers of the stock of USPI, other broker-dealers, and to investors concerning, among other things: (1) the identity of the persons in control of the operations and management of the company; (2) the purported members of USPI's advisory board; and (3) the trading and true value of the common stock of USPI.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EDT, October 8, 1997 through 11:59 p.m. EDT, on October 21, 1997.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 97-27096 Filed 10-8-97; 11:30 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39192; File No. SR-CBOE-97-48]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Incorporated Relating to a Reduction in the Value of the Standard & Poor's 100 Stock Index

October 3, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 19, 1997, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange

Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE is filing this rule change to inform the Commission that Standard & Poor's ("S&P") intends to reduce the value of its S&P 100 Stock Index ("Index") option ("OEX") to one-half of its present value by doubling the divisor used in calculating the Index. In connection with this change, the Exchange proposes doubling the current OEX position and exercise limits. The text of the proposed rule change is available at the Office of the Secretary, the CBOE, and at the Commission.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE 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, Proposed Rule Change

###### 1. Purpose

The CBOE began trading OEX options in March 1983.<sup>3</sup> OEX options are American-style, cash-settled options on the S&P 100 Stock Index. The Exchange notes that, on the strength of a sustained bull market, the value of the OEX has doubled in value since mid-1995, such that the value of the index stood at 928.20 as of August 7, 1997. As a result of the significant increase in the value of the underlying index, the premium for OEX options has also increased. This has caused OEX options to trade at a level that may be uncomfortably high for retail investors, a large and important part of the market for OEX.

As a result, at the request of the CBOE, S&P, the reporting authority for the Index, has agreed to a "two-for-one

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 19264 (November 22, 1982), 47 FR 53981 (November 30, 1982).

split" of the Index. The change will be instituted after Commission approval of this proposed rule change. This change will result in a doubling of the OEX contracts outstanding, such that for each OEX contract held, the holder will receive two contracts at the reduced value, with a strike price of one-half of the original strike price. For instance, the holder of an OEX 930 call will receive two OEX 465 calls. The trading symbol will remain as OEX (plus any necessary wrap symbols).

In addition to the strike price being reduced by one-half, the CBOE proposes to double the position and exercise limits applicable to the OEX from 25,000 to 50,000.<sup>4</sup> The Exchange believes this increase in the position and exercise limits is justified because the reduction in the divisor would result in each contract overlying only one-half of the value of a current OEX contract. Consequently, the revised position and exercise limits would be equivalent to the current levels in terms of the value of the Index.

The CBOE will announce the effective date of the change by way of an Exchange circular to the membership, which will also describe the change to the strike prices and the position and exercise limits.

The Exchange expects the proposed changes to attract additional customer business in OEX in those series in which retail customers are most interested in trading. For example, a September 930 (at the money) call option series currently trades at approximately \$2600 per contract. With the Index split, the same option series (once adjusted), with all else remaining equal, would trade at approximately \$1300 per contract. The Exchange believes the proposed change will permit some investors to trade these options who have otherwise been priced out of the market due to the recent market surge. The Exchange believes that OEX options provide an important opportunity for investors to hedge and speculate upon the market risk associated with the stocks comprising this broad-based widely followed Index. By reducing the value of the Index, investors will be able to utilize this trading vehicle, while extending a smaller outlay of capital. The Exchange believes this should attract additional

investors, and, in turn, create a more active and liquid trading environment.

The Exchange believes that reducing the value of the Index does not raise manipulation concerns and will not cause adverse market impact because the Exchange will continue to employ the same surveillance procedures and has proposed an orderly procedure to achieve the Index split, including adequate prior notice to market participants.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act,<sup>5</sup> in that it is designed to perfect the mechanisms of a free and open market and to protect investors and the public interest.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE does not believe that the proposed rule change will impose any burden on competition.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 25049. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 25049. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-97-48 and should be submitted by October 31, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>6</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 97-26901 Filed 10-9-97; 8:45 am]  
BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39201; File No. SR-OCC-97-09]

### Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving a Proposed Rule Change Seeking To Amend the Valuation Rate Applied to Equity Securities and Corporate Debt Deposited as Margin Collateral

October 3, 1997.

On May 21, 1997, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-OCC-97-09) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposal was published in the **Federal Register** on August 18, 1997.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

## I. Description

OCC currently operates a program to accept deposits of equity securities and corporate debt as margin collateral ("valued securities program") under its rule 604(d).<sup>3</sup> The proposed rule change

<sup>6</sup> 17 CFR 200.30-3(a)(12)

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> Securities Exchange Act Release No. 38923 (August 11, 1997), 62 FR 44025.

<sup>3</sup> For a detailed description of the valued securities program, refer to Securities Exchange Act

<sup>4</sup> The Exchange has separately filed for an increase in the position and exercise limits for OEX in SR-CBOE-97-11 (noticed in Securities Exchange Act Release No. 38525 (April 18, 1997), 62 FR 20046 (April 24, 1997)). In the event that SR-CBOE-97-11 is approved by the Commission prior to this filing, the Exchange would seek a doubling of those higher limits.

<sup>5</sup> 15 U.S.C. 78f(b)(5).

amends OCC Rule 604(d)(1) to increase the valuation rate that OCC applies to equity and corporate debt securities deposited with OCC under the valued securities program from 60 percent to 70 percent.

OCC Rule 604(d) permits OCC's clearing members to deposit as margin collateral common and preferred stock and corporate bonds which meet certain standards. Common and preferred stock must have a market value of greater than \$10 per share and must either be (i) traded on a national securities exchange and have last sale reports collected and disseminated pursuant to a consolidated transaction reporting plan or (ii) traded in the over-the-counter market and designated as National Market System Securities pursuant to Commission Rule 11Aa2-1.<sup>4</sup> Corporate bonds must (i) be listed on a national securities exchange and not be in default, (ii) have a current market value that is readily determinable on a daily basis, and (iii) be rated in one of the four highest rating categories by a nationally recognized statistical rating organization.<sup>5</sup>

## II. Discussion

Section 17A(b)(3)(F) of the Act<sup>6</sup> requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds in its custody or control or for which it is responsible. The Commission believes that the effective functioning of the valued securities program since its inception in 1985 and OCC's various financial safeguards and risk monitoring systems, taken as a whole,<sup>7</sup> suggest that an increase from 60 percent to 70 percent in the valuation rate for debt and equity securities deposited as margin collateral should not detract from OCC's ability to safeguard funds and securities in its custody or control or for which it is responsible.

## III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the

Release Nos. 33893 (April 14, 1994), 59 FR 18427 [File No. SR-OCC-92-13] (order granting accelerated approval to proposed rule change) and 31169 (September 10, 1992), 57 FR 43041 [File No. SR-OCC-92-13] (notice of filing of proposed rule change).

<sup>4</sup> 17 CFR 240.11Aa2-1.

<sup>5</sup> An issue that is suspended from trading in its primary market, or subject to special margin requirements under the rules of its primary market because of volatility, lack of liquidity or similar characteristics may not be deposited with OCC. OCC Rule 604(d)(1).

<sup>6</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>7</sup> OCC financial safeguards include, for example, the valued securities program's eligibility standards for equity and corporate debt securities and OCC's authority to collect intraday margin calls as needed.

Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-OCC-97-09) be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>8</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 97-26902 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-M

## DEPARTMENT OF STATE

[Public Notice No. 2611]

### Shipping Coordinating Committee; Subcommittee on Ocean Dumping; Notice of Meeting

The Subcommittee on Ocean Dumping of the Shipping Coordinating Committee will hold an open meeting on October 21, 1997 from 1:30 pm to 3:30 pm to obtain public comment on the issues to be addressed at the October 27-31, 1997 Nineteenth Consultative Meeting of the Contracting Parties to the London Convention, which is the global international treaty regulating ocean dumping. The meeting will also review the results of the Twentieth Scientific Group Meeting of the London Convention held in May 1997.

The meeting will be held at Environmental Protection Agency offices located at the Fairchild Building, 499 South Capitol Street SW, Washington, DC 20003, Room 709. Interested members of the public are invited to attend, up to the capacity of the room.

For further information, please contact Mr. John Lishman, Chief, Marine Pollution Control Branch, telephone (202) 260-1952.

Dated: September 25, 1997.

**Russell A. LaMantia,**

*Chairman, Shipping Coordinating Committee.*

[FR Doc. 97-26970 Filed 10-9-97; 8:45 am]

BILLING CODE 4710-07-M

## TENNESSEE VALLEY AUTHORITY

### Privacy Act of 1974; System of Records

**AGENCY:** Tennessee Valley Authority.

**ACTION:** Amendment of systems of records to include new categories of individuals and new routine uses.

**SUMMARY:** In accordance with the Privacy Act (5 U.S.C. 552a(e)(4)), the Tennessee Valley Authority (TVA) is issuing notice of our intent to amend the systems of records entitled TVA-2 "Personnel Files—TVA" and TVA-11 "Payroll Records—TVA" to include new categories of individuals for TVA-2 and new routine uses for TVA-2 and TVA-11. We invite public comment on this publication.

**EFFECTIVE DATE:** The changes will become effective as proposed, on November 10, 1997, unless comments which would warrant our preventing the changes from taking effect are received on or before 30 days from the date of this notice.

**ADDRESSES:** Interested individuals may comment on this publication by writing to Wilma H. McCauley, Privacy Act Officer, Tennessee Valley Authority, 1101 Market Street (WR 4Q), Chattanooga, Tennessee 37402-2801. All comments received will be available for public inspection at that address.

**FOR FURTHER INFORMATION CONTACT:** Wilma H. McCauley, (423) 751-2523.

### SUPPLEMENTARY INFORMATION:

#### Discussion of Proposed Additions to Routine Use

Pursuant to the Pub. L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, TVA will disclose data from its Personnel Files and Payroll Records to the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services for use in its Federal Parent Locator System (FPLS) and Federal Tax Offset System, DHHS/OCSE No. 09-90-0074. Information on this system was last published at 61 FR 38754, July 25, 1996.

FPLS is a computerized network through which States may request location information from Federal and State agencies to find non-custodial parents and/or their employers for purposes of establishing paternity and securing support.

Effective October 1, 1997, the FPLS will be enlarged to include the National Directory of New Hires, a database containing information on employees commencing employment, quarterly wage data on private and public sector employees, and information on unemployment compensation benefits. Effective October 1, 1998, the FPLS will be expanded to include a Federal Case Registry. The Federal Case Registry will contain abstracts on all participants involved in child support enforcement cases. When the Federal Case Registry is instituted, its files will be matched on

<sup>28</sup> 7 CFR 200.30-3(a)(12).

an ongoing basis against the files in the National Directory of New Hires to determine if an employee is a participant in a child support case anywhere in the country. If the FPLS identifies a person as being a participant in a State child support case, that State will be notified of the participant's current employer. State requests to the FPLS for location information will also continue to be processed after October 1, 1998.

The data to be disclosed by TVA to the FPLS include: New Hire information and Quarterly Wage information.

In addition, names and social security numbers submitted by TVA to the FPLS will be disclosed by the Office of Child Support Enforcement to the Social Security Administration for verification to ensure that the social security number provided is correct.

The data disclosed by TVA to the FPLS will also be disclosed by the Office of Child Support Enforcement to the Secretary of the Treasury for use in verifying claims for the advance payment of the earned income tax credit or to verify a claim of employment on a tax return.

The data from TVA-2 disclosed by TVA to TVA contractors will enable TVA contractors to make suitability determinations regarding prospective employees.

The full text of TVA-2 appears at 55 FR 34817-18, August 24, 1990, and 56 FR 19137, April 25, 1991. The full text of TVA-11 appears at 55 FR 34824-26, August 24, 1990.

#### TVA-2

##### SYSTEM NAME:

Personnel Files—TVA.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former TVA employees, some contractors, applicants for employment, and applicants for employment by TVA contractors.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Information related to education; qualifications; work history; interests and skills; test results; performance evaluation; career counseling; personnel actions; job description; salary and benefit information; service dates, including other Federal and military service; replies to congressional inquiries; medical data; and security investigation data.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831dd; Executive Order 10577; Executive Order 10450; Executive Order 11478; Executive Order

11222; Veterans' Preference Act of 1944, 58 Stat. 387, as amended; Equal Employment Opportunity Act of 1972. Pub. L. 92-261, 86 Stat. 103; various sections of title 5 of the United States Code related to employment by TVA.

##### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To provide information to TVA contractors engaged in making suitability determinations for their prospective employees under TVA contracts.

To the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services Federal Parent Locator System (FPLS) and Federal Tax Offset System for use in locating individuals and identifying their income sources to establish paternity, establish and modify orders of support and for enforcement action.

To the Office of Child Support Enforcement for release to the Social Security Administration for verifying social security numbers in connection with the operation of the FPLS by the Office of Child Support Enforcement.

To Office of Child Support Enforcement for release to the Department of Treasury for purposes of administering the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verifying a claim with respect to employment in a tax return.

#### TVA-11

##### SYSTEM NAME:

Payroll Records—TVA.

##### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All employees and personal service contractors selected for certain training programs and applicants for employment.

##### CATEGORIES OF RECORDS IN THE SYSTEM:

Personal identifying information, pay, leave and debt claim information.

##### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Tennessee Valley Authority Act of 1933, 16 U.S.C. 831-831dd; Internal Revenue Code; Fair Labor Standards Act, 29 U.S.C. Chapter 8, 5 U.S.C. Chapter 63.

##### ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

To the Office of Child Support Enforcement, Administration for Children and Families, Department of Health and Human Services Federal Parent Locator System (FPLS) and

Federal Tax Offset System for use in locating individuals and identifying their income sources to establish paternity, establish and modify orders of support and for enforcement action.

To the Office of Child Support Enforcement for release to the Social Security Administration for verifying social security numbers in connection with the operation of the FPLS by the Office of Child Support Enforcement.

To Office of Child Support Enforcement for release to the Department of Treasury for purposes of administering the Earned Income Tax Credit Program (Section 32, Internal Revenue Code of 1986) and verifying a claim with respect to employment in a tax return.

**William S. Moore,**

*Senior Manager, Administrative Services.*

[FR Doc. 97-27003 Filed 10-9-97; 8:45 am]

BILLING CODE 8120-08-P

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Notice of Request for Extension and Revision of a Currently Approved Information Collection

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) this notice announces the Department of Transportation's (DOT) intention to request an extension for and revision to a currently approved information collection.

**DATES:** Comments on this notice must be received by December 9, 1997.

**ADDRESSES:** Comments should be sent to the Special Authorities Division (X-57), Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590-0002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ronale Taylor or Mr. Charles McGuire, Office of the Secretary, Office of Aviation Analysis, X-57, Department of Transportation, at the address above. Telephone: (202) 366-1037/9539.

##### SUPPLEMENTARY INFORMATION:

*Title:* Canadian Charter Air Taxi Operators.

*OMB Control Number:* 2106-0013.

*Expiration Date:* October 31, 1997.

*Type of Request:* Extension for and revision to a currently approved information collection.

*Abstract:* The 1974 U.S.-Canada Nonscheduled Air Services Agreement provides that Canadian air taxi operators that meet the criteria imposed by the Canadian and U.S. governments will be authorized to fly into the U.S. The Agreement further provides that such authorization will be considered with a minimum of procedural delay. Prior to the adoption of Part 294 Canadian air taxi operators were required to formally seek this authorization by a somewhat lengthy process. The Airline Deregulation Act of 1978 expanded the Department of Transportation's exemption powers to include foreign air carriers. Part 294 was adopted to provide a simpler method of obtaining Department approval and Form 4505 was developed to request only the information necessary to ensure that applicant Canadian operators meet the U.S. requirements for operating authority. Approval of this authority also exempts Canadian charter air taxi operators from certain provisions of Subtitle VII of Title 49 of the United States Code (Transportation).

Collection of this information is necessary to determine whether or not a Canadian air taxi meets the U.S. criteria for an operating authorization.

*Respondents:* Small Canadian air carriers operating aircraft with 60 seats or less or 18,000 pounds payload or less.

*Estimated Number of Respondents:* 27.

*Average Annual Burden per Respondent:* 30 minutes.

*Estimated Total Burden on Respondents:* 14 hours.

This information collection is available for inspection at the Special Authorities Division (X-57), Office of Aviation Analysis, DOT, at the address above. Copies of 14 CFR Part 294 can be obtained from Ms. Ronale Taylor at the address and telephone number shown above.

Comments are Invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC on October 6, 1997.

**John V. Coleman,**

*Office of Aviation Analysis.*

[FR Doc. 97-26924 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Notice of Request for Extension and Revision of a Currently Approved Information Collection

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended) this notice announces the Department of Transportation's (DOT) intention to request a reinstatement without change of a previously approved collection for which approval has expired.

**DATES:** Comments on this notice must be received by November 9, 1997.

**ADDRESSES:** Comments should be sent to the Special Authorities Division (X-57), Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590-0002.

**FOR FURTHER INFORMATION CONTACT:** Ms. Ronale Taylor or Mr. Charles McGuire, Office of the Secretary, Office of Aviation Analysis, X-57, Department of Transportation, at the address above. Telephone: (202) 366-1037/9539.

#### SUPPLEMENTARY INFORMATION:

*Title:* Foreign Air Freight Forwarders and Foreign Cooperative Shippers Associations.

*OMB Control Number:* 2106-0036.

*Expiration Date:* May 1997.

*Type of Request:* Reinstatement without change of a previously approved collection for which approval has expired.

*Abstract:* Title 14 CFR Part 297 (sec. 297.10) grants foreign indirect air carriers an exemption from certain provisions of Subtitle VII of Title 49 of the United States Code (Transportation) in order that they may consolidate air freight shipments in the U.S. for further transportation on direct air carrier flights. One of the requirements of Part 297 is that the carriers apply for and receive an approved registration from the Department before operating (sec. 297.20). The registration information required makes it possible for the Department to consider the grant or denial of access to U.S. markets by

foreign-owned companies based on the availability of reciprocal privileges for U.S. carriers abroad. Without this requirement, the Department could not protect the competitive and financial interests of U.S. carriers. The form used for these collections is simplified and requests only basic information about the carriers ownership and management.

*Respondents:* Foreign indirect air carriers.

*Estimated Number of Respondents:* 15.

*Average Annual Burden per Respondent:* 30 minutes.

*Estimated Total Burden on Respondents:* 8 hours.

This information collection is available for inspection at the Special Authorities Division (X-57), Office of Aviation Analysis, DOT, at the address above. Copies of 14 CFR Part 297 can be obtained from Ms. Ronale Taylor at the address and telephone number shown above.

Comments are Invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC on October 6, 1997.

**John V. Coleman,**

*Office of Aviation Analysis.*

[FR Doc. 97-26925 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### Reports, Forms, and Recordkeeping Requirements: Agency Information Collection Activity Under OMB Review

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act 1995 (44 USC Chapter 35), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to

the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on July 31, 1997 [62 41127].

**DATES:** Comments must be submitted on or before November 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Mr. Erhard W. Koehler, 202/366-2631 or FAX 202/366-3954, Division of Ship Maintenance and Repair, Maritime Administration, MAR-611, Room 2119, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**Maritime Administration**

*Title:* Maintenance and Repair Cumulative Summary.

*OMB Number:* 2133-0007.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Subsidized ship operators.

*Abstract:* The collection consists of form MA-140 to which are attached invoices and other supporting documents for expenses claimed for subsidy. Subsidized operators submit form MA-140 to the appropriate MARAD region office for review within 60 days of the termination of a subsidized voyage.

*Estimated Annual Burden Hours:* 1,200.

*Number of Respondents:* 4.

*Needs and Users:* The collected information is necessary to perform the reviews required in order to permit payment of Maintenance and Repair subsidy.

*Address:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on October 3, 1997.

**Vanester M. Williams,**

*Clearance Officer, United States Department of Transportation.*

[FR Doc. 97-26921 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

**DEPARTMENT OF TRANSPORTATION**

**Office of the Secretary**

**Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review**

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act 1995 (44 USC Chapter 35), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on April 18, 1997 [62 FR 19160].

**DATES:** Comments must be submitted on or before November 10, 1997.

**FOR FURTHER INFORMATION CONTACT:** Ms. Claretta Duren, (202) 366-4636, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**Federal Highway Administration (FHWA)**

*Title:* Statement of Materials and Labor used by Contractor on Highway Construction Involving Federal Funds.

*OMB Number:* 2125-0033.

*Type of Request:* Reinstatement, without change, of a previously approved collection for which approval has expired.

*Affected Public:* Contractors.

*Abstract:* The form "FHWA-47 "Statement of Materials and Labor Used by Contractors on Highway Construction Involving Federal Funds" is needed in order to obtain information on the usage of materials and labor in highway construction. Title 29 U.S.C. 2 authorizes the Department of Labor to collect the labor-related information using its own forces or by getting the information from other Federal agencies. An informal agreement has been reached for FHWA to collect the desired data for the Department of Labor. This information is used by

FHWA for estimating current material usage and cost distribution on Federal-aid highway construction contracts to aid in planning for future requirements based on anticipated program levels. There is also considerable interest by industry, particularly suppliers of highway construction materials, for the usage information derived from the FHWA-47 forms. This data is collected from contracts of \$1,000,000 or more on the National Highway System and is not considered confidential. The respondent must submit the FHWA-47 form after the project has been completed.

*Estimated Annual Burden Hours:* 7,475.

*Number of Respondents:* 650.

*Address:* Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725-17th Street, NW., Washington, DC 20503, Attention DOT Desk Officer.

Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Issued in Washington, DC, on October 3, 1997.

**Vanester M. Williams,**

*Clearance Officer, United States Department of Transportation.*

[FR Doc. 97-26922 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

**DEPARTMENT OF TRANSPORTATION**

**Aviation Proceedings, Agreements Filed During the Week Ending October 3, 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-97-2964

*Date Filed:* October 2, 1997

*Parties:* Members of the International Air Transport Association

*Subject:*

PTC23 EUR-SEA 0040 dated

September 30, 1997 r1-6

PTC23 EUR-SEA 0041 dated

September 30, 1997 r7

Europe-Southeast Asia Expedited Resos

Intended effective date: as early as November 15, 1997.

*Docket Number:* OST-97-2969

*Date Filed:* October 3, 1997

*Parties:* Members of the International Air Transport Association

*Subject:*

PTC2 EUR 0100 dated September 23, 1997 r1-33

PTC2 EUR 0101 dated September 23, 1997 r34-58

PTC2 EUR 0102 dated September 23, 1997 r59-68

Within Europe Resolutions

(A summary is attached.)

Intended effective date: March 1, 1998

**Paulette V. Twine,**

*Documentary Services.*

[FR Doc. 97-27010 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

## DEPARTMENT OF TRANSPORTATION

### Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending October 3, 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-97-2946.

*Date Filed:* September 29, 1997.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* October 27, 1997.

*Description:* Application of Delta Air Lines, Inc., pursuant to 49 U.S.C. 41102 and 41108 and Subpart Q of the Regulations, applies for renewal of its Certificate of Public Convenience and Necessity for Route 616, segment 12, issued by Order 91-10-33 (October 25, 1991) in the Delta-Pan Am Route Transfer Proceeding, last renewed by Order 93-4-3, permitting Delta to engage in scheduled foreign air transportation of persons, property, and mail between New York, New York and Boston, Massachusetts, on the one hand, and Nairobi, Kenya on the other hand. Delta's certificate authority to serve Nairobi, Kenya on Route 616, segment

12, expires on April 1, 1998. Delta hereby requests renewal of its certificate authority for Route 616, segment 12, for an additional five year duration.

**Paulette V. Twine,**

*Documentary Services.*

[FR Doc. 97-27009 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-62-P

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

#### Environmental Impact Statement: Bibb County, GA

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of intent.

**SUMMARY:** The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in the City of Macon and Bibb County, Georgia.

#### FOR FURTHER INFORMATION CONTACT:

Clyde B. Johnson, Project Development Manager, Federal Highway Administration, 61 Forsyth Street, SW., Suite 17T100, Atlanta, Georgia 30303, Telephone: (404) 562-3657 or David E. Studstill, State Environment/Location Engineer, Georgia Department of Transportation, Office of Environment/Location, 3993 Aviation Circle, Atlanta, Georgia 30336, Telephone: (404) 699-4401.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the Georgia Department of Transportation (GDOT), will prepare an environmental impact statement (EIS) on a proposal to complete the Eisenhower Parkway which is a section of the Fall Line Freeway through the City of Macon and Bibb County, Georgia near the Ocmulgee National Monument. The proposed multiple-lane roadway with a median is intended to provide a connection between the Eisenhower Parkway at Interstate 75 and Emery Highway/U.S. 80.

Improvements to the corridor are considered necessary to provide for the existing and projected traffic demand, complete the multi-laned economic developmental highway, and provide additional connections between east and west Macon. Alternatives under consideration include: (1) Taking no action; (2) widening the exiting roadway facilities to accommodate increase traffic volumes; and (3) constructing a four-lane, limited access highway on new location. Incorporated into and studied with the various build

alternatives will be design variations of grade and alignment.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, and to private organizations and citizens who have previously expressed or are known to have interest with this proposal. A series of public meetings will be held in Macon-Bibb County and in Oklahoma, the home of the Muscogee Creek Nation, in November 1997. In addition, a public hearing will be held. Public notice will be given of the time and place of these meetings and hearing. The draft EIS will be made available for public and agency review and comment prior to the public hearing. No formal scoping meeting has been scheduled at this time.

To ensure that the full range of issues related to this proposed project are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions regarding this proposed action and the EIS should be directed to FHWA at the address provided above.

(Catalogue of Federal Domestic Assistance Program Number 20.250, *Highway Research Planning and Construction*. Georgia's approved clearinghouse review procedures apply to this program)

Issued on: September 30, 1997.

**Clyde B. Johnson,**

*Project Development Engineer, Atlanta, Georgia.*

[FR Doc. 97-26967 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-22-M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### Safety Performance Standards and Research and Development Programs Meetings

**AGENCY:** National Highway Traffic Safety Administration.

**ACTION:** Notice of NHTSA industry meeting.

**SUMMARY:** This notice announces a public meeting at which NHTSA will answer questions from the public and the automobile industry regarding the agency's vehicle regulatory program. In addition, NHTSA will hold a separate public meeting to describe and discuss specific research and development projects.

**DATES:** The Agency's regular, quarterly public meeting relating to its vehicle regulatory program will be held on December 17, 1997, beginning at 9:45

a.m. and ending at approximately 12:30 p.m. Questions relating to the vehicle regulatory program must be submitted in writing by November 20, 1997, to the address shown below. If sufficient time is available, questions received after November 20 may be answered at the meeting. The individual, group or company submitting a question(s) does not have to be present for the question(s) to be answered. A consolidated list of the questions submitted by November 20, 1997, and the issues to be discussed, will be posted on NHTSA's web site ([www.nhtsa.dot.gov](http://www.nhtsa.dot.gov)) by December 15, 1997, and will be available at the meeting. Also, the agency will hold a second public meeting the same day December 17, at 1:30 p.m. devoted exclusively to a presentation of research and development programs. That meeting is described more fully in a separate announcement. The next NHTSA vehicle regulatory program meeting will take place on Tuesday, March 17, 1998 at the Clarion Inn Hotel, 9191 Wickham Road, in Romulus, MI.

**ADDRESSES:** Questions for the December 17, NHTSA Technical Industry Meeting, relating to the agency's vehicle regulatory program, should be submitted to Delia Gage, NPS-01, National Highway Traffic Safety Administration, Room 5401, 400 Seventh Street, SW., Washington, DC 20590, Fax Number 202-366-4329. The meeting will be held at the Clarion Inn Hotel, 9191 Wickham Road, in Romulus, MI.

**FOR FURTHER INFORMATION CONTACT:** Delia Gage, (202) 366-1810.

**SUPPLEMENTARY INFORMATION:** NHTSA holds a regular, quarterly meeting to answer questions from the public and the regulated industries regarding the agency's vehicle regulatory program. Questions on aspects of the agency's research and development activities that relate directly to ongoing regulatory actions should be submitted, as in the past, to the agency's Safety Performance Standards Office. The purpose of this meeting is to focus on those phases of NHTSA activities which are technical, interpretative or procedural in nature. Transcripts of these meetings will be available for public inspection in the NHTSA Technical Reference Section in Washington, DC, within four weeks after the meeting. Copies of the transcript will then be available at ten cents a page, (length has varied from 100 to 150 pages) upon request to NHTSA Technical Reference Section, Room 5108, 400 Seventh Street, SW., Washington, DC 20590. The Technical Reference Section is open to the public

from 9:30 a.m. to 4:00 p.m. We would appreciate the questions you send us to be organized by categories to help us to process the questions into agenda form more efficiently. Sample format as follows:

- I. Rulemaking
  - A. Crash avoidance
  - B. Crashworthiness
  - C. Other Rulemakings
- II. Consumer Information
- III. Miscellaneous

NHTSA will provide auxiliary aids to participants as necessary. Any person desiring assistance of "auxiliary aids" (e.g., sign-language interpreter, telecommunications devices for deaf persons (TDDs), readers, taped texts, brailled materials, or large print materials and/or a magnifying device), please contact Delia Gage on (202) 366-1810, by COB November 20, 1997.

Issued: October 6, 1997.

**L. Robert Shelton,**

*Associate Administrator for Safety Performance Standards.*

[FR Doc. 97-27008 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-59-M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. 97-068; Notice 1]

#### Notice of Receipt of Petition for Decision That Nonconforming 1990-1991 Mercedes Benz 420 SE Passenger Cars Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 1990-1991 Mercedes Benz 420 SE passenger cars are eligible for importation.

**SUMMARY:** This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1990-1991 Mercedes Benz 420 SE passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is November 10, 1997.

**ADDRESSES:** Comments should refer to the docket number and notice number,

and be submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 a.m. to 4 p.m.]

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

**SUPPLEMENTARY INFORMATION:**

**Background**

Under 49 U.S.C. § 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. § 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Champagne Imports, Inc. of Lansdale, Pennsylvania (Registered Importer No. R-90-009) has petitioned NHTSA to decide whether 1990-1991 Mercedes Benz 420 SE passenger cars are eligible for importation into the United States. The vehicle which Champagne believes is substantially similar is the 1990-1991 Mercedes Benz 420 SEL. Champagne has submitted information indicating that Daimler Benz, A.G., the company that manufactured the 1990-1991 Mercedes Benz 420 SEL, certified that vehicle as conforming to all applicable Federal motor vehicle safety standards and offered it for sale in the United States.

The petitioner contends that it carefully compared the 1990-1991 Mercedes Benz 420 SE to the 1990-1991 Mercedes Benz 420 SEL, and found the two models to be substantially similar with respect to compliance with most

applicable Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that the 1990–1991 Mercedes Benz 420 SE, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as the 1990–1991 Mercedes Benz 420 SEL that was offered for sale in the United States, or is capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that the 1990–1991 Mercedes Benz 420 SE is identical to the certified 1990–1991 Mercedes Benz 420 SEL with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence* \* \* \*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the vehicle is capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp that displays the appropriate symbol; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp assemblies; (b) installation of U.S.-model front and rear sidemarker/reflector assemblies; (c) installation of U.S.-model taillamp assemblies; (d) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims*: installation of a tire information placard.

Standard No. 111 *Rearview Mirrors*: replacement of the passenger side rear view mirror.

Standard No. 114 *Theft Protection*: installation of a buzzer microswitch in the steering lock assembly, and a warning buzzer.

Standard No. 118 *Power Window Systems*: rewiring of the power window

system so that the window transport is inoperative when the ignition is switched off.

Standard No. 206 *Door Locks and Door Retention Components*: replacement of the rear door locks and locking buttons with U.S.-model parts.

Standard No. 208 *Occupant Crash Protection*: (a) Installation of a U.S.-model seat belt in the driver's position, or a belt webbing-actuated microswitch inside the driver's seat belt retractor; (b) installation of an ignition switch-actuated seat belt warning lamp and buzzer; (c) replacement of the driver's side air bag and knee bolster with U.S.-model components. The petitioner states that the vehicles are equipped with combination lap and shoulder restraints that adjust by means of an automatic retractor and release by means of a single push button at each front designated seating position, with combination lap and shoulder restraints that release by means of a single push button at each rear outboard designated seating position, and with a lap belt in the rear center designated seating position.

Standard No. 214 *Side Impact Protection*: installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity*: installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the 1990–1991 Mercedes Benz 420 SE must be reinforced, or U.S.-model bumper components must be installed, to comply with the Bumper Standard found in 49 CFR part 581.

The petitioner also states that a vehicle identification number plate must be affixed to the vehicle to comply with the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal**

**Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141 (a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: October 6, 1997.

**Marilynne Jacobs,**

*Director, Office of Vehicle Safety Compliance.*  
[FR Doc. 97–26923 Filed 10–9–97; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. 97–069; Notice 1]

#### Notice of Receipt of Petition for Decision That Nonconforming 1987–1995 BMW K75S Motorcycles Are Eligible for Importation

**AGENCY:** National Highway Traffic Safety Administration, DOT.

**ACTION:** Notice of receipt of petition for decision that nonconforming 1987–1995 BMW K75S motorcycles are eligible for importation.

**SUMMARY:** This document announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1987–1995 BMW K75S motorcycles that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

**DATES:** The closing date for comments on the petition is November 10, 1997.

**ADDRESSES:** Comments should refer to the docket number and notice number, and be submitted to: Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 am to 4 pm]

**FOR FURTHER INFORMATION CONTACT:** George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

#### SUPPLEMENTARY INFORMATION:

##### Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission

into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR Part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

Champagne Imports, Inc. of Lansdale, Pennsylvania ("Champagne") (Registered Importer 90-009) has petitioned NHTSA to decide whether 1987-1995 BMW K75S motorcycles are eligible for importation into the United States. The vehicles which Champagne believes are substantially similar are 1987-1995 BMW K75S motorcycles that were manufactured for importation into, and sale in, the United States and certified by their manufacturer, Bayerische Motorenwerke A.G., as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1987-1995 BMW K75S motorcycles to their U.S. certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that non-U.S. certified 1987-1995 BMW K75S motorcycles, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1987-1995 BMW K75S motorcycles are identical to their U.S. certified counterparts with respect to compliance with Standard Nos. 106 *Brake Hoses*, 111 *Rearview Mirrors*, 116 *Brake Fluid*, 119 *New Pneumatic Tires for Vehicles other than Passenger Cars*, and 122 *Motorcycle Brake Systems*.

Petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: installation of U.S.-model headlamp assemblies.

Standard No. 120 *Tire Selection and Rims for Vehicles other than Passenger Cars*: installation of a tire information placard.

Standard No. 123 *Motorcycle Controls and Displays*: installation of a U.S. model speedometer calibrated in miles per hour.

The petitioner also states that vehicle identification number plates meeting the requirements of 49 CFR Part 565 will be affixed to non-U.S. certified 1987-1995 BMW K75S motorcycles.

Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, S.W., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

**Authority:** 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: October 7, 1997.

**Marilynne Jacobs,**

*Director Office of Vehicle Safety Compliance.*

[FR Doc. 97-27007 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-59-P

## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration

[Docket No. RSPA-97-2968 (PDA-17(R))]

#### Application by William E. Comley, Inc. and TWC Transportation Corporation for a Preemption Determination as to Public Utilities Commission of Ohio Requirements for Cargo Tanks

**AGENCY:** Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Public notice and invitation to comment.

**SUMMARY:** Interested parties are invited to submit comments on an application

by William E. Comley, Inc. and TWC Transportation Corporation for an administrative determination whether Federal hazardous materials transportation law preempts requirements enforced by the Public Utilities Commission of Ohio concerning the transportation of hypochlorite solutions in non-DOT specification cargo tank motor vehicles.

**DATES:** Comments received on or before November 24, 1997, and rebuttal comments received on or before December 9, 1997, will be considered before an administrative ruling is issued by RSPA's Associate Administrator for Hazardous Materials Safety. Rebuttal comments may discuss only those issues raised by comments received during the initial comment period and may not discuss new issues.

**ADDRESSES:** The application and all comments received may be reviewed in the Dockets Office, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW, Washington, DC 20590-0001. Comments may be submitted to the Dockets Office at the above address. Three copies of each written comment should be submitted. Comments may also be submitted by E-mail to "rspa.counsel@rspa.dot.gov." Each comment should refer to the Docket Number set forth above.

A copy of each comment must also be sent to (1) Mr. William E. Comley, Sr., Chairman, WECCO/TWC, 28 Kenton Lands Road, P.O. Box 18580, Erlanger, KY 41018, and (2) Mr. William L. Wright, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, OH 43215-3793. A certification that a copy has been sent to these persons must also be included with the comment. (The following format is suggested: "I certify that copies of this comment have been sent to Messrs. Comley and Wright at the addresses specified in the **Federal Register**.")

**FOR FURTHER INFORMATION CONTACT:** Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001 (Tel. No. 202-366-4400).

#### SUPPLEMENTARY INFORMATION:

##### I. Application for a Preemption Determination

William E. Comley, Inc. (WECCO) and TWC Transportation Corporation (TWC) have applied for a determination that Federal hazardous material transportation law, 49 U.S.C. 5101 *et seq.*, preempts certain requirements of the State of Ohio, enforced by the Public Utilities Commission of Ohio (PUCO),

with respect to cargo tank motor vehicles used to transport hypochlorite solutions. This application arises out of enforcement proceedings brought by PUCO against WECCO and TWC for transporting hypochlorite solutions in non-DOT specification cargo tank motor vehicles. These companies have provided documents, including opinions and orders of PUCO, that indicate the following:

1. WECCO's truck No. 88 was inspected by PUCO on June 3 and September 26, 1991, and WECCO was cited both times for several violations including transporting hypochlorite solution in an unauthorized package.

2. At the time of PUCO's 1991 inspections, truck No. 88 did not have any specification plate. Sometime thereafter, WECCO attached specification plates to its three cargo tanks, including truck No. 88.

3. In its December 17, 1992 Opinion and Order relating to the 1991 citations, PUCO found that, "in order to be an authorized package for the transportation of sodium hypochlorite under HMR 49 CFR 173.277(a)(9), respondent's tank must be classified as an MC 310, MC 311, MC 312 or DOT 412 cargo tank." PUCO also found that truck No. 88 "has several design flaws which prevent it from qualifying under the HMR as a specification MC 312 cargo tank." PUCO assessed a fine of \$11,470 against WECCO, which included \$10,750 for violations of 49 CFR 173.277, transporting hazardous material in an unauthorized package and willful misrepresentation of cargo tank certification. Of the total fine, \$5,000 was suspended for six months.

4. Truck No. 88, which had been transferred by WECCO to TWC, was inspected by PUCO on June 22, 1993, and TWC was cited for eight violations including leaking closures, transporting hypochlorite solution in an unauthorized package, and misrepresenting that the package met the MC 312 specification. On PUCO's hazardous materials report form, the contents of the cargo tank is indicated as "Hypochlorite Solution, PG III."

5. TWC's truck No. 66 was inspected by PUCO on July 3, 1993, and TWC was cited for seven violations including leaking closures, transporting hypochlorite solution in an unauthorized package, and misrepresenting that the package met the MC 312 specification. On WECCO's shipping paper attached to PUCO's hazardous materials report form, the hypochlorite solution is classed within "PG III."

6. In its October 25, 1995 Opinion and Order relating to the 1993 citations,

PUCO found that "numerous defects for both cargo tanks (Nos. 88 and 66) \* \* \* preclude either from meeting the specifications of an MC 312 cargo tank." PUCO also stated that whether or not TWC "need[ed] an MC 312 certified cargo tank to haul sodium hypochlorite solution of the concentration involved in these cases \* \* \* is not an issue before us and respondent has not been charged with any such violation." PUCO assessed a total civil forfeiture of \$14,290.50 against TWC for violations which included transporting hypochlorite solution in unauthorized packages and in tanks misrepresented as meeting MC 312 specifications, in violation of 49 CFR 173.33(a) and 49 CFR 171.2(c), respectively.

Based on telephone conversations with WECCO and PUCO, RSPA understands that no part of the fines or civil forfeitures assessed against WECCO and TWC has been paid, and PUCO is currently seeking to collect these penalties.

The State of Ohio has adopted (as State law) the requirements in the Hazardous Materials Regulations (HMR, 49 CFR parts 171-180) applicable to highway transportation of hazardous materials, including hypochlorite solutions. Under the HMR, since January 1, 1991, hypochlorite solutions containing more than 5% but less than 16% available chlorine may be transported in "non-DOT specification cargo tank motor vehicles suitable for transportation of liquids" and which also meet the general requirements for bulk packagings set forth in 49 CFR 173.24 and 173.24b. 49 CFR 173.241(b); see also 172.101 (Hazardous Materials Table). (At present, hypochlorite solutions up to 5% available chlorine are not subject to the HMR. During a transition period that continued until October 1, 1996, the HMR also authorized the transportation of hypochlorite solutions containing up to 7% available chlorine by weight transported in nonspecification cargo tanks that were "free from leaks and [with] all discharge openings \* \* \* securely closed during transportation." 49 CFR 173.510 (1990 ed.))

According to WECCO and TWC, in the course of these enforcement proceedings, PUCO has required the use of a DOT specification cargo tank motor vehicle, bearing a specification plate, for transportation of hypochlorite solutions containing more than 5% but less than 16% available chlorine. These companies also assert that PUCO has required cargo tank motor vehicles built under the MC 312 specification, that are unloaded at a pressure less than 15 psig,

to be designed and constructed in accordance with the ASME code and also required the certification of MC 312 cargo tank motor vehicles in some manner other than as specified in the HMR.

In comments addressed to this application, PUCO has stated that its policy is to enforce the requirements in the HMR "aggressively yet fairly." It stated that the focus of its enforcement proceedings against WECCO and TWC was the misrepresentation of these two cargo tank motor vehicles as meeting the MC 312 specification, when PUCO "specifically found that the cargo tanks in question did not meet MC 312 specifications." PUCO also stated that it allows the use of non-specification cargo tank motor vehicles for the transportation of hypochlorite solutions with less than 16% available chlorine, but that WECCO and TWC have never provided any evidence on the concentration of the sodium hypochlorite solution being transported in their trucks.

Although WECCO and TWC assert that their cargo tanks were constructed to ASME requirements, and had wall, head, and lining thicknesses that exceeded requirements for specification MC 312 cargo tank motor vehicles, their application does not contain an assertion that these trucks actually meet DOT's MC 312 specification. Rather, the applicants state that specification plates are not required for these vehicles to transport sodium hypochlorite with less than 16% available chlorine, but that specification plates were applied to their trucks only to satisfy PUCO's insistence that a specification cargo tank motor vehicle was required for the transportation of this material. RSPA notes that the misrepresentation of any packaging as qualified for the transportation of a hazardous material is a serious violation of both 49 U.S.C. 5104(a) and the HMR, whether or not that packaging is actually used for the transportation of hazardous materials. However, because there is no evidence that PUCO has enforced design, construction, and operational requirements for MC 312 specification cargo tanks against these companies in any manner different from that specified in the HMR, issues relating to PUCO's assessment of penalties for misrepresenting cargo tank motor vehicles as meeting the MC 312 specification are not part of this proceeding.

The application submitted by WECCO and TWC is being considered solely with respect to issues that concern whether PUCO has required the use of a specification cargo tank motor vehicle

for the transportation of sodium hypochlorite with less than 16% available chlorine, after January 1, 1991. Neither the applicants nor PUCO has provided RSPA with copies of shipping papers or other documents to indicate the concentration of the sodium hypochlorite in the 1991 shipments. However, as stated above, the PUCO hazardous materials report forms for the June and July 1993 inspections (as provided by WECCO and TWC) indicate that the hypochlorite solutions were classed as Packing Group III materials. Packing Group III applies to hypochlorite solutions with more than 5% but less than 16% available chlorine. 49 CFR 172.101.

The following materials have been placed in the public docket of this proceeding:

Mr. Comley's April 24, 1997 application for a preemption determination and attachments.

RSPA's May 7, 1997 letter dismissing Mr. Comley's application.

Mr. Comley's May 12, 1997 reapplication for a preemption determination, with attachments.

RSPA's May 23, 1997 letter requesting additional information.

Mr. Comley's May 29, 1997 letter and attachments.

PUCO's July 8, 1997 letter and attachments.

Copies of these materials will be provided at no cost upon request to RSPA's Dockets Unit, located in Room 8421, 400 Seventh Street, SW, Washington, DC 20590-0001; telephone 202-366-4453.

## II. Federal Preemption

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation greater authority "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." Pub. L. 93-633 § 102, 88 Stat. 2156, amended by Pub. L. 103-272 and codified as revised in 49 U.S.C. 5101. The HMTA "replace[d] a patchwork of state and federal laws and regulations \* \* \* with a scheme of uniform, national regulations." *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted "without substantive change" by Pub. L. 103-272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51.

A statutory provision for Federal preemption was central to the HMTA. In

1974, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, a Federal Court of Appeals found that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments which expanded the preemption provisions. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991). In 1990, Congress specifically found that:

(3) many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shippers and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification, and other regulatory requirements,

(4) because of the potential risks to life, property, and the environment posed by unintentional releases of hazardous materials, consistency in laws and regulations governing the transportation of hazardous materials is necessary and desirable,

(5) in order to achieve greater uniformity and to promote the public health, welfare, and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. 101-615 § 2, 104 Stat. 3244.

Following the 1990 amendments and the subsequent 1994 codification of the Federal hazardous material transportation law, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e), "a requirement of a State, political subdivision of a State, or Indian tribe" is explicitly preempted (unless it is authorized by another Federal law) if

(1) complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

49 U.S.C. 5125(a). These two paragraphs set forth the "dual compliance" and "obstacle" criteria which RSPA had applied in issuing inconsistency rulings before 1990. While advisory in nature, these inconsistency rulings were "an alternative to litigation for a determination of the relationship of Federal and State or local requirements" and also a possible "basis for an

application \* \* \* [for] a waiver of preemption." Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, etc. 44 FR 75566, 76657 (Dec. 20, 1979). The dual compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978).

In the 1990 amendments, Congress also confirmed that there is no room for differences from Federal requirements in certain key matters involving the transportation of hazardous material. As now codified, a non-Federal requirement "about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter," is preempted unless it is authorized by another Federal law or DOT grants a waiver of preemption:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

49 U.S.C. 5125(b)(1). RSPA has defined "substantively the same" to mean "conforms in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. This administrative determination replaced RSPA's process for issuing inconsistency rulings. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing which have been delegated to FHWA. 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination must be published in the **Federal Register**. *Id.* Following the receipt and consideration of written comments, RSPA publishes its determination in the **Federal Register**. See 49 CFR 107.209(d). A short period of time is allowed for filing of petitions for reconsideration. 49 C.F.R. 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

RSPA's authority to issue preemption determinations does not provide a means for review or appeal of State enforcement proceedings, nor does RSPA consider any of the State's procedural requirements applied in an enforcement proceedings. The filing of an application for a preemption determination does not operate to stay a State enforcement proceeding.

Preemption determinations do not address issues of preemption arising under the Commerce Clause of the Constitution or under statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 12,612, entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority. Section 5125 contains express preemption provisions, which RSPA has implemented through its regulations.

### III. Public Comment

Comments should be limited to whether Federal hazardous material transportation law preempts a requirement allegedly applied and enforced by PUCO, after January 1, 1991, for the use of a DOT specification cargo tank motor vehicle for the transportation of hypochlorite solutions containing more than 5% and less than 16% available chlorine. WECCO and TWC have not provided any evidence to indicate that PUCO enforces different requirements for the design,

construction, and certification of MC 312 specification cargo tank motor vehicles. In addition, allegations in the application relating to PUCO's procedures for holding hearings and assessing penalties are not subject to this proceeding.

Persons submitting comments should:

(1) Set forth in detail the manner in which PUCO applies and enforces requirements for transportation of hypochlorite solution with more than 5% but less than 16% available chlorine; and

(2) Specifically address whether PUCO has enforced a requirement concerning the packing of a hazardous material that is "not substantively the same as" the requirements in the HMR. Comments may also address the "dual compliance" and "obstacle" criteria described in Part II, above.

Persons intending to comment should review the standards and procedures governing RSPA's consideration of applications for preemption determinations, set forth at 49 CFR 107.201-107.211.

Issued in Washington, DC, on October 3, 1997.

**Alan I. Roberts,**

*Associate Administrator for Hazardous Materials Safety.*

[FR Doc. 97-26918 Filed 10-9-97; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Research and Special Programs Administration (RSPA), DOT

[Docket No. PS-142; Notice 9]

#### Pipeline Safety: Remaining Candidates for the Pipeline Risk Management Demonstration Program

**AGENCY:** Office of Pipeline Safety, DOT.

**ACTION:** Notice.

**SUMMARY:** The Research and Special Programs Administration's (RSPA) Office of Pipeline Safety (OPS) has completed screening of twelve candidate companies for the Pipeline Risk Management Demonstration Program. OPS named and described the first three companies screened (Northwest Pipeline Corporation, Shell Pipe Line Corporation, Tennessee Gas Pipeline/East Tennessee Natural Gas) in a previous notice. The nine additional companies screened subsequent to that notice are: Chevron Pipe Line Company; CNG Transmission Corporation; Columbia Gas Transmission Corporation/Columbia Gulf Transmission Company; Duke Energy;

Florida Gas Transmission Company; Lakehead Pipeline Company; Mobil Pipe Line Company; Natural Gas Pipeline Company of America; and Phillips Pipe Line Company. OPS believes these companies' demonstration project proposals satisfy all eligibility criteria, based on a Letter of Intent (LOI) submitted by each company to OPS, a subsequent OPS screening, and an examination of each company's safety and environmental compliance record. Although this notice does not contain specific details of all project proposals, OPS believes the information provided in these companies' LOIs was sufficient to justify proceeding to the consultation process. Additional information, including further details of specific project proposals, will be provided in future **Federal Register** notices and other means of communication. This notice is based on information obtained very early in the process. It informs the public of which companies are interested in participating, the technologies to be explored, and the geographic areas demonstration projects may traverse. OPS invites public comment on any aspect of these companies' proposals.

**Comments:** OPS requests that comments to this notice be submitted on or before December 9, 1997 so that OPS can give the comments full consideration before deciding whether to approve a company's proposal. However, comments on any aspect of the Demonstration Program, including the individual projects, will be accepted in the Docket throughout the 4-year demonstration period. Comments should be sent to the Dockets Facility, U.S. Department of Transportation, Plaza 401, 400 Seventh Street, SW, Washington, DC 20590-0001. Comments should identify the docket number (PS-142). Persons should submit the original document and one (1) copy. Persons wishing to receive confirmation of receipt of their comments must include a self-addressed stamped postcard. The Dockets Facility is located on the plaza level of the Nassif Building in Room 401, 400 Seventh Street, SW, Washington, DC. The Dockets Facility is open from 10:00 a.m. to 5:00 p.m., Monday through Friday, except on Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Eben Wyman, (202) 366-0918 regarding the subject matter of this notice. Contact the Dockets Unit, (202) 366-5046, for docket material.

**SUPPLEMENTARY INFORMATION:** Appendix A of the Requests for Applications for the Pipeline Risk Management

Demonstration Program (62 FR 14719; March 27, 1997) describes how OPS will receive, review, approve, monitor, modify, and terminate company risk management demonstration projects. This process established a July 25, 1997 deadline for companies considering participating in a demonstration project to have submitted a Letter of Intent to OPS. Based on Letters of Intent and additional screening considerations, OPS has chosen twelve candidate companies whose project proposals merit further consideration. OPS is entering into consultations with candidate companies to clarify and refine demonstration project provisions. OPS may approve up to ten demonstration projects. If OPS approves a project, OPS will issue an order and begin auditing project performance. OPS is limited to approving no more than ten projects for participation in the program.

OPS expects the projects, and the Demonstration Program itself, to evolve from lessons learned during the four-year demonstration period. OPS hopes to learn whether and in what form risk management should be incorporated into the Federal pipeline safety program on a permanent basis.

This document is consistent with the OPS Communications Plan (62 FR 43028), published in the **Federal Register** on August 11, 1997. OPS is requesting public input through all stages of the demonstration projects, beginning with receipt of the Letters of Intent. Specific benefits of public involvement in the Demonstration Program for OPS, industry, State and community representatives include:

- Exchange of information about specific and relevant local factors during the decision-making process that may not be known at the Federal or State level; and
- Feedback regarding the success of the Demonstration Program in accomplishing the goals for which it was designed.

OPS requests comments on safety, environmental, socioeconomic, land use, geographic and any other issues that relate to these demonstration project proposals. OPS is considering public input, as well as input from local, State, and other federal agencies, during its consultations with candidate companies to discuss demonstration project provisions. OPS will publish the final provisions for each project and allow for additional public comment before issuing a project approval order. OPS will continue to seek broadbased input on individual demonstration projects throughout the four-year demonstration period. OPS is engaging

in consultations with companies to achieve consensus on demonstration project provisions. If OPS and a company reach agreement, OPS will evaluate the company's formal proposal and approve those that offer the most benefits in testing risk management practices on pipelines.

There were many distinguishing features contained in the LOI's that attracted OPS to these proposals. Besides many geographic areas involved, the type of terrain that these proposals would be also very diverse. Proposals included marshlands, river crossings, mountains, diverse climates, diverse soil types, etc. Further, demonstration sites varied in population densities, and fall under all Class locations ranging from Class 1 to Class 4. Class locations are areas characterized by different population densities, and are how OPS regulates pipelines according to populations in areas where pipelines exist.

The following descriptions provide a brief, introductory summary of each company's demonstration project proposal. The information is derived from each company's LOI and from subsequent discussions between OPS and the company. More detailed information regarding the individual projects will be collected during the consultation process and carefully considered before a project is approved. The company descriptions are listed in alphabetical order.

**1. Chevron Pipe Line Company (CPL):** Chevron Pipe Line Company (CPL) is proposing to use all or a portion of its Northwest Products Pipeline System (NPPS) in the demonstration program. The NPPS consists of two, eight-inch products pipelines, one transporting all grades of gasoline, the other transporting distillates such as diesel and jet fuel. The 40-year old pipeline system transports a total of 72,000 barrels per day over 705 miles, traversing the states of Utah, Idaho, Oregon, and Washington. These states fall under the oversight of the OPS Western Region. The pipeline system begins at Chevron's Salt Lake City, Utah, refinery and terminates in Spokane, Washington. The pipeline crosses various terrains, including desert, farmland, mountains and several major river crossings. Most of the route is through low density population areas, with the exception of Salt Lake City and Boise, Idaho, where the population densities are moderate.

CPL conducted a risk assessment of the NPPS in April, 1997. The assessment identified areas requiring mitigation that CPL believed it would not have otherwise identified through

existing regulatory requirements. CPL found most of the existing regulations to be effective in reducing pipeline incidents, but also looked for opportunities to diverge from existing regulations and offer risk reduction alternatives that will add value. CPL is proposing a set of risk management procedures that consider the scope of the risks and would involve several employees throughout the company. CPL looks forward to a closer working relationship with pipeline regulatory agencies to allow for cost-effective alternatives that provide superior safety.

CPL's risk management coordinator and point-of-contact is Dave Feiglstock. He can be reached at Chevron Pipe Line Company, P.O. Box 6059, 4000 Executive Parkway, San Ramon, California, 94583-0959, or by calling (510) 842-6893.

**2. CNG Transmission Corporation:** CNG Transmission Corporation (CNGT) operates an interstate natural gas pipeline system consisting of 8,274 miles of transmission, storage, and gathering pipelines located in Maryland, New York, Ohio, West Virginia, Pennsylvania and Virginia. CNGT has identified 23 pipeline sections in all six states for its risk management demonstration project. These states fall under the OPS Central and Eastern Region.

CNGT proposes to apply risk control activities as an alternative to current pipeline safety requirements regarding maximum allowable operating pressure (MAOP) in various Class locations. These risk control activities include use of smart pigging, special aerial patrols, and remediation of anomalies, or defects that could affect the pipeline's integrity. CNGT also proposes to incorporate additional prevention and mitigation measures in its comprehensive demonstration project to reduce the risk of third party damage.

CNG's risk management coordinator and point-of-contact is Robert Fulton. He can be reached at CNG Transmission Corporation, 445 West Main Street, P.O. Box 2450, Clarksburg, West Virginia 26392-2450, or by calling (304) 623-8200.

**3. Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company (Columbia):** The Columbia system includes 12,705 miles of pipeline operated by Columbia Gas Transmission and 3,856 miles of pipeline operated by Columbia Gulf Transmission. The Columbia Gas Transmission portion originates in the Appalachian production areas and transports gas to the Midwest and mid-Atlantic states. The Columbia Gulf portion originates in the Gulf Coast

production areas and transports gas to the Columbia Gas system. Both pipeline systems traverse a wide variety of terrain, including coastal plain, offshore, marsh, major river crossings, mountainous regions, and agricultural regions as well as some major population areas. The scope of the proposed project includes New York, Ohio, Pennsylvania, and Tennessee, and falls under OPS Central, Eastern, and Southern Region's responsibility.

Columbia will include most, if not all, of its pipeline system and phase in the implementation of risk control activities over the four-year demonstration period. For the initial phase of the project, Columbia proposes the following for its entire system:

- Modified inspection frequency for relief and regulator valves including capacity calculations;
- Modified inspection frequency for rectifier and test point inspection and detail survey;
- Modified class location change resulting in different inspection frequencies and time frame for action under certain circumstances;
- Use of hardness testing correlation to confirm pipe properties in lieu of lab analysis under certain conditions;
- Expanded use of alternative pipeline repair techniques including welding activities and composite sleeves; and
- Modified inspection frequency for valves and vaults.

Columbia also intends to include certain geographic or site-specific risk management activities including:

- Elimination of pipe replacement due only to class location changes under certain conditions in Tennessee, New York, Ohio, and Pennsylvania;
- Modification of MAOP under certain conditions in Ohio, Pennsylvania, and New York; and
- New design and construction techniques for their proposed Millennium Pipeline System.

OPS is interested in how Columbia approaches the maintenance program for older pipelines, and uses a management approach that integrates data collected across the organization.

Columbia's risk management coordinator and point-of-contact is John S. Zurcher. He can be reached at Columbia at 1700 MacCorkle Avenue, S.E., P.O. Box 1273, Charleston, West Virginia, 25325-1273, or by calling (304) 357-2669.

**4. Duke Energy:** Duke Energy (formerly PanEnergy Corporation) operates approximately 21,000 miles of interstate natural gas transmission pipelines within the United States. This pipeline system is composed of four

interstate pipeline operating companies: Panhandle Eastern Pipeline Company (6,600 miles), Texas Eastern Transmission Corporation (9,000 miles), Trunkline Gas Company (4,200 miles), and Algonquin Gas Transmission Company (1,100 miles). The system is composed of pipelines with diverse physical attributes, such as age, strength, and size, and operates in diverse geographic and demographic environments. The project would be conducted in Pennsylvania, and is under OPS Eastern Region's oversight.

Duke's proposal would be deployed in four phases. Each phase would be initiated contingent on a detailed explanation of the risk assessment and risk management programs that Duke uses on its pipelines and OPS's acceptance of the implementation of each phase. The first phase would involve the use of welding to repair external corrosion damage. Recent research work by the pipeline industry evaluated and tested this technique under simulated pipeline operating conditions, and developed criteria for safe operation. Duke proposes to use these criteria for repairs on the Texas Eastern system for anomalies detected during planned remediation work of the pipeline in Pennsylvania. The work would be restricted to specific, rural sections of pipeline on Line A. Line A is a 36-inch pipeline installed from the late 1970 through the early 1980's, which traverses the state of Pennsylvania west to east in parallel with two and sometimes three other Texas Eastern pipelines of varying ages.

Duke Energy's proposal is being considered because this company offers extensive experience with data collection and modeling for risk assessment, applied in a prioritized structure.

Duke Energy's risk management coordinator and point-of-contact is Andy Drake. He can be reached at Duke Energy Corporation, P.O. Box 1642, 5444 Westheimer Court, Houston, Texas 77056-1642, or by calling (713) 989-2311.

**5. Florida Gas Transmission Company (FGTC):** Florida Gas Transmission Company (FGTC), a wholly owned subsidiary of Citrus Corporation, operates a pipeline of approximately 5,051 miles with a capacity of 1.5 BCF/day. It transports natural gas from Texas to Florida. Citrus Corporation is jointly owned by an Enron Corp. subsidiary and Sonat Inc.

FGTC proposes a demonstration project involving a pipeline system operated by its Orlando Florida Team. The proposed test area includes a 379-mile network of pipelines ranging in

size from four-inch through 30-inch and in-age timeframes from one to 38 years, with numerous measurement and regulation stations, a range of population densities (from rural to highly metropolitan), and various geographic and soil conditions.

For the demonstration program, FGTC proposes to submit an application covering a wide range of alternative risk controls for:

- Modifying MAOP;
- Alternatives for class location changes; and
- Changes in inspection frequencies and methods.

This project is being considered for use of diverse elements in construction and operation practices.

FGTC's risk management coordinator and point-of-contact is Max Brown. He can be reached at Florida Gas Transmission Company, P.O. Box 1188, Houston, Texas 77251-1188, or by calling (713) 853-6161.

**6. Lakehead Pipe Line Company:** Lakehead Pipe Line Company (Lakehead) operates approximately 2,700 miles of liquid petroleum pipelines through seven Midwestern states. Lakehead intends to use a risk management approach for the control of potential longitudinal seam cracks and internal and external corrosion on the 34-inch segments of its Line 3 crude petroleum pipeline in North Dakota, Minnesota, and Wisconsin. Items to be considered in this project include:

- The use of advanced elastic wave in-line inspection methodology (in lieu of hydrostatic testing) to evaluate and mitigate the potential risk of a pipeline rupture resulting from long-seam crack propagation on certain submerged pipeline segments.
- The use of in-line inspection and advanced internal corrosion mitigation and monitoring techniques to reduce the potential risk of a pipeline rupture resulting from corrosion damage.
- Application of comprehensive risk management techniques to evaluate and mitigate problems associated with the integrity of tape coating on a large diameter pipeline.
- Identification of prescribed activities that may become redundant or unnecessary in view of the potentially more effective and significant measures employed above.

OPS sees benefit in Lakehead's exploration of techniques that may offer greater safety benefits than current requirements. Lakehead has also expressed an interest in developing new communications protocols with OPS.

Lakehead's risk management coordinator and point-of-contact is Richard Sandahl. He can be reached at

Lakehead Pipe Line Company, Lake Superior Place, 21 West Superior Street, Duluth, Minnesota 55802-2067, or by calling (218) 725-0102.

7. *Mobil Pipe Line Company*: Mobil Pipe Line Company (Mobil) currently owns approximately 5,409 miles of hazardous liquid pipeline in nine states. The proposed demonstration project will be conducted at Mobil's Patoka, Illinois, breakout tank facility in the OPS Central Region, and is intended to demonstrate Mobil's release prevention program. The prevention program uses an integrated system that includes proper equipment design, construction, operator training, operating procedures, periodic maintenance, periodic inspection, management controls, and management practices. Mobil proposes to use the Mobil Engineering Practices, elements of American Petroleum Institute standards, sound engineering judgment, management controls, sophisticated techniques called "multi-attribute" risk assessment scenarios, and risk management principles to validate and verify the integrity of its storage tanks. The project would also help demonstrate how these release prevention measures would work in conjunction with OPS's proposal to adopt multiple API Above Ground Storage Tank standards. Mobil's proposal offers a focus on challenges to tank integrity to provide special protection. Mobil's risk management coordinator and point-of-contact is Steve Streeter. He can be reached at Mobil Pipe Line Company, P.O. Box 900, Dallas, Texas 75221-0900, or by calling (703) 842-6189.

8. *Natural Gas Pipeline Company of America*: Natural Gas Pipeline Company of America (NGPL), a subsidiary of the MidCon Corporation, moves natural gas through 13,000 miles of pipeline and pipeline facilities in 14 different states. Approximately seventy percent of NGPL's cross country transmission pipelines were constructed in the last 50 years and are between 24 and 36 inches in diameter. The terrain in which these pipelines are located is relatively flat with predominantly lower stress clay, loam, and sandy soil. Population distribution within 220 yards of the pipeline is 92 percent Class 1, three percent Class 2, and five percent Class 3. This means that NGPL's pipeline exists predominantly in low-density population areas.

NGPL currently practices risk management in its normal operations and proposes to build on risk management programs by developing a more formal set of procedures in compliance with the requirements of the Risk Management Program Framework

(62 FR 14719) and Risk Management Program Standard. It proposes to apply risk management to the entire pipeline system traversing Iowa, Illinois, and Indiana, all of which operate under the oversight of OPS's Central Region office.

Company-wide issues that NGPL anticipates addressing include:

- Testing existing research by the Pipeline Research Committee for in-service surface weld repair of pipe body defects and cold field bending of pipe;
- Current drug testing frequency requirements;
- Third party damage prevention programs, including annual public awareness activities;
- Review record retention requirements;
- Evaluating shorted casing corrosion, over pressure protection and proof testing of new or existing pipelines using inert gas along with new technologies in corrosion minimization/identification; and
- Proof testing pipeline facilities using water or gas, design factor requirements for fabricated assemblies, meter facilities, and compressor facilities.

Site-specific issues in NGPL's proposal include:

- Pipe replacement or maximum allowable operating pressure (MAOP) reduction due to Class Location change;
- The design yield strength or wall thickness of pipe with an unknown strength;
- The design factor at different population areas in Class 1, 2 and 3 locations;
- Distance interval requirements for pipeline sectioning with block valves;
- Inspection intervals for rectifiers and other corrosion inspection test intervals;
- Surface rust on aboveground pipe and pipeline facilities; and
- Odorization in Class 3 areas and line patrol for different "Class" locations.

NGPL offers a very extensive range of alternatives in its proposal, and has shown considerable interest in working with OPS to choose these alternatives to address the most problematic areas.

NGPL's risk management coordinator and point-of-contact is Craig Howard. He can be reached at Natural Gas Pipeline of America, 701 East 22nd Street, Lombard, Illinois 60148-5072, or by calling (630) 691-3617.

9. *Phillips Pipe Line Company*: Phillip's risk management proposal encompasses its Sweeny-Pasadena system, which consists of a 12-inch and 18-inch refined products pipeline in Texas. These lines cross 60 miles of varied population densities in the Houston, Texas area.

Phillips is proposing a risk-based approach to all company and third-party excavation activities that occur on these pipelines to demonstrate that risk management practices can be effectively applied to improve safety through reduction of third party damage. Because third-party damage is the leading cause in pipeline failures, OPS looks forward to investigating these damage prevention practices to provide superior safety on the pipeline.

Currently, Phillips deploys planning and oversight resources based on regulatory requirements on an equal basis regardless of related risks. In its risk management application, the company would consider risk factors such as depth of cover, operating status, population, and environmental exposure, and equipment used. Phillips would demonstrate that applying risk management principles to these factors, as well as developing specific of performance measures, can be more effective in assuring the pipeline's safety than what is achieved by current regulations.

Phillip's risk management coordinator and point-of-contact is L.J. Schmitz. He can be reached at Phillips Pipe Line Company, 370 AB, Bartlesville, OK 74004, or by calling (918) 661-4814.

This concludes the nine demonstration summaries. For your convenience, we are providing the summaries of the three companies that were screened earlier in the process.

*Appendix*—Excerpt from the **Federal Register** Notice, "Candidates for the Pipeline Risk Management Demonstration Program" (62 FR 40135; July 25, 1997), which described the three projects screened earlier. The only change in this section is that the Point-of-Contact for Northwest Pipeline's proposed demonstration project has changed since this notice was published. This updates the previous language.

**SUPPLEMENTARY INFORMATION:** OPS has previously screened the following three candidates, and has determined that they meet the criteria for participating with OPS in consultations about their proposals: Northwest Pipeline Corporation, Shell Pipe Line Corporation, and Tennessee Gas Pipeline Corporation/East Tennessee Natural Gas Company.

1. *Northwest Pipeline Corporation (Northwest)*: Northwest operates approximately 3,900 miles of interstate natural gas transmission line running through six western states, with endpoints at Ingacio, Colorado and the Canadian border at Sumas, Washington.

The pipeline traverses the densely populated regions of western

Washington and Oregon through the agricultural areas of eastern Oregon, Washington and Idaho into the isolated areas of southwest Wyoming, Utah and Colorado. The route covers a variety of terrains from mountains to deserts, crossing numerous rivers and lakes, encountering very moderate to very extreme climates, and crossing national parks, Indian nations, wilderness areas, and habitats of numerous threatened and some endangered species.

While Northwest proposes to apply a risk management approach to its entire system, the company plans to limit regulatory exemptions to specified locations on the pipeline.

OPS is interested in entering into consultations with Northwest because its risk management program has the potential to:

- Explore means of assessing and addressing risks presented by a pipeline in rugged terrain susceptible to land movement;
- Investigate the risk-reduction benefits of certain new technologies; and
- Investigate new means of industry/government partnering to conduct cooperative pipeline research.

The proposed Northwest demonstration project also has the potential to help OPS examine the benefits of risk management as a regulatory alternative under a variety of conditions because of the following distinguishing features:

- A location with diverse geographic features (the demonstration site traverses six western states: Washington, Oregon, Idaho, Wyoming, Utah, and Colorado);
- The identification of land movement as a significant risk issue for Northwest; and
- The opportunity to explore various regulatory approaches, from item-by-item approvals to approvals of risk-based decision processes.

Northwest's risk management program coordinator and point-of-contact is Deonne Hootman. She can be reached at Northwest Pipeline Corporation, P.O. Box 58900, Salt Lake City, UT, 84158-8800, or by calling (801) 584-6874.

2. *Shell Pipe Line Corporation (SPLC)*: SPLC operates nearly 8,000 miles of pipelines, transporting over 4.0 million barrels of oil, oil products, and carbon dioxide daily and employing over 700 people in 16 states.

SPLC is proposing portions of two separate interstate pipeline systems with different yet very distinct risk characteristics as its demonstration project: one transporting ethylene, a flammable, highly volatile liquid (HVL)

that becomes a slightly lighter-than-air gas when released to the atmosphere, and which, under certain conditions, could form an explosive vapor cloud until diluted/dispersed; the second transporting carbon dioxide, a non-flammable, inert, non-toxic liquid that becomes a heavier-than-air gas when released to the atmosphere, and which, under certain conditions, could become an asphyxiation hazard until diluted/dispersed. Both ethylene, a hazardous liquid, and carbon dioxide must comply with Part 195 of the Code of Federal Regulations.

The first part of SPLC's proposed demonstration project consists of nearly its entire Texas-Louisiana 12" Ethylene Pipeline System (approximately 205 miles of 250 miles), which transports chemical-grade ethylene between Shell Oil Products Company's Deer Park (Texas) Manufacturing Complex and its Napoleonville (Louisiana) transfer facility. Ethylene is a chemical feed stock which is used in the manufacture of plastics, antifreeze, detergents and other consumer products. This proposed test area addresses risks concerning the operation of a 12 inch, HVL pipeline (and related facilities) at pressures between 1000 and 1400 psig, in the proximity to, and sometimes traversing, five areas with large and growing industrial/residential populations. SPLC has been the operator of the pipeline since its construction in 1979.

The second part of SPLC's proposed demonstration project consists of the northwestern half (approximately 260 miles) of its Cortez 30" Carbon Dioxide Pipeline System which transports merchantable-grade carbon dioxide from Cortez, Colorado across New Mexico to Denver City, Texas (the demonstration segment terminates near Albuquerque, New Mexico). This carbon dioxide, in turn, is then used for tertiary oil recovery in the Denver City area. This proposed test area will assess the risks surrounding the operation of a 30-inch, carbon dioxide pipeline (and related facilities) at pressures between 1300 and 2200 psig, where it operates in proximity to five areas with small and growing residential populations. SPLC has been the operator of the pipeline since its construction in 1983.

For the test area included in the demonstration program, SPLC proposes a comprehensive risk management program that will assess all hazards and risks associated with operation of these pipelines.

OPS is interested in entering into consultations with SPLC because its risk management program has the potential to:

- Explore resource reallocation from lower-risk carbon dioxide pipeline to higher-risk ethylene;
- Evaluate the effect on public safety and environmental protection caused by resource reallocation within an individual pipeline system, based on the constantly changing set of internal (i.e. pressure) and external (i.e. population) conditions; and
- Employ the risk management communications initiative to improve third-party damage prevention and emergency response coordination.

The proposed SPLC demonstration project also has the potential to help OPS examine the benefits of risk management as a regulatory alternative under a variety of conditions because of the following distinguishing features:

- The commodities (ethylene and carbon dioxide);
- The location (the demonstration sites cross several southwestern states, including Colorado, New Mexico, Texas, and Louisiana);
- Technical/regulatory issues (SPLC is considering operating a section of the carbon dioxide pipeline at a higher pressure than is currently allowed by the regulations); and
- Policy issues (the allocation of resources between high and low risk pipelines, and between high and low risk sections on the same pipeline).

Fred Fischer, Manager, Technical Operations Support, leads SPLC's designated Risk Management team and serves as the central information contact for the program. He can be reached at Shell Pipe Line Corporation, Two Shell Plaza, P.O. Box 2648, Houston, Texas, 77252, or by calling 713-241-0461.

3. *Tennessee Gas Pipeline Corporation/East Tennessee Natural Gas Company (Tennessee/East Tennessee)*: Tennessee/East Tennessee are subsidiaries of El Paso Natural Gas Company of Houston, Texas. Tennessee Gas operates a total of 14,574 miles of both onshore and offshore pipeline, while East Tennessee Natural Gas operates 1,149 miles of onshore pipeline.

Tennessee/East Tennessee proposes to apply a risk management approach to its entire system. The company proposes modifying or eliminating compressor station relief valve testing and inspection under certain conditions, extending from 18 months to 24 months the time it is allowed to confirm or revise maximum allowable operating pressure due to class location changes, reducing the inspection frequency under certain conditions of certain emergency valves and regulators, and using new design criteria for increased system efficiency.

Tennessee/East Tennessee has also specified locations in western Pennsylvania, central Tennessee, and offshore Louisiana where it proposes altering maximum allowable operating pressure to suit local conditions.

The company believes superior safety can be achieved by enhanced damage prevention, increased patrolling, the use of internal inspection tools, and the reallocation of funds to re-habilitation projects on its higher risk pipeline segments.

OPS is interested in entering into consultations with Tennessee/East Tennessee because its risk management program has the potential to:

- Provide examples of data collection and analysis tools for supporting risk management; and
- Provide examples of how companies can use risk management to re-allocate resources to re-habilitation projects and other high value safety activities.

The proposed Tennessee/East Tennessee demonstration project also has the potential to help OPS examine the benefits of risk management as a regulatory alternative under a variety of conditions because of the following distinguishing features:

- Consideration of worker safety as well as public safety in risk assessment;
- Examination of the risk control potential of a number of existing regulations;
- The use of risk-based arguments for establishing MAOP; and
- The breadth of the demonstration site (which includes four OPS regions: Southern, Eastern, Central, and Southwest; and 17 states).

Tennessee/East Tennessee's risk management program coordinator and point-of-contact is Daron Moore. He can be reached at Tennessee Gas Pipeline Company, P.O. Box 2511, Houston, TX, 77252-2511, or by calling (713) 757-4023.

Issued in Washington, DC, on October 6, 1997.

**Richard B. Felder,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 97-26916 Filed 10-9-97; 8:45 am]

BILLING CODE 4910-60-P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Docket No. AB-77 (Sub-No. 10X)]

#### Bangor & Aroostook Railroad Company—Abandonment Exemption—in Aroostook County, ME

Bangor & Aroostook Railroad Company (Applicant) has filed a notice

of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 5.66-mile line of railroad on the Fort Fairfield Branch from milepost F-13.00 to the end of the branch at milepost F-18.66, in the Town of Fort Fairfield, in Aroostook County, ME. The line traverses United States Postal Service Zip Code 04742.

Applicant has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic moving over the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R.Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on November 9, 1997, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,<sup>1</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>2</sup> and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 20, 1997. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by October 30, 1997, with: Surface Transportation Board, Office of the Secretary, Case

<sup>1</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>2</sup> Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25).

Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: Sebastian Ferrer, Esquire, Gollatz, Griffin & Ewing, P.C., 213 W. Miner Street, P. O. Box 796, West Chester, PA 19381-0796.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

Applicant has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by October 15, 1997. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565-1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Applicant shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Applicant's filing of a notice of consummation by October 10, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Decided: October 6, 1997.

By the Board, David M. Konschnik,  
Director, Office of Proceedings.

**Vernon A. Williams,**

*Secretary.*

[FR Doc. 97-27026 Filed 10-9-97; 8:45 am]

BILLING CODE 4915-00-P

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[STB Docket No. AB-290 (Sub-No. 191X)]

#### Interstate Railroad Company—Abandonment Exemption—in Wise County, VA

Interstate Railroad Company (Interstate) has filed a notice of exemption under 49 CFR 1152 Subpart F—*Exempt Abandonments* to abandon a 2.6-mile line of its railroad between milepost D-0.0 at Dorchester Junction and milepost D-2.6 at Dorchester, in Wise County, VA. The line traverses

United States Postal Service Zip Code 24293.

Interstate has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) there is no overhead traffic moving over the line; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on November 9, 1997, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,<sup>1</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>2</sup> and trail use/rail banking requests under 49 CFR 1152.29 must be filed by October 20, 1997. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by October 30, 1997, with: Surface Transportation Board, Office of the Secretary, Case

<sup>1</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Service Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>2</sup> Each offer of financial assistance must be accompanied by the filing fee, which currently is set at \$900. See 49 CFR 1002.2(f)(25).

Control Unit, 1925 K Street, N.W., Washington, DC 20423.

A copy of any petition filed with the Board should be sent to applicant's representative: James R. Paschall, General Attorney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510.

If the verified notice contains false or misleading information, the exemption is void *ab initio*.

Interstate has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. The Section of Environmental Analysis (SEA) will issue an environmental assessment (EA) by October 15, 1997. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423) or by calling SEA, at (202) 565-1545. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Interstate shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Interstate's filing of a notice of consummation by October 10, 1998, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Decided: October 6, 1997.

By the Board, David M. Konschnik, Director, Office of Proceedings.

**Vernon A. Williams,**  
Secretary.

[FR Doc. 97-27027 Filed 10-9-97; 8:45 am]

BILLING CODE 4915-00-P

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## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Former Prisoners of War, Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act, as amended

(Public Law 92-463; 5 U.S.C. App.), that the Department of Veterans Affairs' Advisory Committee on Former Prisoners of War has been renewed for a 2-year period beginning September 30, 1997, through September 30, 1999.

Dated: October 2, 1997.

By Direction of the Secretary-Designate.

**Heyward Bannister,**

*Committee Management Officer.*

[FR Doc. 97-26975 Filed 10-9-97; 8:45 am]

BILLING CODE 8320-01-M

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## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on the Readjustment of Veterans; Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act, as amended (Public Law 92-463; 5 U.S.C. App.), that the Advisory Committee on the Readjustment of Veterans has been renewed for a 2-year period beginning August 29, 1997, through August 29, 1999. Congress enacted Public Law 104-262, Section 333, in October 1996, making this committee statutory.

Dated: October 1, 1997.

By Direction of the Secretary-Designate.

**Heyward Bannister,**

*Committee Management Officer.*

[FR Doc. 97-26973 Filed 10-9-97; 8:45 am]

BILLING CODE 8320-01-M

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## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on Women Veterans; Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act, as amended (Public Law 92-463; 5 U.S.C. App.), that the Department of Veterans Affairs' Advisory Committee on Women Veterans has been renewed for a 2-year period beginning September 26, 1997, through September 26, 1999.

Dated: September 30, 1997.

By Direction of the Secretary-Designate.

**Heyward Bannister,**

*Committee Management Officer.*

[FR Doc. 97-26974 Filed 10-9-97; 8:45 am]

BILLING CODE 8320-01-M

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# Corrections

Federal Register

Vol. 62, No. 197

Friday, October 10, 1997

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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.

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## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

#### *Correction*

In notice document 97-25158 beginning on page 49672, in the issue of Tuesday, September 23, 1997, make the following correction:

On page 49672, in the second column, in the DATES section, in the last two lines of that section, “[insert the 60th day after publication of this notice]” should read “November 24, 1997”.

BILLING CODE 1505-01-D

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

#### 21 CFR Part 1310

[DEA-156P]

RIN 1117-aa43

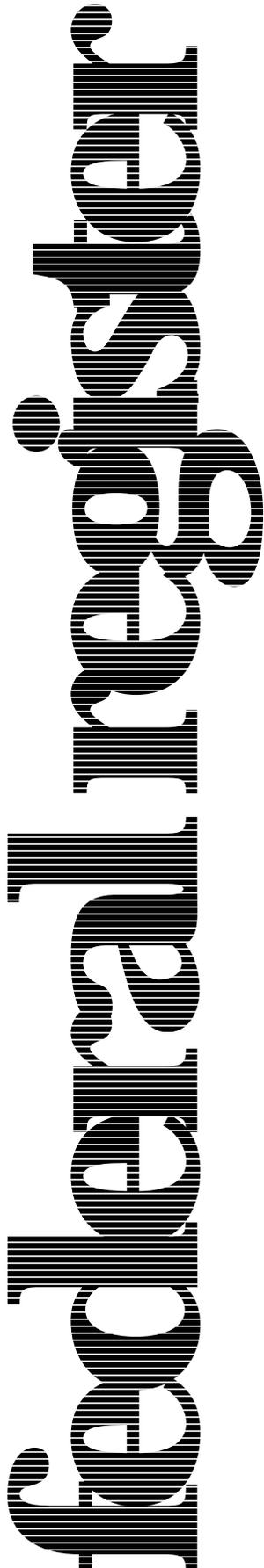
#### Listed Chemicals; Proposed Establishment of Thresholds for Iodine and Hydrochloric Gas (Hydrogen Chloride Gas)

#### *Correction*

In proposed rule document 97-25362 beginning on page 51072, in the issue of Tuesday, September 30, 1997, make the following correction:

On page 51073, in the third column, in the eighth line from the bottom, “of” should read “or”.

BILLING CODE 1505-01-D



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Friday  
October 10, 1997

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**Part II**

**Securities and  
Exchange  
Commission**

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**Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. (“NASD”) to Proposed Changes in the By-Laws and Restated Certificates of Incorporation of NASD, NASD Regulation, Inc., The Nasdaq Stock Market, Inc., and the Plan of Allocation and Delegation of Functions by the NASD to Subsidiaries; Notice**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39175; File No. SR-NASD-97-71]

### Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. ("NASD") to Proposed Changes in the By-Laws and Restated Certificates of Incorporation of the NASD, NASD Regulation, Inc., The Nasdaq Stock Market, Inc., and the Plan of Allocation and Delegation of Functions by the NASD to Subsidiaries

September 30, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on September 19, 1997, the National Association of Securities Dealers, Inc. ("Association" or "NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization.<sup>2</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is filing a proposed rule change to amend: (1) The By-Laws of the NASD; (2) the By-Laws of NASD Regulation, Inc. ("NASD Regulation"); (3) the By-Laws of The Nasdaq Stock Market, Inc. ("Nasdaq"); (4) the Plan of Allocation and Delegation of Functions By NASD to Subsidiaries ("Delegation Plan"); and (5) the Restated Certificates of Incorporation for the three corporations. Attachment A is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included

statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

a. *Introduction:* The purpose of the proposed rule change is to provide for a more efficient and effective corporate structure for the Association, to conform the Association's corporate documents to the recently amended Code of Procedure (Rule 9000 Series) and membership procedures (Rule 1010 Series), and to make the Association's corporate documents more consistent with one another.<sup>3</sup> In particular, the proposed corporate structure is designed to streamline the decision making process to be more responsive to investor interests, improve communication among Board members and the staff, enable the Association to act quickly and decisively when necessary, and preserve the principles set forth in the September 15, 1995 *Report of the NASD Select Committee on Structure and Governance To The NASD Board of Governors* ("Select Committee Report").

Portions of the proposed rule change set forth in this rule filing were previously submitted and noticed in the **Federal Register** in SR-NASD-96-20,<sup>4</sup> SR-NASD-96-29,<sup>5</sup> and SR-NASD-97-28.<sup>6</sup> No comments were received on those parts of these rule filings concerning the Association's corporate documents and the Delegation Plan.<sup>7</sup> The Association believes that the changes to its corporate structure would be better understood if all changes to these documents were included in one rule filing. Therefore, the Association

withdrew its request for approval of the portion of the proposed rule change relating to the Association's corporate documents and the Delegation Plan set forth in SR-NASD-97-28 and included all proposed changes to its corporate documents and the Delegation Plan in this rule filing.<sup>8</sup> In the description of the proposed rule change for each document below, the Association has identified the rule changes that are proposed for the first time in this rule filing.

To achieve the corporate objectives set forth above, the Association proposes to retain the current three corporation structure, but reduce the overall number of board members for the three corporations and create a new board structure, with both the Nasdaq and NASD Regulation Boards of Directors shrinking in size and becoming part of an expanded NASD Board of Governors.<sup>9</sup> As a result, the Association would reduce the overall number of board members from 49 to 27, reduce the number of board meetings from 17 to seven, reduce the number of board committees from nine to five, and replace two subsidiary board executive committees with one parent board executive committee.<sup>10</sup>

The NASD Board would consist of 21 to 27 Governors and include a nucleus of Governors who would not serve as directors on either subsidiary board. The subsidiary boards each would have five to eight Directors, each of whom would be NASD Governors. The number of directors on each subsidiary board would be equal, thereby enabling the nucleus of individuals who served only as NASD Governors to perform a tie-breaking function on the parent board.

The NASD Board, while remaining ultimately responsible for the actions of its subsidiaries, would also retain its current authority to review and ratify or reject certain actions of the subsidiaries, although the process of exercising this authority would be expedited by transferring certain functions to new

<sup>8</sup> See letter from Alden S. Adkins, General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated July 11, 1997 (Amendment No. 3 to SR-NASD-97-28).

<sup>9</sup> Currently, the NASD Board has 11 Governors, the NASD Regulation Board has 24 Directors, and the Nasdaq Board has 14 Directors. The Board of Governors of the NASD is referred to herein as the NASD Board, and the Boards of Directors of NASD Regulation and Nasdaq are referred to herein as the NASD Regulation Board and the Nasdaq Board, respectively.

<sup>10</sup> As explained below, the by-laws of each subsidiary would continue to authorize its board to appoint executive and finance committees, but the Association does not anticipate that the subsidiary boards will find it necessary to continue to appoint such committees.

<sup>1</sup> 15 U.S.C. § 78s(b)(1).

<sup>2</sup> On September 29, 1997, the NASD filed a technical amendment to the proposed rule change, the substance of which is included in this notice. See letter from T. Grant Callery, General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission. On September 30, 1997, the filing was further amended by the NASD to correct non-substantive typographical errors. Meeting between Mary Dunbar, Office of General Counsel, NASD Regulation and Mandy S. Cohen, Division of Market Regulation, Commission.

<sup>3</sup> All references to "Rule" followed by a four-digit number in this rule filing are references to one or more Rules of the Association, as defined in NASD By-Laws, Article I, Definitions.

<sup>4</sup> Securities Exchange Act Release No. 37282 (June 6, 1996), 61 FR 29777 (June 12, 1996), as amended.

<sup>5</sup> Securities Exchange Act Release No. 37425 (July 11, 1996), 61 FR 37518 (July 18, 1996), as amended.

<sup>6</sup> Securities Exchange Act Release No. 38545 (April 24, 1997) 62 FR 25226 (May 8, 1997), as amended.

<sup>7</sup> SR-NASD-96-20 and SR-NASD-96-29 include temporary approvals of the corporate governance documents and the Delegation Plan, respectively. Upon approval of this rule filing, temporary approval of 96-20 and 96-29 will be rescinded.

entities under each subsidiary board and changing several meeting schedules. First, the Association proposes to transfer the functions of the National Business Conduct Committee, a committee of the NASD Regulation Board composed entirely of Directors, to a new entity, the National Adjudicatory Council.<sup>11</sup> The National Adjudicatory Council would be appointed by the NASD Regulation Board, after nomination by the National Nominating Committee. Similarly, the Association proposes to transfer the functions of the Nasdaq Listing and Hearing Review Committee to a new Nasdaq Listing and Hearing Review Council ("Listing Council").<sup>12</sup> Listing Council members would be appointed by the Nasdaq Board. Except for the Chair of National Adjudicatory Council, members of the councils would not serve on any of the Association's boards.

These new councils would meet at least 15 days before the subsidiary boards and generally would provide written reports of their decisions to their respective boards not later than 15 days before the subsidiary board meetings. The subsidiary board meetings then would be scheduled to occur one day before the meetings of the NASD Board.<sup>13</sup> Although matters delegated to each subsidiary would, as a matter of general practice, be considered by the subsidiary boards before proceeding to the NASD Board, the time required for final disposition would be significantly reduced by these structural and scheduling changes. Under the current structure and meeting schedule, the subsidiaries may have to delay issuing disciplinary, listing, and other decisions and filing rule proposals with the Commission until a parent board meeting is held, which may occur several weeks after the subsidiary board takes action. Such delay would be eliminated by the new corporate structure and meeting schedule.

In addition to compressing the time between subsidiary and parent board meetings, the proposed structural refinements would facilitate other efficiencies because members of the revamped subsidiary boards would constitute a subset of NASD Board members. For example, an NASD Regulation rule amendment that warrants consideration by the NASD Board could be taken directly to the NASD Board for action, thereby

avoiding the need for duplicative discussions of the same matter. The same would be true of rule amendments as to which NASD Board review is mandatory under the Delegation Plan. Thus, action on significant or controversial matters could be accomplished in one step, rather than the two steps that are currently required. Furthermore, because the Directors of both subsidiary boards would be Governors of the NASD Board, the consideration of matters at the NASD Board level always would have the benefit of subsidiary board participation.

To further expedite decision-making, the NASD Board would be specifically authorized by the Delegation Plan to take action on its own initiative. Thus, subsidiary board action on a matter within its sphere of delegated authority would not be a prerequisite to action by the NASD Board. Rather, the NASD Board would be authorized to take action *ab initio*.<sup>14</sup>

The Association believes that these changes are consistent with the core principles of corporate governance outlined in the Select Committee Report and the November 1995 *Select Committee on Structure and Governance—Staff Implementation Plan* ("Staff Implementation Plan"). The principles of the Select Committee Report and the Staff Implementation Plan include maintaining a balanced governance structure, an independent corporate structure, an independent and autonomous operating structure, and a clear and distinct role for each corporation. The proposed rule change maintains a balanced governance structure by providing for diversity among Industry Governors and Directors; providing for a majority of Non-Industry Governors on the parent board, including at least five Public Governors; and providing for at least 50 percent Non-Industry and Public Directors on the board of directors of each subsidiary. Maintaining two separate, wholly owned subsidiaries with their own Presidents ensures that independent corporate structures continue to exist. Preserving separate and independent professional staffs and substantial deference to the subsidiaries in their areas of jurisdiction reinforces an independent and autonomous operating structure. Finally, each corporation retains its clear and distinct role under the proposed rule change: The NASD continues to resolve conflicts between the subsidiaries and retain ultimate responsibility for statutory obligations, including its

responsibilities as a self-regulatory organization; NASD Regulation continues to perform the day-to-day regulation of brokers and dealers and to supervise surveillance of Nasdaq and other OTC markets; and Nasdaq continues to own and operate The Nasdaq Stock Market and develop and implement rules governing that market.

The proposed corporate structure also is consistent with the Undertakings set forth in the Association's August 8, 1996, settlement with the Commission.<sup>15</sup> Specifically, the proposed rule changes comport with the requirements for balancing the Association's boards and committees,<sup>16</sup> placing primary day-to-day responsibility for regulatory matters with NASD Regulation,<sup>17</sup> providing for the autonomy and independence of the regulatory staff of the NASD and its subsidiaries,<sup>18</sup> and ensuring the existence of a substantial, independent internal audit staff that reports directly to an audit committee of the NASD Board.<sup>19</sup>

b. Proposed Changes to NASD By-Laws: The expanded NASD Board would function much as it does today, with ultimate responsibility for the regulatory and market operation functions delegated to the subsidiary boards. Substantive changes to the NASD By-Laws are set forth below. Key changes related to the corporate restructuring are found in proposed Article VII, Sections 4, 5, 9, 10, and 13; Article IX, Sections 4 through 6; Article XV, Section 4(b); Article XVI, Section 1; and Articles XX and XXI. Stylistic changes and other minor, non-substantive changes are not described.<sup>20</sup>

#### Proposed Article I. Definitions

The Association proposes several substantive amendments to Article I, which sets forth definitions for the NASD By-Laws. First, the Association proposes to move the following

<sup>15</sup> Securities Exchange Act Release No. 37538 (August 8, 1996), 62 SEC Docket 1346, Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, *In the Matter of National Association of Securities Dealers, Inc.*, Administrative Proceeding File No. 3-9056 (the "Order").

<sup>16</sup> See Proposed NASD By-Laws Article VII, Section 4 and Article IX; Proposed NASD Regulation By-Laws Article IV; Proposed Nasdaq By-Laws Article IV; Delegation Plan I.C., II.C.

<sup>17</sup> See Proposed Delegation Plan II.A.1.

<sup>18</sup> *Id.*

<sup>19</sup> See proposed NASD By-Laws Article IX, Section 5.

<sup>20</sup> All references to Articles or Sections in this section "b" refer to the NASD By-Laws, unless otherwise noted.

<sup>11</sup> See proposed Article V of the NASD Regulation By-Laws.

<sup>12</sup> See proposed Article V of the Nasdaq By-Laws.

<sup>13</sup> Amendments to the Association's Code of Procedure and other rules that contain NASD Board call-out authority will be proposed in a separate rule filing.

<sup>14</sup> See Proposed Delegation Plan I.B.11.

definitions from the Delegation Plan<sup>21</sup> to the appropriate corporate by-laws: "Industry Director"; "Industry Governor" or "Industry committee member"; "National Nominating Committee"; "Non-Industry Director"; "Non-Industry Governor" or "Non-Industry committee member"; "Public Director"; "Public Governor" or "Public committee member".<sup>22</sup> Related, substantive provisions of the Delegation Plan also would be moved to the By-Laws of the appropriate corporate entity.

The Association also is proposing certain refinements to the NASD By-Laws' definitions of "Industry Governor", "Industry committee member", "Non-Industry Governor", and "Non-Industry committee member". Specifically, the Association proposes to exclude from the definition of Industry Governor or committee member a person who is or was an outside director of a broker or a dealer or a director not engaged in the day-to-day management of a broker or dealer. The Association proposes to include in the definition of Industry Governor, Director and Committee member a Governor, Director, or committee member who (1) is an employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (2) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (3) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership; or (4) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership.

The Association proposes to delete from the definition of Non-Industry Governor or committee member specific references to (1) persons affiliated with brokers and dealers that operate solely to assist the securities-related activities of the business of non-member affiliates, such as a broker or dealer established to distribute an affiliate's securities which are issued on a continuous or regular basis, or process the limited buy and sell orders of the shares of employee owners of the affiliate; and (2) employees of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who are primarily engaged in the business of the non-member entity. The Association believes that any person engaged in the day-to-day management of any broker or dealer, including a limited purpose broker or dealer, should be considered an Industry Governor or committee member.

Parallel amendments are proposed for the definitions of "Non-Industry Director" or "Non-Industry member" at the subsidiary level.

Second, the Association proposes to amend the term "person associated with a member" by adding a clause to clarify that the term includes any natural person registered under the Rules of the Association. The impetus for the proposed change is *Slade versus Metropolitan Life Ins. Co.*<sup>23</sup> *Slade* involved a former registered representative who sued his former employer, an NASD member, for wrongful termination. The member filed a motion to compel arbitration of the dispute. The member argued that because the former employee had signed a Form U-4, Uniform Application for Securities Industry Registration or Transfer, and had become registered with the firm, he was subject to the provision of the Form U-4 that requires arbitration of employment-related disputes. The former employee argued that although he signed the Form U-4, he never conducted any securities activities and never acted as an associated person of the member. The lower court ruled that the former employee was not required to arbitrate this dispute. The court held that the NASD's definition of associated person in Article 1(q) of its By-Laws used the words "engaged" in the member's investment banking and securities business, and because the former employee was not "engaged" in such

business, he was not covered by the definition of associated person. The court also noted that the former employee's job responsibilities were not among those listed by the associated person definition in the By-Laws. The member appealed this ruling and in September 1996, the Supreme Court, Appellate Division, affirmed the lower court ruling.<sup>24</sup> The New York Court of Appeals denied the member's request to review the September 1996 ruling.<sup>25</sup>

*Slade* suggests that any person whose job title or position is not specifically identified in the By-Laws' definition of associated person would not be considered an associated person if he or she were not deemed to be "engaged" in the member's securities business. The same result might hold even for persons who are registered with a member firm pursuant to NASD Rules. To avoid this result, the NASD proposes to amend the definition of associated person to clarify that all registered persons are associated persons, regardless of whether they would be deemed to be engaged in the securities business.<sup>26</sup>

Third, the Association proposes to delete the definition "rules of the Corporation" to avoid confusion with the more commonly used, but differently defined term, "Rules of the Association".<sup>27</sup> The term "rules of the Corporation" currently is used to refer collectively to the NASD Certificate of Incorporation, the NASD By-Laws, and the Rules of the Association. Given the restructuring of the NASD into three legal entities, such a collective term for all of the corporate documents of the Association would not be useful. Thus, under the proposed rule change, where a particular provision must be consistent with a particular corporate document, that document is specified. Similarly, the Association also proposes to delete the definitions of "Boards" and "Corporations" and instead refer to each corporate entity specifically where intended.<sup>28</sup> The term "Rules of the Association" or "Rules" is defined to mean the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board pursuant to the NASD By-Laws, as amended or supplemented. A cross-reference from the Rules of the

<sup>24</sup> 231 A.D.2d at 467.

<sup>25</sup> 676 N.E.2d at 500.

<sup>26</sup> See proposed NASD By-Laws Article I, "Definitions"; proposed NASD Regulation By-Laws Article I, "Definitions"; and proposed Nasdaq By-Laws Article I, "Definitions".

<sup>27</sup> See Current NASD By-Laws Article I(v).

<sup>28</sup> See Current NASD By-Laws Article I (d) and (i).

<sup>21</sup> See Delegation Plan, I.A. and I.C.

<sup>22</sup> See proposed NASD By-Laws Article I(n), (o), (bb), (cc), (dd), (ff), and (gg).

<sup>23</sup> Index No. 117688/94, Decision and Order of April 9, 1996 (Sup. Ct., N.Y. Co.), *aff'd*, 231 A.D.2d 467 (N.Y. 1996), *appeal denied*, 676 N.E.2d 500 (N.Y. 1996).

Association deferring to the NASD By-Laws is included in Rule 0121.

Finally, the following definitions are added or amended to reflect drafting conventions adopted to reflect the three corporation structure or other drafting conventions. Those definitions are: "Board"; "branch office"; "day"; "dealer"; "Delegation Plan"; "district"; "member"; "municipal securities dealer"; "NASD"; "Nasdaq"; "Nasdaq Board"; "Nasdaq Listing and Hearing Review Council"; "NASD Regulation"; "NASD Regulation Board"; and "National Adjudicatory Council".<sup>29</sup>

#### Proposed Article II. Offices

The Association proposes to add a new Article II "Offices" that states the location of the registered corporate office of the NASD. This change makes the NASD By-Laws consistent with the NASD Regulation and Nasdaq By-Laws, which both include such a provision.

#### Proposed Article III. Qualifications of Members and Associated Persons

Current Article II, "Qualifications of Members and Associated Persons", is renumbered as proposed Article III. The Association proposes to conform Section 3, which addresses ineligibility of certain persons for membership or association, to the Rule 9520 Series, which sets forth rules for the Association's eligibility proceedings. Specifically, the Association proposes to amend Section 3(d) to clarify that *members* may use eligibility proceedings to obtain relief from the Association's eligibility requirements, *e.g.*, to resolve a statutory disqualification problem. As written, current Section 3(d) could be read to suggest that a broker or dealer seeking admission to the Association could use such proceedings to obtain relief from eligibility requirements as a means of gaining admission to the Association. That is not the Association's practice or the intent of the provision, and Section 3(d) is amended to remove this potential ambiguity.

The Association proposes to delete Section 3(d)(2), which addresses the status of members or persons engaged in eligibility proceedings, because that subject is addressed in the Rule 9520 Series. This change does not result in a substantive change in the Association's practice. Specifically, if a person is already associated with a member at the time a statutory disqualification is discovered, the person may remain associated with the member until final

action is taken under the Rules of the Association. If the person is a prospective employee, the person may not become associated with the member until the Association takes final action under the Rule 9520 Series.

The Association proposes to add a new Section 3(g) to clarify that the Board may delegate its authority under Section 3 in a manner not inconsistent with the Delegation Plan.

Finally, the Association proposes to amend Section 4(h) to conform it to the Act.

#### Proposed Article IV. Membership

Current Article III, Membership, is renumbered as proposed Article IV. The Association proposes to delete Section 1(a)(3), which requires members to release the Association from liability except for willful malfeasance.<sup>30</sup> The Association also proposes to conform Section 7 to changes in the Rule 1010 Series, which sets forth procedures for membership applications and changes in a member's ownership or operations.

#### Proposed Article V. Registered Representatives and Associated Persons

Current Article IV, "Registered Representatives and Associated Persons", is renumbered as proposed Article V. The Association proposes to delete current Section 2(a)(2), which requires registered representatives to release the Association from liability except for willful malfeasance.<sup>31</sup>

#### Proposed Article VI. Dues, Assessments, and Other Charges

Current Article V, "Dues, Assessments, and Other Charges", is renumbered as proposed Article VI. The Association proposes to add a new Section 5 that states that the NASD may delegate its authority regarding dues, assessments, and other charges in a manner not inconsistent with the Delegation Plan.

#### Proposed Article VII. Board of Governors

Current Article VI, "Board of Governors", is renumbered as proposed Article VII. The Association proposes to amend Section 1(c) to clarify the Board's authority to delegate its powers. Specifically, the Association proposes to amend Section 1(c) to provide that to the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and the By-Laws, the NASD may delegate any power of the NASD or its Board of Governors to a

committee appointed pursuant to proposed Article IX, Section 1, the NASD Regulation Board, the Nasdaq Board, or NASD staff in a manner not inconsistent with the Delegation Plan. The Association proposes to add parallel provisions to the NASD Regulation By-Laws and the Nasdaq By-Laws.<sup>32</sup>

The Association proposes to amend Section 2. Proposed Section 2 authorizes the Board to cancel or suspend the membership of a member or suspend the association of a person associated with a member for failure to provide requested information. The proposed amendment provides for reinstatement pursuant to the Rules of the Association.<sup>33</sup> The Association also proposes to delete the delegation to the Chief Executive Officer and replace it with a delegation provision consistent with other provisions set forth in the proposed NASD By-Laws. Specifically, the Association proposes that the Board be permitted to delegate its authority under this Section in a manner not inconsistent with the Delegation Plan and otherwise in accordance with the Rules of the Association.

The Association proposes to amend Section 4, which addresses the composition and qualifications of the Board, to conform to the new corporate structure. Under the proposed rule change, the NASD Board would consist of the Chief Executive Officer and the Chief Operating Officer of the NASD, the Presidents of NASD Regulation and Nasdaq, the Chair of the National Adjudicatory Council,<sup>34</sup> and at least 16 and not more than 22 Governors elected by the members of the NASD. Thus, the By-Laws would authorize a Board of 21 to 27 Governors in total. Proposed Section 4(a) further provides that the Governors elected by the members would include a representative of an issuer of investment company shares or an affiliate of such an issuer, a representative of an insurance company, and a Nasdaq issuer. A majority of the Governors would be Non-Industry Governors, and the Non-Industry Governors would include five or six Public Governors, depending on the size of the Board. Section 4(b) is amended to prohibit the Chair of the National

<sup>32</sup> See proposed NASD Regulation By-Laws Article IV, Section 4.1 and proposed Nasdaq Article IV, Section 4.1, respectively.

<sup>33</sup> See, *e.g.*, Rules 8225 and 9516.

<sup>34</sup> The National Adjudicatory Council is a new entity that would be appointed by the NASD Regulation Board and assume the responsibilities of the National Business Conduct Committee. A more detailed discussion of the National Adjudicatory Council's role and responsibilities is included below in the description of proposed Article V of the NASD Regulation By-Laws.

<sup>29</sup> See proposed NASD By-Laws Article I (c), (d), (g), (h), (i), (j), (q), (t), (u), (v), (w), (x), (y), (z), and (aa).

<sup>30</sup> This proposed deletion was not included in SR-NASD-97-28.

<sup>31</sup> This proposed deletion was not included in SR-NASD-97-28.

Adjudicatory Council from serving as Chair of the Board. The Association believes that the responsibilities of each chairmanship require the attention of one individual.

Section 5, "Term of Office of Governors", is amended to reflect the Board structure. Under proposed Section 5, the Chief Executive Officer and the Chief Operating Officer of the NASD and the Presidents of NASD Regulation and Nasdaq would serve as Governors until a successor was selected, or until death, resignation, or removal. The Chair of the National Adjudicatory Council would serve as a Governor for a term of one year, and generally could not serve more than two consecutive terms.<sup>35</sup> However, proposed Section 5 provides that a former Chair of the National Adjudicatory Council could serve as a Governor elected by the members of the NASD. The Governors elected by the members of the NASD would be divided into three classes and serve three-year terms. Such Governors generally could not serve more than two consecutive terms.

The Association proposes to add a new Section 6, "Disqualification", which addresses the disqualification of a Board member. Proposed Section 6 states that a Governor's term of office immediately terminates if the Board determines that: (a) The Governor no longer satisfies the classification (Industry, Non-Industry or Public Governor) for which the Governor was elected; and (b) failure to remove the Governor would violate the compositional requirements of the Board set forth in proposed Section 4. If a Governor's term of office terminates under this Section, and the remaining term of office of such Governor was not more than six months, during the period of vacancy the Board would not be deemed to be in violation of its compositional requirements by virtue of such vacancy. Proposed Section 6 replaces a provision currently in the Delegation Plan that provides for "automatic removal" if a Governor no longer satisfies the classification for which he or she was elected without describing any process for such removal.<sup>36</sup> The Association proposes this rule change to avoid any potential for the Board to take an *ultra vires* action in the event that a Governor

failed to notify the Board promptly of a change in his or her classification and continued to sit on the Board and cast votes before such removal took place.<sup>37</sup>

Current Section 6, which addresses the filling of vacancies on the Board, is renumbered as proposed Section 7, "Filling of Vacancies". The Association proposes to move the current provisions of the Delegation Plan that address the filling of vacancies to this Section and to provide further that if the remaining term of office of the governorship to be filled is more than one year, then the replacement Governor must stand for election in the next annual election.<sup>38</sup>

Current Section 7, "The National Nominating Committee", which describes nomination and election procedures, is expanded and renumbered as proposed Sections 9 through 14. Proposed Section 9, "The National Nominating Committee", sets forth the powers of the National Nominating Committee. The National Nominating Committee nominates Industry, Non-Industry, and Public Governors for each vacant or new Governor position on the NASD Board; Industry, Non-Industry, and Public Directors for the NASD Regulation Board and the Nasdaq Board; and Industry, Non-Industry, and Public members for the National Adjudicatory Council; and Industry and Non-Industry members for the Nasdaq Listing and Hearing Review Council.

Proposed Section 9 also includes and clarifies the compositional requirements for the National Nominating Committee, which are currently set forth in the Delegation Plan.<sup>39</sup> The Delegation Plan currently provides that a National Nominating Committee member may be removed for cause by a majority vote of the NASD Board. Proposed Section 9 refines this provision by specifying the causes for which a National Nominating Committee member may be removed—refusal, failure, neglect, or inability to discharge such member's duties. This same specific standard for removal is used throughout the Association's corporate documents for committee and council members.

Proposed Section 9 also includes a new provision that requires the Secretary of the NASD to collect from each nominee for Governor such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, or Public

Governor. The Association proposes that the Secretary certify to the National Nominating Committee each nominee's classification to ensure that the compositional requirements of each Board are met.

Proposed Section 10, "Procedures for Nomination of Governors", largely parallels current Section 7(c) and adds provisions regarding contested elections currently located in the Delegation Plan. Conforming references also are made to proposed Article XXI, "Meetings of Members", a new article that provides for meetings of the membership. Proposed Section 10 clarifies the procedures for contested elections and changes the number of members that must sign a petition to support adding a candidate to the ballot for NASD Board elections. Currently, a person seeking to be added to a ballot must obtain the support of two percent of the members of the NASD. The Association proposes to increase the level to three percent of the members.<sup>40</sup> As is currently the case, a petition may be signed only by a member's Executive Representative. Proposed Section 10 also transfers the authority to certify the additional candidate from the National Nominating Committee to the Secretary. Because the Secretary maintains the records of Executive Representatives, and under the proposed rule change would be charged with reviewing information regarding the classification (Industry, Non-Industry, or Public) for each governorship, the Association believes that it would be more efficient for the Secretary to exercise this authority.

Proposed Sections 11, "Communication of Views", 12, "Administrative Support", and 15, "Resignation", are new provisions that parallel new provisions added to the NASD Regulation and Nasdaq By-Laws. Proposed Section 11 prohibits the NASD, the Board, the National Nominating Committees, other committees, and NASD staff from taking any official position regarding a contested nomination or election under the proposed NASD or NASD Regulation By-Laws. Proposed Section 11 permits Board and committee members to communicate their views with respect to a candidate in a contested election only if the Board or committee member acts solely in his or

<sup>35</sup> Under the proposed rule change, the Chair of the National Adjudicatory Council, who serves a term of one year, simultaneously would serve as a Governor of the NASD Board and a Director of the NASD Regulation Board. See proposed Articles IV and V of the NASD Regulation By-Laws. Thus, this proposed change is intended to ensure that the terms for each of these positions run concurrently.

<sup>36</sup> See Delegation Plan, I.C.5.b.

<sup>37</sup> If a disqualified governor's term is greater than 6 months, a qualifying replacement would be provided pursuant to proposed Section 7.

<sup>38</sup> See current Delegation Plan, I.C.5.

<sup>39</sup> See current Delegation Plan, I.C.2.b.(1).

<sup>40</sup> In SR-NASD-97-28, the Association proposed to change this provision to require supporting petitions from three percent of the members, one-half of which would have to be obtained from members outside of the district in which the challenger was employed. The Association has determined that it will not propose a requirement for out-of-district support.

her individual capacity and disclaims any intention to communicate in any official capacity. Under proposed Section 12, administrative support to the candidates in a contested NASD election is limited to two mailings; any other administrative support in any NASD or NASD Regulation contested election or nomination is prohibited. Proposed Section 15 adds resignation provisions that parallel Article 4, Section 4.5 in the NASD Regulation and Nasdaq By-Laws.

Proposed Section 13, "Election of Governors", is largely parallel to current Section 7(a), with conforming amendments to proposed Sections 9 through 12 and a new cross-reference to proposed Article XXI, which sets forth procedures for membership meetings.

Proposed Section 14, "Maintenance of Compositional Requirements of the Board", is a new procedure that requires each Governor to update the information submitted to the NASD Secretary under proposed Section 9(e) regarding his or her classification as an Industry, Non-Industry, or Public Governor at least annually and upon request of the Secretary and to report immediately to the Secretary any change in such classification. Parallel provisions are proposed for the NASD Regulation and Nasdaq By-Laws. These submissions and reports will help the Association ensure that the compositional requirements of the Board and its committees are maintained.

The Association proposes to amend current Section 8, "Meetings of Board; Quorum; Required Vote", which addresses meetings, quorums, and voting of the Board, to provide that a quorum consists of a majority of the Board then in office, including not less than 50 percent of the Non-Industry Governors.<sup>41</sup> This proposed change would ensure that Industry Governors alone could not constitute or dominate a quorum of the Board, and thereby thwart the balanced compositional requirements of the Board under proposed Section 4. Current Section 8 is not renumbered.

#### Proposed Article VIII. Officers, Agents, And Employees

Current Article VII, "Officers, Agents, and Employees", is renumbered as proposed Article VIII. The Association proposes to amend Section 1, "Officers", to require that the NASD Board elect a Secretary and a Chief

Operating Officer. Under current Section 1, the NASD Board is authorized, but not required, to elect a Secretary. Given the number of responsibilities assigned to the Secretary under the proposed By-Laws and the NASD Board's practice of always electing a person to such position, the Association proposes to require that a Secretary be elected. The Board also must elect a Chief Operating Officer because such officer serves on the Board under proposed Article VII, Section 4.

The Association proposes to amend Section 3, "Agents and Employees", to provide that agents and employees shall be under the supervision and control of the officers, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.<sup>42</sup> Generally, agents and employees are under the supervision and control of the officers, but the NASD Board may wish in certain circumstances to retain control over an employee or agent, e.g., as in Section 4, when the Board determines that it wishes to retain counsel.

The Association proposes to move current Section 5, which provides for compensation of Board and committee members, to its own Article, proposed Article X, "Compensation of Board and Committee Members".

The Association proposes to add new Sections 5, 6, and 7 to this Article to conform it to proposed Article 7 of the NASD Regulation By-Laws and proposed Article 6 of the Nasdaq By-Laws. Proposed Section 5 permits the Board to delegate the duties and powers of any officer to any other officer. Proposed Section 6 provides for the resignation and removal of officers. Proposed Section 7 permits the NASD to secure the fidelity of its officers, agents, and employees by bond or otherwise.

#### Proposed Article IX. Committees

Current Article VIII, "Committees", which addresses the formation and powers of committees, is renumbered as proposed Article IX. The Association proposes to amend Section 1 to cross-reference proposed Article VII, Section 1(c), which limits the Board's authority to delegate its powers and authority.

The Association proposes to add a new Section 2, "Maintenance of Compositional Requirements of Committees", which is designed to help the Association maintain the compositional requirements of certain

committees. Undertakings 1 and 6 under the Order require certain committees<sup>43</sup> to have a particular balance of Industry, Non-Industry, and Public committee members.<sup>44</sup> To help ensure that compositional requirements are maintained for committees appointed by the NASD Board, proposed Section 2 authorizes the Secretary to collect from each prospective member of a committee that must be balanced such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member. The Secretary must certify to the Board each prospective committee member's classification. Each committee member must update the information submitted at least annually and upon request of the Secretary of the NASD, and must report immediately to the Secretary any change in such classification. Parallel provisions are set forth in proposed Article 4, Section 4.13(h) of the NASD Regulation By-Laws and proposed Article 4, Section 4.13(h) of the Nasdaq By-Laws.

Current Section 2, "Removal of Committee Member", which addresses removal of a committee member, is renumbered as proposed Section 3 and amended to clarify that a committee member can only be removed for refusal, failure, neglect, or inability to discharge his or her duties by majority vote of the whole Board.

The Association proposes to add new sections to authorize the appointment of an Executive Committee and a Finance Committee and to require, consistent with Undertaking 6, the appointment of an Audit Committee. Proposed Section 4, "Executive Committee", authorizes the NASD Board to appoint an

<sup>43</sup> Undertaking 1 sets forth compositional requirements for "the National Nominating Committee, the Trading/Quality of Markets Committee, the Arbitration Committee, the Market Surveillance Committee, the National Business Conduct Committee, the Management Compensation Committee, and all successors thereto." Undertaking 6 sets forth compositional requirements for an audit committee. The current names of such committees are the National Nominating Committee, the Quality of Markets Committee, the National Arbitration and Mediation Committee, the Market Regulation Committee, the National Adjudicatory Council, the Management Compensation Committee, and the Audit Committee.

<sup>44</sup> The compositional requirements for the National Nominating Committee and the Audit Committee are set forth in the NASD By-Laws. The compositional requirements for the National Adjudicatory Council are set forth in the NASD Regulation By-Laws. The compositional requirements for the Quality of Markets Committee, the National Arbitration and Mediation Committee, the Market Regulation Committee, and the Management Compensation Committee are set forth in the Delegation Plan and the Order.

<sup>41</sup> Other provisions in this filing that state that a quorum consists of a majority of a board, committee, or council also mean a majority of the board, committee, or council then in office.

<sup>42</sup> But see proposed NASD By-Laws Article IX, Section 5(d). The Office of Internal Review and the Director of Internal Review are under the supervision and control of the Audit Committee.

Executive Committee composed of five to nine Governors of the NASD Board, with percentages of Non-Industry and Public committee members as great as the percentages of Non-Industry and Public Governors on the Board. The Executive Committee would include the NASD Chief Executive Officer/Chairman, at least one member each of the NASD Regulation and Nasdaq Boards, and at least two Governors who are not Directors of NASD Regulation of Nasdaq. The Executive Committee would be authorized (consistent with Delaware law) to act on behalf of the NASD Board. A quorum for the transaction of business at Executive Committee meetings would consist of a majority of the Executive Committee, including at least 50 percent of the Non-Industry committee members.<sup>45</sup>

Proposed Section 5, "Audit Committee", contains the provisions relating to the Audit Committee currently found in the Delegation Plan,<sup>46</sup> except that the compositional provisions are amended to require that two (rather than one) Public Governors serve on the Committee. A quorum for the transaction of business at Audit Committee meetings would consist of a majority of the Audit Committee, including at least 50 percent of the Non-Industry committee members. The current Delegation Plan provides that subsidiary directors serve as liaisons to the Audit Committee rather than as full members of the Committee.

Proposed Section 6, "Finance Committee", authorizes the Board to appoint a Finance Committee composed of at least four Governors, including the Chief Executive Officer of the NASD. The Finance Committee would be balanced, with the number of Non-Industry Governors equaling or exceeding the number of Industry Governors plus the Chief Executive Officer. A quorum for the transaction of business at Finance Committee meetings would consist of a majority of the Finance Committee, including at least 50 percent of the Non-Industry committee members.

If any officer of the NASD, NASD Regulation or Nasdaq serves as a member (other than an ex-officio member) of a committee appointed under the by-laws of any of the three corporations, such officer will be counted with the Industry committee

members for purposes of any compositional or quorum requirements.

Finally, the resolution concerning interpretations and explanations is deleted because the NASD Board rescinded it on June 26, 1997. The resolution no longer conforms to Association practice and is contrary to Undertaking 4.

#### Proposed Article X. Compensation of Board and Committee Members

As noted previously, current Article VII, Section 5, which addresses compensation of Board and committee members, is renumbered as proposed Article X, "Compensation of Board and Committee Members".

#### Proposed Article XI. Rules

Current Article IX, "Rules", which authorizes the NASD to adopt rules, is renumbered as proposed Article XI. No substantive changes are proposed.

#### Proposed Article XII. Disciplinary Proceedings

Current Article X, "Disciplinary Proceedings", which authorizes disciplinary proceedings, is renumbered as proposed Article XII. No substantive changes are proposed.

#### Proposed Article XIII. Powers of Board to Impose Sanctions

Current Article XI, "Powers of Board to Prescribe Sanctions", which authorizes the NASD Board to impose sanctions, is renumbered as proposed Article XIII. The Association proposes to amend Section 1(e) and add a new Section (2) to clarify that any delegation under the proposed Article must be in conformity with the Delegation Plan.

#### Proposed Article XIV. Uniform Practice Code

Current Article XII, "Uniform Practice Code", is renumbered as proposed Article XIV. The Association proposes to amend Section 2, "Administration Code", to provide that the Board may delegate its authority with respect to administering the Uniform Practice Code to the NASD Regulation Board and Nasdaq Board in accordance with the Delegation Plan.

#### Proposed Article XV. Limitation of Powers

Current Article XIII, "Limitation of Powers", is renumbered as proposed Article XV. On June 26, 1997, the NASD Board rescinded the resolution that follows current Article XIII, Section 2, which provides for the use of the NASD's name by members. The provisions of the resolution have been

moved to IM-2210-4 of the Rules of the Association.

The Association proposes to amend Section 4, "Conflicts of Interest", which addresses conflicts of interest. The Association proposes to amend Section 4 by redesignating it as Section 4(a) and therein prohibiting any Governor or committee member from directly or indirectly participating in any adjudication of the interests of any party if the Governor or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. Proposed Section 4(a) further requires the Governor or committee member to recuse himself or herself or be disqualified in accordance with the Rules of the Association.<sup>47</sup> Current Section 4 simply references the Rules of the Association. The standard set forth in proposed Section 4(a) is consistent with the conflict of interest standard in Rule 9160.

In addition, the Association proposes to add a new Section 4(b) to address conflicts of interests in non-adjudicatory matters in a manner consistent with the By-Laws for the NASD Regulation Board and the Nasdaq Board. Proposed Section 4(b) provides that a contract or transaction between the NASD and a Governor or officer, or between the NASD and any entity in which a Governor or officer is a director or officer, or has a financial interest, is not void or voidable solely for this reason, or solely because the Governor or officer is present at the meeting of the Board or committee that authorizes the contract or transaction, or solely because the Governor's or officer's vote is counted for such purposes if: (1) The material facts pertaining to such relationship or interest are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Governors; or (2) the contract or transaction is fair to the NASD as of the time it is authorized, approved, or ratified by the Board or committee. Proposed Section 4(b) provides that only disinterested Governors may be counted in determining the presence of a quorum at a meeting of the Board or of a committee which authorizes the contract or transaction. A contract or transaction between the NASD and one of its subsidiaries would not be subject to proposed Section 4(b).

Finally, Section 6, "Government Securities", which limits the Association rulemaking authority over

<sup>45</sup> Similar quorum requirements would be imposed on the Executive Committees of the subsidiaries, the NASD Finance Committee, the National Nominating Committee, the Audit Committee, the Management Compensation Committee, and the National Adjudicatory Council.

<sup>46</sup> See current Delegation Plan, I.D.

<sup>47</sup> See, e.g., Rule 9160.

government securities activities, is deleted to conform the By-Laws to changes previously made to the Association's authority over the government securities activities of its members.

#### Proposed Article XVI. Procedure for Adopting Amendments to By-Laws

Current Article XIV, "Procedure for Adopting Amendments To By-Laws", is renumbered as proposed Article XVI and amended. Currently, a Governor, a district committee, or 25 members may propose amendments to the By-Laws. Proposed Article XVI permits committees appointed by the Board, rather than district committees, to propose By-Law amendments. Under the new corporate structure, proposals by the district committees normally would be presented to the NASD Regulation Board first, or if presented directly to the NASD Board, would be presented by the NASD Regulation President.

#### Proposed Article XVII. Corporate Seal

Current Article XV, "Corporate Seal", is renumbered as proposed Article XVII. There are no substantive changes to proposed Article XVII.

#### Proposed Article XVIII. Checks

Current Article XVI, "Checks", is renumbered as proposed Article XVIII. There are no substantive changes to proposed Article XVIII.

#### Proposed Article XIX. Annual Financial Statement

Current Article XVII, "Annual Financial Statement", is renumbered as proposed Article XIX. There are no substantive changes to proposed Article XIX.

#### Proposed Article XX

The Association proposes to add a new Article XX, "Record Dates". Consistent with Delaware law, proposed Section 1, "Fixing of Date by Board", permits the Board to fix a record date to determine the members that are entitled to notice of or to vote at member meetings. Proposed Section 2, "Default Date", provides for a default record date if the Board does not fix such a date. Proposed Section 3, "Adjournment", provides that a determination of members of record also applies to an adjournment of a member meeting.

#### Proposed Article XXI

The Association proposes to add a new Article XXI, "Meetings of Members". Proposed Section 1, "Annual Meeting", authorizes the NASD Board to designate a time and

place and set an agenda for an annual meetings of members. Proposed Section 2, "General Meeting", sets forth procedures for setting the agenda of special meetings. Proposed Section 3, "Notice of Meeting; Member Business", sets forth notice requirements for meetings. Proposed Section 4, "Inspector", describes voting procedures. Proposed Section 5, "Conduct of Meeting", states that the Chief Executive Officer of the NASD acts as Chair of the meeting and authorizes the Board to adopt rules and regulations for the conduct of meetings.

*c. Proposed Changes to NASD Regulation By-Laws:* NASD Regulation adopted its current By-Laws on July 19, 1996. The Association proposes to amend the NASD Regulation By-Laws to conform them to the changes described in the introduction to Section II of this rule filing. In addition, the Association proposes to explicitly recognize the NASD as the sole stockholder of NASD Regulation capital stock and add new articles describing the composition and powers of a new National Adjudicatory Council, procedures for nominations to the National Adjudicatory Council, and procedures for district elections. Significant changes to the NASD Regulation By-Laws are described below, including changes relating to the corporate restructuring in proposed Article IV, Sections 4.2, 4.3, 4.4(b), 4.13, 4.14(b); Article V; Article VI. Minor, non-substantive changes and changes to reflect drafting conventions are not described.<sup>48</sup>

#### Proposed Article I. Definitions

First, a new Article I, entitled "Definitions", is proposed. Current Article I, "Offices" is renumbered as proposed Article II.

The Association proposes that the By-Laws for each corporate entity have a free-standing set of definitions. Therefore, the Association proposes to add definitions for the following terms, which conform to the definitions in proposed Article I of the NASD By-Laws: "Delegation Plan"; "Executive Representative"; "Industry Director" or "Industry member"; "NASD Regulation"; "National Adjudicatory Council"; "National Nominating Committee"; "Non-Industry Director" or "Non-Industry member"; "person associated with a member"; and "Public Director" or "Public member".<sup>49</sup>

The Association proposes to include the following definitions only in the

<sup>48</sup> All references to Articles or Sections in this section "c" refer to the NASD Regulation By-Laws, unless otherwise noted.

<sup>49</sup> See proposed Section 1.1(h), (o), (q), (u), (v) (w), (x), (y), and (z).

NASD Regulation By-Laws: "District Committee"; "District Director"; "District Nominating Committee"; "district office"; "Independent Agent"; and "Regional Nominating Committee". These terms relate to the nomination and election procedures set forth in proposed Article VI, "National Adjudicatory Council Regional Nominations for Industry Members", and Article VIII, "District Committee and District Nominating Committee" and therefore are not used in the proposed NASD and Nasdaq By-Laws.

In addition, the Association proposes to add the following definitions for clarity and to conform to the drafting conventions adopted generally, but which do not result in any substantive change: "Board"; "day"; "Delaware law"; "Director"; "NASD"; "NASD member"; and "Rules of the Association" or "Rules".<sup>50</sup>

#### Proposed Article II. Offices

Current Article I, "Offices", is renumbered as proposed Article II. Sections 1.1 and 1.2 are renumbered as Sections 2.1 and 2.2. There are no substantive changes in proposed Article II.

#### Proposed Article III. Meetings of Stockholders

Current Article II, "Meetings of Stockholders", is renumbered as proposed Article III. Current Article II sets forth general provisions for meetings of stockholders consistent with Delaware law. In proposed Article III, in recognition of the fact that NASD Regulation has only one stockholder, the Association proposes to delete all of the general provisions regarding meetings of stockholders and retain only the provision on which NASD Regulation generally relies, namely obtaining the stockholder's written consent for any action that is required or permitted to be taken at a stockholder meeting. Thus, Sections 2.1 through 2.6 are deleted, and Section 2.7 is renumbered as Section 3.1.

#### Proposed Article IV. Board of Directors

Current Article III, "Board of Directors", is renumbered as proposed Article IV. Sections 3.1 through 3.4 are renumbered as Section 4.1 through 4.4. Proposed Section 4.1, "General Powers", sets forth the general powers of the Board. The Association proposes to conform the Board's authority to delegate its powers to the delegation authority set forth in proposed Article VII, Section 1(c) of the NASD By-Laws,

<sup>50</sup> See proposed Section 1.1(b), (e), (g), (i), (r), (t), and (bb).

*i.e.*, to the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and these By-Laws, the Board may delegate any of its powers to a committee appointed under proposed Section 4.14 or to NASD Regulation staff in a manner not inconsistent with the Delegation Plan.

The Association proposes to amend Sections 4.2, "Numbers of Directors", and Section 4.3, "Qualifications". The Association proposes that the NASD Board appoint the NASD Regulation Directors from among the NASD Board of Governors. The NASD Regulation Board would be composed of between five and eight Directors, including the NASD Regulation President, a representative of an issuer of investment company shares or an affiliate of such an issuer and an insurance company or an affiliated NASD member, and at least one or two Public Directors, depending on the size of the Board. The number of Non-Industry Directors would be equal to or greater than the number of Industry Directors plus the President. As noted above, the Chair of National Adjudicatory Council would serve simultaneous one-year terms on the NASD and NASD Regulation Boards. Finally, the total number of NASD Regulation Directors would equal the total number of Nasdaq Directors.

Proposed Section 4.3(b) is a new provision requiring the Board to elect a Chair and Vice Chair from among its members.

Proposed Section 4.4(a), "Election", which provides for the election of Directors, is amended to reflect the NASD's role as sole stockholder. As described in proposed Article VII, Section 9 of the NASD By-Laws, the National Nominating Committee, an NASD Board committee, nominates Directors for the NASD Regulation Board.

Current Section 3.5, "Term", is deleted. Under the proposed rule change, the NASD Board would elect Directors annually; thus the Board would not be divided into classes.<sup>51</sup> As a general matter, NASD Regulation Directors would be appointed for three one-year terms that coincide with their terms on the NASD Board. However, the NASD Board would retain flexibility in this regard and could appoint individuals to serve where they are best qualified or best able to serve. Thus, for example, an individual who has served one year on the NASD Regulation Board could be appointed to Nasdaq Board, or could serve on the NASD Board alone.

<sup>51</sup> See Section 211(b) of the General Corporation Law of the State of Delaware.

Current Section 3.7, "Removal", is renumbered as proposed Section 4.6. Proposed Section 4.6 clarifies that a Director may be removed from office only by a majority vote of the NASD Board.

Proposed Section 4.7, "Disqualification", and proposed Section 4.8, "Filling of Vacancies", are new. Current Sections 3.8 through 3.11 ("Quorum and Voting", "Regulation", "Meetings", and "Notice of Meetings", respectively) are renumbered as proposed Sections 4.9 through 4.12. Current Section 3.12, "Conflicts of Interest", is renumbered as proposed Section 4.14. Current Section 3.13, "Committees of the Board of Directors", is renumbered as proposed Section 4.13 and retitled "Committees". Current Section 3.14, "Action Without Meeting", is renumbered as proposed Section 4.15.

Proposed Sections 4.7, "Disqualification", 4.8, "Filling of Vacancies", 4.9, "Quorum and Voting", and 4.14, "Contracts and Transactions Involving Directors", which set forth provisions for disqualification, filling of vacancies, quorums, and conflicts of interest, are designed to parallel proposed Article VII, Sections 6 through 8, and proposed Article XV, Section 4 of the NASD By-Laws.<sup>52</sup>

There are no substantive changes in proposed Section 4.10, "Regulation", proposed Section 4.11, "Meetings", or proposed Section 4.15, "Action Without Meeting".

In proposed Section 4.12, "Notice of Meeting; Waiver of Notice", the Association proposes to increase the amount of time required for mail notice of a meeting from two to seven days, to clarify that any of the permissible forms of notice described may be used for any meeting of the Board, and to add a subsection that provides that any meeting of the Board is a legal meeting without any prior notice if all Directors are present.<sup>53</sup>

Proposed Section 4.13 "Committees", (current Section 3.13 as renumbered)

<sup>52</sup> There is one difference between the conflicts of interest provision for the NASD and the conflicts of interest provisions for the subsidiaries. The proposed By-Laws for NASD Regulation and Nasdaq provide that a transaction also is not void or voidable if the material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the stockholder, *i.e.*, the NASD, and the contract or transaction is approved in good faith by vote of the stockholder. See proposed Article IV, Section 4.14 in both the NASD Regulation and Nasdaq By-Laws.

<sup>53</sup> A Director is still permitted, pursuant to Section 12.3(b), to attend a meeting for the express purpose of objecting, at the beginning of a meeting, to the transaction of any business because the meeting is not lawfully called or convened.

sets forth new provisions regarding committees. Proposed Section 4.13(a) authorizes the Board to appoint committees. Proposed Section 4.13(b) describes how the Board may delegate authority to such committees. In accordance with the functions and responsibilities set forth in the Delegation Plan, the Board may delegate its authority to any duly appointed committee. Any action by such committee is subject to review, ratification, or rejection by the Board. In addition, such delegations must be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. These limitations previously were set forth in the Delegation Plan. Proposed Section 4.13(b) further clarifies that, with respect to other matters, the Board may delegate its powers and authority to act on behalf of the Board in managing the business and affairs of NASD Regulation only to committees consisting solely of one or more Directors, and that any such delegation must be not inconsistent with the Delegation Plan.

Proposed Sections 4.13(f) and (g) authorize the NASD Regulation Board to appoint an Executive Committee and a Finance Committee.<sup>54</sup> Proposed Section 4.13(h) mirrors Article IX, Section 2 of the NASD By-Laws.

Proposed Section 4.16, "Communication of Views Regarding Contested Election or Nomination", which concerns communication of views during a contested election or nomination, parallels Article VII, Section 11 of the NASD By-Laws.

Proposed Article V. National Adjudicatory Council

Proposed Article V is a new article that requires the NASD Regulation Board to appoint a National Adjudicatory Council. The adjudicatory functions of the National Business Conduct Committee would be transferred to the National Adjudicatory Council, and the authority to appoint a National Business Conduct Committee would be deleted from the Delegation Plan. The National Adjudicatory Council would operate much as the National Business Conduct Committee currently operates under the Delegation Plan. However, in order to ensure that there is adequate time for the NASD Regulation and NASD Boards to consider adjudicatory decisions of the National Adjudicatory Council, written

<sup>54</sup> The by-laws of each subsidiary would continue to authorize its board to appoint executive and finance committees, but the Association does not anticipate that the subsidiary boards will find it necessary to continue to appoint such committees.

reports of National Adjudicatory Council actions would be provided to the Secretary of the NASD no later than 15 calendar days before regularly scheduled meetings of the revamped NASD Board.<sup>55</sup> Thus, the National Adjudicatory Council would have greater flexibility than currently exists in scheduling the National Business Conduct Committee's work, and could meet telephonically if needed in order to reduce the time demands of National Adjudicatory Council service. Absent exigent circumstances, however, the National Adjudicatory Council would schedule its adjudicatory work to provide a 15 calendar day review period. In addition, the National Adjudicatory Council would have the option of holding telephonic meetings on an as-needed basis to expedite NASD Regulation Board consideration of disciplinary-related policy matters.

The National Adjudicatory Council's areas of responsibility are set forth in proposed Section 5.1 "Appointment and Authority". These areas include disciplinary and statutory disqualification decisions and other miscellaneous and policy matters. The National Adjudicatory Council also would assume certain other review functions, including reviews of denials of access, denials of exemptions, limitations on operations, and membership proceedings. As is the case with the current National Business Conduct Committee, the National Adjudicatory Council would consider and make recommendations to the NASD Regulation Board on policy and rule changes relating to: (1) The business and sales practices of NASD members and associated persons; and (2) enforcement policies, including policies with respect to fines and other sanctions.

Proposed Section 5.2, "Number of Members and Qualifications", describes the compositional requirements of the National Adjudicatory Council. It would be composed of 12 to 14 members, including at least three Public members. The number of Non-Industry members would equal or exceed the number of Industry members.

Proposed Section 5.3, "Nominations Process", sets forth the nomination process for membership on the National Adjudicatory Council. All members of the National Adjudicatory Council would be proposed by the National Nominating Committee and appointed by the NASD Regulation Board. Beginning in 1998, the Industry members of the National Adjudicatory

Council would be nominated pursuant to procedures that are similar to current procedures for the nomination of regional Industry Directors to the NASD Regulation Board. The regional nominating process for the National Adjudicatory Council is set forth in proposed Article VI.

Under proposed Section 5.4, "Term of Office", all National Adjudicatory Council members would be appointed for a one-year term in 1988. Regional nominations would be held at the end of 1998, and each National Adjudicatory Council member would serve a term of one or two years beginning in 1999, with staggered two-year terms thereafter. Proposed Sections 5.5 through 5.10, which set forth procedures for resignation, removal, disqualification, filling of vacancies, quorum and voting, and meetings, are derived from similar provisions in the NASD and NASD Regulation By-Laws.

Proposed Article VI. National Adjudicatory Council Regional Nominations for Industry Members

The Association proposes to add a new Article VI, National Adjudicatory Council Regional Nominations for Industry Members, to the NASD Regulation By-Laws. The procedures are based on the procedures for regional nominations to the NASD Regulation Board, which are currently set forth in the Delegation Plan<sup>56</sup> and in NASD Regulation Board resolutions. The regional nomination process would begin in 1998 for the 1999 National Adjudicatory Council.

The Industry members of the National Adjudicatory Council would represent a geographical region of the United States. Each Industry member initially would be nominated by a Regional Nominating Committee. Each Regional Nominating Committee then would present a nominee to the National Nominating Committee to represent such region on the National Adjudicatory Council. The Regional Nominating Committee would act essentially in an advisory capacity because only the National Nominating Committee could formally nominate to the NASD Regulation Board an Industry member for the National Adjudicatory Council. The NASD Regulation Board, in turn, could appoint or reject the candidates nominated by the National Nominating Committee.

Proposed Article VI sets forth the following procedures for the regional nominating process. As previously noted, the Board would designate regions. Each region would have a Regional Nominating Committee, which

would be composed of two to four members from each District Committee in the region. These members would be selected by their District Nominating Committee.<sup>57</sup> When the term of office of a National Adjudicatory Council member representing a region was due to expire, the Secretary of NASD Regulation would notify the appropriate Regional Nominating Committee, which would initiate the regional nominating process.

The Regional Nominating Committee would receive from the Secretary of NASD Regulation a description of the firms eligible to vote in the region. Firms eligible to vote are those that either are headquartered in the region or have a branch office in the region. In making nominations, the Regional Nominating Committee would seek to ensure appropriate and fair representation of the classes and types of firms eligible to vote in the region. The Regional Nominating Committee could nominate more than one candidate so that the NASD membership in the region could vote on a nominee to present to the National Nominating Committee. (This process would work in the same manner as a contested nomination, which is described below.)

Once the Regional Nominating Committee selected a nominee (or nominees), it would send notice of its nomination to the Executive Representative of each NASD member eligible to vote. The Executive Representative is the officer or employee of the member who casts votes for the member in all nominations and elections. If any person not nominated wished to contest a nomination, he or she would send notice of intent to contest to the Regional Nominating Committee or the Secretary of NASD Regulation within a specified period. Such person then would be required to submit within a specified period a written petition signed by at least ten percent of the members eligible to vote in the region supporting such person's candidacy. If support of ten percent of the membership was not obtained within the requisite time, and if the Nominating Committee nominated only one candidate, then the nominee of the Regional Nominating Committee would be presented to the National Nominating Committee.

If the Regional Nominating Committee nominated more than one candidate, or

<sup>55</sup> As stated above, revised review procedures will be set forth in a separate rule filing.

<sup>56</sup> See current Delegation Plan II.B.

<sup>57</sup> See discussion of proposed Article VIII, "District Committees and District Nominating Committees," for a description of how District Committee and District Nominating Committee members would be elected.

if a person who was not nominated obtained the necessary support, then contested nomination procedures would apply. Under these procedures, the Association would pay for two mailings of literature for each candidate, and the members of all NASD, Nasdaq, and NASD Regulation Boards, councils, and committees, and NASD, Nasdaq, and NASD Regulation staff, would be prohibited from expressing views on the nomination. However, members of the Boards, councils, and committees could express views if they made it clear they are acting in their individual capacities and disclaimed any intention to communicate in an official capacity. A ballot would be sent to Executive Representatives of the firms eligible to vote, and specified procedures, including the use of an independent agent to qualify returned ballots and count votes, then would be followed to determine the outcome of the nomination. If the National Nominating Committee or the NASD Board rejected a nominee of a Regional Nominating Committee, the Regional Nominating Committee would repeat the regional nomination procedures and submit another nominee to the National Nominating Committee.

#### Proposed Article VII. Officers, Agents, and Employees

Former Article IV, "Officers, Agents and Employees", is set forth as proposed Article VII. Former Sections 4.1, 4.3, 4.4, and 4.5 are renumbered, respectively, as 7.1, 7.4, 7.5, and 7.6. Changes to these sections are made only as necessary to conform to the definitions in proposed Article I and other drafting conventions. The Association proposes to add a new Section 7.2, "Absence of the President", to provide a standard operational mechanism in the event of the President's inability to act, absence, or a vacancy in the position, in conformity with proposed Article VIII, Section 2 of the NASD By-Laws. In proposed Section 7.3, "Agents and Employees", the Association proposes a conforming change to clarify supervision and control of agents and employees.<sup>58</sup>

#### Proposed Article VIII. District Committees and District Nominating Committees

Proposed Article VIII, "District Committees and District Nominating Committees", is a new Article. Proposed Article VIII authorizes the Board to designate districts and sets forth

procedures for the members within each district to elect a District Committee and a District Nominating Committee. The language of proposed Article VIII is drawn from former Article VIII of the NASD By-Laws, which authorized the NASD Board to form such committees. Proposed Article VIII is drafted to conform to the Undertakings. Specifically, under Proposed Article VIII, Section 8.2, "Composition of District Committees", the role of the District Committee members is limited to serving as panelists in disciplinary proceedings in accordance with the Rule 9200 Series, recommending policy and rule changes to the NASD Regulation Board, and selecting members of the Regional Nominating Committees in a manner consistent with proposed Article VI of the NASD Regulation By-Laws.

Election procedures for District Committees and District Nominating Committees currently are set forth in corporate resolutions. The Association proposes to add these procedures, with further clarifications and detail, to the By-Laws in proposed Article VIII. The procedures conform to the nomination procedures in proposed Article VI.

Proposed Article VIII sets forth the following procedures for district elections. In May of each year, each District Nominating Committee would solicit candidates to fill the vacancies anticipated to occur on its District Committees as well as candidates to serve on the following year's District Nominating Committee. District Nominating Committee members would serve a one-year term, while District Committee members would serve a three-year term. The District Nominating Committee would receive from the Secretary of NASD Regulation a description of the firms eligible to vote in the district. Firms eligible to vote are those that either are headquartered in the district or have a branch office in the district. In making nominations, the District Nominating Committee would seek to ensure appropriate and fair representation of the classes and types of firms eligible to vote in the district. Any candidate would have to be employed by a member eligible to vote in the district.

Current corporate resolutions authorize the District Nominating Committee to nominate one candidate for each vacancy. The Association proposes to authorize the District Nominating Committee to nominate more than one candidate per vacancy. (This process would trigger contested election procedures, which would work like the contested nomination procedures described above.)

Once the District Nominating Committee selected its nominees, it would send notice of its slate to the District Committee and the Executive Representative of each firm eligible to vote. If a person employed by a member in the district was not nominated but wished to contest an election, he or she would send notice of intent to contest to the District Director or the Secretary of NASD Regulation within a specified period. Such person then would be required to submit within a specified period a written petition evidencing support for such contest by at least ten percent of the members eligible to vote in the district. If the person did not obtain ten percent support for a contest within the requisite period, or if the District Nominating Committee nominated only one candidate per vacancy, then nominees of the District Nominating Committee would be deemed elected, and the election process would be complete.

If the District Nominating Committee nominated more than one candidate per vacancy, or if a person obtained the necessary support for a contest, then contested election procedures would apply. These procedures conform to the procedures for contested regional nominations in proposed Article VI. The candidates for District Committee membership receiving the largest number of votes cast in the district for that office would be declared elected such that the number of candidates declared elected equaled the number of vacancies on the District Committee. The candidates for District Nominating Committee membership receiving the largest number of votes cast in the district for that office would be declared elected such that the number of candidates declared elected equaled the number of vacancies on the District Nominating Committee.

#### Proposed Article IX. Compensation

Proposed Article IX, "Compensation", is a new Article that parallels proposed Article X of the NASD By-Laws and also authorizes compensation for National Adjudicatory Council members.

#### Proposed Article X. Indemnification

Current Article V, Indemnification, is renumbered as proposed Article X. Sections 5.1 through 5.5 are combined, amended, and renumbered as proposed Section 10.1, and current Section 5.6 is renumbered as proposed Section 10.2. The Association proposes to make the indemnification policies for all three corporate entities essentially identical. Therefore, proposed Sections 10.1 and 10.2 conform to proposed Article VII, Sections 7.1 and 7.2 of Nasdaq By-Laws

<sup>58</sup> See proposed NASD By-Laws Article VIII, Section 3, and proposed Nasdaq By-Laws Article VII, Section 7.3.

and the provisions for indemnification in the NASD's Restated Certificate of Incorporation.

NASD Regulation By-Laws provide for the indemnification of, and advancement of expenses to, persons named or threatened to be named as a party to any civil, administrative, or investigative proceeding because such person is or was a Director, officer, employee, or agent of the corporation. The By-Laws also provide that: (1) The right of indemnification is not exclusive of any other right the person may have; (2) the amount of indemnification is reduced by the amount the indemnified person collects from another source; and (3) NASD Regulation has the power to purchase and maintain indemnification insurance.

The Association proposes to extend the indemnification provisions to cover National Adjudicatory Council and committee members.

The Association also proposes to modify NASD Regulation's By-Laws to make indemnification and advancement of expenses to agents discretionary with the Board, rather than mandatory, to permit the Board to determine whether indemnification is appropriate under the particular circumstances.

Indemnification of non-officer employees remains the presumption. However, the Association proposes to authorize the Board to refuse to advance expenses to an employee if: (1) The employee (i) acted in bad faith, or (ii) did not act in a manner that the employee believed to be in, or not opposed to, the best interests of NASD Regulation; (2) with respect to a criminal matter, the employee believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) the employee breached his or her duty to NASD Regulation. Finally, the Association proposes to add a provision requiring NASD Regulation, in response to a written claim for indemnification or advancement, to make such payment within 60 days of the claim.

While it is a common corporate practice to provide for discretionary indemnification of employees (as well as agents), NASD Regulation believes that it is essential that employees have confidence that they will be indemnified if they are named in any proceeding resulting from actions taken in good faith. At the same time, NASD Regulation believes it is essential that the Board have the opportunity to evaluate and deny advancement of expenses if it determines the action was not taken in good faith or if the person had reason to believe the action was illegal or breached a duty to the corporation.

#### Proposed Article XI. Capital Stock

Current Article VI, "Capital Stock", is renumbered as proposed Article XI. The Association proposes to add a new Section 11.1, "Sole Stockholder", recognizing the NASD's status as sole stockholder. Current Sections 6.1 through 6.7 are renumbered as proposed Section 11.2 through 11.8. The Association proposes certain changes only to conform the proposed Article to the drafting conventions and stylistic changes incorporated generally in the NASD By-Laws, the NASD Regulation By-Laws, and the Nasdaq By-Laws. There are no substantive changes to proposed Article XI. In proposed Section 11.8, the Association proposes to delete detailed provisions of Delaware law for the fixing of record dates, which are more useful to corporations with more than one stockholder, and instead provide that a record date may be fixed in accordance with Delaware law.

#### Proposed Article XII. Miscellaneous Provisions

Current Article VII, "Miscellaneous Provisions", is renumbered as proposed Article XII. There are no substantive changes in proposed Article XII. Current Sections 7.1, 7.2, 7.3, 7.4, and 7.5 are proposed to be renumbered, respectively, as Sections 12.1, 12.2, 12.3., 12.4, and 12.5.

#### Proposed Article XIII. Amendments; Emergency By-Laws

Current Article VIII, "Amendments; Emergency By-Laws", is renumbered as proposed Article XIII. There are no substantive changes in proposed Article XIII. Current Sections 8.1, 8.2, and 8.3 are proposed to be renumbered, respectively, as Sections 13.1, 13.2, and 13.3.

*d. Proposed Changes to NASDAQ By-Laws:* Nasdaq adopted its current By-Laws on October 27, 1993. The Association proposes to amend the Nasdaq By-Laws to conform them to changes described in the introduction to Section 3(a)(i) of this rule filing, to the proposed NASD and NASD Regulation By-Laws, where appropriate. Significant changes to Nasdaq's By-Laws are described below, including changes relating to the corporate restructuring in proposed Article IV, Sections 4.2, 4.3, 4.13, 4.14(b); and Article V. Minor, non-substantive changes and changes to reflect drafting conventions are not described.

#### Proposed Article I. Definitions

The Association proposes to add a new Article I, "Definitions". As noted previously, the Association proposes

that the By-Laws for each corporate entity have a free-standing set of definitions. Therefore, the Association proposes to add the following definitions, which conform to definitions proposed for inclusion in the NASD and NASD Regulation By-Laws: "Act"; "Board"; "broker"; "Commission"; "day"; "dealer"; "Delaware law"; "Delegation Plan"; "Director"; "Industry Director" or "Industry committee member"; "NASD"; "NASD Board"; "NASD Regulation"; "Nasdaq"; "Nasdaq Listing and Hearing Review Council"; "National Nominating Committee"; "Non-Industry Director" or "Non-Industry committee member"; "person associated with a member"; "Public Director" or "Public committee member"; and "Rules of the Association" or "Rules".

#### Proposed Article II. Offices

Current Article I, "Offices", is renumbered as proposed, and the Sections are renumbered accordingly.

#### Proposed Article III. Meetings of Stockholders

Current Article II, "Meetings of Stockholders", is renumbered as proposed Article III and conformed to the changes in proposed Article III of the NASD Regulation By-Laws.

#### Proposed Article IV. Board of Directors

Current Article III, "Board of Directors", is renumbered as proposed Article IV. The changes in proposed Article IV are designed to conform it, as appropriate, to proposed Article IV of the NASD Regulation By-Laws. Sections 3.1 through 3.4 are renumbered as Section 4.1 through 4.4. In proposed Sections 4.2 and 4.3, provisions regarding the number and qualifications of Directors are amended. Under the proposed rule change, the Nasdaq Board would be appointed by the NASD Board from among its members. The Nasdaq Board would be composed of between five and eight individuals, including the President of Nasdaq, at least one Public member, and at least one issuer representative. The number of Non-Industry Directors would be equal to or greater than the combined total of Industry Directors and the President of Nasdaq.

Like the NASD Regulation Board, members of the Nasdaq Board generally would be appointed for three one-year terms that coincided with their terms on the NASD Board. However, the NASD Board would retain flexibility in this regard and could appoint individuals to serve where they are best qualified to serve. Thus, as described above in the

corresponding section of the NASD Regulation By-Laws, current Section 3.5, "Term", is deleted and the remaining sections are renumbered accordingly.

Proposed Section 4.14(a), "Conflicts of Interest; Contracts and Transactions Involving Directors", is identical to the corresponding provision in the NASD Regulation By-Laws, except that there is no cross-reference to the Rules of the Association because the Association does not have a specific disqualification standard for Nasdaq proceedings as it has in the Rule 9160 Series for NASD Regulation disciplinary proceedings. Finally, proposed Section 4.16, "Communication of Views Regarding NASD or NASD Regulation Elections or Nomination", is a new section that holds Nasdaq, Nasdaq's Board and its committees, the Nasdaq Listing and Hearing Review Council, and Nasdaq staff to the same standards proposed for NASD and NASD Regulation with respect to contested elections or nominations.<sup>59</sup>

#### Proposed Article V. Nasdaq Listing and Hearing Review Council

Proposed Article V, "Nasdaq Listing and Hearing Review Council", is a new article that requires the Nasdaq Board to appoint a Listing Council. The responsibilities of the Nasdaq Listing and Hearing Review Committee are transferred to the Listing Council, and the provision of the Delegation Plan authorizing the appointment of the Committee is deleted. Proposed Section 5.1, "Appointment and Authority", sets forth the responsibilities of the Listing Council. The Listing Council generally would operate much as the Nasdaq Listing and Hearing Review Committee currently operates under the Delegation Plan.<sup>60</sup> As is the case with the current Nasdaq Listing and Hearing Review Committee, the Listing Council would be authorized to make recommendations to the Nasdaq Board on listing-related rule amendments.

Under proposed Section 5.2, "Number of Members and Qualifications", the Listing Council would be composed of at least eight and not more than 11 members, of which no more than 50 percent could be directly engaged in market-making activity or employed by a member firm whose revenues from market-making activity exceed ten percent of its total revenue. The Listing Council also would include at least

three Non-Industry members, and a quorum for the transaction of business at Listing Council meetings would include at least one of the Non-Industry members. Under proposed Sections 5.3, "Nomination Process", and 5.4, "Term of Office", the members of the Listing Council would be nominated by the National Nominating Committee and appointed by the Nasdaq Board and serve for a term of two years. Sections 5.5 through 5.10 mirror the administrative provisions for the National Adjudicatory Council in proposed Article VI, Sections 5.5 through 5.10 of the NASD Regulation By-Laws.

#### Proposed Article VI. Compensation

Proposed Article VI, "Compensation", is a new Article that conforms with proposed Article X of the NASD By-Laws and proposed Article IX of the NASD Regulation By-Laws. Proposed Article VI also authorizes compensation of Listing Council members.

#### Proposed Article VII. Officers, Agents and Employees

Current Article IV, "Officers, Agents and Employees", is renumbered as proposed Article VII, and the Sections are renumbered accordingly. Only one substantive change is proposed to Article VII. Proposed Section 7.3 (current Section 4.3), "Subordinate Officers, Agents, or Employees", includes a provision that clarifies that agents and employees of Nasdaq are under the supervision and control of the officers of Nasdaq, unless the Nasdaq Board, by resolution, provides that an agent or employee shall be under its supervision and control.<sup>61</sup>

#### Proposed Article VIII. Indemnification

Current Article V, "Indemnification", is renumbered as proposed Article VIII, and the Sections are renumbered accordingly. Proposed Article VIII conforms to the provisions for indemnification in the NASD's Restated Certificate of Incorporation and proposed Article X of the NASD Regulation By-Laws. As noted above, the Association proposes to make the indemnification policies for all three corporate entities identical. Proposed Section 8.1, "Nasdaq Listing and Hearing Review Council and Committee Members", also provides for indemnification of Listing Council and committee members.

<sup>61</sup> See proposed Article VIII, Section 3 of the NASD By-Laws and proposed Article VII, Section 7.3 of the NASD Regulation By-Laws.

#### Proposed Article IX. Capital Stock

Current Article VI, "Capital Stock", is renumbered as proposed Article IX. The Association proposes changes to conform to those set forth for proposed Article XI of the NASD Regulation By-Laws.

#### Proposed Article X. Miscellaneous Provisions

Current Article VII, "Miscellaneous Provisions", is renumbered as proposed Article X, and the sections are renumbered accordingly. There are no substantive changes.

#### Proposed Article XI. Amendments; Emergency By-Laws

Current Article VIII, "Amendments; Emergency By-Laws", is renumbered as proposed Article XI, and the sections are renumbered accordingly. There are no substantive changes.

*e. Proposed Changes to the Delegation Plan and Restated Certificates of Incorporation.* The Association proposes to amend the Delegation Plan to delete provisions added to the By-Laws of the NASD, NASD Regulation, and Nasdaq.<sup>62</sup> Specifically, in Section I.A., the definitions of "Industry", "Non-Industry", and "Public" Governors, Directors, and committee members are deleted and instead the Section cross-references the By-Laws of the NASD, NASD Regulation, and Nasdaq, where the Association proposes to define such terms.<sup>63</sup>

The Association proposes to add a new Section I.B.11. to the Delegation Plan, authorizing the NASD Board to take action *ab initio*; either the full NASD Board or the NASD Executive Committee could exercise this authority.<sup>64</sup> This authority typically would be exercised in two circumstances. First, when an issue was ripe for consideration at a regularly scheduled meeting of a subsidiary board but clearly warranted consideration by the NASD Board, separate consideration by the subsidiary board could be avoided without any loss of subsidiary board input because the subsidiary board members constitute a subset of the NASD Board. This option is not available under the current corporate structure, which invariably requires that matters within a subsidiary's sphere of delegated authority be considered by

<sup>62</sup> All references to Sections in this section "d" refer to the Delegation Plan, unless otherwise noted.

<sup>63</sup> See proposed Article I of the NASD By-Laws; proposed Article I of the NASD Regulation By-Laws; proposed Article I of the Nasdaq By-Laws.

<sup>64</sup> This proposed rule change is a result of the corporate restructuring and was not proposed in SR-NASD-97-28.

<sup>59</sup> See proposed Article VII, Sections 11 and 12 of the NASD By-Laws and proposed Article IV, Section 4.16 of the NASD Regulation By-Laws.

<sup>60</sup> Procedures for NASD Board review of Listing Council decisions will be proposed in a separate rule filing.

that subsidiary's board before consideration by the NASD Board.

Second, should a time-sensitive issue arise between regularly scheduled board meetings, the issue could be resolved by the NASD Executive Committee in a single step. At present, the subsidiaries' executive committees are authorized to take initial action on such matters, but such action cannot be implemented without the unanimous written consent of the NASD Board. Obtaining such unanimous written consent can impede the Association's ability to respond to urgent matters. This time-consuming step is avoided through the creation of an NASD Executive Committee that could convene telephonically on an as-needed basis to address time-sensitive matters.

The Association further proposes to delete Sections I.C., I.D., II.B., II.D., III.B., and part of III.D., which address the composition of the Boards, elections, terms of office, vacancies, disqualification due to change in classification, and the composition and authority of certain committees because the Association proposes to include revised provisions in the appropriate By-Laws.<sup>65</sup> With respect to committees, the Association proposes to include in the appropriate By-Laws or in the Delegation Plan the compositional requirements for specified committees as provided in the Undertakings. If the committee consists solely of Directors or Governors, the Association proposes to include provisions describing the committee's powers and compositional requirements in the appropriate corporate By-Laws. If the committee consists of Directors or Governors as well as other members, the Association proposes to include provisions describing the committee's powers and compositional requirements in the Delegation Plan. Thus, the Association proposes to add provisions regarding the powers and composition of the Market Regulation Committee and the National Arbitration and Mediation Committee as proposed Section II.C. of the Delegation Plan.

The Association proposes to amend Section II.A.1.f. to specify that NASD Regulation will establish procedures to consider requests by members, associated persons, and members of the public that NASD Regulation initiate formal disciplinary action. This provision was discussed in SR-NASD-

97-28 in connection with the discussion of the deletion of former Rule 8120.

The Association proposes to amend Section II.C., which sets forth certain NASD Regulation Board review procedures, by deleting specific procedures that are now set forth in the Rule 9000 Series.

The Association also proposes to clarify that both NASD Regulation and Nasdaq are responsible for operating Stockwatch. Therefore, new Sections II.A.1.s. and III.A.1.o. are added, and the section pertaining to Stockwatch is renumbered as Section IV of the Delegation Plan.

With respect to committee procedures, the Association proposes to require that a quorum for the transaction of business by the Quality of Markets Committee, the National Arbitration and Mediation Committee, and the Market Regulation Committee consist of a majority of such committee, including not less than 50 percent of its Non-Industry committee members. However, if at least 50 percent of the Non-Industry committee members are present at or have filed a waiver of attendance for a meeting *after receiving an agenda prior to such meeting*, the requirement that not less than 50 percent of the Non-Industry committee members be present to constitute the quorum would be waived. The Association believes a waiver is appropriate because these committees generally act only in an advisory capacity.

Finally, the Association proposes to add a new petition for reconsideration procedure to the Delegation Plan.<sup>66</sup> Under the proposed rule change, if the NASD Regulation or NASD Board took action on a rule change relating to the business and sales practices that was materially inconsistent with the recommendation of the National Adjudicatory Council, the NASD Regulation or NASD Board would be required to notify the National Adjudicatory Council within one calendar day. After receipt of such notice, the National Adjudicatory Council would be allowed two calendar days in which to determine, by majority vote, whether to petition the NASD Board for reconsideration. The petition would have to be submitted in writing and accompanied by a written statement explaining in detail why the National Adjudicatory Council believed that the NASD Regulation or NASD Board's action should be set aside. Upon receipt of a timely petition for reconsideration and accompanying statement, the NASD

Executive Committee would have three calendar days in which to convene and take action on the petition. If the NASD Executive Committee granted reconsideration, the matter would be added to the agenda of the next regularly scheduled meeting of the NASD Board. If the Executive Committee denied reconsideration, the NASD Regulation or NASD Board's previous action on the rule would be final, and the necessary rule filings would be made with the SEC. The same procedures would apply if the Nasdaq or NASD Board took action on a listing-related rule change that was materially inconsistent with the recommendation of the Listing Council.

With respect to the certificates of incorporation, the Association proposes to amend Article Eighth of the NASD Restated Certificate of Incorporation to conform it to the structural changes to the NASD Board previously described. Only conforming changes are proposed to the NASD Regulation and Nasdaq Certificates of Incorporation.

## 2. Statutory Basis

The NASD believes the proposed rule change is consistent with Section 15A(b)(4) of the Act in that it assures a fair representation of its members in the selection of its directors and administration of its affairs and provides that one or more directors shall be representatives of issuers and investors and not be associated with a member of the association, a broker, or a dealer.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The NASD has neither solicited nor received written comments.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

<sup>65</sup> See proposed Article VII, Sections 4, 5, 6, 7, 9, and 10 of the NASD By-Laws; proposed Article IV, Sections 4.2, 4.3, 4.4, 4.7, 4.8 and 4.13 of the NASD Regulation By-Laws; proposed Article IV, Sections 4.2., 4.3, 4.4, 4.7, 4.8 and 4.13 of the Nasdaq By-Laws.

<sup>66</sup> See proposed II.B.2. and III.B.3. This proposed rule change is a result of the corporate restructuring and was not proposed in SR-NASD-97-28.

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. In addition to the general comments concerning the Association's proposal, the Commission requests particular comments addressing whether the proposal would result in any burdens on competition and whether the proposal would promote efficiency, competition and capital formation. The Commission also seeks comment on whether the proposal, given the unique nature of the Association as a self-regulatory organization, adequately promotes the goals of the Act.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. § 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Association. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. File Number SR-NASD-97-71 should be included on the subject line if E-mail is used to submit a comment letter. Electronically submitted comment letters will be posted on the Commission's Internet web site (<http://www.sec.gov>).

All submissions should refer to File No. SR-NASD-97-71 and should be submitted by October 31, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>67</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

#### Attachment A

Additions are *italicized*;  
Deletions are [bracketed].

*The By-Laws of the NASD, NASD Regulation and Nasdaq are compared to the versions temporarily approved in SR-NASD-96-20, Amendment No. 5; Securities Exchange Act Release No. 34-38644 (May 15, 1997), 62 FR 43571, (May 22, 1997).*

The Delegation Plan is compared to the version temporarily approved in SR-NASD-96-29, Amendment No. 5; Securities Exchange Act Release No. 38909 (August 7, 1997), 62 FR 43571 (August 14, 1997).

*The Revised Certificates of Incorporation of the NASD, NASD Regulation and Nasdaq are compared to those filed with the Secretary of State for the State of Delaware on September 11, 1996, January 25, 1996 and December 21, 1993, respectively.*

\* \* \* \* \*

*By-Laws of the National Association of Securities Dealers, Inc.*

#### Article I

##### Definitions

When used in these By-Laws, [and any rules of the Corporation,] unless the context otherwise requires, the term:

(a) "Act" means the Securities Exchange Act of 1934, as amended;

(b) "bank" means (1) a banking institution organized under the laws of the United States, (2) a member bank of the Federal Reserve System, (3) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-722 (12 U.S.C. § 92a), and which is supervised and examined by a State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of the Act, and (4) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (1), (2), or (3) of this subsection;

(c) "Board" means the Board of Governors of the [Corporation.] NASD;

[(d) "Boards" means the Board of Governors of the Corporation and the Boards of Directors of The Nasdaq Stock Market, Inc. and NASD Regulation, Inc.];

[(e)](d) "branch office" means an office defined as a branch office in [NASD Rule 3010] *the Rules of the Association*;

[(f)](e) "broker" means any individual, corporation, partnership,

association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;

[(g)](f) "Commission" means the Securities and Exchange Commission;

[(h) "Corporation" means the National Association of Securities Dealers, Inc.];

[(i) "Corporations" means the National Association of Securities Dealers, Inc. ("NASD"), and its subsidiaries, The Nasdaq Stock Market, Inc. ("Nasdaq") and NASD Regulation, Inc. ("NASD Regulation");]

(g) "day" means calendar day;

[(j)](h) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for [his] *such individual's or entity's own account*, through a broker or otherwise, but does not include a bank, or any person insofar as [he] *such person* buys or sells securities for [his] *such person's own account*, either individually or in some fiduciary capacity, but not as part of a regular business;

[(k) "delegation" (i) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(j) "district" means a district established by the NASD Regulation Board pursuant to the NASD Regulation By-Laws;

[(l)](k) "government securities broker" shall have the same meaning as in Section 3(a)(43) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

[(m)](l) "government securities dealer" shall have the same meaning as in Section 3(a)(44) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

[(n)](m) "Governor" means a member of the Board[.];

(n) "Industry Director" means a Director of the NASD Regulation Board or Nasdaq Board (excluding the Presidents) who: (1) Is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director, (excluding an outside director) or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3)

<sup>67</sup> 17 CFR 200.30-3(a)(12).

owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's firm or partnership; (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or 20 percent or more of the gross revenues received by the Director's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

(o) "Industry Governor" or "Industry committee member" means a Governor (excluding the Chief Executive Officer and Chief Operating Officer of the NASD and the Presidents of NASD Regulation and Nasdaq) or committee member who: (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director, (excluding an outside director) or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership; (5) provides

professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Governor or committee member or 20 percent or more of the gross revenues received by the Governor's or committee member's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

[(o)](p) "investment banking or securities business" means the business, carried on by a broker, dealer, or municipal securities dealer (other than a bank or department or division of a bank), or government securities broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others;

[(p)](q) "member" means any broker or dealer admitted to membership in the [Corporation] NASD;

[(q)](r) "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond as defined by Section 3(a)(29) of the Act;

[(r)](s) "municipal securities broker" means a broker, except a bank or department or division of a bank, engaged in the business of effecting transactions in municipal securities for the account of others;

[(s)](t) "municipal securities dealer" means any person, except a bank or department or division of a bank, engaged in the business of buying and selling municipal securities for [his] such person's own account, through a broker or otherwise, but does not include any person insofar as [he] such person buys or sells securities for [his] such person's own account either individually or in some fiduciary capacity, but not as a part of a regular business;

(u) "NASD" means the National Association of Securities Dealers, Inc.;

(v) "Nasdaq" means The Nasdaq Stock Market, Inc.;

(w) "Nasdaq Board" means the Board of Directors of Nasdaq;

(x) "Nasdaq Listing and Hearing Review Council" means a body appointed pursuant to Article V of the Nasdaq By-Laws;

(y) "NASD Regulation" means NASD Regulation, Inc.;

(z) "NASD Regulation Board" means the Board of Directors of NASD Regulation;

(aa) "National Adjudicatory Council" means a body appointed pursuant to Article V of the NASD Regulation By-Laws;

(bb) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of these By-Laws;

(cc) "Non-Industry Director" means a Director of the NASD Regulation Board or Nasdaq Board (excluding the Presidents of NASD Regulation and Nasdaq) who is: (1) A Public Director; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Director;

(dd) "Non-Industry Governor" or "Non-Industry committee member" means a Governor (excluding the Chief Executive Officer and Chief Operating Officer of the NASD and the Presidents of NASD Regulation and Nasdaq) or committee member who is: (1) A Public Governor or committee member; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Governor or committee member;

[(t)](ee) "person associated with a member" or "associated person of a member" means: (1) [Every] a natural person registered under the Rules of the Association; or (2) a sole proprietor, partner, officer, director, or branch manager of [any] a member, or [any] a natural person occupying a similar status or performing similar functions, or [any] a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by [such] a member, whether or not any such person is registered or exempt from registration with the [Corporation] NASD [pursuant to] under these By-Laws or the Rules of the Association;

(ff) "Public Director" means a Director of the NASD Regulation Board or Nasdaq Board who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq;

(gg) "Public Governor" or "Public committee member" means a Governor or committee member who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq;

(u)(hh) "registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer" means any broker, dealer, municipal securities broker or dealer, or government securities broker or dealer which is registered with the Commission under the Act; and

(v) "rules of the Corporation" means all rules of the Corporation (which rules may be referred to as "NASD Rules"), Certificate of Incorporation, By-Laws, Rules of the Association, any other rules, and any interpretations thereunder.]

(ii) "Rules of the Association" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the Board pursuant to these By-Laws, as hereafter amended or supplemented.

## Article II

### Offices

#### Location

Sec. 1. The address of the registered office of the NASD in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. The NASD also may have offices at such other places both within and without the State of Delaware as the Board may from time to time designate or the business of the NASD may require.

#### Change of Location

Sec. 2. In the manner permitted by law, the Board or the registered agent may change the address of the NASD's registered office in the State of Delaware and the Board may make, revoke, or change the designation of the registered agent.

## Article [II] III

### Qualifications of Members and Associated Persons

#### Persons Eligible to [become] Become Members and Associated Persons of Members

Sec. 1. (a) Any registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer authorized to transact, and whose regular course of business consists in actually transacting, any branch of the investment banking or securities business in the United States,

under the laws of the United States, shall be eligible for membership in the [Corporation] NASD, except such registered brokers, dealers, or municipal securities brokers or dealers, or government securities brokers or dealers which are excluded under the provisions of [Sections 3 (a) or (b) of this Article] Section 3.

(b) Any person shall be eligible to become an associated person of a member, except such persons who are excluded under the provisions of Section 3[(b) of this Article].

#### Authority of Board to Adopt Qualification Requirements

Sec. 2. (a) The Board [of Governors] shall have authority to adopt rules and regulations applicable to applicants for membership, members, and persons associated with applicants or members establishing specified and appropriate standards with respect to the training, experience, competence, and such other qualifications as the Board [of Governors] finds necessary or desirable, and in the case of an applicant for membership or a member, standards of financial responsibility and operational capability.

(b) In establishing and applying such standards, the Board [of Governors] may classify members and persons associated with such members, taking into account relevant matters, including the nature, extent, and type of business being conducted and of securities sold, dealt in, or otherwise handled. The Board [of Governors] may specify that all or any portion of such standards shall be applicable to any such class and may require the persons in any such class to be registered with the [Corporation] NASD.

(c) The Board [of Governors] may from time to time make changes in such rules, regulations, and standards as it deems necessary or appropriate.

#### Ineligibility of Certain Persons for Membership or Association

Sec. 3. (a) No registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer shall be admitted to membership, and no member shall be continued in membership, if such broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member fails or ceases to satisfy the qualification requirements established under Section 2 [of this Article], if applicable, or if such broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member is or becomes subject to a disqualification under Section 4 [of this Article], or if

such member fails to comply with the requirement that all forms filed pursuant to these By-Laws be filed via electronic process or such other process as the [Corporation] NASD may prescribe.

(b) No person shall become associated with a member, continue to be associated with a member, or transfer association to another member, if such person fails or ceases to satisfy the qualification requirements established under Section 2 [of this Article], if applicable, or if such person is or becomes subject to a disqualification under Section 4 [of this Article]; and no broker, dealer, municipal securities broker or dealer, or government securities broker or dealer shall be admitted to membership, and no member shall be continued in membership, if any person associated with it is ineligible to be an associated person under this subsection.

(c) If it deems appropriate, the Board [of Governors], upon notice and opportunity for a hearing, may cancel the membership of a member if it becomes ineligible for continuance in membership under subsection (a) [hereof], may suspend or bar a person [for] from continuing to be associated with any member if such person is or becomes ineligible for association under subsection (b) [hereof], and may cancel the membership of any member who continues to be associated with any such ineligible person.

(d) Any [broker, dealer, municipal securities dealer, or government securities broker or dealer which is ineligible for admission into membership, or any member which] member that is ineligible for continuance in membership[,] may file with the Board [of Governors] an application requesting relief from the ineligibility pursuant to [procedures adopted by the Board of Governors and contained in the Corporation's Procedural Rules. The Board of Governors] the Rules of the Association. A member may file such application on its own behalf and on behalf of a current or prospective associated person. The Board may, in its discretion, approve the [admission] continuance in membership, and may also approve the association or continuance of [an applicant or member, or the] association of any person, if the Board determines that such approval is consistent with the public interest and the protection of investors. Any approval hereunder may be granted unconditionally or on such terms and conditions as the Board considers necessary or appropriate. In the exercise of the authority granted hereunder, the Board [of Governors]

may: (1) Conduct such inquiry or investigation into the relevant facts and circumstances as it, in its discretion, considers necessary to its determination, which, in addition to the background and circumstances giving rise to the failure to qualify or disqualification, may include the proposed or present business of [an applicant for membership or of] a member and the conditions of association of any *current or prospective associated person* [prospective or presently associated person, among other matters; (2) permit, in limited types of situations, a membership or association with a member pending completion of its inquiry or investigation, and its final determination, based upon a consideration of relevant factors, and may classify situations taking into account the status of brokers, dealers, municipal securities brokers and dealers and government securities brokers and dealers as applicants or existing members and of persons as prospective or presently associated persons of members; the type of disqualification or failure to qualify; whether a member or associated person has been the subject of a previous approval and the terms and conditions thereof; and any other relevant factors; and (3) delegate any of its functions and authority under this subsection (d) to appropriate committees of the Corporation or to Corporation staff members].

(e) An application filed under subsection (d) [hereof] shall not foreclose any action which the Board [of Governors] is authorized to take under subsection (c) [hereof] until approval has been granted.

(f) Approval by the Board [of Governors] of an application made under subsection (d) shall be subject to whatever further action the Commission may take pursuant to authority granted to the Commission under the Act.

(g) *The Board may delegate its authority under this Section in a manner not inconsistent with the Delegation Plan.*

#### Definition of Disqualification

Sec. 4. A person is subject to a "disqualification" with respect to membership, or association with a member, if such person:

(a) Has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to Section 5 of the

Commodity Exchange Act, or foreign equivalent of a contract market designated pursuant to any substantially equivalent foreign statute or regulation, or futures association registered under Section 17 of the Commodity Exchange Act or a foreign equivalent of a futures association designated pursuant to any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(b) Is subject to—

(1) An order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority:

(i) Denying, suspending for a period not exceeding 12 months, or revoking [his] *such person's* registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or limiting [his] *such person's* activities as a foreign person performing a function substantially equivalent to any of the above; or

(ii) Barring or suspending for a period not exceeding 12 months [his] *such person from* being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above;

(2) An order of the Commodity Futures Trading Commission denying, suspending, or revoking [his] *such person's* registration under the Commodity Exchange Act (7 U.S.C. § 1 et seq.); or

(3) An order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(c) By [his] *such person's* conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in [subsections] *subsection* (a) or (b) of this Section;

(d) By [his] *such person's* conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an

entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subsection (a) or (b) of this Section;

(e) Has associated with him or her any person who is known, or in the exercise of reasonable care should be known, to him or her to be a person described in [subsections] *subsection* (a), (b), (c), or (d) of this Section;

(f) Has willfully made or caused to be made in any application for membership in a self-regulatory organization, or to become associated with a member of a self-regulatory organization, or in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization, any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein;

(g)(1) Has been convicted within ten years preceding the filing of any application for membership in the [Corporation] *NASD*, or to become associated with a member of the [Corporation] *NASD*, or at any time thereafter, of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which:

(i) Involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant foreign government, or conspiracy to commit any such offense;

(ii) Arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, foreign person performing a function substantially equivalent to any of the above, or any entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation;

(iii) Involves the larceny, theft, robbery, extortion, forgery,

counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) Involves the violation of Sections 152, 1341, 1342, or 1343 or Chapters 25 or 47 of Title 18, United States Code, or a violation of a substantially equivalent foreign statute;

(2) Has been convicted within ten years preceding the filing of any application for membership in the [Corporation] NASD, or to become associated with a member of the [Corporation] NASD, or at any time thereafter of any other felony;

(h) Is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any of the above, entity or person required to be registered under the Commodity Exchange Act, or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security;

(i) Has been found by a foreign financial regulatory authority to have—

(1) Made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(2) Violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade; or

(3) Aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to [his] *such person's* supervision.

#### Article [III] IV

#### Membership

#### Application for Membership

Sec. 1. (a) Application for membership in the [Corporation] NASD, properly signed by the applicant, shall be made to the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe, on the form to be prescribed by the [Corporation] NASD, and shall contain:

(1) An [acceptance of and an agreement to abide by, comply with, and adhere to, all the provisions, conditions, and covenants of the Restated Certificate of Incorporation, the By-Laws] *agreement to comply with the federal securities laws, the rules and regulations [of the Corporation as they are or may from time to time be adopted, changed or amended,] thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury Department, the By-Laws of the NASD, NASD Regulation, and Nasdaq, the Rules of the Association, and all rulings, orders, directions, and decisions [of,] issued and sanctions imposed [by, the Board of Governors or any duly authorized committee, and the provisions of the federal securities laws, including the rules and regulations adopted thereunder, including the rules of the Municipal Securities Rulemaking Board and the Treasury Department, provided, however, that such an agreement shall not be construed as a waiver by the applicant of any right to appeal as provided in the Act] under the Rules of the Association;*

(2) An agreement to pay such dues, assessments, and other charges in the manner and amount as [shall from time to time be fixed by the Board of Governors pursuant to these By-Laws] *from time to time shall be fixed*

*pursuant to the NASD By-Laws, Schedules to the NASD By-Laws, and the Rules of the Association; and*

(3) An agreement that none of the Corporations, or any officer, employee, or member of the Board or committees of the Corporations, shall be liable, except for willful malfeasance, to the applicant or to any member of the Corporation or to any other person, for any action taken by such officer or member of the Boards or of any committee, in his official capacity, or by any employee of the Corporations while acting within the scope of his employment or under instruction of any officer, Board, or committee of the Corporations, in connection with the administration or enforcement of any of the provisions of the rules of the Corporation as they are or may from time to time be adopted, or amended, any ruling, order, directive, decision of, or penalty imposed by, the Boards or any duly authorized committee thereof, or the provisions of the federal securities laws, including the rules and regulations adopted thereunder, and the rules of the Municipal Securities Rulemaking Board and the Treasury Department; and]

(4) (3) Such other reasonable information with respect to the applicant as the [Corporation] NASD may require.

(b) Any application for membership received by the [Corporation] NASD shall be processed in the manner set forth in the [Procedural] Rules of the [Corporation] Association.

(c) Each applicant and member shall ensure that its membership application with the [Corporation] NASD is kept current at all times by supplementary amendments via electronic process or such other process as the [Corporation] NASD may prescribe to the original application. Such amendments to the application shall be filed with the [Corporation] NASD not later than [thirty (30) calendar] 30 days after learning of the facts or circumstances giving rise to the amendment.

#### Similarity of Membership Names

Sec. 2. (a) No person or firm shall be admitted to or continued in membership in the [Corporation] NASD having a name [which] *that* is identical to the name of another member appearing on the membership roll of the [Corporation] NASD or a name so similar to any such name as to tend to confuse or mislead.

(b) No member may change its name without prior approval of the [Corporation] NASD.

### Executive Representative

Sec. 3. Each member shall appoint and certify to the Secretary of the [Corporation] NASD one "executive representative" who shall represent, vote, and act for the member in all the affairs of the [Corporation] NASD, except that other executives of a member may also hold office in the [Corporation] NASD, serve on the Board [of Governors] or committees [of the Corporation] appointed under Article IX, Section 1 or otherwise take part in the affairs of the [Corporation] NASD. A member may change its executive representative upon giving notice thereof via electronic process or such other process as the [Corporation] NASD may prescribe to the Secretary, or may, when necessary, appoint, by notice via electronic process to the Secretary, a substitute for its executive representative. An executive representative of a member or a substitute shall be a member of senior management and registered principal of the member.

### Membership Roll

Sec. 4. The Secretary of the [Corporation] NASD shall keep a currently accurate and complete membership roll, containing the name and address of each member, and the name and address of the executive representative of each member. In any case where a membership has been terminated, such fact shall be recorded together with the date on which the membership ceased. The membership roll of the [Corporation] NASD shall at all times be available to all members of the [Corporation] NASD, to all governmental authorities, and to the general public.

### Resignation of Members

Sec. 5. Membership in the [Association] NASD may be voluntarily terminated only by formal resignation. Resignations of members must be filed via electronic process or such other process as the [Corporation] NASD may prescribe and addressed to the [Corporation] NASD. Any member may resign from the [Corporation] NASD at any time. Such resignation shall not take effect until [thirty (30) calendar] 30 days after receipt thereof by the [Corporation] NASD and until all indebtedness due the [Corporation] NASD from such member shall have been paid in full and so long as any complaint or action is pending against the member under the [Procedural] Rules of the Association. The [Corporation] NASD, however, may in

its discretion declare a resignation effective at any time.

### Retention of Jurisdiction

Sec. 6. A resigned member or a member that has had its membership canceled or revoked shall continue to be subject to the filing of a complaint under the [Procedural] Rules of the Association based upon conduct which commenced prior to the effective date of the member's resignation from the [Corporation] NASD or the cancellation or revocation of its membership. Any such complaint, however, shall be filed within two [(2)] years after the effective date of resignation, cancellation, or revocation.

### Transfer and Termination of Membership

Sec. 7. (a) Except as provided hereinafter, no member of the [Corporation] NASD may transfer its membership or any right arising therefrom and the membership of a corporation, partnership, or any other business organization which is a member of the [Corporation] NASD shall terminate upon its liquidation, dissolution, or winding up, and the membership of a sole proprietor which is a member shall terminate at death, provided that all obligations of membership under the By-Laws and the [other rules] Rules of the [Corporation] Association have been fulfilled.

(b) The consolidation, reorganization, merger, change of name, or similar change in any corporate member shall not terminate the membership of such corporate member provided that the member or surviving organization, if any, shall be deemed a successor to the business of the corporate member, and the member or the surviving organization shall continue in the investment banking and securities business, and shall possess the qualifications for membership in the [Corporation] NASD. The death, change of name, withdrawal of any partner, the addition of any new partner, reorganization, consolidation, or any change in the legal structure of a partnership member shall not terminate the membership of such partnership member provided that the member or surviving organization, if any, shall be deemed a successor to the business of the partnership member, and the member or surviving organization shall continue in the investment banking and securities business and shall possess the qualifications for membership in the [Corporation] NASD. If the business of any predecessor member is to be carried on by an organization deemed to be a successor organization by the

[Corporation] NASD, the membership of such predecessor member shall be extended to the successor organization subject to the notice and application requirements of the Rules of the Association and the right of the NASD to place restrictions on the successor organization pursuant to the Rules of the Association; otherwise, any surviving organization shall be required to satisfy all of the membership application requirements of [the] these By-Laws and the Rules of the Association.

### Registration of Branch Offices

Sec. 8. (a) Each branch office of a member of the [Corporation] NASD shall be registered with and listed upon the membership roll of the [Corporation] NASD, and shall pay such dues, assessments, and other charges as shall be fixed from time to time by the Board [of Governors] pursuant to Article [V of the By-Laws] VI.

(b) Each member of the [Corporation] NASD shall promptly advise the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe of the opening, closing, relocation, change in designated supervisor, or change in designated activities of any branch office of such member not later than [thirty (30) calendar] 30 days after the effective date of such change.

### Article [IV] V

#### Registered Representatives and Associated Persons

##### Qualification Requirements

Sec. 1. No member shall permit any person associated with [such] the member to engage in the investment banking or securities business unless the member determines that such person [has complied with the applicable provisions under Article II of the By-Laws] satisfies the qualification requirements established under Article III, Section 2 and is not subject to a disqualification under Article III, Section 4.

##### Application for Registration

Sec. 2. (a) Application by any person for registration with the [Corporation] NASD, properly signed by the applicant, shall be made to the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe, on the form to be prescribed by the [Corporation] NASD and shall contain:

(1) [An acceptance of and] An agreement to comply with the [all the provisions of the rules of the Corporation as they are or may from

time to time be adopted or amended,] *federal securities laws, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury Department, the By-Laws of the NASD, NASD Regulation, and Nasdaq, the Rules of the Association, and all rulings, orders, directions, and decisions [of, and penalties imposed by, the Board of Governors or any duly authorized committee, and the provisions of the federal securities laws, including the rules and regulations adopted thereunder, and the rules of the Municipal Securities Rulemaking Board and the Treasury Department, provided, however, that such an agreement shall not be construed as a waiver by the applicant of any right to appeal as provided in the Act;] issued and sanctions imposed under the Rules of the Association; and*

[(2) An agreement that none of the Corporations, or any officer, employee, or member of the Boards or committees of the Corporation, shall be liable except for willful malfeasance, to the applicant or to any member of the Corporation or to any other person, for any action taken by such officer, member of the Boards or of any committee in his official capacity, or by any employee of the Corporation while acting within the scope of his employment, or under instruction of any officer, Board, or committee of the Corporations, in connection with the administration or enforcement of any of the provisions of the By-Laws, any rules of the Corporation as they are or may from time to time be adopted or amended, any ruling, order, direction, decision of, or penalty imposed by the Boards or any duly authorized committee thereof, and the provisions of the federal securities laws, including the rules and regulations adopted thereunder including the rules of the Municipal Securities Rulemaking Board and the rules of the Treasury Department; and]

[(3)] (2) Such other reasonable information with respect to the applicant as the [Corporation] NASD may require.

(b) The [Corporation] NASD shall not approve an application for registration of any person who is not eligible to be an associated person of a member under the provisions of *Article III*, Section 3[(b) of Article II of these By-Laws].

(c) Every application for registration filed with the [Corporation] NASD shall be kept current at all times by supplementary amendments via electronic process or such other process as the [Corporation] NASD may prescribe to the original application. Such amendment to the application

shall be filed with the [Corporation] NASD not later than [thirty (30) calendar] 30 days [of] after learning of the facts or circumstances giving rise to the amendment. If such amendment involves a statutory disqualification as defined in Section 3(a)(39) and Section 15(b)(4) of the Act, such amendment shall be filed not later than ten [(10) calendar] days after such disqualification occurs.

Notification by Member to [Corporation] the NASD and Associated Person of Termination; Amendments to Notification

Sec. 3. (a) Following the termination of the association with a member of a person who is registered with it, such member shall, not later than [thirty (30) calendar] 30 days after such termination, give notice of the termination of such association to the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe on a form designated by the [Corporation] NASD, and concurrently shall provide to the person whose association has been terminated a copy of said notice as filed with the [Corporation] NASD. A member [which] that does not submit such notification[,] and provide a copy to the person whose association has been terminated, within the time period prescribed, shall be assessed a late filing fee as specified by the [Corporation] NASD. Termination of registration of such person associated with a member shall not take effect so long as any complaint or action under the [rules] Rules of the [Corporation] Association is pending against a member and to which complaint or action such person associated with a member is also a respondent, or so long as any complaint or action is pending against such person individually under the [rules] Rules of the [Corporation]. The [Corporation] Association. The NASD, however, may in its discretion declare the termination effective at any time.

(b) The member shall notify the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe by means of an amendment to the notice filed pursuant to subsection [paragraph] (a) [above] in the event that the member learns of facts or circumstances causing any information set forth in said notice to become inaccurate or incomplete. Such amendment shall be filed with the [Corporation] NASD via electronic process or such other process as the [Corporation] NASD may prescribe and a copy provided to the person whose association with the member has been terminated not later than [thirty (30)

calendar] 30 days after the member learns of the facts or circumstances giving rise to the amendment.

Retention of Jurisdiction

Sec. 4. A person whose association with a member has been terminated and is no longer associated with any member of the [Corporation] NASD or a person whose registration has been revoked or canceled shall continue to be subject to the filing of a complaint under the [rules] Rules of the [Corporation] Association based upon conduct which commenced prior to the termination [or], revocation, or cancellation or upon such person's failure, while subject to the [Corporation's] NASD's jurisdiction as provided herein, to provide information requested by the [Corporation] NASD pursuant to [NASD Rule 8210] the Rules of the Association, but any such complaint shall be filed within:

(a) Two [(2)] years after the effective date of termination of registration pursuant to Section 3 [above], provided, however that any amendment to a notice of termination filed pursuant to Section 3(b) that is filed within two years of the original notice which discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period under this [paragraph] subsection;

(b) Two [(2)] years after the effective date of revocation or cancellation of registration pursuant to [NASD Rule 8320] the Rules of the Association; or

(c) in the case of an unregistered person, within two [(2)] years after the date upon which such person ceased to be associated with the member.

Article [V] VI

Dues, Assessments, and Other Charges

Power of [Corporation] the NASD to Fix and Levy Assessments

Sec. 1. The [Corporation] NASD shall prepare an estimate of the funds necessary to defray reasonable expenses of administration in carrying on the work of the [Corporation] NASD each fiscal year, and on the basis of such estimate, shall fix and levy the amount of admission fees, dues, assessments, and other charges to be paid by members of the [Corporation] NASD and issuers and any other persons using any facility or system which the [Corporation] NASD, NASD Regulation, or Nasdaq operates or controls. Fees, dues, assessments, and other charges shall be called and payable as determined by the [Corporation] NASD

from time to time; provided, however, that such admission fees, dues, assessments, and other charges shall be equitably allocated among members and issuers and any other persons using any facility or system which the [Corporation] NASD operates or controls. The [Corporation] NASD may from time to time make such changes or adjustments in such fees, dues, assessments, and other charges as it deems necessary or appropriate to assure equitable allocation of dues among members. In the event of termination of membership or the extension of any membership to a successor organization during any fiscal year for which an assessment has been levied and become payable, the [Corporation] NASD may make such adjustment in the fees, dues, assessments, or other charges payable by any such member or successor organization or organizations during such fiscal years as it deems fair and appropriate in the circumstances.

#### Reports of Members

Sec. 2. Each member, issuer, or other person shall promptly furnish all information or reports requested by the [Corporation] NASD in connection with the determination of the amount of admission fees, dues, assessments, or other charges.

#### Suspension or Cancellation of Membership or Registration

Sec. 3. The [Corporation] NASD after [fifteen (15)] 15 days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments, or other charges or for failure to furnish any information or reports requested pursuant to Section 2 [of this Article], or for failure to comply with an award of arbitrators properly rendered pursuant to [Section 41] the Rules of the [Code of Arbitration Procedure] Association, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the [procedures specified by the Corporation] Rules of the Association.

#### Reinstatement of Membership or Registration

Sec. 4. Any membership or registration suspended or canceled under this Article may be reinstated by the [Corporation] NASD upon such terms and conditions as it shall deem

just; provided, however, that any applicant for reinstatement of membership or registration shall possess the qualifications required for membership or registration in the [Corporation] NASD.

#### Delegation

Sec. 5. The NASD may delegate its authority under this Article in a manner not inconsistent with the Delegation Plan.

#### Article [VI] VII

##### Board of Governors

##### Powers and Authority of Board

Sec. 1. (a) The Board [of Governors] shall be the governing body of the [Corporation] NASD and, except as otherwise provided by applicable law, the Restated Certificate of Incorporation, or these By-Laws, shall be vested with all powers necessary for the management and administration of the affairs of the [Corporation] NASD and the promotion of the [Corporation's] NASD's welfare, objects, and purposes. In the exercise of such powers, the Board [of Governors] shall have the authority to:

[(1)] (i) Adopt for submission to the membership, as hereinafter provided, such By-Laws and changes or additions thereto as it deems necessary or appropriate;

[(2)] (ii) Adopt such other [rules] Rules of the [Corporation] Association and changes or additions thereto as it deems necessary or appropriate, provided, however, that the Board may at its option submit to the membership any such adoption, change, or addition to such [rules] Rules;

[(3)] (iii) make such regulations, issue such orders, resolutions, exemptions, interpretations, including interpretations of these By-Laws and the [rules] Rules of the [Corporation] Association, and directions, and make such decisions as it deems necessary or appropriate;

[(4)] (iv) Prescribe [a code of arbitration procedure providing] rules for the required or voluntary arbitration of controversies between members and between members and customers or others as it shall deem necessary or appropriate;

[(5)] (v) Establish rules and procedures to be followed by members in connection with the distribution of securities issued by members and affiliates thereof;

[(6)] (vi) Require all over-the-counter transactions in securities between members, other than transactions in exempted securities as defined in Section 3(a)(12) of the Act, to be cleared

and settled through the facilities of a clearing agency registered with the Commission pursuant to the Act, which clears and settles such over-the-counter transactions in securities;

[(7)] (vii) Organize and operate automated systems to provide qualified subscribers with securities information and automated services. The systems may be organized and operated by a division or subsidiary company of the [Corporation] NASD or by one or more independent firms under contract with the [Corporation] NASD as the Board [of Governors] may deem necessary or appropriate. The Board [of Governors] may adopt rules for such automated systems, establish reasonable qualifications and classifications for members and other subscribers, provide qualification standards for securities included in such systems, require members to report promptly information in connection with securities included in such systems, and establish charges to be collected from subscribers and others;

[(8)] (viii) Require the prompt reporting by members of such original and supplementary trade data as the Board deems appropriate. Such reporting requirements may be administered by the [Corporation] NASD, a division or subsidiary thereof, or a clearing agency registered under the Act; and

[(9)] (ix) Engage in any activities or conduct necessary or appropriate to carry out the [Corporation's] NASD's purposes under its Restated Certificate of Incorporation and the federal securities laws.

(b) In the event of the refusal, failure, neglect, or inability of any [member of the Board of Governors] Governor to discharge [his] such Governor's duties, or for any cause affecting the best interests of the [Corporation] NASD the sufficiency of which the Board [of Governors] shall be the sole judge, the Board shall have the power, by the affirmative vote of two-thirds of the Governors then in office, to remove such [member] Governor and declare [his] such Governor's position vacant and that such position shall be filled in accordance with the provisions of Section [6] 7 [of this Article].

(c) To the fullest extent permitted by applicable law, the Restated Certificate of Incorporation [and applicable law, the Corporation], and these By-Laws, the NASD may delegate any power of the [Corporation or the Board of Governors] to any person or entity, including a subsidiary of the Corporation; provided that such delegation is] NASD or the Board to a committee appointed pursuant to Article IX, Section 1, the

*NASD Regulation Board, the Nasdaq Board, or NASD staff in a manner not inconsistent with the Delegation Plan.*

**Authority to Cancel or Suspend for Failure to Submit Required Information**

Sec. 2. (a) The Board [of Governors] shall have authority, upon notice and opportunity for a hearing, to cancel or suspend the membership of any member or suspend the association of any person associated with a member for failure to file, or to submit on request, any report, document, or other information required to be filed with or requested by the [Corporation] *NASD pursuant to these By-Laws or the Rules of the Association.*

(b) *Any membership or association suspended or canceled pursuant to this Section may be reinstated by the NASD pursuant to the Rules of the Association.*

[(b)] (c) The Board [of Governors] is authorized to delegate [the authority hereinabove granted to the Chief Executive Officer of the Corporation; provided, however, that the Executive Committee of the Board of Governors shall be notified in writing of any such contemplated action by the Chief Executive Officer] *its authority under this Section in a manner not inconsistent with the Delegation Plan and otherwise in accordance with the Rules of the Association.*

**Authority to Take Action Under Emergency or Extraordinary Market Conditions**

Sec. 3. The Board [of Governors], or such person or persons as may be designated by the Board, in the event of an emergency or extraordinary market conditions, shall have the authority to take any action regarding[:]:

[(1)] (a) The trading in or operation of the over-the-counter securities market, the operation of any automated system owned or operated by the [Corporations] *NASD, NASD Regulation, or Nasdaq,* and the participation in any such system of any or all persons or the trading therein of any or all securities; and

[(2)] (b) The operation of any or all member firms' offices or systems, if, in the opinion of the Board or the person or persons hereby designated, such action is necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace or the system.

**Composition and Qualifications of the Board**

Sec. 4. (a) [The Board of Governors shall be composed of five or more members, the number thereof to be determined from time to time by the

Board of Governors, and shall include at all times the Chief Executive Officer and such Industry, Non-Industry, and Public Governors as shall be determined from time to time by the Board of Governors, both of which determinations shall be consistent with the Delegation Plan and Section 15A(b)(4) of the Act. The criteria for the categories of Industry, Non-Industry and Public Governors, as used herein, shall be established by the Board of Governors from time to time, which criteria shall be consistent with the Delegation Plan.] *The Board shall consist of the Chief Executive Officer and the Chief Operating Officer of the NASD, the Presidents of NASD Regulation and Nasdaq, the Chair of the National Adjudicatory Council, and no fewer than 16 and no more than 22 Governors elected by the members of the NASD. The Governors elected by the members of the NASD shall include a representative of an issuer of investment company shares or an affiliate of such an issuer, a representative of an insurance company, and a Nasdaq issuer. A majority of the Governors shall be Non-Industry Governors. If the Board consists of 21 to 23 Governors, at least five shall be Public Governors. If the Board consists of 24 to 27 Governors, at least six shall be Public Governors.*

(b) As soon as practicable[,] following the annual election [of members to the Board] of Governors, the Board [of Governors] shall elect from [the] *among its members [of the Board of Governors a Chairman,] a Chair* and such other persons having such titles as it shall deem necessary or advisable, to serve until the next annual election or until their successors are chosen and qualify. *The Chair of the National Adjudicatory Council may not serve as Chair of the Board. The Chair and other persons [so] elected under this subsection shall have such powers and duties as may be determined from time to time by the Board [of Governors]. The Board [of Governors, by affirmative vote of], by resolution adopted by a majority of [its members] the Governors then in office, may remove the Chair and any [such] person elected under this subsection from such position at any time.*

**Term of Office of Governors**

Sec. 5. [Each Governor, except as otherwise provided by the Restated Certificate of Incorporation or these By-Laws, shall hold office for a term of not more than three years, such term to be fixed by the Board at the time of the nomination or certification of such Governor, or until his successor is elected and qualified, or until his death, resignation, disqualification, or removal. Except for the Chief Executive Officer,

no Governor may serve more than two consecutive terms, provided, however, that if a Governor is appointed to fill a term of less than one year, such Governor may serve up to two consecutive terms following the expiration of such Governor's current term. The Chief Executive Officer of the Corporation shall serve as a member of the Board until his successor is selected and qualified, or until his death, resignation, disqualification, or removal.]

(a) *The Chief Executive Officer and the Chief Operating Officer of the NASD and the Presidents of NASD Regulation and Nasdaq shall serve as Governors until a successor is elected, or until death, resignation, or removal.*

(b) *The Chair of the National Adjudicatory Council shall serve as a Governor for a term of one year, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Chair of the National Adjudicatory Council may not serve more than two consecutive terms as a Governor, unless a Chair of the National Adjudicatory Council is appointed to fill a term of less than one year for such office. In such case, the Chair of the National Adjudicatory Council may serve an initial term as a Governor and up to two consecutive terms as a Governor following the expiration of the initial term. After serving as a Chair of the National Adjudicatory Council, an individual may serve as a Governor elected by the members of the NASD.*

(c) *The Governors elected by the members of the NASD shall be divided into three classes and hold office for a term of no more than three years, such term to be fixed by the Board at the time of the nomination or certification of such Governor, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Governor elected by the members of the NASD may not serve more than two consecutive terms. If a Governor is elected by the Board to fill a term of less than one year, the Governor may serve up to two consecutive terms following the expiration of the Governor's initial term. The term of office of Governors of the first class shall expire at the January 1999 Board meeting, of the second class one year thereafter, and of the third class two years thereafter. At each annual election, commencing January 1999, Governors shall be elected for a term of three years to replace those whose terms expire.*

**Disqualification**

Sec. 6. Notwithstanding Section 5, the term of office of a Governor shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Governors, that: (a) The Governor no longer satisfies the classification (Industry, Non-Industry, or Public Governor) for which the Governor was elected; and (b) the Governor's continued service as such would violate the compositional requirements of the Board set forth in Section 4. If the term of office of a Governor terminates under this Section, and the remaining term of office of such Governor at the time of termination is not more than six months, during the period of vacancy the Board shall not be deemed to be in violation of Section 4 by virtue of such vacancy.

**Filling of Vacancies**

Sec. [6.] 7. [(a) Any vacancy in the office of] *If a Governor position becomes vacant, whether [occurring by reason] because of death, disability, disqualification, removal, or resignation, [other than a vacancy by reason of an increase in the size of the Board, shall be filled] the National Nominating Committee shall nominate, and the Board shall elect by majority vote of the remaining Governors then in office [and any person elected to fill such vacancy shall satisfy the qualifications and criteria], a person satisfying the classification (Industry, Non-Industry, or Public Governor) for the governorship [being filled] as provided in Section 4 [of this Article.] to fill such vacancy, except that if the remaining term of office for the vacant Governor position is not more than six months, no replacement shall be required. If the remaining term of office for the vacant Governor position is more than one year, the Governor elected by the Board to fill such position shall stand for election in the next annual election pursuant to this Article. [(b) Any vacancy in the office of a Governor occurring by reason of an increase in the size of the Board shall be filled by majority vote of the Board and any person elected to fill such vacancy shall satisfy the criteria for such newly created governorship as shall be established by resolution of the Board, provided that the filling of any such vacancy shall not be inconsistent with any other provisions of these By-Laws or the Delegation Plan.]*

**Meetings of Board; Quorum; Required Vote**

Sec. 8. Meetings of the Board shall be held at such times and places, upon such notice, and in accordance with such procedure as the Board [of Governors] in its discretion may determine. [A] *At all meetings of the Board, unless otherwise set forth in these By-Laws or required by law, a quorum [of the Board of Governors] for the transaction of business shall consist of a majority of the [total number of Governors of the Corporation and any] Board, including not less than 50 percent of the Non-Industry Governors. Any action taken by a majority vote at any meeting at which a quorum is present, except as otherwise provided in the Restated Certificate of Incorporation or these By-Laws, shall constitute the action of the Board [of Governors]. [Members of the Board of] Governors[,] or members of any committee appointed by the Board [of Governors or any other committee of the Corporation,] under Article IX, Section 1 may participate in a meeting [thereof] of the Board or a committee by means of communications facilities that ensure all persons participating in the meeting can hear and speak to [each other] one another, and participation in a meeting pursuant to this By-Law shall constitute presence in person at such meeting. No [member of the Board of Governors] Governor shall vote by proxy at any meeting of the Board.*

**The National Nominating Committee**

Sec. [7. (b)] 9. (a) *The National Nominating Committee shall [have such powers and shall perform such functions as shall be determined by resolution of the Board of Governors from time to time, consistent with the Delegation Plan] nominate: Industry, Non-Industry, and Public Governors for each vacant or new Governor position on the NASD Board for election by the membership; Industry, Non-Industry, and Public Directors for each vacant or new position on the NASD Regulation Board and the Nasdaq Board for election by the Board; Industry, Non-Industry, and Public members for each vacant or new position on the National Adjudicatory Council for appointment by the NASD Regulation Board; and Industry and Non-Industry members for each vacant or new position on the Nasdaq Listing and Hearing Review Council for appointment by the Nasdaq Board.*

(b) *The National Nominating Committee shall consist of [six or more persons who shall have such qualifications, and who shall be selected*

*in such manner, as shall be determined by resolution of the Board of Governors from time to time, which qualifications and manner of selection shall be consistent with the Delegation Plan] no fewer than six and no more than nine members. The number of Industry committee members shall equal or exceed the number of Non-Industry committee members. If the National Nominating Committee consists of six members, at least two shall be Public committee members. If the National Nominating Committee consists of seven or more members, at least three shall be Public committee members. No officer or employee of the Association shall serve as a member of the National Nominating Committee in any voting or non-voting capacity. No more than three of the National Nominating Committee members and no more than two of the Industry committee members shall be current members of the NASD Board.*

(c) *A National Nominating Committee member may not simultaneously serve on the National Nominating Committee and the Board, unless such member is in his or her final year of service on the Board, and following that year, that member may not stand for election to the Board until such time as he or she is no longer a member of the National Nominating Committee.*

(d) *Members of the National Nominating Committee shall be appointed annually by the Board and may be removed only by majority vote of the whole Board, after appropriate notice, for refusal, failure, neglect, or inability to discharge such member's duties. The NASD Regulation Board and the Nasdaq Board each shall propose two candidates to the NASD Board for appointment to the National Nominating Committee.*

(e) *The Secretary of the NASD shall collect from each nominee for Governor such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, or Public Governor, and the Secretary shall certify to the National Nominating Committee each nominee's classification.*

(f) *At all meetings of the National Nominating Committee, a quorum for the transaction of business shall consist of a majority of the National Nominating Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.*

#### Procedure for Nomination of Governors

Sec. [7.(c)] 10. [At least 90 days prior] Prior to a meeting of members pursuant to Article XXI for the election of Governors, the [Corporation] NASD shall notify the members of the [date, place, and time of such meeting and shall set forth in such notice the] names of each nominee [(a "Nominee"), as] selected by the National Nominating Committee[,] for each governorship up for election, [and shall further provide in such notice the qualifications] the classification of governorship (Industry, Non-Industry, or Public Governor) for which the nominee is nominated, the qualifications of each nominee, and such other information regarding each [such Nominee] nominee as the National Nominating Committee deems pertinent. A person who has not been so nominated may be included on the ballot for the election of Governors if: [(1)(a) [at least 60] within 30 days [prior to the scheduled date for the meeting of members] after the date of such notice in 1997, or within 45 days after the date of such notice in 1998 and thereafter, such person [complies with the requirements and procedures for nomination set forth in the Delegation Plan and (2) the person is certified] presents to the Secretary of the NASD petitions in support of his or her nomination duly executed by three percent of the members; and (b) the Secretary certifies that (i) the petitions are duly executed by the Executive Representatives of the requisite number of members; and (ii) the person satisfies the classification (Industry, Non-Industry, or Public Governor) of the governorship to be filled, based on such information provided by the person as is reasonably necessary to make the certification. The Secretary shall not unreasonably withhold or delay the certification. Upon certification, the election shall be deemed a contested election. After the certification of a contested election or the expiration of time for contesting an election under this Section, the Secretary shall deliver notice of a meeting of members pursuant to Article XXI, Section 3(a).

#### Communication of Views

Sec. 11. The NASD, the Board, the National Nominating Committee, a committee appointed pursuant to Article IX, Section 1, and NASD staff shall not take any position publicly or with a member or person associated with or employed by a member with respect to any candidate in a contested election or nomination held pursuant to these By-Laws or the NASD Regulation By-Laws. A Governor or a member of the

National Nominating Committee or any other committee may communicate his or her views with respect to any candidate if such Governor or committee member acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of the NASD, the NASD Board, the National Nominating Committee, or any other committee. Except as provided herein, any candidate and his or her representatives may communicate support for the candidate to a member or person associated with or employed by a member.

#### Administrative Support

Sec. 12. The Secretary of the NASD shall provide administrative support to the candidates in a contested election under this Article by sending to NASD members eligible to vote up to two mailings of materials prepared by the candidates. The NASD shall pay the postage for the mailings. If a candidate wants such mailings sent, the candidate shall prepare such material on the candidate's personal stationery. The material shall state that it represents the opinions of the candidate. The candidate shall provide a copy of such material for each member of the NASD. A candidate nominated by the National Nominating Committee may identify himself or herself as such in his or her materials. Any candidate may send additional materials to NASD members at the candidate's own expense. Except as provided in this Article, the NASD, the Board, any committee, and NASD staff shall not provide any other administrative support to a candidate in a contested election conducted under this Article or a contested election or nomination conducted under the NASD Regulation By-Laws.

#### Election of [Board Members] Governors

Sec. [7.(a)] 13. [The members of the Board of] Governors shall be elected by a plurality of the votes of the members of the [Corporation] NASD present in person or represented by proxy at the annual meeting of the [Corporation] NASD and entitled to vote thereat. The annual meeting of the [Corporation] NASD shall be on such date and at such place as the Board [of Governors] shall designate pursuant to Article XXI. Any Governor so elected must be nominated by the National Nominating Committee or certified by the Secretary [described in subsection (b) below or certified] pursuant to [subsection (c) below and must satisfy the other qualifications for Governors set forth in Section 4 of this Article or as established by resolution of the Board of Governors from time to

time, which qualifications shall be consistent with the Delegation Plan] Section 10.

#### Maintenance of Compositional Requirements of the Board

Sec. 14. Each Governor shall update the information submitted under Section 9(e) regarding his or her classification as an Industry, Non-Industry, or Public Governor at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary any change in such classification.

#### Resignation

Sec. 15. Any Governor may resign at any time either upon written notice of resignation to the Chair of the Board, the Chief Executive Officer, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

#### Article [VII] VIII

#### Officers, Agents, and Employees Officers

Sec. 1. The Board [of Governors] shall [select] elect a Chief Executive Officer, who shall be responsible for the management and administration of its affairs and shall be the official representative of the [Corporation] NASD in all public matters and who shall have such powers and duties in the management of the [Corporation] NASD as may be prescribed in a resolution by the Board [of Governors], and which powers and duties shall not be inconsistent with the Delegation Plan. The Board shall elect a Chief Operating Officer and Secretary, who shall have such powers and duties conferred by these By-Laws and such other powers and duties as may be prescribed in a resolution by the Board. The Board may provide for such other executive or administrative officers as it shall deem necessary or advisable, including, but not limited to, Executive Vice [-]President, Senior Vice[-] President, Vice [-]President, [Secretary,] and Treasurer of the [Corporation] NASD. All such officers shall have such titles, [such] powers, and duties, and shall be entitled to such compensation, as shall be determined from time to time by the Board [of Governors]. Each such officer shall hold office until [his] a successor is elected and qualified or until [his] such officer's earlier resignation or removal. Any officer may resign at any time upon written notice

to the [Corporation] NASD. [The Board of Governors may remove any officer, with or without cause, at any time, but such removal shall be without prejudice to the contractual rights of such officer, if any, with the Corporation. Any number of offices may be held by the same person. Any vacancy occurring in any office of the Corporation by death, resignation, removal, or otherwise may be filled for the unexpired portion of the term by the Board of Governors at any meeting.]

#### Absence of Chief Executive Officer

Sec. 2. In the case of the absence or inability to act of the [President] *Chief Executive Officer* of the [Corporation] NASD, or in the case of a vacancy in such office, the Board [of Governors] may appoint its [Chairman] *Chair* or such other person as it may designate to act as such officer pro tem, who shall assume all the functions and discharge all the duties of the [President] *Chief Executive Officer*.

#### Agents and Employees

Sec. 3. *The Board may employ or authorize the employment and prescribe the powers and duties of such agents and employees as it deems necessary or advisable. The employment and compensation of such agents and employees shall be at the pleasure of the Board, provided that such determinations are not inconsistent with the requirements of the Delegation Plan. Except as provided in Article IX, Section 5(d), agents and employees of the NASD shall be under the supervision and control of the officers of the NASD, unless the Board provides by resolution that an agent or employee shall be under the supervision and control of the Board.*

#### Employment of Counsel

Sec. [3.] 4. The Board [of Governors] may retain or authorize the employment of counsel, with such powers, titles, duties, and authority as it shall deem necessary or advisable.

#### [Administrative Staff

Sec. 4. The Board of Governors may employ or authorize the employment and prescribe the powers and duties of such an administrative staff as it deems necessary or advisable. The employment and compensation of such administrative staff of the Corporation shall be at the pleasure of the Board of Governors, provided that such determinations are not inconsistent with the requirements of the Delegation Plan.]

#### Delegation of Duties of Officers

Sec. 5. *The Board may delegate the duties and powers of any officer of the NASD to any other officer or to any Governor for a specified period of time and for any reason that the Board may deem sufficient.*

#### Resignation and Removal of Officers

Sec. 6. (a) *Any officer may resign at any time upon written notice of resignation to the Board, the Chief Executive Officer, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.*

(b) *Any officer of the NASD may be removed, with or without cause, by resolution adopted by a majority of the Governors then in office at any regular or special meeting of the Board or by a written consent signed by all of the Governors then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, if any, with the NASD.*

#### Bond

Sec. 7. *The NASD may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.*

#### Article [VIII] IX

##### Committees

##### Appointment

Sec. 1. [The] *Subject to Article VII, Section 1(c), the Board may appoint such committees or subcommittees as it deems necessary or desirable, and it shall fix their powers, duties, and terms of office; provided that such determinations are not inconsistent with requirements of the Delegation Plan]. Any such committee or subcommittee consisting solely of one or more Governors, to the extent provided by these By-Laws or by resolution of the Board, shall have and may exercise all powers and authority of the Board in the management of the business and affairs of the [Corporation] NASD.*

##### Maintenance of Compositional Requirements of Committees

Sec. 2. *Upon request of the Secretary of the NASD, each prospective committee member who is not a Governor shall provide to the Secretary such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member. The Secretary shall certify to the Board each prospective*

*committee member's classification. Each committee member shall update the information submitted under this Section at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary any change in such classification.*

#### Removal of Committee Member

Sec. [2] 3. [Any] A member of [any] a committee or subcommittee appointed pursuant to this Article [VIII] may be removed from such committee or subcommittee only by a majority vote of the whole Board, after appropriate notice, for refusal, failure, neglect, or inability to discharge [his] such member's duties [or for any cause the sufficiency of which shall be decided by the Board].

#### [Resolution of the Board of Governors

##### Interpretations and Explanations

The Executive Committee be and hereby is authorized and directed to consider and make recommendations to the Board of Governors with respect to such interpretative questions, having to do with the Certificate of Incorporation, By-Laws, Rules of Fair Practice and Code of Procedure of the Association, as may from time to time be submitted to the Committee by the Board of Governors or the President.

Where a decision is required as to which reasonable men, equally well informed, might well not differ, the ruling shall be deemed to be an explanation. Where a decision is required where reasonable men, equally well informed, might well differ, the ruling shall be deemed to be an interpretation.

Where in the judgment of the President and upon advice of Counsel, any question involves an answer clearly in the nature of an explanation, such question may be answered in the office of the President.

Where in the judgment of the President and upon advice of Counsel, any question involves an answer in the nature of an interpretation, the President shall present such question to the Executive Committee.

The President may, after consultation with and upon advice of Counsel, give an office opinion. Such office opinion shall state that it reflects only the opinion of the office of the President and it is provisional and subject to the approval of the Board of Governors.

District Committees, District Business Conduct Committees, Counsel or staff thereof, are hereby directed not to issue any interpretations of the Certificate of Incorporation, By-Laws, Rules of Fair

Practice or Code of Procedure, either in oral or written form without presentation of the question to the President and in such case, if the questions presented appear to be an interpretation with the meaning of this resolution the matter shall be presented in writing to the Executive Committee.]

#### Executive Committee

Sec. 4. (a) The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by the General Corporation Law of the State of Delaware and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs of the NASD between meetings of the Board, and which may authorize the seal of the NASD to be affixed to all papers that may require it.

(b) The Executive Committee shall consist of no fewer than five and no more than nine Governors. The Executive Committee shall include the Chief Executive Officer of the NASD, at least one Director of NASD Regulation, at least one Director of Nasdaq, and at least two Governors who are not Directors of NASD Regulation or Nasdaq. The number of Directors of the NASD Regulation Board and the number of Directors of the Nasdaq Board serving on the Executive Committee shall be equal at all times. The Executive Committee shall have a percentage of Non-Industry committee members at least as great as the percentage of Non-Industry Governors on the whole Board and a percentage of Public committee members at least as great as the percentage of Public Governors on the whole Board.

(c) An Executive Committee member shall hold office for a term of one year.

(d) At all meetings of the Executive Committee, a quorum for the transaction of business shall consist of a majority of the Executive Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.

#### Audit Committee

Sec. 5. (a) The Board shall appoint an Audit Committee. The Audit Committee shall consist of four or five Governors, none of whom shall be officers or employees of the Association. A majority of the Audit Committee members shall be Non-Industry Governors. The Audit Committee shall include two Public Governors. A Public Governor shall serve as Chair of the Committee. An Audit Committee

member shall hold office for a term of one year.

(b) The Audit Committee shall perform the following functions: (i) ensure the existence of adequate controls and the integrity of the financial reporting process of the NASD; (ii) recommend to the NASD Board, and monitor the independence and performance of, the certified public accountants retained as outside auditors by the NASD; and (iii) direct and oversee all the activities of the NASD's internal review function, including but not limited to management's responses to the internal review function.

(c) No member of the Audit Committee shall participate in the consideration or decision of any matter relating to a particular NASD member, company, or individual if such Audit Committee member has a material interest in, or a professional, business, or personal relationship with, that member, company, or individual, or if such participation shall create an appearance of impropriety. An Audit Committee member shall consult with the General Counsel of the NASD to determine if recusal is necessary. If a member of the Audit Committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Audit Committee.

(d) The Audit Committee shall have exclusive authority to: (i) hire or terminate the Director of Internal Review; (ii) determine the compensation of the Director of Internal Review; and (iii) determine the budget for the Office of Internal Review. The Office of Internal Review and the Director of Internal Review shall report directly to the Audit Committee. The Audit Committee may, in its discretion, direct that the Office of Internal Review also report to senior management of the NASD on matters the Audit Committee deems appropriate and may request that senior NASD management perform such operational oversight as necessary and proper, consistent with preservation of the independence of the internal review function.

(e) At all meetings of the Audit Committee, a quorum for the transaction of business shall consist of a majority of the Audit Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.

#### Finance Committee

Sec. 6(a) The Board may appoint a Finance Committee. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of the NASD, including recommendations for the NASD's annual operating and capital budgets and proposed changes to the rates and fees charged by NASD.

(b) The Finance Committee shall consist of four or more Governors. The Chief Executive Officer of the NASD shall be a member of the Finance Committee. The number of Non-Industry committee members shall equal or exceed the number of Industry committee members plus the Chief Executive Officer of the NASD. A Finance Committee member shall hold office for a term of one year.

(c) At all meetings of the Finance Committee, a quorum for the transaction of business shall consist of a majority of the Finance Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.

#### Article X

##### Compensation of Board and Committee Members

[Article VII, Sec. 5.] Sec. 1. The Board may provide for reasonable compensation of the [Chairman] Chair of the Board, the Governors, and the members of any committee [of the Board from the Corporation]. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of the [Corporation] NASD.

#### Article [IX] XI

##### Rules

Sec. 1. To promote and enforce just and equitable principles of trade and business, to maintain high standards of commercial honor and integrity among members of the [Corporation] NASD, to prevent fraudulent and manipulative acts and practices, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, to protect investors and the public interest, to collaborate with governmental and other agencies in the promotion of fair practices and the elimination of fraud, and in general to carry out the purposes of the [Corporation] NASD and of the Act, the Board [of Governors] is hereby authorized to adopt such [Rules of Fair Practice] rules for the members and persons associated with members, and

such amendments thereto as it may, from time to time, deem necessary or appropriate. If any such [Rules] *rules* or amendments thereto are approved by the Commission as provided in the Act, they shall become effective Rules of the Association as of such date as the Board [of Governors] may prescribe. The Board [of Governors] is hereby authorized, subject to the provisions of the By-Laws and the Act, to administer, enforce, suspend, or cancel any Rules of [Fair Practice] *the Association* adopted hereunder.

#### Article [X] *XII*

##### Disciplinary Proceedings

Sec. 1. The Board [of Governors] shall have authority to establish procedures relating to disciplinary proceedings involving members and their associated persons.

Sec. 2. Except as otherwise permitted under these By-Laws or the Act, in any disciplinary proceeding [before the Corporation] *under the Rules of the Association*, any member or person associated with a member shall be given the opportunity to have a hearing at which [he] *such member or person associated with a member* shall be entitled to be heard in person [and/or by counsel] *or by counsel or by a representative as provided in the Rules of the Association*. Such persons may present any relevant material *in accordance with the Rules of the Association*. In any such proceeding against a member or against a person associated with a member to determine whether the member [and/or] *or the person associated with a member* shall be disciplined:

(a) Specific charges shall be brought;

(b) Such member or person associated with a member shall be notified of and be given an opportunity to defend against such charges;

(c) A record shall be kept; and

(d) Any determination shall include a statement setting forth:

[(1)] *(i)* Any act or practice, in which such member or person associated with a member may be found to have engaged or which such member or person associated with a member may be found to have omitted;

[(2)] *(ii)* The rule, regulation, or statutory provision of which any such act or practice, or omission to act, is deemed to be in violation;

[(3)] *(iii)* The basis upon which any findings are made; and

[(4)] *(iv)* The [penalty] *sanction* imposed.

#### Article [XI] *XIII*

##### Powers of Board to [Prescribe] *Impose* Sanctions

Sec. 1. The Board is hereby authorized to [prescribe] *impose* appropriate sanctions applicable to members, including censure, fine, suspension, or expulsion from membership, suspension or bar from being associated with all members, limitation of activities, functions, and operations of a member, or any other fitting sanction, and to [prescribe] *impose* appropriate sanctions applicable to persons associated with members, including censure, fine, suspension or barring a person associated with a member from being associated with all members, limitation of activities, functions, and operations of a person associated with a member, or any other fitting sanction, for:

(a) Breach by a member or a person associated with a member of any covenant with the [Corporation] *NASD* or its members;

(b) Violation by a member or a person associated with a member of any of the terms, conditions, covenants, and provisions of the [rules of the Corporation] *By-Laws of the NASD, NASD Regulation, or Nasdaq, the Rules of the Association*, or the federal securities laws, including the rules and regulations adopted thereunder, [and including] *the rules of the Municipal Securities Rulemaking Board, and the rules of the Treasury Department*;

(c) Failure by a member or person associated with a member to: *(i)* Submit a dispute for arbitration [under the Code of Arbitration Procedure ("Arbitration Code")] as required by the [Arbitration Code] *Rules of the Association*[,] ; [or to fail to] *(ii)* appear or [to] produce any document in [their] *the member's or person's* possession or control as directed pursuant to [provisions of] the [Arbitration Code] *Rules of the Association*[,] ; [or to fail to honor] *(iii)* comply with an award of arbitrators properly rendered pursuant to the [Arbitration Code] *Rules of the Association*, where a timely motion [has not been made] to vacate or modify such award *has not been made* pursuant to applicable law *or where such a motion has been denied*; *or (iv) comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Rules of the Association*;

(d) Refusal by a member or person associated with a member to abide by an official ruling of the Board or any committee exercising powers assigned by the Board with respect to any

transaction which is subject to the Uniform Practice Code; or

(e) Failure by a member or person associated with a member to adhere to any ruling, order, direction, or decision of[,] or to pay any [penalty,] *sanction*, fine, or costs[,] imposed by the Board[, or any committee exercising powers assigned by the Board] *or any entity to which the Board has delegated its powers in accordance with the Delegation Plan*.

Sec. 2. *The Board may delegate its authority under this Article in accordance with the Delegation Plan.*

#### Article [XII] *XIV*

##### Uniform Practice Code

##### Authority to Adopt Code

Sec. 1. The Board [of Governors] is hereby authorized to adopt a Uniform Practice Code and amendments, interpretations and explanations thereto, designed to make uniform, where practicable, custom, practice, usage, and trading technique in the investment banking and securities business with respect to such matters as trade terms, deliveries, payments, dividends, rights, interest, reclamations, exchange of confirmations, stamp taxes, claims, assignments, powers of substitution, computation of interest and basis prices, due-bills, transfer fees, "when, as and if issued" trading, "when, as and if distributed" trading, marking to the market, and close-out procedure, all to the end that the transaction of day-to-day business by members may be simplified and facilitated, that business disputes and misunderstandings, which arise from uncertainty and lack of uniformity in such matters, may be eliminated, and that the mechanisms of a free and open market may be improved and impediments thereto removed.

##### Administration of Code

Sec. 2. The administration of any Uniform Practice Code, or any amendment thereto, adopted by the Board [of Governors] pursuant to Section 1 [of this Article], shall be vested in the Board [of Governors], and the Board is hereby granted such powers as are reasonably necessary to achieve its effective operation. In the exercise of such powers, the Board may issue explanations and interpretations and make binding rulings with respect to the applicability of the provisions of the Uniform Practice Code to situations in which there is no substantial disagreement as to the facts involved. [The] *In accordance with the Delegation Plan, the Board may delegate to [appropriate committees such of its*

powers,] *the NASD Regulation Board and the Nasdaq Board such of the Board's powers* hereunder as it deems necessary and appropriate to achieve effective administration and operation of the Uniform Practice Code.

#### Transactions Subject to Code

Sec. 3. All over-the-counter transactions in securities by members, except transactions in securities which are exempted under Section 3(a)(12) of the Act, or are municipal securities as defined in Section 3(a)(29) of the Act, are subject to the provisions of the Uniform Practice Code and to the provisions of Section 2 [of this Article] unless exempted therefrom by the terms of the Uniform Practice Code.

#### Article [XIII] XV Limitation of Powers Prohibitions

Sec. 1. Under no circumstances shall the Board [of Governors] or any officer, employee, or member of the [Corporation] NASD have the power to:

(a) Make any donation or contribution from the funds of the [Corporation] NASD or to commit the [Corporation] NASD for the payment of any donations or contributions for political or charitable purposes; or

(b) Use the name of the facilities of the [Corporation] NASD in aid of any political party or candidate for any public office.

#### Use of Name of [Corporation] *the NASD* by Members

Sec. 2. No member shall use the name of the [Corporation] NASD except to the extent that may be [authorized by the Board of Governors] *permitted by the Rules of the Association.*

#### [Resolution of the Board of Governors Limitations Upon Use of the Association Name

Members are permitted, in conformity with Article XVI, Section 2 of the Association's By-Laws, and within the limitations prescribed by this Resolution, to indicate membership in the Association in the following manner:

1. Solely as a matter of record in recognized trade directories or other similar types of business listings.

2. Solely in conjunction with the identifying use of the firm name on letterheads, booklet covers, sales literature headings, in the masthead of market letters and on other similar types of circular material, so long as this use is exclusively for identification purposes, is separate and apart from the regular text of the literature and is always in a smaller size type and with

lesser emphasis than that used for the firm name.

3. The Association's name may be used in institutional or any other type of general print and/or electronic advertising media so long as such use is solely and exclusively for identifying the firm as a member, used only in proximity to and in conjunction with the firm name, carries no implied or specific indication of Association approval of the securities or services discussed in the advertisement, is separate and apart from the primary text material in the advertisement, and is always in a smaller size type and of lesser emphasis than that used for the firm name.

4. The following language may be used on confirmation forms, "this transaction (if over-the-counter) has been executed in conformity with the rules and regulations of the Uniform Practice Code of the National Association of Securities Dealers, Inc."

5. The name of the Association may be used on the door or entrance way of a member's principal office or any registered branch office in the following manner: "Member, (of the) National Association of Securities Dealers, Inc."

6. Each member shall be entitled to receive upon request to the Association an appropriate certification of membership which may be displayed in the principal office or any registered branch office of the member. Such certification shall be and remain the property of the Association and shall be returned by a member upon request of the Board of Governors or the President of the Association.

No member or person associated with a member shall use the name of the Association in a fraudulent or misleading manner in connection with the promotion or sale of any specific security or in connection with any other aspect of the member's business; or imply orally, visually or in writing that the Association endorses, indemnifies or guarantees any member's business practices, selling methods or class or type of securities offered.

Any improper, fraudulent or misleading use of the Association's name by a member or person associated with a member shall be deemed conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of Article III, Section 1 of the Association's Rules of Fair Practice.]

#### Unauthorized Expenditures

Sec. 3. No officer, employee, member of the Board [of Governors] or of any committee[,] shall have any power to incur or contract any liability on behalf

of the [Corporation] NASD not authorized by the Board [of Governors]. The Board may delegate to the Chief Executive Officer of the [Corporation or his delegate] *NASD or the Chief Executive Officer's delegate*[,] such authority as it deems necessary to contract on behalf of the [Corporation] NASD or to satisfy unanticipated liabilities during the period between Board meetings.

#### Conflicts of Interest

Sec. 4. (a) A Governor or a member of [the Board of Governors or of any] a committee [of the Corporation] shall not directly or indirectly participate in any adjudication of the interests of any party if such [participation would violate the] *Governor or committee member has a conflict of interest [provisions of the Procedural Rules of the Corporation] or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Governor or committee member shall recuse himself or herself or shall be disqualified in accordance with the Rules of the Association.*

(b) *No contract or transaction between the NASD and one or more of its Governors or officers, or between the NASD and any other corporation, partnership, association, or other organization in which one or more of its Governors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason if: (i) the material facts pertaining to such Governor's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Governors; or (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Governors. Only disinterested Governors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction. This subsection shall not apply to any contract or transaction between the NASD and NASD Regulation or Nasdaq.*

#### Municipal Securities

Sec. 5. The provisions of the By-Laws conferring rulemaking authority upon the Board [of Governors] shall not be applicable to the municipal securities

activities of members or persons associated with members to the extent that the application of such authority would be inconsistent with Section 15B of the Act.

#### Government Securities

Sec. 6. The provisions of the By-Laws governing qualifications of members and persons associated with members and conferring rulemaking authority upon the Board of Governors shall not be applicable to the Government securities activities of members or persons associated with members to the extent that the application of such provisions or authority would be inconsistent with Section 15A(f) of the Act.]

#### Article [XIV] XVI

##### Procedure for Adopting Amendments to By-Laws

Sec. 1. [Any member of the Board of Governors by resolution, any District Committee by resolution, or any twenty-five members of the Corporation by petition signed by such members,] A Governor or a committee appointed by the Board may propose amendments to these By-Laws. Any 25 members of the NASD by petition signed by such members may propose amendments to these By-Laws. Every proposed amendment shall be presented in writing to the Board [of Governors], and a record shall be kept thereof. The [Board of Governors] Board may adopt any proposed amendment to these By-Laws by affirmative vote of a majority of the [members of the Board of] Governors then in office. The Board [of Governors], upon adoption of any such amendment to these By-Laws, except as otherwise provided in these By-Laws, shall forthwith cause a copy to be sent to and voted upon by each member of the [Corporation] NASD. If such amendment to these By-Laws is approved by a majority of the members voting within [thirty (30)] 30 days after the date of submission to the membership, and is approved by the Commission as provided in the Act, it shall become effective as of such date as the Board [of Governors] may prescribe.

#### Article [XV] XVII

##### Corporate Seal

Sec. 1. The corporate seal shall have inscribed thereon the name of the [Corporation] NASD, the year of its organization and the words "Corporate Seal, Delaware." Said seal may be used by causing it or a facsimile thereof to be imposed or affixed or reproduced or otherwise.

#### Article [XVI] XVIII

##### Checks

Sec. 1. All checks or demands for money and notes of the [Corporation] NASD shall be signed by such officer or officers or such other person or persons as the Board [of Governors] may from time to time designate.

#### Article [XVII] XIX

##### Annual Financial Statement

Sec. 1. As soon as practicable after the end of each fiscal year, the Board [of Governors] shall send to each member of the [Corporation] NASD a reasonably itemized statement of receipts and expenditures of the [Corporation] NASD for such preceding fiscal year.

#### Article XX

##### Record Dates

##### Fixing of Date by Board

Sec. 1. In order that the NASD may determine the members entitled to notice of or to vote at any meeting of members or any adjournment thereof, or to express consent or dissent to corporate action in writing without a meeting, or for the purpose of any other lawful action, the Board may fix, in advance, a record date, pursuant to Section 213 of the General Corporation Law of the State of Delaware. Only such members as shall be members of record on the date so fixed shall be entitled to notice of and to vote at such meeting or any adjournment thereof, or to give such consent or dissent.

##### Default Date

Sec. 2. If no record date is fixed by the Board, the record date for determining members entitled to notice of or to vote at a meeting of members shall be at the close of business on the day next preceding the date on which notice is given, or if notice is waived, at the close of business on the day next preceding the day on which the meeting is held.

##### Adjournment

Sec. 3. A determination of members of record entitled to notice of or to vote at a meeting of members shall apply to any adjournment of the meeting; provided, however, that the Board may fix a new record date for the adjourned meeting.

#### Article XXI

##### Meetings of Members

##### Annual Meeting

Sec. 1. The annual meeting shall be on such date and at such place as the Board shall designate. The business of the meeting shall include: (a) election of the members of the Board pursuant to

Article VII, Section 13; and (b) the proposal of business (i) by or at the direction of the Chairman of the Board or the Board, or (ii) by any member entitled to vote at the meeting who complied with the notice procedures set forth in Section 3 and was a member at the time such notice was delivered to the Secretary of the NASD.

##### Special Meetings

Sec. 2. A special meeting shall be on such date and at such place as the Board shall designate. Only such business shall be conducted at a special meeting as shall have been brought before the meeting pursuant to Section 3(a); provided, however, that in no event shall the announcement to the members of an adjournment of a special meeting commence a new time period for the giving of notice.

##### Notice of Meeting; Member Business

Sec. 3. (a) Notice of each meeting shall be written or printed; shall state the date, time, and place of the meeting; shall state the purpose or purposes for which the meeting is called; and unless it is the annual meeting, indicate that the notice is being issued at the direction of the person or persons calling the meeting. The Secretary of the NASD shall deliver the notice to the Executive Representative of each member entitled to vote not less than 30 days nor more than 60 days before the date of an annual meeting and not less than ten days nor more than 60 days before the date of a special meeting. If mailed, the notice shall be deemed to be delivered when deposited with postage in the United States mail and addressed to the Executive Representative of the member as it appears on the records of the NASD. Such further notice shall be given as may be required by law. Meetings may be held without notice if all members entitled to vote are present (except as otherwise provided by law), or if notice is waived by those not present. Any previously scheduled meeting of the members may be postponed and any special meeting of the members may be canceled by resolution of the Board upon notice given to the members prior to the time previously scheduled for the meeting.

(b) For business other than the election of Governors to be brought properly before an annual meeting by a member pursuant to Section 1, the member must have given timely notice thereof in writing to the Secretary of the NASD and such other business must otherwise be a proper matter for member action. To be timely, a member's notice shall be delivered to the Secretary at the NASD's principal

executive offices within 30 days after the date of the notice of the meeting. Such member's notice shall set forth a brief description of the business desired to be brought before the meeting, any material interest of the member in such business, and the reasons for conducting such business at the meeting. In no event shall the announcement to the members of an adjournment of an annual meeting commence a new time period for the giving of a member's notice as described above.

(c) Except as otherwise provided by applicable law, the Restated Certificate of Incorporation, or these By-Laws, the chairman of the meeting shall have the power and duty to determine whether any nomination or other business proposed to be brought before the meeting pursuant to subsection (b) or Article VII, Section 10 was made in accordance with the procedures set forth herein and, if any proposed nomination or business is not in compliance with these By-Laws, to declare that such defective nomination or proposal shall be disregarded.

#### Inspector

Sec. 4. At each meeting of the members, the polls shall be opened and closed, the proxies and ballots received and taken in charge, and all questions touching the qualification of voters and the validity of proxies and the acceptance or rejection of votes shall be decided by an inspector appointed by the Secretary of the NASD before the meeting, or in default thereof by the chairman of the meeting. If the inspector previously appointed fails to attend or refuses or is unable to serve, a substitute shall be appointed by the chairman of the meeting. The inspector shall not be a Governor, officer, or employee of the NASD or a director, officer, partner, or employee of an NASD subsidiary or member.

#### Conduct of Meetings

Sec. 5. The chairman of the meeting shall be the Chief Executive Officer of the NASD or his or her designee. The date and time of the opening and closing of the polls for each matter upon which the members will vote at a meeting shall be announced at the meeting by the chairman of the meeting. The Board may adopt by resolution such rules and regulations for the conduct of the meeting of members as it shall deem appropriate. Except to the extent inconsistent with such rules and regulations as adopted by the Board, the chairman of the meeting shall have the right and authority to prescribe such rules, regulations, and procedures and

to do all such acts as, in the judgment of the chairman of the meeting, are appropriate for the proper conduct of the meeting. Such rules, regulations, or procedures, whether adopted by the Board or prescribed by the chairman of the meeting, may include, without limitation, the following: (a) The establishment of an agenda or order of business for the meeting; (b) rules and procedures for maintaining order at the meeting and the safety of those present; (c) limitations on attendance at or participation in the meeting to members, their duly authorized and constituted proxies, or such other persons as the chairman of the meeting shall determine; (d) restrictions on entry to the meeting after the time fixed for the commencement thereof; and (e) limitations on the time allotted to questions or comments by participants. Unless and to the extent determined by the Board or the chairman of the meeting, meetings of members shall not be required to be held in accordance with the rules of parliamentary procedure.

\* \* \* \* \*

By-Laws of NASD Regulation, Inc.

#### Article I

#### Definitions

When used in these By-Laws, unless the context otherwise requires, the term:

- (a) "Act" means the Securities Exchange Act of 1934, as amended;
- (b) "Board" means the Board of Directors of NASD Regulation;
- (c) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;
- (d) "Commission" means the Securities and Exchange Commission;
- (e) "day" means calendar day;
- (f) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as such person buys or sells securities for such person's own account, either individually or in some fiduciary capacity, but not as part of a regular business;
- (g) "Delaware law" means the General Corporation Law of the State of Delaware;

(h) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(i) "Director" means a member of the Board, excluding the Chief Executive Officer of the NASD;

(j) "district" means a district established by the Board pursuant to Article VIII, Section 8.1 of these By-Laws;

(k) "District Committee" means a District Committee elected pursuant to Article VIII of these By-Laws;

(l) "District Director" means an NASD Regulation staff member who heads a district office;

(m) "District Nominating Committee" means a District Nominating Committee elected pursuant to Article VIII of these By-Laws;

(n) "district office" means an office of NASD Regulation located in a district;

(o) "Executive Representative" means the executive representative of an NASD member appointed pursuant to Article IV, Section 3 of the NASD By-Laws;

(p) "Independent Agent" means a corporation or entity selected by the Secretary of NASD Regulation to assist NASD Regulation with nomination and election procedures under Articles VI and VIII of these By-Laws and the representatives of such corporation or entity;

(q) "Industry Director" or "Industry member" means a Director (excluding the President) or a National Adjudicatory Council or committee member who (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director, (excluding an outside director) or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; (5) provides professional services to a

director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

(r) "NASD" means the National Association of Securities Dealers, Inc.;

(s) "NASD Board" means the NASD Board of Governors;

(t) "NASD member" means any broker or dealer admitted to membership in the NASD;

(u) "NASD Regulation" means NASD Regulation, Inc.;

(v) "National Adjudicatory Council" means a body appointed pursuant to Article V of these By-Laws.

(w) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of the NASD By-Laws;

(x) "Non-Industry Director" or "Non-Industry member" means a Director (excluding the President) or a National Adjudicatory Council or committee member who is (1) a Public Director or Public member; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Director or Industry member;

(y) "person associated with a member" or "associated person of a member" means: (1) a natural person registered under the Rules of the Association; or (2) a sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the NASD under these By-Laws or the Rules of the Association;

(z) "Public Director" or "Public member" means a Director or National Adjudicatory Council or committee member who has no material business relationship with a broker or dealer or

the NASD, NASD Regulation, or Nasdaq;

(aa) "Regional Nominating Committee" means a Regional Nominating Committee that nominates to the National Nominating Committee a candidate for the National Adjudicatory Council to represent a geographical region as provided in Article VI of these By-Laws; and

(bb) "Rules of the Association" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board pursuant to the NASD By-Laws, as hereafter amended or supplemented.

Article [I] II

Offices

Location

Sec. [1.1] 2.1 The address of the registered office of [the Corporation] NASD Regulation in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange [St.,] Street, Wilmington, [DE] Delaware 19801. [The Corporation may] NASD Regulation also may have offices at such other places both within and without the State of Delaware as the Board [of Directors] may from time to time designate or the business of [the Corporation] NASD Regulation may require.

Change of Location

Sec. [1.2] 2.2 In the manner permitted by law, the Board [of Directors] or the registered agent may change the address of [the Corporation's] NASD Regulation's registered office in the State of Delaware and the Board [of Directors] may make, revoke, or change the designation of the registered agent.

Article [II] III

Meetings of the [Stockholders] Stockholder

[Annual Meeting

Sec. 2.1 The annual meeting of stockholders of the Corporation for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date, and at such time, and place, within or without the State of Delaware, as may be fixed, from time to time, by the Board of Directors.]

[Special Meetings

Sec. 2.2 Special meetings of stockholders of the Corporation, unless otherwise prescribed by law, may be called at any time by the Chair of the

Board, by the President or by order of a majority of the Board of Directors. Special meetings of stockholders prescribed by law for the election of directors shall be called by the Board of Directors, the President, or the Secretary. Special meetings of stockholders shall be held at such place within or without the State of Delaware as shall be designated in the notice of meeting.]

[Notice of Meetings

Sec. 2.3(a) Whenever stockholders are required or permitted to take any action at a meeting, they shall be given written notice stating the place, date and hour of the meeting, and, in the case of a special meeting, the purpose or purposes thereof. Unless otherwise required by law, the Certificate of Incorporation or these By-Laws, written notice shall be delivered or mailed at least ten but not more than sixty days before such meeting date to each stockholder entitled to vote at such meeting. If mailed, such notice shall be deposited in the United States mail, postage prepaid, directed to each stockholder at the address that appears on the records of the Corporation.]

[(b) When a meeting of stockholders is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Corporation may transact any business that might have been transacted at the original meeting. If, however, the adjournment is for more than thirty days from the date of the original meeting, or if, after the adjournment, a new record date is set for the adjourned meeting, notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting in the manner prescribed above in subsection (a).]

[Quorum

Sec. 2.4 Except as otherwise provided by law, the Certificate of Incorporation or these By-Laws, at each meeting of stockholders the presence in person or by proxy of the holders of record of a majority of the outstanding shares of capital stock entitled to vote or act at such a meeting shall constitute a quorum for the transaction of any business. In the absence of a quorum, the stockholders so present may by majority rule, adjourn any meeting until a quorum shall be present. When a quorum is once present to organize a meeting, the quorum cannot be destroyed by the subsequent withdrawal or revocation of the proxy of any stockholder.]

## [Voting

Sec. 2.5(a) At any meeting of stockholders, each stockholder as of the record date is entitled to one vote for each such share of stock having voting power, upon the matter in question, except as otherwise provided in the Certificate of Incorporation. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy, provided that no proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only so long as, it is coupled with an interest sufficient in law to support an irrevocable power. A stockholder may revoke any proxy that is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or by delivering a proxy in accordance with applicable law bearing a later date to the Secretary of the Corporation.]

[(b) Directors of the Corporation shall be elected by a plurality of the votes cast at a meeting of stockholders pursuant to Sec. 2.5 of these By-Laws. Corporate action other than the election of directors shall be authorized by a majority of the votes cast at a meeting of stockholders, except as otherwise required by law, the Certificate of Incorporation or these By-Laws.]

[(c) Upon the demand of any stockholder entitled to vote, the election of directors or a vote on any other matter at a meeting of stockholders shall be by written ballot; otherwise, the method of voting and the manner in which votes are counted at such a meeting shall be discretionary with the presiding officer of the meeting.]

## [Presiding Officer and Secretary

Sec. 2.6 At every meeting of stockholders, the Chair, or in his/her absence, the President, or in his/her absence, the appointee of the meeting, shall preside. The Secretary, or in his/her absence, the appointee of the presiding officer of the meeting, shall act as Secretary of the meeting.]

## Action by Consent of [Stockholders] Stockholder

Sec. [2.7]3.1 Any action required[,] or permitted by law to be taken at any meeting of the [stockholders] stockholder of [the Corporation] NASD Regulation may be taken without a meeting, without prior notice and without a vote, if a consent in writing,

setting forth the action so taken, is signed by the [holders] holder of the outstanding stock [having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of corporate action without a meeting and by less than unanimous written consent shall be given to those stockholders who have not consented in writing].

## Article [III] IV

## Board of Directors

## General Powers

Sec. [3.1]4.1 The property, business, and affairs of [the Corporation] NASD Regulation shall be managed by or under the direction of the Board [of Directors]. The Board [of Directors] may exercise all such powers of [the Corporation] NASD Regulation and have the authority to perform all such lawful acts as are permitted by law, the Restated Certificate of Incorporation [or], these By-Laws, or the Delegation Plan to assist the [National Association of Securities Dealers, Inc.] NASD in fulfilling its self-regulatory responsibilities as set forth in Section 15A of the [Securities Exchange Act of 1934, and] Act, and to support such other initiatives as the Board [of Directors] may deem appropriate. To the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and these By-Laws, the Board may delegate any of its powers to a committee appointed pursuant to Section 4.13 or to NASD Regulation staff in a manner not inconsistent with the Delegation Plan.

## Number of Directors

Sec. [3.2]4.2 [The Board of Directors of the Corporation shall consist of one or more members; the exact number of directors that shall constitute the whole Board of Directors shall be fixed from time to time by resolution adopted by the whole Board of Directors. After fixing the number of directors constituting the whole Board of Directors, the Board of Directors may, by resolution adopted by the whole Board of Directors, from time to time change the number of directors constituting the whole Board of Directors; provided that such determination shall be consistent with the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (the "Delegation Plan").] The Board shall consist of no fewer than five and no more than eight Directors, the exact number to be determined by resolution adopted by the stockholder of

NASD Regulation from time to time. Notwithstanding the preceding sentence, the number of Directors shall equal the number of directors on the Nasdaq Board. Any new Director position created as a result of an increase in the size of the Board shall be filled as part of the annual election conducted under Section 4.4.

## Qualifications

Sec. [3.3]4.3 (a) Directors need not be stockholders of [the Corporation]. The Board of Directors shall include at all times the President of the Corporation and such Industry, Non-Industry, and Public Governors as shall be determined from time to time by the Board of Directors, which determination shall be consistent with the Delegation Plan. The criteria for the categories of Industry, Non-Industry, and Public Directors, as used herein, shall be established by the Board of Directors from time to time, which criteria shall be consistent with the Delegation Plan.] NASD Regulation. Only Governors of the NASD Board shall be eligible for election to the Board. The number of Non-Industry Directors shall equal or exceed the number of Industry Directors plus the President. The Board shall include the President and the National Adjudicatory Council Chair, representatives of an issuer of investment company shares or an affiliate of such an issuer, and an insurance company or an affiliated NASD member. The Board shall include at least one Public Director, unless the Board consists of eight Directors. In such case, at least two Directors shall be Public Directors. The Chief Executive Officer of the NASD shall be an ex-officio non-voting member of the Board.

(b) As soon as practicable, following the annual election of Directors, the Board shall elect from its members a Chair and a Vice Chair and such other persons having such titles as it shall deem necessary or advisable to serve until the next annual election or until their successors are chosen and qualify. The persons so elected shall have such powers and duties as may be determined from time to time by the Board. The Board, by resolution adopted by a majority of Directors then in office, may remove any such person from such position at any time.

## Election

Sec. [3.4]4.4 Except as otherwise provided by law [or], these By-Laws, or the Delegation Plan, after the first meeting of [the Corporation] NASD Regulation at which [directors] Directors are elected, [directors of the Corporation] Directors of NASD

*Regulation* shall be elected each year at the annual meeting of [stockholders] *the stockholder*, or at a special meeting called for such purpose in lieu of the annual meeting [, by a plurality of the votes cast at such meeting]. If the annual election of [directors] *Directors* is not held on the date designated [therefore,] *therefor*, the [directors] *Directors* shall cause such election to be held as soon thereafter as convenient.

#### [Term

Sec. 3.5 (a) Each Director shall hold office for a term of three years or until his successor is duly elected and qualified, except in the event of earlier termination from office by reason of death, resignation, removal with or without cause, or other reason.]

[(b) The Board of Directors shall be divided into three classes.]

[(c) The President of the Corporation shall serve as a member of the Board until his successor is selected and qualified, or until his death, resignation, or removal.]

[(d) Except for the President, no Director may serve more than two consecutive terms; provided, however, that if a Director is appointed to fill a term of less than one year, such Director may serve up to two consecutive terms following the expiration of such Director's current term.]

[(e) Each director chosen to fill a newly created directorship shall serve until the next succeeding annual meeting of stockholders.]

#### Resignation

Sec. [3.6] 4.5 Any [director] Director may resign at any time either upon written notice of resignation to the Chair of the Board, the President, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time [be] is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

#### Removal

Sec. [3.7] 4.6 Any or all of the [directors] Directors may be removed from office at any time, with or without cause, [by the stockholders] only by a majority vote of the NASD Board.

#### Disqualification

Sec. 4.7 The term of office of a Director shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Directors, that: (a) the Director no longer satisfies the classification (Industry, Non-Industry, or Public Director) for which the Director was elected; and (b)

the Director's continued service as such would violate the compositional requirements of the Board set forth in Section 4.3. If the term of office of a Director terminates under this Section, and the remaining term of office of such Director at the time of termination is not more than six months, during the period of vacancy the Board shall not be deemed to be in violation of Section 4.3 by virtue of such vacancy.

#### Filling of Vacancies

Sec. 4.8 If a Director position becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the NASD Board shall elect by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director) for the directorship as provided in Section 4.3 to fill such vacancy, except that if the remaining term of office for the vacant Director position is not more than six months, no replacement shall be required.

#### Quorum and Voting

Sec. [3.8] 4.9(a) At all meetings of the Board [of Directors, one-third of the total number of directors shall constitute], unless otherwise set forth in these By-Laws or required by law, a quorum for the transaction of business shall consist of a majority of the Board, including not less than 50 percent of the Non-Industry Directors. In the absence of a quorum, a majority of the [directors] Directors present may adjourn the meeting until a quorum [be] is present.

(b) [A director interested in a matter to be acted upon by the Board of Directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors that determines the Corporation's action.]

[(c) Subject to the restrictions of Section 3.12] Except as provided in Section 4.14(b), the vote of a majority of the [directors] Directors present at a meeting at which a quorum is present shall be the act of the Board [of Directors].

#### Regulation

Sec. [3.9] 4.10 The Board [of Directors] may adopt such rules, regulations, and requirements for the conduct of the business and management of [the Corporation,] NASD Regulation not inconsistent with the law, the Restated Certificate of Incorporation, these By-Laws, [or the rules and By-Laws of the National Association of Securities Dealers, Inc., as the Board of Directors may deem proper. A member of the Board of Directors] the Rules of the Association,

or the By-Laws of the NASD, as the Board may deem proper. A Director shall, in the performance of [his or her] such Director's duties, be fully protected in relying in good faith upon the books of account or reports made to [the Corporation] NASD Regulation by any of its officers, [or] by an independent certified public accountant, [or] by an appraiser selected with reasonable care by the Board [of Directors] or any committee of the Board [of Directors] or by any agent of [the Corporation] NASD Regulation, or in relying in good faith upon other records of [the Corporation] NASD Regulation.

#### Meetings

Sec. [3.10] 4.11(a) An annual meeting of the Board [of Directors] shall be held for the purpose of organization, election of officers, and transaction of any other business. If such meeting is held promptly after and at the place specified for the annual meeting of [stockholders] the stockholder, no notice of the annual meeting of the Board [of Directors] need be given. Otherwise, such annual meeting shall be held at such time and place as may be specified in a notice given in accordance with Section [3.11 of these By-Laws] 4.12.

(b) Regular meetings of the Board [of Directors] may be held at such time and place, within or without the State of Delaware, as determined from time to time by the Board [of Directors]. After such determination has been made, notice shall be given in accordance with Section [3.11 of these By-Laws] 4.12.

(c) Special meetings of the Board [of Directors] may be called by the Chair of the Board, [or] by the President, or by at least one-third of the [directors at that time being] Directors then in office. Notice of any special meeting of the Board [of Directors] shall be given to each [director] Director in accordance with Section [3.11 of these By-Laws] 4.12.

(d) [Members of the Board of Directors, or any committee designated by the Board of Directors,] A Director or member of any committee appointed by the Board may participate in a meeting of the Board [of Directors] or of such committee through the use of a conference telephone or similar communications [facilities that ensure] equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

#### Notice of Meetings; Waiver of Notice

Sec. [3.11] 4.12(a) Notice of any meeting of the Board [of Directors] shall

be deemed to be duly given to a [director] Director if: (i) [if] mailed to the address last made known in writing to [the Corporation] NASD Regulation by such [director] Director as the address to which such notices are to be sent, at least [two] seven days before the day on which such [special] meeting is to be held[, or]; (ii) [if] sent to the [director] Director at such address by telegraph, telefax, cable, radio, or wireless, not later than the day before the day on which such meeting is to be held[,]; or (iii) [if] delivered to the [director] Director personally or orally, by telephone or otherwise, not later than the day before the day on which such [special] meeting is to be held. Each notice shall state the time and place of the meeting and the purpose(s) thereof.

(b) Notice of any meeting of the Board [of Directors] need not be given to any [director] Director if waived by that [director] Director in writing (or by telegram, telefax, cable, radio, or wireless and subsequently confirmed in writing) whether before or after the holding of such meeting, or if such [director] Director is present at such meeting, subject to [Section 7.3(b) hereof] Article XII, Section 12.3(b).

(c) Any meeting of the Board shall be a legal meeting without any prior notice if all Directors then in office shall be present thereat.

Committees [of the Board of Directors]

Sec. [3.13]4.13(a) The Board [of Directors] may, by resolution or resolutions adopted by a majority of the whole Board [of Directors, designate], appoint one or more committees[, each committee to consist of one or more directors of the Corporation]. Except as herein provided, vacancies in membership of any committee shall be filled by the vote of a majority of the whole Board [of Directors]. The Board [of Directors] may designate one or more [directors] Directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not [he, she,] such member or [they] members constitute a quorum, may unanimously appoint another [member of the Board of Directors] Director to act at the meeting in the place of any such absent or disqualified member.

Members of a committee shall hold office for such period as may be fixed by a resolution adopted by a majority of the whole Board [of Directors, subject, however, to removal, with or without

cause, at any time by the vote of a majority of the whole Board of Directors]. Any member of a committee may be removed from such committee only after a majority vote of the whole Board, after appropriate notice, for refusal, failure, neglect, or inability to discharge such member's duties.

(b) [Any committee, to the extent permitted by law and to the extent provided in the] The Board may, by resolution or resolutions [creating such committee, shall have and may exercise all the powers and authority of the Board of Directors] adopted by a majority of the whole Board, delegate to one or more committees the power and authority to act on behalf of the Board in carrying out the functions and authority delegated to NASD Regulation by the NASD under the Delegation Plan. Such delegations shall be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. Action taken by a committee pursuant to such delegated authority shall be subject to review, ratification, or rejection by the Board. In all other matters, the Board may, by resolution or resolutions adopted by a majority of the whole Board, delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of [the Corporation, and] NASD Regulation to the extent permitted by law and not inconsistent with the Delegation Plan. A committee, to the extent permitted by law and provided in the resolution or resolutions creating such committee, may authorize the seal of [the Corporation] NASD Regulation to be affixed to all papers that may require it.

(c) Except as otherwise permitted by applicable law, no [such] committee shall have the power or authority of the Board with regard to: amending the Restated Certificate of Incorporation or the By-Laws of [the Corporation,] NASD Regulation; adopting an agreement of merger or consolidation; recommending to the [stockholders] stockholder the sale, lease, or exchange of all or substantially all [the Corporation's] NASD Regulation's property and assets; or recommending to the [stockholders] stockholder a dissolution of [the Corporation] NASD Regulation or a revocation of a dissolution. Unless the resolution of the Board [of Directors] expressly so provides, no [such] committee shall have the power or authority to authorize the issuance of stock.

[(c)] (d) Each committee may adopt its own rules of procedure and may meet

at stated times or on such notice as such committee may determine. Each committee shall keep regular minutes of its proceedings and report the same to the Board [of Directors] when required.

[(d)] (e) Unless otherwise provided by [the Board of Directors] these By-Laws, a majority of [any such] a committee shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.

(f) The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs of NASD Regulation between meetings of the Board, and which may authorize the seal of NASD Regulation to be affixed to all papers that may require it. The Executive Committee shall consist of three or four Directors, including at least one Public Director. The President of NASD Regulation shall be a member of the Executive Committee. The number of Non-Industry committee members shall equal or exceed the number of Industry committee members plus the President. An Executive Committee member shall hold office for a term of one year. At all meetings of the Executive Committee, a quorum for the transaction of business shall consist of a majority of the Executive Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.

(g) The Board may appoint a Finance Committee. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of NASD Regulation, including recommendations for NASD Regulation's annual operating and capital budgets and proposed changes to the rates and fees charged by NASD Regulation. The Finance Committee shall consist of three or four Directors. The President of NASD Regulation shall serve as a member of the Committee. A Finance Committee member shall hold office for a term of one year.

(h) Upon request of the Secretary of NASD Regulation, each prospective committee member who is not a Director shall provide to the Secretary such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public

committee member. The Secretary of NASD Regulation shall certify to the Board each prospective committee member's classification. Such committee members shall update the information submitted under this Section at least annually and upon request of the Secretary of NASD Regulation, and shall report immediately to the Secretary any change in such classification.

#### Conflicts of Interest; Contracts and Transactions Involving Directors

Sec. [3.12] 4.14 (a) [No member of the Board of Directors or of any committee of the Corporation shall] A Director or a National Adjudicatory Council or committee member shall not directly or indirectly participate in any adjudication of the interests of any party [that would at the same time substantially affect his interest or the interests of any person in whom he is directly or indirectly interested] if that Director or National Adjudicatory Council or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the [member shall disqualify himself or shall be disqualified by the Chairman of the Board or Committee] Director or National Adjudicatory Council or committee member shall recuse himself or herself or shall be disqualified in accordance with the Rules of the Association.

(b) No contract or transaction between [the Corporation] NASD Regulation and one or more of its [directors] Directors or officers, or between [the Corporation] NASD Regulation and any other corporation, partnership, association, or other organization in which one or more of its [directors] Directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason[, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or the committee thereof which] if: (i) The material facts pertaining to such Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction[, or solely because his, her, or their votes are counted for such purposes if: (i) The material facts pertaining to such director's or officer's relationship or interest and] by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the

contract or transaction [are disclosed or are known to the Board of Directors or the committee, and the Board] is entered into, and the Board or committee in good faith [authorizes] ratifies the contract or transaction by the affirmative vote of a majority of the disinterested [directors, even though the disinterested directors be less than a quorum; or (ii)] Directors; or (iii) the material facts pertaining to the [director's] Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the [stockholders] stockholder entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the [stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors] stockholder. Only disinterested Directors may be counted in determining the presence of a quorum at the portion of a meeting of the Board [of Directors,] or of a committee that authorizes the contract or transaction. This subsection shall not apply to a contract or transaction between NASD Regulation and the NASD or Nasdaq.

#### Action Without Meeting

Sec. [3.14]4.15 Any action required or permitted to be taken at [any] a meeting of the Board [of Directors or any] or of a committee [thereof] may be taken without a meeting if all Directors or all members of [the Board of Directors or] such committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board [of Directors or such] or the committee.

#### Communication of Views Regarding Contested Election or Nomination

Sec. 4.16 NASD Regulation, the Board, any committee, the National Adjudicatory Council, and NASD Regulation staff shall not take any position publicly or with an NASD member or person associated with or employed by a member with respect to any candidate in a contested election or nomination held pursuant to these By-Laws or the NASD By-Laws. A Director, committee member, or National Adjudicatory Council member may communicate his or her views with respect to a candidate if such individual acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of NASD Regulation, the Board, the National Adjudicatory Council, or any committee. NASD Regulation, the

Board, the National Adjudicatory Council, any committee, and the NASD Regulation staff shall not provide any administrative support to any candidate in a contested election or nomination conducted pursuant to these By-Laws or the NASD By-Laws.

#### [Article V Indemnification

#### Indemnification of Directors, Officers, Employees and Agents Right to Indemnification

Sec. 5.1 The corporation shall indemnify and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding"), by reason of the fact that he, or a person for whom he is the legal representative, is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation or of a partnership, joint venture, trust, enterprise or nonprofit entity, including service with respect to employee benefit plans (an "indemnitee"), against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such indemnitee, notwithstanding the foregoing, but subject to Section 5.3 hereof, the corporation shall be required to indemnify an indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if the initiation of such proceeding (or part thereof) by the indemnitee was authorized by the Board of Directors.]

#### [Payment of Expenses

Sec. 5.2 The corporation shall pay the expenses (including attorneys' fees) incurred by the persons set forth in Section 5.1 in defending any proceeding in advance of its final disposition, provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the proceeding shall be made only upon receipt of an undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article or otherwise.]

#### [Nonexclusivity of Rights

Sec. 5.3 The rights conferred on any person by this Article shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of the

Certificate of Incorporation, these By-Laws, agreement, vote of stockholders or disinterested directors or otherwise.]

#### [Other Indemnification

Sec. 5.4 The corporation's obligation, if any, to indemnify or advance expenses to any person who was or is serving at its request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise or nonprofit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise or nonprofit entity.]

#### [Amendment or Repeal

Sec. 5.5 Any repeal or modification of the foregoing provisions of this Article shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification.]

#### [Indemnification Insurance

Sec. 5.6 The Corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise, or nonprofit entity against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify him against such liability under the provisions of this section.]

#### Article V National Adjudicatory Council Appointment and Authority

Sec. 5.1 The Board shall appoint a National Adjudicatory Council. The National Adjudicatory Council may be authorized to act for the Board in a manner consistent with these By-Laws, the Rules of the Association, and the Delegation Plan with respect to an appeal or review of a disciplinary proceeding, a statutory disqualification proceeding, or a membership proceeding; a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; the exercise of exemptive authority; and such other proceedings or actions authorized by the Rules of the Association. The National Adjudicatory Council also shall consider and make recommendations to the Board on policy and rule changes relating to the business and sales

practices of NASD members and associated persons and enforcement policies, including policies with respect to fines and other sanctions. The Board may delegate such other powers and duties to the National Adjudicatory Council as the Board deems appropriate in a manner not inconsistent with the Delegation Plan.

#### Number of Members and Qualifications

Sec. 5.2 (a) The National Adjudicatory Council shall consist of no fewer than 12 and no more than 14 members. The number of Non-Industry members, including at least three Public members, shall equal or exceed the number of Industry members. In 1999 and thereafter, the Industry members shall represent a geographic region designated by the Board under Article VI, Section 6.1.

(b) As soon as practicable following the appointment of members, the National Adjudicatory Council shall elect a Chair and a Vice Chair from among its members. The Chair and Vice Chair shall have such powers and duties as may be determined from time to time by the National Adjudicatory Council. The Chair also shall serve as a Director of the NASD Regulation Board and a Governor of the NASD Board for a one-year term as provided in the By-Laws and Restated Certificate of Incorporation of the NASD and these By-Laws. The Board, by resolution adopted by a majority of Directors then in office and after notice to the NASD Board, may remove the Chair or Vice Chair from such position at any time for refusal, failure, neglect, or inability to discharge his or her duties.

#### Nomination Process

Sec. 5.3 (a) Each Regional Nominating Committee shall nominate an Industry member for consideration by the National Nominating Committee as provided in Article VI and subsection (b) of this Section.

(b) The Secretary of NASD Regulation shall collect from each nominee for the office of member of the National Adjudicatory Council such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, or Public member, and the Secretary shall certify to the National Nominating Committee each nominee's classification. After appointment to the National Adjudicatory Council, each member shall update such information at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such classification.

#### Term of Office

Sec. 5.4 (a) Except as otherwise provided in this Article, each National Adjudicatory Council member shall hold office for a term of two years or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, disqualification, or other reason.

(b) In 1998, each National Adjudicatory Council member shall hold office for a term of one year or until a successor is duly appointed and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, disqualification, or other reason.

(c) Beginning in January 1999 and thereafter, the National Adjudicatory Council shall be divided into two classes. The term of office of those of the first class shall expire in January 2000, and the term of office of those of the second class shall expire one year thereafter. Beginning in January 2000, members shall be appointed for term of two years to replace those whose terms expire.

(d) Beginning in 2000, no member may serve more than two consecutive terms, except that if a member is appointed to fill a term of less than one year, such member may serve up to two consecutive terms following the expiration of such member's initial term.

#### Resignation

Sec. 5.5 A member of the National Adjudicatory Council may resign at any time upon written notice to the Board. Any such resignation shall take effect at the time specified therein, or if the time is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

#### Removal

Sec. 5.6 Any or all of the members of the National Adjudicatory Council may be removed from office at any time for refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the Board.

#### Disqualification

Sec. 5.7 Notwithstanding Section 5.4, the term of office of a National Adjudicatory Council member shall terminate immediately upon a determination by the Board, by a majority vote, that: (a) the member no longer satisfies the classification (Industry, Non-Industry, or Public member) for which the member was elected; and (b) the member's continued

service as such would violate the compositional requirements of the National Adjudicatory Council set forth in Section 5.2. If the term of office of a National Adjudicatory Council member terminates under this Section, and the remaining term of office of such member at the time of termination is not more than six months, during the period of vacancy the National Adjudicatory Council shall not be deemed to be in violation of Section 5.2 by virtue of such vacancy.

#### Filling of Vacancies

Sec. 5.8 If a position on the National Adjudicatory Council becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the Board shall appoint a person satisfying the classification (Industry, Non-Industry, or Public member) for the position as provided in Section 5.2(a) to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

#### Quorum and Voting

Sec. 5.9 At all meetings of the National Adjudicatory Council, a quorum for the transaction of business shall consist of a majority of the National Adjudicatory Council, including not less than 50 percent of the Non-Industry members. In the absence of a quorum, a majority of the members present may adjourn the meeting until a quorum is present.

#### Meetings

Sec. 5.10 The members of the National Adjudicatory Council may participate in a meeting through the use of a conference telephone or similar communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

#### Article VI

##### *National Adjudicatory Council Regional Nominations for Industry Members*

##### *Establishment of Regions*

Sec. 6.1 The Board shall establish boundaries for geographical regions within the United States for the purpose of nominating candidates for membership on the National Adjudicatory Council to the National Nominating Committee. The Board may make changes from time to time in the number or boundaries of the regions as the Board deems necessary or

appropriate in accordance with Article V, Section 5.2(a). The Board shall prescribe such policies and procedures as are necessary or appropriate to address the implementation of a new region configuration in the event of a change in the number or boundaries of the regions.

##### *Composition*

Sec. 6.2 (a) A Regional Nominating Committee shall be elected for each region designated by the Board under Section 6.1. Each District Nominating Committee for a district located in the region shall elect two District Committee members from the district to serve on the Regional Nominating Committee. If a region shall consist of one district, the District Nominating Committee for the district shall elect four District Committee members from the district to serve on the Regional Nominating Committee.

(b) In the event of the refusal, failure, neglect, or inability of a member of a Regional Nominating Committee to discharge his or her duties, the Regional Nominating Committee may remove the member by the affirmative vote of two-thirds of the members of the Regional Nominating Committee then in office and declare the member's position vacant. The Regional Nominating Committee shall notify the Regional Nominating Committee member of his or her removal within seven days after the vote. The member's position shall be filled pursuant to Section 6.4. A member who is removed may submit a written appeal of the removal to the Board within 30 days after the date he or she is notified in writing of the removal. The Board may affirm, reverse, or modify the determination of the Regional Nominating Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the Regional Nominating Committee.

##### *Term of Office*

Sec. 6.3 Each regularly elected member of a Regional Nominating Committee shall hold office for a term of two years, or until a successor is elected and qualified, or until death, resignation, or removal. A member of a Regional Nominating Committee may not serve more than three consecutive terms.

##### *Filling of Vacancies*

Sec. 6.4 In the event of a vacancy on a Regional Nominating Committee caused by the departure of a member prior to the expiration of the member's term of office, the District Nominating Committee that elected the member

shall appoint by majority vote another member of the District Committee to fill the vacancy. The appointment shall be effective until the next regularly scheduled election occurs pursuant to this Article.

##### *Meetings*

Sec. 6.5 Meetings of a Regional Nominating Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each Regional Nominating Committee in its discretion may determine. A quorum of a Regional Nominating Committee shall consist of a majority of its members, and any action taken by a majority vote at any meeting at which a quorum is present, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a Regional Nominating Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a majority of the Committee shall constitute the action of the Committee. Action taken by telephonic vote shall be confirmed in writing at a regular meeting of the Regional Nominating Committee.

##### *Election of Officers*

Sec. 6.6 Following the annual election of members of the Regional Nominating Committees pursuant to this Article, each Regional Nominating Committee shall elect from its members a Chair and such other officers as it deems necessary for the proper performance of its duties under these By-Laws.

##### *Expenses*

Sec. 6.7 Funds to meet the regular expenses of each Regional Nominating Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

##### *Notice to Chair*

Sec. 6.8 On or before August 1, 1998, the Secretary of NASD Regulation shall send a written notice to the Chair of each Regional Nominating Committee to initiate the process for nominating an individual to represent the region on the National Adjudicatory Council for a term of office of one or two years, as determined by the Board, beginning in 1999. On or before August 1, 1999, and annually thereafter, the Secretary of NASD Regulation shall send a written notice to the chair of a Regional Nominating Committee if the term of office of the National Adjudicatory Council member representing the region shall expire in the next calendar year. The notice shall describe the

nomination procedures for filling the office.

#### *Solicitation of Candidates*

Sec. 6.9 NASD Regulation staff shall provide the Regional Nominating Committee with a description of the NASD membership in the region. The Regional Nominating Committee shall identify and solicit candidates to nominate to the National Nominating Committee for the office of National Adjudicatory Council member. The Regional Nominating Committee Chair shall send a written notice of the upcoming nomination to the Executive Representative and each branch office of the NASD members in the region and request that such NASD members submit names of candidates to the Regional Nominating Committee or the Secretary of NASD Regulation for consideration.

#### *Secretary's Notice to NASD Members*

Sec. 6.10 The Secretary of NASD Regulation shall send a written notice to NASD members in the region describing the nomination procedures.

#### *Regional Nominating Committee Candidate*

Sec. 6.11 The Regional Nominating Committee shall review the background of the candidates and the description of the NASD membership provided by NASD Regulation staff and shall propose one or more candidates for nomination to the National Nominating Committee. In proposing a candidate for nomination, the Regional Nominating Committee shall endeavor to secure appropriate and fair representation of the region.

#### *Notice of Regional Nominating Committee Candidate*

Sec. 6.12 The Regional Nominating Committee shall send to the Executive Representatives and branch offices of the NASD members in the region a written notice of the name of the candidate or candidates the Regional Nominating Committee proposes for nomination to the National Nominating Committee.

#### *Designation of Additional Candidates*

Sec. 6.13 If an officer, director, or employee of an NASD member in the region is not proposed for nomination by the Regional Nominating Committee and wants to seek the nomination, he or she shall send a written notice to the Regional Nominating Committee Chair or the Secretary of NASD Regulation within 14 calendar days after the mailing date of the Regional Nominating Committee's notice under Section 6.12.

The Regional Nominating Committee Chair or the Secretary of NASD Regulation shall make a written record of the time and date of the receipt of the officer's, director's, or employee's notice. The officer, director, or employee shall be designated as an "additional candidate."

#### *List of NASD Members Eligible to Vote*

Sec. 6.14 (a) The Secretary of NASD Regulation shall mail a list of all NASD members eligible to vote in the region and their Executive Representatives to the additional candidate immediately following receipt of the additional candidate's notice by the Regional Nominating Committee Chair or the Secretary of NASD Regulation.

(b) An NASD member that has its principal office, one or more registered branch offices, or a principal office and one or more registered branch offices in the region shall be eligible to cast one vote on the nomination through the NASD member's Executive Representative.

#### *Requirement for Petition Supporting Additional Candidate*

Sec. 6.15 An additional candidate shall be proposed for nomination if a petition signed by at least ten percent of the NASD members eligible to vote in the region is filed with the Regional Nominating Committee within 30 calendar days after the date of mailing of the list to the additional candidate pursuant to Section 6.14. Only an Executive Representative may sign a petition on behalf of an NASD member.

#### *Uncontested Nomination*

Sec. 6.16 If the Regional Nominating Committee proposes one candidate for nomination and no additional candidate is proposed for nomination pursuant to Section 6.15, the Regional Nominating Committee shall nominate its candidate to the National Nominating Committee.

#### *Notice of Contested Nomination*

Sec. 6.17 If the Regional Nominating Committee proposes more than one candidate for nomination, or if an additional candidate is proposed for nomination pursuant to Section 6.15, the Regional Nominating Committee shall send a written notice to the Executive Representatives of the NASD members eligible to vote in the region announcing the names of the candidates and describing contested nomination procedures.

#### *Administrative Support*

Sec. 6.18 The Secretary of NASD Regulation shall designate a district office in the region to provide

administrative support to all candidates by sending to NASD members eligible to vote in the region up to two mailings of materials prepared by the candidates. NASD Regulation shall pay the postage for the mailings. If a candidate wants such mailings sent, the candidate shall prepare such material on the candidate's personal stationery. The material shall state that it represents the opinion of the candidate. The candidate shall provide a copy of such material for each member of the NASD in the region. A candidate proposed for nomination by the Regional Nominating Committee may identify himself or herself as such in his or her materials. Any candidate may send additional mailings to NASD members at the candidate's own expense. Except as provided in this Article, NASD Regulation, the Board, the Regional Nominating Committee, any other committee, the National Adjudicatory Council, and NASD Regulation staff shall not provide any other administrative support to a candidate for the nomination under this Article or any candidate in a contested election conducted under Article VII of the NASD By-Laws.

#### *Ballots*

Sec. 6.19 With the assistance of the Secretary of NASD Regulation and an Independent Agent, the Regional Nominating Committee shall prepare a ballot with the name or names of its candidate and any additional candidates proposed for nomination pursuant to Section 6.15. The ballot shall list the candidates in alphabetical order and shall identify the candidate or candidates proposed for nomination by the Regional Nominating Committee. The Regional Nominating Committee shall send a ballot to the Executive Representative of each NASD member eligible to vote in the region. Instructions on the ballot shall direct the Executive Representative to return the ballot to the Independent Agent and state that the ballot envelope must be postmarked on or before the return date specified on the ballot. The return date specified on the ballot shall be no fewer than 30 and no more than 45 days after the date of mailing of the ballot.

#### *Vote Qualification List*

Sec. 6.20 Eligibility to vote on a regional nomination shall be based on the NASD's membership records as of a date designated by the Secretary of NASD Regulation that is not more than 30 days before the date of mailing of the ballot. The Secretary of NASD Regulation shall prepare a list of NASD members eligible to vote in the region and their Executive Representatives,

which shall be used for vote qualification purposes, and shall provide the list to the candidates.

#### *Ballots Returned As Undelivered*

Sec. 6.21 The Independent Agent shall open any ballot envelope returned undelivered and shall determine whether it was sent to the NASD member's address of record. If incorrectly addressed, the Independent Agent shall send a new ballot to the NASD member's address of record.

#### *General Procedures for Qualification and Accounting of Ballots*

Sec. 6.22 After the voting period, on a date or dates designated by the Secretary of NASD Regulation, the qualification and accounting of ballots shall take place. The date or dates designated shall be not later than 14 calendar days after the return date specified on the ballot pursuant to Section 6.19. Candidates and their representatives shall be allowed to observe the qualification and accounting of ballots. Representation for each candidate shall be limited to two individuals. The Independent Agent shall bring to a specified district office in the region all ballots timely received. Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall open and count the ballots. For ballot qualification purposes, the Independent Agent shall identify to the candidates the NASD members that timely returned ballots and inform the candidates of the Independent Agent's determination of whether or not a ballot is qualified for voting purposes. The determination shall be based on a comparison of ballots received against the list of NASD members eligible to vote in the region and their Executive Representatives as prepared by the Secretary of NASD Regulation under Section 6.20. The Secretary of NASD Regulation or the Secretary's designee shall make the final determination of the qualification of a ballot. Upon the qualification of a ballot, the Independent Agent shall record the vote indicated on the ballot. The candidates and their representatives shall not be allowed to see the vote of an NASD member.

#### *Ballots Set Aside*

Sec. 6.23 The Independent Agent shall set aside a ballot if: (a) The ballot is received from an NASD member eligible to vote in the region and the ballot is signed by a person who is not the Executive Representative listed on the vote qualification list prepared under Section 6.20, and the Secretary of the NASD has not received proper

notice of a change in Executive Representative pursuant to the NASD By-Laws; or (b) two or more properly executed ballots are received from an NASD member eligible to vote in the region. If the Independent Agent determines that the ballots set aside are material to the outcome of the nomination, the Secretary of NASD Regulation and the Independent Agent shall make reasonable efforts to resolve each ballot set aside. With respect to a ballot not signed by an Executive Representative of record, the Secretary of NASD Regulation shall contact the NASD member to request that the NASD member send proper written notice of any change in Executive Representative by facsimile so that the ballot may be counted. With respect to multiple ballots from an NASD member, the Independent Agent shall contact the Executive Representative of the NASD member to obtain the NASD member's vote. The Secretary of NASD Regulation shall keep a list of NASD members that reported their ballot was lost or not received and that were provided with a duplicate ballot. The Secretary of NASD Regulation shall provide the list to the Independent Agent and, upon request, to the candidates.

#### *Invalid Ballots*

Sec. 6.24 The Independent Agent shall declare a ballot invalid if one or more of the following conditions exists:

- (a) The ballot is not signed by the Executive Representative (unless Section 6.23 applies);
- (b) A vote is not indicated on the ballot; or
- (c) A vote for more than one candidate is indicated on the ballot.

#### *Certification of Nomination*

Sec. 6.25 Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall count the votes received for each candidate. The candidate receiving the largest number of votes cast in the region shall be declared the nominee from the region and the Regional Nominating Committee shall nominate such candidate to the National Nominating Committee. In the event of a tie, there shall be a run-off vote for the nomination. The Regional Nominating Committee shall send a written certification of the nomination results to the National Nominating Committee. The certification shall state the number of votes received by each candidate and the number of ballots set aside.

#### *Rejection of Regional Nominating Committee Nominee*

Sec. 6.26 If the National Nominating Committee rejects the nominee of the Regional Nominating Committee, the Regional Nominating Committee shall repeat the nomination procedures in Section 6.9 through Section 6.25.

#### *Extension of Time and Additional Procedures*

Sec. 6.27 The Secretary of NASD Regulation may extend a time period under this Article for good cause shown. In extraordinary circumstances, the Secretary of NASD Regulation, with the approval of the Executive Committee or the Board, may adopt additional procedures for nominations under this Article.

#### Article [IV] VII

#### Officers, Agents, and Employees

#### Officers

Sec. [4.1]7.1 The Board [of Directors] shall elect the officers of [the Corporation] NASD Regulation, which shall include a President, a Secretary, and such [for] other executive or administrative officers as it shall deem necessary or advisable, including, but not limited to: Executive Vice[-] President, Senior Vice [-]President, Vice [-]President, General Counsel, [Secretary] and Treasurer of [the Corporation] NASD Regulation. All such officers shall have such titles, powers, and duties, and shall be entitled to such compensation, as shall be determined from time to time by the Board [of Directors]. The terms of office of such officers shall be at the pleasure of the Board [of Directors], which by affirmative vote of a majority of the [members] Board, may remove any such officer at any time. One person may hold the offices and perform the duties of any two or more of said offices, except the offices and duties of President and Vice President or of President and Secretary. None of the officers, except the President, need be [directors of the Corporation] Directors of NASD Regulation.

#### *Absence of the President*

Sec. 7.2 In the case of the absence or inability to act of the President of NASD Regulation, or in the case of a vacancy in such office, the Board may appoint its Chair or such other person as it may designate to act as such officer pro tem, who shall assume all the functions and discharge all the duties of the President.

## Agents and Employees

Sec. [4.2]7.3 In addition to the officers, [the Corporation] NASD Regulation may employ such agents and employees as the Board [of Directors] may deem necessary or advisable, each of whom shall hold office for such period and exercise such authority and perform such duties as the Board [of Directors], the President, or any officer designated by the Board [of Directors,] may from time to time determine. [The Board of Directors at any time may appoint and remove, or may delegate to any principal officer the power to appoint and to remove, any agent or employee of the Corporation.] Agents and employees of NASD Regulation shall be under the supervision and control of the officers of the NASD Regulation, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.

## Delegation of Duties of Officers

Sec. [4.3]7.4 The Board [of Directors] may delegate the duties and powers of any officer of [the Corporation] NASD Regulation to any other officer or to any [director] Director for a specified period of time and for any reason that the Board [of Directors] may deem sufficient.

## Resignation and Removal of Officers

Sec. [4.4]7.5 (a) Any officer may resign at any time upon written notice of resignation to the Board [of Directors], the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

(b) Any officer[, agent or employee of the Corporation] of NASD Regulation may be removed, with or without cause, by resolution adopted by a majority of the [directors] Directors then in office at any regular or special meeting of the Board [of Directors] or by a written consent signed by all of the [directors] Directors then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, [agent, or employee,] if any, with [the Corporation] NASD Regulation.

## Bond

Sec. [4.5]7.6 [The Corporation] NASD Regulation may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.

## [Compensation of Board and Committee Members

Sec. 4.6 The Board of Directors may provide for reasonable compensation of the Chairman of the Board, the Directors, and the members of any committee of the Board or any District Committee from the Corporation. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of the Corporation.]

## Article VIII

### *District Committees and District Nominating Committees*

#### *Establishment of Districts*

Sec. 8.1 The Board shall establish boundaries for districts within the United States to assist NASD Regulation in administering its affairs in a manner that is consistent with applicable law, the Restated Certificate of Incorporation, these By-Laws, the Delegation Plan, and the Rules of the Association. The Board may make changes from time to time in the number or boundaries of the districts as it deems necessary or appropriate. The Board shall prescribe such policies and procedures as are necessary or appropriate to address the implementation of a new district configuration in the event of a change in the number or boundaries of the districts.

#### *Composition of District Committees*

Sec. 8.2 (a) A district created under Section 8.1 shall elect a District Committee pursuant to this Article. A District Committee shall consist of no fewer than five and no more than 20 members, unless otherwise provided by resolution of the Board. Each District Committee member shall be employed in the office of an NASD member eligible to vote in the district. A District Committee shall determine the number of its members to be elected each year. Members of the District Committees shall serve as panelists in disciplinary proceedings in accordance with the Rules of the Association. The District Committees shall consider and recommend policies and rule changes to the Board. The District Committees shall endeavor, in such manner as they deem appropriate, to educate NASD members and other brokers and dealers in their respective districts as to the objects, purposes, and work of the NASD, NASD Regulation, and Nasdaq in order to foster NASD members' interest and cooperation.

(b) In the event of the refusal, failure, neglect, or inability of a member of a District Committee to discharge his or her duties, or for any cause affecting the

best interests of NASD Regulation, the sufficiency of which shall be decided by the District Committee, the District Committee may remove the member by the affirmative vote of two-thirds of the members of the District Committee then in office and declare the member's position vacant. The District Committee shall notify the District Committee member of his or her removal within seven days after the vote. The member's position shall be filled pursuant to Section 8.4. A member who is removed may submit a written appeal of the removal to the Board within 30 days after the date he or she is notified of the removal. The Board may affirm, reverse, or modify the determination of the District Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the District Committee.

#### *Term of Office of District Committee Members*

Sec. 8.3 Each regularly elected member of a District Committee shall hold office for a term of three years, or until a successor is elected and qualified, or until death, resignation, or removal. A member of a District Committee may not serve more than two consecutive terms.

#### *Filling of Vacancies on District Committees*

Sec. 8.4 In the event of a vacancy on a District Committee caused by the departure of a Committee member prior to the expiration of the member's term of office, the District Committee shall appoint by majority vote a representative of an NASD member eligible to vote in the district to fill the vacancy. The appointment shall be effective until the next regularly scheduled election occurs. Following the election, the newly elected Committee member shall serve only the duration of the departed Committee member's term.

#### *Meetings of District Committees*

Sec. 8.5 Meetings of a District Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each District Committee in its discretion may determine. A quorum of a District Committee shall consist of a majority of its members, and any action taken by a majority at any meeting at which a quorum is present, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a District Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a majority of the Committee shall

constitute the action of the Committee. Any action taken by telephonic vote shall be confirmed in writing at a regular meeting of the District Committee.

#### *Election of District Officers*

Sec. 8.6 Following the annual election of members of the District Committees pursuant to this Article, each District Committee shall elect from its members a Chair and such other officers as it deems necessary for the proper performance of its duties under these By-Laws, and shall prescribe their powers and duties.

#### *Advisory Council*

Sec. 8.7 (a) The Chairs of the District Committees, elected pursuant to Section 8.6, shall constitute an Advisory Council to the Board.

(b) The Advisory Council shall be advised of and entitled to attend such meetings of the Board as the Board may designate for such Advisory Council's attendance, and the Board shall designate at least one such meeting annually. The Advisory Council shall not be entitled to vote at meetings of the Board.

#### *Expenses of District Committees*

Sec. 8.8 Funds to meet the regular expenses of each District Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

#### *Composition of District Nominating Committees*

Sec. 8.9 (a) Each district created under Section 8.1 shall elect a District Nominating Committee pursuant to this Article. A District Nominating Committee shall consist of five members, unless the Board by resolution increases a District Nominating Committee to a larger number. Each member of a District Nominating Committee shall be employed in the office of an NASD member eligible to vote in the district, but shall not be a member of the District Committee. A District Nominating Committee shall include a majority of persons who previously have served on a District Committee or who are current or former Directors or current or former Governors of the NASD Board, and shall include at least one current or former Director or Governor.

(b) In the event of the refusal, failure, neglect, or inability of a member of a District Nominating Committee to discharge his or her duties, or for any cause affecting the best interests of NASD Regulation, the sufficiency of which shall be decided by the District

Nominating Committee, the District Nominating Committee may remove the member by the affirmative vote of two-thirds of the members of the District Nominating Committee then in office and declare the member's position vacant. The member's position shall be filled pursuant to Section 8.11. The District Nominating Committee shall notify the District Nominating Committee member of his or her removal within seven days after the vote. A member who is removed may submit a written appeal of the removal to the Board within 30 days after the date he or she is notified in writing of the removal. The Board may affirm, reverse, or modify the determination of the District Nominating Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the District Nominating Committee.

#### *Term of Office of District Nominating Committee Members*

Sec. 8.10 Each regularly elected member of a District Nominating Committee shall hold office for a term of one year, and until a successor is elected and qualified, or until death, resignation, or removal. A member of a District Nominating Committee may not serve more than two consecutive terms.

#### *Filling of Vacancies for District Nominating Committees*

Sec. 8.11 In the event of a vacancy on a District Nominating Committee caused by the departure of a Committee member prior to the expiration of the member's term of office, the District Nominating Committee shall appoint by majority vote a representative of an NASD member eligible to vote in the district to fill the vacancy. The appointment shall be effective until the next regularly scheduled election occurs pursuant to this Article.

#### *Meetings of District Nominating Committees*

Sec. 8.12 Meetings of a District Nominating Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each District Nominating Committee in its discretion may determine. A quorum of a District Nominating Committee shall consist of a majority of its members, and any action taken by a majority of the entire Committee at any meeting, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a District Nominating Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a

majority of the Committee shall constitute the action of the Committee. Action taken by telephonic vote shall be confirmed in writing at a regular meeting of the District Nominating Committee.

#### *Election of District Nominating Committee Officers*

Sec. 8.13 Following the annual election of members of the District Nominating Committees pursuant to this Article, each District Nominating Committee shall elect from its members a Chair and such other officers as it deems necessary for the proper performance of its duties under these By-Laws, and shall prescribe their powers and duties.

#### *Expenses of District Nominating Committees*

Sec. 8.14 Funds to meet the regular expenses of each District Nominating Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

#### *Notice to Chair*

Sec. 8.15 On or before May 1 of each year, the Secretary of NASD Regulation shall send a written notice to the Chair of each District Nominating Committee and each District Committee identifying the members of the District Nominating Committee and the District Committee whose terms of office shall expire in the next calendar year. The notice shall describe election procedures for filling the offices.

#### *Solicitation of Candidates*

Sec. 8.16 NASD Regulation staff shall provide the District Nominating Committee with a description of the NASD membership in the district. The District Nominating Committee shall identify and solicit candidates to nominate for the vacancies on the District Committee and the District Nominating Committee. The District Nominating Committee Chair shall send a written notice of the upcoming election to the Executive Representative and each branch office of the NASD members in the district and request that such NASD members submit names of candidates to the District Nominating Committee or the District Director for consideration.

#### *Secretary's Notice to NASD Members*

Sec. 8.17 The Secretary of NASD Regulation shall send a written notice to NASD members in the district describing the election procedures.

*District Nominating Committee Slate*

Sec. 8.18 (a) The District Nominating Committee shall review the background of proposed candidates and the description of the NASD membership provided by NASD Regulation staff and shall nominate a slate of candidates for the election. The slate shall include one or more candidates for each vacancy. In nominating candidates for the office of member of the District Committee and the office of member of the District Nominating Committee, the District Nominating Committee shall endeavor to secure appropriate and fair representation on the District Committee and on the District Nominating Committee of the various sections of the district and all classes and types of NASD members engaged in the investment banking or securities business within the district. In nominating candidates for the office of member of the District Nominating Committee, a District Nominating Committee shall assure that the composition of the District Nominating Committee meets the standards in Section 8.9(a).

(b) A District Nominating Committee shall not nominate an incumbent member of the District Committee to succeed himself or herself unless the District Nominating Committee first takes appropriate action by a written ballot of the entire NASD membership within the district to ascertain that such nomination is acceptable to a majority of the NASD members in the district, unless the incumbent member of the District Committee is serving pursuant to the provisions of Section 8.4. A District Nominating Committee may not nominate more than two incumbent members of the District Nominating Committee to succeed themselves.

*Certification of Nomination*

Sec. 8.19 The District Nominating Committee shall certify to the District Committee each candidate nominated by the District Nominating Committee and the office to which the candidate is nominated. Within five calendar days after the certification, the District Committee shall send to the Executive Representatives of NASD members in the district a copy of the certification.

*Designation of Additional Candidates*

Sec. 8.20 If an officer, director, or employee of an NASD member who meets the qualifications of Section 8.2 is not nominated by the District Nominating Committee and wants to be considered for a vacancy on the District Committee or the District Nominating

Committee, he or she shall send a written notice to the District Director within 14 calendar days after the mailing date of the certification to the Executive Representatives pursuant to Section 8.19. The District Director shall make a written record of the time and date of the receipt of the officer's, director's, or employee's notice. The officer, director, or employee shall be designated as an "additional candidate."

*List of NASD Members Eligible to Vote*

Sec. 8.21 (a) The Secretary of NASD Regulation shall provide a list of all NASD members eligible to vote in the district and their Executive Representatives to the additional candidate immediately following receipt of the additional candidate's notice by the District Director.

(b) An NASD member that has its principal office, one or more registered branch offices, or its principal office and one or more registered branch offices in the district shall be eligible to cast one vote through the NASD member's Executive Representative for each vacancy to be filled in the election.

*Requirement for Petition Supporting Additional Candidate*

Sec. 8.22 An additional candidate shall be nominated if a petition signed by at least ten percent of the NASD members eligible to vote in the district is filed with the District Nominating Committee within 30 calendar days after the date of mailing of the list to the additional candidate pursuant to Section 8.21. Only an Executive Representative may sign a petition on behalf of an NASD member.

*Uncontested Election*

Sec. 8.23 If the District Nominating Committee nominates one candidate for each vacancy and no additional candidate is nominated pursuant to Section 8.22, the candidates nominated by the District Nominating Committee shall be considered duly elected and the District Committee shall certify the election to the Board.

*Notice of Contested Election*

Sec. 8.24 If the District Nominating Committee nominates more than one candidate for a vacancy, or if an additional candidate is nominated pursuant to Section 8.22, the election shall be considered a contested election. The District Committee shall send a notice to the Executive Representatives of the NASD members eligible to vote in the district announcing the names of the candidates and the office to which each

candidate is nominated and describing contested election procedures.

*Administrative Support*

Sec. 8.25 The District Office shall provide administrative support to all candidates by sending to NASD members eligible to vote in the district up to two mailings of materials prepared by the candidates. NASD Regulation shall pay the postage for the mailings. If a candidate wants such mailings sent, the candidate shall prepare such material on the candidate's personal stationery. The material shall state that it represents the opinion of the candidate. The candidate shall provide a copy of the material for each member of the NASD in the district. Candidates nominated by the District Nominating Committee may identify themselves as such in their materials. Any candidate may send additional mailings at the candidate's own expense. Except as provided in this Article, NASD Regulation, the Board, the Regional Nominating Committee, any other committee, and NASD Regulation staff shall not provide any other administrative support to a candidate in the election.

*Ballots*

Sec. 8.26 With the assistance of the Secretary of NASD Regulation and an Independent Agent, the District Nominating Committee shall prepare a ballot with the names of the District Nominating Committee's candidates and any additional candidate nominated pursuant to Section 8.22 and the office to which each candidate is nominated. The ballot shall list the candidates in alphabetical order and shall identify the candidates nominated by the District Nominating Committee. The District Nominating Committee shall send a ballot to the Executive Representative of each NASD member eligible to vote in the district. Instructions on the ballot shall direct the Executive Representative to return the ballot to the Independent Agent and state that the ballot envelope must be postmarked on or before the return date specified on the ballot. The return date specified on the ballot shall be no fewer than 30 and no more than 45 days after the date of mailing of the ballot.

*Vote Qualification List*

Sec. 8.27 Eligibility to vote in a district election shall be based on the NASD's membership records as of a date selected by the Secretary of NASD Regulation that is not more than 30 days before the date of mailing of the ballot. The Secretary of NASD Regulation shall prepare a list of NASD members eligible

to vote in the district and their Executive Representatives, which shall be used for vote qualification purposes, and shall provide the list to the candidates.

#### *Ballots Returned As Undelivered*

Sec. 8.28 The Independent Agent shall open any ballot envelope returned undelivered and shall determine whether it was sent to the NASD member's address of record. If incorrectly addressed, the Independent Agent shall send a new ballot to the address of record.

#### *General Procedures for Qualification and Accounting of Ballots*

Sec. 8.29 After the voting period, on a date or dates designated by the Secretary of NASD Regulation, the qualification and accounting of ballots shall take place. The date or dates designated shall be not later than 14 calendar days after the return date specified on the ballot pursuant to Section 8.26. Candidates and their representatives shall be allowed to observe the qualification and accounting of ballots. Representation for each candidate shall be limited to two individuals. The Independent Agent shall bring to the district office all ballots timely received. Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall open and count the ballots. For ballot qualification purposes, the Independent Agent shall identify to the candidates the NASD members that timely returned ballots and inform the candidates of the Independent Agent's determination of whether or not a ballot is qualified for voting purposes. The determination shall be based on a comparison of ballots received against the list of NASD members eligible to vote in the district and their Executive Representatives as prepared by the Secretary of NASD Regulation pursuant to Section 8.27. The Secretary of NASD Regulation or the Secretary's designee shall make the final determination of the qualification of a ballot. Upon the qualification of a ballot, the Independent Agent shall record the vote indicated on the ballot. The candidates and their representatives shall not be allowed to see the vote of an NASD member.

#### *Ballots Set Aside*

Sec. 8.30 The Independent Agent shall set aside a ballot if: (a) The ballot is received from an NASD member eligible to vote in the district and the ballot is signed by a person who is not the Executive Representative listed on the vote qualification list prepared

under Section 8.27, and the Secretary of the NASD has not received proper notice of a change in Executive Representative pursuant to the NASD By-Laws; or (b) if two or more properly executed ballots are received from an NASD member eligible to vote in the district. If the Independent Agent determines that the ballots set aside are material to the outcome of the election, the Secretary of NASD Regulation and the Independent Agent shall make reasonable efforts to resolve each ballot set aside. With respect to a ballot not signed by an Executive Representative of record, the Secretary of NASD Regulation shall contact the NASD member to request that the NASD member send written notice of any change in Executive Representative by facsimile so that the ballot may be counted. With respect to multiple ballots from an NASD member, the Independent Agent shall contact the Executive Representative of the NASD member to obtain the NASD member's vote. The Secretary of NASD Regulation shall keep a list of NASD members that reported their ballot was lost or not received and that were provided with a duplicate ballot. The Secretary of NASD Regulation shall provide the list to the Independent Agent and, upon request, to the candidates.

#### *Invalid Ballots*

Sec. 8.31 The Independent Agent shall declare a ballot invalid if one or more of the following conditions exist:

- (a) the ballot is not signed by the Executive Representative (unless Section 8.30 applies);
- (b) a vote is not indicated on the ballot; or
- (c) the ballot indicates votes for more candidates than there are vacancies for an office.

#### *Certification of Election*

Sec. 8.32 Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall count the votes received for each candidate in a district. The candidates for the office of member of the District Committee receiving the largest number of votes cast in the district for the office shall be declared elected such that the number of candidates declared elected equals the number of vacancies on the District Committee. The candidates for the office of member of the District Nominating Committee receiving the largest number of votes cast in the district for the office shall be declared elected such that the number of candidates declared elected equals the number of vacancies on the District Nominating Committee. In the

event of a tie, there shall be a run-off election. Each District Committee shall send a written certification of the election results to the Board. The certification shall state the number of votes received by each candidate and the number of ballots set aside.

#### *Extensions of Time and Additional Procedures*

Sec. 8.33 The Secretary of NASD Regulation may extend a time period under this Article for good cause shown. In extraordinary circumstances, the Secretary of NASD Regulation, with the approval of the Executive Committee or the Board, may adopt additional procedures for elections under this Article.

#### *Article IX*

##### *Compensation*

##### *Compensation of Board, Council, and Committee Members*

Sec. 9.1 The Board may provide for reasonable compensation of the Chair of the Board, the Directors, National Adjudicatory Council members, and the members of any committee of the Board or any District Committee. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of NASD Regulation.

##### *Article X*

##### *Indemnification*

##### *Indemnification of Directors, Officers, Employees, Agents, National Adjudicatory Council and Committee Members*

Sec. 10.1 (a) NASD Regulation shall indemnify, and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a Director, officer, or employee of NASD Regulation or a National Adjudicatory Council or committee member, or is or was a Director, officer, or employee of NASD Regulation who is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, is or was a party, or is threatened to be made a party to:

- (i) Any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of NASD Regulation)

against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or

(ii) Any threatened, pending, or completed action or suit by or in the right of NASD Regulation to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit.

(b) NASD Regulation shall advance expenses (including attorneys' fees and disbursements) to persons described in subsection (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

(c) NASD Regulation may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he or she is or was an agent of NASD Regulation or is or was an agent of NASD Regulation who is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, was or is a party, or is threatened to be made a party to any action or proceeding described in subsection (a).

(d) NASD Regulation may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition; provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

(e) Notwithstanding the foregoing or any other provision of these By-Laws, no advance shall be made by NASD Regulation to an agent or non-officer employee if a determination is

reasonably and promptly made by the Board by a majority vote of those Directors who have not been named parties to the action, even though less than a quorum, or, if there are no such Directors or if such Directors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) The person seeking advancement of expenses (i) Acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of NASD Regulation; (2) with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to NASD Regulation.

(f) The indemnification provided by this Section in a specific case shall not be deemed exclusive of any other rights to which a person seeking indemnification may be entitled, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Director, officer, National Adjudicatory Council or committee member, employee, or agent and shall inure to the benefit of such person's heirs, executors, and administrators.

(g) Notwithstanding the foregoing, but subject to subsection (j), NASD Regulation shall be required to indemnify any person identified in subsection (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.

(h) NASD Regulation's obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

(i) Any repeal or modification of the foregoing provisions of this Section shall not adversely affect any right or protection hereunder of any person respecting any act or omission occurring prior to the time of such repeal or modification.

(j) If a claim for indemnification or advancement of expenses under this Article is not paid in full within 60 days after a written claim therefor by an indemnified person has been received

by NASD Regulation, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, NASD Regulation shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under Delaware law.

#### Indemnification Insurance

Sec. 10.2 NASD Regulation shall have power to purchase and maintain insurance on behalf of any person who is or was a Director, officer, National Adjudicatory Council or committee member, employee, or agent of NASD Regulation, or is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not NASD Regulation would have the power to indemnify such person against such liability hereunder.

#### Article [VI] XI

##### Capital Stock

##### Sole Stockholder

Sec. 11.1 The NASD shall be the sole stockholder of the capital stock of NASD Regulation.

##### Certificates

Sec. [6.1]11.2 [Each] The stockholder [in the Corporation] shall be entitled to a certificate or certificates in such form as shall be approved by the Board, certifying the number of shares of capital stock in [the Corporation] NASD Regulation owned by [such] the stockholder.

##### Signatures

Sec. [6.2]11.3 (a) Certificates for shares of capital stock of [the Corporation] NASD Regulation shall be signed in the name of [the Corporation] NASD Regulation by two officers with one being the Chair of the Board, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board [of Directors]. Such certificates may be sealed with the corporate [Seal] seal of [the Corporation] NASD Regulation or a facsimile thereof.

(b) If any such certificates are countersigned by a transfer agent other than [the Corporation] NASD Regulation or its employee, or by a registrar other

than [the Corporation] NASD Regulation or its employee, any other signature on the certificate may be a facsimile. In [case] the event that any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall [have ceased] cease to be such officer, transfer agent, or registrar before such certificate is issued, such certificate may be issued by [the Corporation] NASD Regulation with the same effect as if such person were such officer, transfer agent, or registrar at the date of issue.

#### Stock Ledger

Sec. [6.3]11.4 (a) A record of all certificates for capital stock issued by [the Corporation] NASD Regulation shall be kept by the Secretary or any other officer, employee, or agent designated by the Board [of Directors]. Such record shall show the name and address of the person, firm, or corporation in which certificates for capital stock are registered, the number of shares represented by each such certificate, the date of each such certificate, and in the case of certificates that have been canceled, the date of cancellation thereof.

(b) [The Corporation] NASD Regulation shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. Except as otherwise required by applicable law, [the Corporation] NASD Regulation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not [the Corporation] NASD Regulation shall have express or other notice thereof.

#### Transfers of Stock

Sec. [6.4]11.5 (a) The Board [of Directors] may make such rules and regulations as it may deem expedient, not inconsistent with law, the Restated Certificate of Incorporation, or these By-Laws, concerning the issuance, transfer, and registration of certificates for [share] shares of capital stock of [the Corporation] NASD Regulation. The Board [of Directors] may appoint, or authorize any principal officer to appoint, one or more transfer agents or one or more transfer clerks and one or more registrars and may require all certificates for capital stock to bear the signature or signatures of any of them.

(b) Transfers of capital stock shall be made on the books of [the Corporation] NASD Regulation only upon delivery to [the Corporation] NASD Regulation or

its transfer agent of: (i) A written direction of the registered holder named in the certificate or such holder's attorney lawfully constituted in writing[.]; (ii) the certificate for the shares of capital stock being transferred[.]; and (iii) a written assignment of the shares of capital stock evidenced thereby.

#### Cancellation

Sec. [6.5]11.6 Each certificate for capital stock surrendered to [the Corporation] NASD Regulation for exchange or transfer shall be canceled and no new certificate or certificates shall be issued in exchange for any existing certificate other than pursuant to [Sec. 6.6] Section 11.7 until such existing certificate shall have been canceled.

#### Lost, Stolen, Destroyed, and Mutilated Certificates

Sec. [6.6]11.7 In the event that any certificate for shares of capital stock of [the Corporation] NASD Regulation shall be mutilated, [the Corporation] NASD Regulation shall issue a new certificate in place of such mutilated certificate. In [case] the event that any such certificate shall be lost, stolen, or destroyed [the Corporation] NASD Regulation may, in the discretion of the Board [of Directors] or a committee [designated] appointed thereby with power so to act, issue a new certificate for capital stock in the place of any such lost, stolen, or destroyed certificate. The applicant for any substituted certificate or certificates shall surrender any mutilated certificate or, in the case of any lost, stolen, or destroyed certificate, furnish satisfactory proof of such loss, theft, or destruction of such certificate and of the ownership thereof. The Board [of Directors] or such committee may, in its discretion, require the owner of a lost or destroyed certificate, or [his] such owner's representatives, to furnish to [the Corporation] NASD Regulation a bond with an acceptable surety or sureties and in such sum as [will] shall be sufficient to indemnify [the Corporation] NASD Regulation against any claim that may be made against it on account of the lost, stolen, or destroyed certificate or the issuance of such new certificate. A new certificate may be issued without requiring a bond when, in the judgment of the Board [of Directors], it is proper to do so.

#### Fixing of Record Date

Sec. [6.7]11.8 The Board may fix a record date in accordance with Delaware law. [(a) In order that the Corporation may determine the stockholders entitled to notice of or to

vote at any meeting of stockholders or any adjournment thereof, or to express consent or dissent to corporate action in writing without a meeting, or to exercise any rights with respect to any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, pursuant to and in accordance with Section 213 of the General Corporation Law of the State of Delaware. Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of and to vote at such meeting or any adjournment thereof, or to give such consent or dissent, or to exercise such rights with respect to any such change, conversion or exchange of stock, or to participate in any such action, notwithstanding the transfer of any stock on the books of the Corporation after any record date so fixed.]

[(b) If no record date is fixed by the Board of Directors:

(i) The record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or if notice is waived, at the close of business on the day next preceding the day on which the meeting is held;

(ii) The record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be at the close of business on the day on which the first written consent is expressed; and

(iii) The record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.]

[(c) A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.]

#### Article [VII] XII

#### Miscellaneous Provisions

#### Corporate Seal

Sec. [7.1]12.1 The seal of [the Corporation] NASD Regulation shall be circular in form and shall bear, in addition to any other emblem or device approved by the Board [of Directors], the name of [the Corporation] NASD Regulation, the year of its incorporation, and the words "Corporate Seal" and "Delaware[']". The seal may be used by causing it to be affixed or impressed, or

a facsimile thereof may be reproduced or otherwise used in such manner as the Board [of Directors] may determine.

#### Fiscal Year

Sec. [7.2]12.2 The fiscal year of [the Corporation] NASD Regulation shall begin on the [1st] first day of January in each year, or such other month as the Board [of Directors] may determine by resolution.

#### Waiver of Notice

Sec. [7.3]12.3 (a) Whenever notice is required to be given by law, the Restated Certificate of Incorporation, or these By-Laws, a written waiver thereof, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the [stockholders, directors] stockholder, Directors, or members of a committee of [directors] Directors need be specified in any written waiver of notice.

(b) Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

#### Execution of Instruments, Contracts, Etc.

Sec. [7.4]12.4 (a) All checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money shall be signed in the name of [the Corporation] NASD Regulation by such officer or officers or person or persons[,] as the Board [of Directors], or a duly authorized committee thereof, may from time to time designate. Except as otherwise provided by law, the Board [of Directors], any committee given specific authority in the premises by the Board [of Directors], or any committee given authority to exercise generally the powers of the Board [of Directors] during intervals between meetings of the Board [of Directors], may authorize any officer, employee, or agent, in the name of and on behalf of [the Corporation] NASD Regulation, to enter into or execute and deliver deeds, bonds, mortgages, contracts, and other obligations or instruments, and such authority may be general or confined to specific instances.

(b) All applications, written instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental

authority, may be executed in the name of [the Corporation] NASD Regulation by any principal officer or subordinate officer of [the Corporation] NASD Regulation, or, to the extent designated for such purpose from time to time by the Board [of Directors], by an employee or agent of [the Corporation] NASD Regulation. Such designation may contain the power to substitute, in the discretion of the person named, one or more other persons.

#### Form of Records

Sec. [7.5]12.5 Any records maintained by [the Corporation] NASD Regulation in the regular course of business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, magnetic tape, computer disk, or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time.

#### Article [VIII] XIII

##### Amendments; Emergency By-Laws

By [Stockholders] Stockholder  
Sec. [8.1]13.1 These By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any meeting of [stockholders] the stockholder, provided that, in the case of a special meeting, notice that an amendment is to be considered and acted upon shall be inserted in the notice or waiver of notice of said meeting.

##### By Directors

Sec. [8.2]13.2 To the extent permitted by the Restated Certificate of Incorporation, these By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any regular or special meeting of the Board [of Directors].

##### Emergency By-Laws

Sec. [8.3]13.3 The Board [of Directors] may adopt emergency By-Laws subject to repeal or change by action of the [stockholders] stockholder that shall, notwithstanding any different provision of law, the Restated Certificate of Incorporation, or these By-Laws, be operative during any emergency resulting from any nuclear or atomic disaster, an attack on the United States or on a locality in which [the Corporation] NASD Regulation conducts its business or customarily holds meetings of the Board [of Directors] or stockholders] or stockholder, any catastrophe, or other emergency condition, as a result of which a quorum of the Board [of Directors] or a committee thereof cannot readily be

convened for action. Such emergency By-Laws may make any provision that may be practicable and necessary [for] under the circumstances of the emergency.

\* \* \* \* \*

#### By-Laws of the NASDAQ Stock Market, Inc.

##### Article I

##### Definitions

*When used in these By-Laws, unless the context otherwise requires, the term:*

- (a) "Act" means the Securities Exchange Act of 1934, as amended;
- (b) "Board" means the Board of Directors of Nasdaq;
- (c) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;
- (d) "Commission" means the Securities and Exchange Commission;
- (e) "day" means calendar day;
- (f) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as such person buys or sells securities for such person's own account, either individually or in some fiduciary capacity, but not as part of a regular business;
- (g) "Delaware law" means the General Corporation Law of the State of Delaware;
- (h) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;
- (i) "Director" means a member of the Board, excluding the Chief Executive Officer of the NASD;
- (j) "Industry Director" or "Industry member" means a Director (excluding the President) or National Listing and Hearing Review Council or committee member who (1) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director, (excluding an outside director) or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more

than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director's or member's firm or partnership; or (6) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

(k) "NASD" means the National Association of Securities Dealers, Inc.;

(l) "Nasdaq" means The Nasdaq Stock Market, Inc.;

(m) "Nasdaq Listing and Hearing Review Council" means a body appointed by the Board pursuant to Article V of these By-Laws;

(n) "NASD Board" means the NASD Board of Governors;

(o) "NASD Regulation" means NASD Regulation, Inc.;

(p) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of the NASD By-Laws;

(q) "Non-Industry Director" or "Non-Industry member" means a Director (excluding the President) or National Listing and Hearing Review Council or committee member who is (1) a Public Director or Public member; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; or (3) any other individual who would not be an Industry Director or Industry member;

(r) "person associated with a member" or "associated person of a member" means: (1) A natural person registered under the Rules of the Association; or (2) a sole proprietor,

partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the NASD under these By-Laws or the Rules of the Association;

(s) "Public Director" or "Public member" means a Director or National Listing and Hearing Review Council or committee member who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq; and

(t) "Rules of the Association" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board pursuant to the NASD By-Laws, as hereafter amended or supplemented.

#### Article [I] II

##### Offices

##### Location

Sec. [1.1]2.1 The address of the registered office of [the Corporation] Nasdaq in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange [St.,] Street, Wilmington, [DE] Delaware 19801. [The Corporation] Nasdaq also may [also] have offices at such other places both within and without the State of Delaware as the Board [of Directors] may from time to time designate or the business of [the Corporation] Nasdaq may require.

##### Change of Location

Sec. [1.2]2.2 In the manner permitted by law, the Board [of Directors] or the registered agent may change the address of [the Corporation's] Nasdaq's registered office in the State of Delaware and the Board [of Directors] may make, revoke, or change the designation of the registered agent.

#### Article [III] III

##### Meetings of the [Stockholders]

##### Stockholder

##### [Annual Meeting]

Sec. 2.1 The annual meeting of stockholders of the Corporation for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date, and at such time, and place, within or without the

State of Delaware, as may be fixed, from time to time, by the Board of Directors.]

##### [Special Meetings]

Sec. 2.2 Special meetings of stockholders of the Corporation, unless otherwise prescribed by law, may be called at any time by the Chair of the Board, by the President or by order of a majority of the Board of Directors. Special meetings of stockholders prescribed by law for the election of directors shall be called by the Board of Directors, the President, or the Secretary. Special meetings of stockholders shall be held at such place within or without the State of Delaware as shall be designated in the notice of meeting.]

##### [Notice of Meetings]

Sec. 2.3 (a) Whenever stockholders are required or permitted to take any action at a meeting, they shall be given written notice stating the place, date and hour of the meeting, and, in the case of a special meeting, the purpose or purposes thereof. Unless otherwise required by law, the Certificate of Incorporation or these By-Laws, written notice shall be delivered or mailed at least ten but not more than sixty days before such meeting date to each stockholder entitled to vote at such meeting. If mailed, such notice shall be deposited in the United States mail, postage prepaid, directed to each stockholder at the address that appears on the records of the Corporation.]

[(b) When a meeting of stockholders is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Corporation may transact any business which might have been transacted at the original meeting. If, however, the adjournment is for more than thirty days from the date of the original meeting, or if, after the adjournment, a new record date is set for the adjourned meeting, notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting in the manner prescribed above in subsection (a).]

##### [Quorum]

Sec. 2.4 Except as otherwise provided by law, the Certificate of Incorporation or these By-Laws, at each meeting of stockholders the presence in person or by proxy of the holders of record of a majority of the outstanding shares of capital stock entitled to vote or act at such a meeting shall constitute a quorum for the transaction of any business. In the absence of a quorum,

the stockholders so present may by majority rule, adjourn any meeting until a quorum shall be present. When a quorum is once present to organize a meeting, the quorum cannot be destroyed by the subsequent withdrawal or revocation of the proxy of any stockholder.]

#### [Voting

Sec. 2.5 (a) At any meeting of stockholders, each stockholder as of the record date is entitled to one vote for each such share of stock having voting power, upon the matter in question. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy, provided that no proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only so long as, it is coupled with an interest, whether in the stock itself or in the Corporation, sufficient in law to support an irrevocable power. A stockholder may revoke any proxy which is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or by delivering a proxy in accordance with applicable law bearing a later date to the Secretary of the Corporation.]

[(b) Directors of the Corporation shall be elected by a plurality of the votes cast at a meeting of stockholders pursuant to Sec. 2.5 of these By-Laws. Corporate action other than the election of directors shall be authorized by a majority of the votes cast at a meeting of stockholders, except as otherwise required by law, the Certificate of Incorporation or these By-Laws.]

(c) Upon the demand of any stockholder entitled to vote, the election of directors or a vote on any other matter at a meeting of stockholders shall be by written ballot; otherwise, the method of voting and the manner in which votes are counted at such a meeting shall be discretionary with the presiding officer of the meeting.]

#### [Presiding Officer and Secretary

Sec. 2.6 At every meeting of stockholders, the Chair, or in his/her absence, the President, or in his/her absence, the appointee of the meeting, shall preside. The Secretary, or in his/her absence, the appointee of the presiding officer of the meeting, shall act as Secretary of the meeting.]

#### Action by Consent of Stockholder[s]

Sec. [2.7]3.1 Any action required[,] or permitted by law to be taken at any meeting of *the stockholder* [stockholders] of [the Corporation] *Nasdaq* may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the [holders] *holder* of the outstanding stock [having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of corporate action without a meeting and by less than unanimous written consent shall be given to those stockholders who have not consented in writing and who would be entitled to vote thereon at a meeting].

#### Article [III] IV

##### Board of Directors

##### General Powers

Sec. [3.1]4.1 The property, business, and affairs of [the Corporation] *Nasdaq* shall be managed by *or under the direction of* the Board [of Directors]. The Board [of Directors] may exercise all such powers of [the Corporation] *Nasdaq* and have the authority to perform all such lawful acts as are permitted by law, the *Restated Certificate of Incorporation* [or], these By-Laws, *or the Delegation Plan* for the organization, development, and operation of electronic data processing and communications facilities, including computer hardware and software, for the purposes of: [(i)](a) Supporting the operation, regulation, and surveillance of The Nasdaq Stock Market and other organized securities markets established for trading equity securities, debt securities, derivative instruments, or other financial products that may be developed; [(ii)](b) supporting the efficient clearance and settlement of securities transactions; [(iii)](c) supporting various elements of the national market system pursuant to Section 11A of the [Securities Exchange Act of 1934 ("Exchange Act")] *Act* and the rules thereunder; [(iv)](d) assisting the [National Association of Securities Dealers, Inc.] *NASD* in fulfilling its self-regulatory responsibilities as set forth in Section 15A of the [Exchange] Act[.]; and [(v)](e) supporting such other initiatives as the Board [of Directors] may deem appropriate. *To the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and these By-Laws, the Board may delegate any of its powers to a*

*committee appointed pursuant to Section 4.13 or to Nasdaq staff in a manner not inconsistent with the Delegation Plan.*

##### Number of Directors

Sec. [3.2]4.2 [The Board of Directors of the Corporation shall consist of one or more members; the exact number of directors which shall constitute the whole Board of Directors shall be fixed from time to time by resolution adopted by a majority of the whole Board of Directors. After fixing the number of directors constituting the whole Board of Directors, the Board of Directors may, by resolution adopted by a majority of the whole Board of Directors, from time to time change the number of directors constituting the whole Board of Directors.] *The Board shall consist of no fewer than five and no more than eight Directors, the exact number to be determined by resolution adopted by the stockholder of Nasdaq from time to time. Notwithstanding the preceding sentence, the number of Directors shall equal the number of Directors on the NASD Regulation Board. Any new Director position created as a result of an increase in the size of the Board shall be filled as part of the annual election conducted under Section 4.4.*

##### Qualifications

Sec. [3.3]4.3 Directors need not be stockholders of [the Corporation] *Nasdaq*. *Only Governors of the NASD Board shall be eligible for election to the Board. The President of Nasdaq shall be a Director. The number of Non-Industry Directors, including at least one Public Director and at least one issuer representative, shall equal or exceed the number of Industry Directors plus the President. The Chief Executive Officer of the NASD shall be an ex-officio non-voting member of the Board.*

##### Election

Sec. [3.4]4.4 Except as otherwise provided by law [or], these By-Laws, *or the Delegation Plan*, after the first meeting of [the Corporation] *Nasdaq* at which [directors] *Directors* are elected, [directors of the Corporation] *Directors of Nasdaq* shall be elected each year at the annual meeting of [stockholders] *the stockholder*, or at a special meeting called for such purpose in lieu of the annual meeting[, by a plurality of the votes cast at such meeting]. If the annual election of [directors] *Directors* is not held on the date designated [therefore,] *therefor*, the [directors] *Directors* shall cause such election to be held as soon thereafter as convenient.

## [Term

Sec. 3.5 (a) Each director shall hold office for a term of three years or until his successor is duly elected and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, with or without cause, or other reason.]

[(b) The Board of Directors shall be divided into three classes.]

[(c) The President of the Corporation shall serve as a member of the Board until his successor is selected and qualified, or until his death, resignation, or removal.]

[(d) Except for the President, no Director may serve more than two consecutive terms; provided, however, that if a Director is appointed to fill a term of less than one year, such Director may serve up to two consecutive terms following the expiration of such Director's current term.]

[(e) Each Director chosen to fill newly created directorship shall serve until the next succeeding annual meeting of stockholders.]

## Resignation

Sec. [3.6]4.5 Any [director] *Director* may resign at any time either upon written notice of resignation to the Chair of the Board, the President, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time [be] *is* not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

## Removal

Sec. [3.7]4.6 Any or all of the [directors] *Directors* may be removed from office at any time, with or without cause, *only* by a majority vote of the [stockholders] *NASD Board*.

## Disqualification

Sec. 4.7 *The term of office of a Director shall terminate immediately upon a determination by the Board, by a majority vote of the remaining Directors, that: (a) The Director no longer satisfies the classification (Industry, Non-Industry, or Public Director) for which the Director was elected; and (b) the Director's continued service as such would violate the compositional requirements of the Board set forth in Section 4.3. If the term of office of a Director terminates under this Section, and the remaining term of office of such Director at the time of termination is not more than six months, during the period of vacancy the Board shall not be deemed to be in violation of Section 4.3 by virtue of such vacancy.*

## Filling of Vacancies

Sec. 4.8 If a Director position becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the NASD Board shall elect by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director) for the directorship as provided in Section 4.3 to fill such vacancy, except that if the remaining term of office for the vacant Director position is not more than six months, no replacement shall be required.

## Quorum and Voting

Sec. [3.8]4.9 (a) *At all meetings of the Board [of Directors, one-third of the total number of directors shall constitute], unless otherwise set forth in these By-Laws or required by law, a quorum for the transaction of business shall consist of a majority of the Board, including not less than 50 percent of the Non-Industry Directors. In the absence of a quorum, a majority of the [directors] Directors present may adjourn the meeting until a quorum be present.*

(b) *[A director interested in a contract or transaction may be counted in determining the presence of a quorum at a meeting of the Board of Directors which authorizes the contract or transaction.] Except as provided in Section 4.14(b), the vote of a majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board.*

[(c) The vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.]

## Regulation

Sec. [3.9]4.10 The Board [of Directors] may adopt such rules, regulations, and requirements for the conduct of the business and management of [the Corporation] *Nasdaq*, not inconsistent with law, the Restated Certificate of Incorporation, these By-Laws, [or the rules and By-Laws of the National Association of Securities Dealers, Inc., as the Board of Directors may deem proper. A member of the Board of Directors] *the Rules of the Association, or the By-Laws of the NASD, as the Board may deem proper. A Director* shall, in the performance of [his or her] *such Director's* duties, be fully protected in relying in good faith upon the books of account or reports made to [the Corporation] *Nasdaq* by any of its officers, [or] by an independent certified public accountant, [or] by an appraiser selected with reasonable care by the Board [of

Directors] or any committee of the Board [of Directors] or by any agent of [the Corporation] *Nasdaq*, or in relying in good faith upon other records of [the Corporation] *Nasdaq*.

## Meetings

Sec. [3.10]4.11 (a) An annual meeting of the Board [of Directors] shall be held for the purpose of organization, election of officers, and transaction of any other business. If such meeting is held promptly after and at the place specified for the annual meeting of [stockholders] *the stockholder*, no notice of the annual meeting of the Board [of Directors] need be given. Otherwise, such annual meeting shall be held at such time and place as may be specified in a notice given in accordance with Section [3.11 of these By-Laws] 4.13.

(b) Regular meetings of the Board [of Directors] may be held at such time and place, within or without the State of Delaware, as determined from time to time by the Board [of Directors]. After such determination has been made, notice shall be given in accordance with Section [3.11 of these By-Laws] 4.12.

(c) Special meetings of the Board [of Directors] may be called by the Chair of the Board, [or] by the President, or by at least one-third of the [directors at that time being] *Directors then* in office. Notice of any special meeting of the Board [of Directors] shall be given to each [director] *Director* in accordance with Section [3.11 of these By-Laws.] 4.12.

(d) [Members of the Board of Directors, or any committee designated by the Board of Directors,] *Directors or members of any committee appointed by the Board* may participate in a meeting of the Board [of Directors] or of such committee through the use of a conference telephone or similar communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

## Notice of Meetings; Waiver of Notice

Sec. [3.11]4.12 (a) Notice of any meeting of the Board [of Directors] shall be deemed to be duly given to a [director (i) if] *Director if: (i)* Mailed to the address last made known in writing to [the Corporation] *Nasdaq* by such [director] *Director* as the address to which such notices are to be sent, at least [two] *seven* days before the day on which such [special] meeting is to be held[, or]; (ii) [if] sent to the [director] *Director* at such address by telegraph, telefax, cable, radio, or wireless, not

later than the day before the day on which such meeting is to be held[.]; or (iii) [if] delivered to the [director] Director personally or orally, by telephone or otherwise, not later than the day before the day on which such [special] meeting is to be held. Each notice shall state the time and place of the meeting and the purpose(s) thereof.

(b) Notice of any meeting of the Board [of Directors] need not be given to any [director] Director if waived by that [director] Director in writing (or by telegram, telefax, cable, radio, or wireless and subsequently confirmed in writing) whether before or after the holding of such meeting, or if such [director] Director is present at such meeting, *subject to Article IX, Section 9.3(b)*.

(c) Any meeting of the Board [of Directors] shall be a legal meeting without any prior notice if all [directors] Directors then in office shall be present thereat.

Committees [of the Board of Directors]

Sec. [3.13]4.13 (a) The Board [of Directors] may, by resolution or resolutions adopted by a majority of the whole Board [of Directors, designate], *appoint* one or more committees[, each committee to consist of one or more directors of the Corporation]. Except as herein provided, vacancies in membership of any committee shall be filled by the vote of a majority of the whole Board [of Directors]. The Board [of Directors] may designate one or more [directors] Directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not [he, she,] *such member* or [they] *members* constitute a quorum, may unanimously appoint another [member of the Board of Directors] Director to act at the meeting in the place of any such absent or disqualified member. Members of a committee shall hold office for such period as may be fixed by a resolution adopted by a majority of the whole Board [of Directors, subject, however, to removal, with or without cause, at any time by the vote of a majority of the whole Board of Directors]. *Any member of a committee may be removed from such committee only after a majority vote of the whole Board, after appropriate notice, for refusal, failure, neglect, or inability to discharge such committee member's duties.*

(b) [Any committee, to the extent permitted by law and to the extent provided in the] *The Board may, by resolution or resolutions [creating such committee, shall have and may exercise all the powers and authority of the Board of Directors] adopted by a majority of the whole Board, delegate to one or more committees the power and authority to act on behalf of the Board in carrying out the functions and authority delegated to Nasdaq by the NASD under the Delegation Plan. Such delegations shall be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. Action taken by a committee pursuant to such delegated authority shall be subject to review, ratification, or rejection by the Board. In all other matters, the Board may, by resolution or resolutions adopted by a majority of the whole Board, delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of [the Corporation,] and Nasdaq to the extent permitted by law and not inconsistent with the Delegation Plan. A committee, to the extent permitted by law and provided in the resolution or resolutions creating such committee, may authorize the seal of [the Corporation] Nasdaq to be affixed to all papers [which] that may require it.*

(c) *Except as otherwise provided by applicable law, no [No such] committee shall have the power or authority of the Board with regard to: amending the Restated Certificate of Incorporation or the By-Laws of [the Corporation,] Nasdaq; adopting an agreement of merger or consolidation; recommending to the [stockholders] stockholder the sale, lease, or exchange of all or substantially all [the Corporation's] Nasdaq's property and assets; or recommending to the [stockholders] stockholder a dissolution of [the Corporation] Nasdaq or a revocation of a dissolution. Unless the resolution of the Board [of Directors] expressly so provides, no [such] committee shall have the power or authority to authorize the issuance of stock.*

(d) *The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs of Nasdaq between meetings of the Board, and which may authorize the seal of Nasdaq to be affixed to all papers that may require it. The Executive Committee shall consist of*

*three or four Directors, including at least one Public Director. The President of Nasdaq shall be a member of the Executive Committee. The number of Non-Industry committee members shall equal or exceed the number of Industry committee members plus the President. An Executive Committee member shall hold office for a term of one year. At all meetings of the Executive Committee, a quorum for the transaction of business shall consist of a majority of the Executive Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.*

(e) *The Board may appoint a Finance Committee. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of Nasdaq, including recommendations for Nasdaq's annual operating and capital budgets and proposed changes to the rates and fees charged by Nasdaq. The Finance Committee shall consist of three or four Directors. The President of Nasdaq shall serve as a member of the Committee. A Finance Committee member shall hold office for a term of one year.*

[(c)](f) Each committee may adopt its own rules of procedure and may meet at stated times or on such notice as such committee may determine. Each committee shall keep regular minutes of its proceedings and report the same to the Board [of Directors] when required.

[(d)](g) Unless otherwise provided by [the Board of Directors] *these By-Laws*, a majority of [any such] a committee shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.

(h) *Upon request of the Secretary of Nasdaq, each prospective committee member who is not a Director shall provide to the Secretary such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member. The Secretary of Nasdaq shall certify to the Board each prospective committee member's classification. Such committee members shall update the information submitted under this Section at least annually and upon request of the Secretary of Nasdaq, and shall report immediately to the Secretary any change in such classification.*

*Conflicts of Interest; Contracts and Transactions Involving Directors*

Sec. [3.12]4.14 (a) *A Director or a member of the National Listing and Hearing Review Council or a committee shall not directly or indirectly participate in any adjudication of the interests of any party if that Director or National Listing and Hearing Review Council or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Director or National Listing and Hearing Review Council or committee member shall recuse himself or herself or shall be disqualified.*

(b) *No contract or transaction between [the Corporation] Nasdaq and one or more of its [directors] Directors or officers, or between [the Corporation] Nasdaq and any other corporation, partnership, association, or other organization in which one or more of its [directors] Directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason[, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or the committee thereof which] if: (i) The material facts pertaining to such Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction[, or solely because his, her, or their votes are counted for such purposes if: (i) The material facts pertaining to such director's or officer's relationship or interest and] by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction [are disclosed or are known to the Board of Directors or the committee, and the Board] is entered into, and the Board or committee in good faith [authorizes] ratifies the contract or transaction by the affirmative vote of a majority of the disinterested [directors, even though the disinterested directors be less than a quorum; or (ii)] Directors; or (iii) the material facts pertaining to the [director's] Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the [stockholders] stockholder entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the [stockholders; or (iii) the contract or transaction is fair as to the Corporation*

*as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors] stockholder. Only disinterested Directors may be counted in determining the presence of a quorum at the portion of a meeting of the Board [of Directors,] or of a committee that [which] authorizes the contract or transaction. This subsection shall not apply to a contract or transaction between Nasdaq and the NASD or NASD Regulation.*

*Communication of Views Regarding NASD or NASD Regulation Election or Nomination*

Sec. 4.15 *Nasdaq, the Board, any committee, the Nasdaq Listing and Hearing Review Council, and Nasdaq staff shall not take any position publicly or with an NASD member or person associated with or employed by a member with respect to any candidate in a contested election or nomination held pursuant to the NASD By-Laws or the NASD Regulation By-Laws. A Director, committee member, or Nasdaq Listing and Hearing Review Council member may communicate his or her views with respect to a candidate if such individual acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of Nasdaq, the Board, the Nasdaq Listing and Hearing Review Council, or any committee. Nasdaq, the Board, the Nasdaq Listing and Hearing Review Council, any committee, and the Nasdaq staff shall not provide any administrative support to any candidate in a contested election or nomination conducted pursuant to the NASD By-Laws or the NASD Regulation By-Laws.*

*Action Without Meeting*

Sec. [3.14]4.16 *Any action required or permitted to be taken at [any] a meeting of the Board [of Directors or any] or of a committee [thereof] may be taken without a meeting if all Directors or all members of [the Board of Directors or] such committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board [of Directors or such committee] or the committee.*

*Article V**Nasdaq Listing and Hearing Review Council Appointment and Authority*

Sec. 5.1 *The Board shall appoint a Nasdaq Listing and Hearing Review Council. The Nasdaq Listing and Hearing Review Council may be authorized to act for the Board in a*

*manner consistent with these By-Laws, the Rules of the Association, and the Delegation Plan with respect to listing decisions. The Nasdaq Listing and Hearing Review Council also shall consider and make recommendations to the Board on policy and rule changes relating to issuer listings. The Board may delegate such other powers and duties to the Nasdaq Listing and Hearing Review Council as the Board deems appropriate in a manner not inconsistent with the Delegation Plan.*

*Number of Members and Qualifications*

Sec. 5.2 (a) *The Nasdaq Listing and Hearing Review Council shall consist of no fewer than eight and no more than 11 members, of which not more than 50 percent may be engaged in market-making activity or employed by a member whose revenues from market-making activity exceed ten percent of its total revenues. The Nasdaq Listing and Hearing Review Council shall include at least three Non-Industry members.*

(b) *As soon as practicable following the appointment of members, the Nasdaq Listing and Hearing Review Council shall elect a Chair from among its members. The Chair shall have such powers and duties as may be determined from time to time by the Nasdaq Listing and Hearing Review Council. The Board, by resolution adopted by a majority of Directors then in office and after notice to the NASD Board, may remove the Chair from such position at any time for refusal, failure, neglect, or inability to discharge the duties of Chair.*

*Nomination Process*

Sec. 5.3 *The Secretary of Nasdaq shall collect from each nominee for the office of member of the Nasdaq Listing and Hearing Review Council such information as is reasonably necessary to serve as the basis for a determination of the nominee's qualifications and classification as an Industry or Non-Industry member, and the Secretary shall certify to the National Nominating Committee each nominee's qualifications and classification. After appointment to the Nasdaq Listing and Hearing Review Council, each member shall update such information at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such qualifications or classification.*

*Term of Office*

Sec. 5.4 (a) *Except as otherwise provided in this Article, each Nasdaq Listing and Hearing Review Council member shall hold office for a term of two years or until a successor is duly*

appointed and qualified, except in the event of earlier termination from office by reason of death, resignation, removal, disqualification, or other reason.

(b) The Nasdaq Listing and Hearing Review Council shall be divided into two classes. The term of office of those of the first class shall expire in January 1999, and the term of office of those of the second class shall expire one year thereafter. Beginning in January 1999, members shall be appointed for a term of two years to replace those whose terms expire.

(c) Beginning in 1999, no member may serve more than two consecutive terms, except that if a member is appointed to fill a term of less than one year, such member may serve up to two consecutive terms following the expiration of such member's initial term.

#### Resignation

Sec. 5.5 A member of the Nasdaq Listing and Hearing Review Council may resign at any time upon written notice to the Board. Any such resignation shall take effect at the time specified therein, or if the time is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

#### Removal

Sec. 5.6 Any or all of the members of the Nasdaq Listing and Hearing Review Council may be removed from office at any time for refusal, failure, neglect, or inability to discharge the duties of such office by majority vote of the Board.

#### Disqualification

Sec. 5.7 Notwithstanding Section 5.4, the term of office of a Nasdaq Listing and Hearing Review Council member shall terminate immediately upon a determination by the Board, by a majority vote, that: (a) The member no longer satisfies the classification (Industry or Non-Industry) for which the member was elected; and (b) the member's continued service as such would violate the compositional requirements of the Nasdaq Listing and Hearing Review Council set forth in Section 5.2. If the term of office of a Nasdaq Listing and Hearing Review Council member terminates under this Section, and the remaining term of office of such member at the time of termination is not more than six months, during the period of vacancy the Nasdaq Listing and Hearing Review Council shall not be deemed to be in

violation of Section 5.2 by virtue of such vacancy.

#### Filling of Vacancies

Sec. 5.8 If a position on the Nasdaq Listing and Hearing Review Council becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the Board shall appoint a person satisfying the qualifications for the position as provided in Section 5.2(a) to fill such vacancy, except that if the remaining term of office for the vacant position is not more than six months, no replacement shall be required.

#### Quorum and Voting

Sec. 5.9 At all meetings of the Nasdaq Listing and Hearing Review Council, unless otherwise set forth in these By-Laws, a quorum for the transaction of business shall consist of a majority of the Nasdaq Listing and Hearing Review Council, including one Non-Industry member. In the absence of a quorum, a majority of the members present may adjourn the meeting until a quorum is present.

#### Meetings

Sec. 5.10 The members of the Nasdaq Listing and Hearing Review Council may participate in a meeting through the use of a conference telephone or similar communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

#### Article VI

##### Compensation

##### Compensation of Board, Council, and Committee Members

Sec. 6.1 The Board may provide for reasonable compensation of the Chair of the Board, the Directors, Nasdaq Listing and Hearing Review Council members, and the members of any committee. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of Nasdaq.

##### Article [IV] VII

##### Officers, Agents, and Employees

##### Principal Officers

Sec. [4.1]7.1 The principal officers of [the Corporation] Nasdaq shall be elected by the Board [of Directors] and shall include a Chair, a President, a Secretary, a Treasurer, and such other officers as may be designated by the Board [of Directors]. One person may hold the offices and perform the duties

of any two or more of said principal offices, except the offices and duties of President and Vice President or of President and Secretary. None of the principal officers, except the Chair of the Board and the President, need be [directors of the Corporation] *Directors of Nasdaq*.

##### Election of Principal Officers; Term of Office

Sec. [4.2]7.2 (a) The principal officers of [the Corporation] *Nasdaq* shall be elected annually by the Board [of Directors] at the annual meeting of the Board [of Directors] convened pursuant to Section [3.10(a) of these By-Laws] 4.11(a). Failure to elect any principal officer annually shall not dissolve [the Corporation] *Nasdaq*.

(b) If the Board [of Directors] shall fail to fill any principal office at an annual meeting, or if any vacancy in any principal office shall occur, or if any principal office shall be newly created, such principal office may be filled at any regular or special meeting of the Board [of Directors].

(c) Each principal officer shall hold office until [his or her] a successor is duly elected and qualified, or until [his or her earlier] death, resignation, or removal.

##### Subordinate Officers, Agents, or Employees

Sec. [4.3]7.3 In addition to the principal officers, [the Corporation] *Nasdaq* may have one or more subordinate officers, agents, and employees as the Board [of Directors] may deem necessary, each of whom shall hold office for such period and exercise such authority and perform such duties as the Board [of Directors], the President, or any officer designated by the Board [of Directors], may from time to time determine. [The Board of Directors at any time may appoint and remove, or may delegate to any principal officer the power to appoint and to remove, any subordinate officer, agent, or employee of the Corporation.] *Agents and employees of Nasdaq shall be under the supervision and control of the officers of Nasdaq, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.*

##### Delegation of Duties of Officers

Sec. [4.4]7.4 The Board [of Directors] may delegate the duties and powers of any officer of [the Corporation] *Nasdaq* to any other officer or to any [director] *Director* for a specified period of time and for any reason that the Board [of Directors] may deem sufficient.

## Resignation and Removal of Officers

Sec. [4.5]7.5 (a) Any officer may resign at any time upon written notice of resignation to the Board [of Directors], the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

(b) Any officer[, agent or employee of the Corporation] of *Nasdaq* may be removed, with or without cause, by resolution adopted by a majority of the [directors] *Directors* then in office at any regular or special meeting of the Board [of Directors] or by a written consent signed by all of the [directors] *Directors* then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, [agent, or employee,] if any, with [the Corporation] *Nasdaq*.

## Bond

Sec. [4.6]7.6 [The Corporation] *Nasdaq* may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.

## Chair of the Board

Sec. [4.7]7.7 The Chair of the Board shall preside at all meetings of the Board [of Directors] at which [he or she] *the Chair* is present. The Chair shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the Chair* from time to time by the Board [of Directors].

## President

Sec. [4.8] 7.8 The President shall, in the absence of the Chair of the Board, preside at all meetings of the Board [of Directors] at which [he or she] *the President* is present. The President shall be the [chief executive officer of the Corporation] *Chief Executive Officer of Nasdaq* and shall have general supervision over the business and affairs of [the Corporation] *Nasdaq*. The President shall have all powers and duties usually incident to the office of the President, except as specifically limited by a resolution of the Board [of Directors]. The President shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the President* from time to time by the Board [of Directors].

## Vice President

Sec. [4.9] 7.9 *The Board shall elect one or more Vice Presidents.* In the absence or disability of the President or if the office of President [be] *becomes vacant*, the Vice Presidents in the order determined by the Board [of Directors],

or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board [of Directors] at any time to extend or restrict such powers and duties or to assign them to others. Any Vice President may have such additional designations in [his or her] *such Vice President's* title as the Board [of Directors] may determine. The Vice Presidents shall generally assist the President in such manner as the President shall direct. Each Vice President shall exercise such other powers and perform such other duties as may be assigned to [him or her] *such Vice President* from time to time by the Board [of Directors] or the President. The term "Vice President" used in this Section shall include the positions of Executive Vice President, Senior Vice President, and Vice President.

## Secretary

Sec. [4.10] 7.10 The Secretary shall act as Secretary of all meetings of [stockholders] *the stockholder* and of the Board [of Directors] at which [he or she] *the Secretary* is present, shall record all the proceedings of all such meetings in a book to be kept for that purpose, shall have supervision over the giving and service of notices of [the Corporation] *Nasdaq*, and shall have supervision over the care and custody of the corporate records and the corporate seal of [the Corporation] *Nasdaq*. The Secretary shall be empowered to affix the corporate seal to documents, the execution of which on behalf of [the Corporation] *Nasdaq* under its seal, is duly authorized, and when so affixed, may attest the same. The Secretary shall have all powers and duties usually incident to the office of Secretary, except as specifically [listed] *limited* by a resolution of the Board [of Directors]. The Secretary shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the Secretary* from time to time by the Board [of Directors] or the President.

## Assistant Secretary

Sec. [4.11] 7.11 In the absence of the Secretary or in the event of [his or her] *the Secretary's* inability or refusal to act, any Assistant Secretary, approved by the Board, shall exercise all powers and perform all duties of the Secretary. An Assistant Secretary shall also exercise such other powers and perform such other duties as may be assigned to [him or her] *such Assistant Secretary* from time to time by the Board [of Directors] or the Secretary.

## Treasurer

Sec. [4.12] 7.12 The Treasurer shall have general supervision over the care and custody of the funds and over the receipts and disbursements of [the Corporation] *Nasdaq* and shall cause the funds of [the Corporation] *Nasdaq* to be deposited in the name of [the Corporation] *Nasdaq* in such banks or other depositories as the Board [of Directors] may designate. The Treasurer shall have supervision over the care and safekeeping of the securities of [the Corporation] *Nasdaq*. The Treasurer shall have all powers and duties usually incident to the office of Treasurer except as specifically limited by a resolution of the Board [of Directors]. The Treasurer shall exercise such other powers and perform such other duties as may be assigned to [him] *the Treasurer* from time to time by the Board [of Directors] or the President.

## Assistant Treasurer

Sec. [4.13] 7.13 In the absence of the Treasurer or in the event of [his or her] *the Treasurer's* inability or refusal to act, any Assistant Treasurer, approved by the Board, shall exercise all powers and perform all duties of the Treasurer. An Assistant Treasurer shall also exercise such other powers and perform such other duties as may be assigned to [him or her] *such Assistant Treasurer* from time to time by the Board [of Directors] or the Treasurer.

## Article [V] VIII

Indemnification of Directors, Officers, Employees, [and] Agents, *Nasdaq Listing and Hearing Review Council and Committee Members*

Sec. [5.1] 8.1 (a) [The Corporation] *Nasdaq* shall indemnify, and hold harmless, to the fullest extent permitted by *Delaware* law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a [director or] *Director*, officer [of the Corporation], or *employee of Nasdaq or a Nasdaq Listing and Hearing Review Council or committee member*, or is or was a [director or] *Director*, officer, or *employee of Nasdaq* who is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other enterprise, ], *enterprise, or non-profit entity, including service with respect to employee benefit plans*, is or was a party, or is threatened to be made a party to:

(i) Any threatened, pending, or completed action, suit, or proceeding,

whether civil, criminal, administrative, or investigative (other than an action by or in the right of [the Corporation] *Nasdaq*) against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or

(ii) Any threatened, pending, or completed action or suit by or in the right of [the Corporation] *Nasdaq* to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such [persons] person in connection with the defense or settlement of such action or suit.

(b) *Nasdaq* shall advance expenses (including attorneys' fees and disbursements) to persons described in subsection (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

[(b)](c) [The Corporation] *Nasdaq* may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he or she is or was an [employee or agent of the Corporation, or ] agent of *Nasdaq* or is or was an agent of *Nasdaq* who is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, trust [or other enterprise, ], enterprise, or non-profit entity, including service with respect to employee benefit plans, was or is a party, or is threatened to be made a party to any action or proceeding described [above] in subsection (a).

[(c)](d) [The Corporation] *Nasdaq* may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition[.]; provided, however, that the payment of expenses incurred by [a director, officer, or employee] such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by [the officer, director, or employee] that person to repay all amounts advanced if it should be ultimately determined that [such] the

person is not entitled to be indemnified under this Section [5.1 or otherwise] or otherwise.

(e) *Notwithstanding the foregoing or any other provision of these By-Laws, no advance shall be made by Nasdaq to an agent or non-officer employee if a determination is reasonably and promptly made by the Board by a majority vote of those Directors who have not been named parties to the action, even though less than a quorum, or, if there are no such Directors or if such Directors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) The person seeking advancement of expenses (i) acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of Nasdaq; (2) with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to Nasdaq.*

[(d)] (f) The indemnification provided by this [section] Section in a specific case shall not be deemed exclusive of any other rights to which a person seeking indemnification may be entitled [under any by-law, agreement, vote of stockholders or disinterested directors or otherwise], both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a [director] Director, officer, National Listing and Hearing Review Council or committee member, employee, or agent and shall inure to the benefit of [his or her] such person's heirs, executors, and administrators.

(g) *Notwithstanding the foregoing, but subject to subsection (j), Nasdaq shall be required to indemnify any person identified in subsection (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.*

[(e)] (h) [The Corporation's] *Nasdaq's* obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other], enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, [or other] enterprise, or non-profit entity.

[(f)](i) Any repeal or modification of the foregoing provisions of this Section [5.1] shall not adversely affect any right or protection hereunder of any person respecting any act or omission occurring prior to the time of such repeal or modification.

(j) *If a claim for indemnification or advancement of expenses under this Article is not paid in full within 60 days after a written claim therefor by an indemnified person has been received by Nasdaq, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, Nasdaq shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under Delaware law.*

#### Indemnification Insurance

Sec. [5.2]8.2 [The Corporation] *Nasdaq* shall have power to purchase and maintain insurance on behalf of any person who is or was a [director] Director, officer, National Listing and Hearing Review Council or committee member, employee, or agent of [the Corporation] *Nasdaq*, or is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other], enterprise, or non-profit entity against any liability asserted against [him or her] such person and incurred by [him or her] such person in any such capacity, or arising out of [his or her] such person's status as such, whether or not [the Corporation] *Nasdaq* would have the power to indemnify [him or her] such person against such liability [under the provisions of this section] hereunder.

#### Article [VI] IX

##### Capital Stock

###### Sole Stockholder

Sec. 9.1 *The NASD shall be the sole stockholder of the capital stock of Nasdaq.*

##### Certificates

Sec. [6.1]9.2 [Each] *The* stockholder [in the Corporation] shall be entitled to a certificate or certificates in such form as shall be approved by the Board [of Directors], certifying the number of shares of capital stock in [the Corporation] *Nasdaq* owned by [such] the stockholder.

## Signatures

Sec. [6.2]9.3 (a) Certificates for shares of capital stock of [the Corporation] *Nasdaq* shall be signed in the name of [the Corporation] *Nasdaq* by two officers with one being the Chair of the Board, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board [of Directors]. Such certificates may be sealed with the corporate [Seal] seal of [the Corporation] *Nasdaq* or a facsimile thereof.

(b) If any such certificates are countersigned by a transfer agent other than [the Corporation] *Nasdaq* or its employee, or by a registrar other than [the Corporation] *Nasdaq* or its employee, any other signature on the certificate may be a facsimile. In [case] *the event that* any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall [have ceased] cease to be such officer, transfer agent, or registrar before such certificate is issued, such certificate may be issued by [the Corporation] *Nasdaq* with the same effect as if such person were such officer, transfer agent, or registrar at the date of issue.

## Stock Ledger

Sec. [6.3]9.4 (a) A record of all certificates for capital stock issued by [the Corporation] *Nasdaq* shall be kept by the Secretary or any other officer, employee, or agent designated by the Board [of Directors]. Such record shall show the name and address of the person, firm, or corporation in which certificates for capital stock are registered, the number of shares represented by each such certificate, the date of each such certificate, and in the case of certificates which have been canceled, the date of cancellation thereof.

(b) [The Corporation] *Nasdaq* shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. [The Corporation] *Nasdaq* shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not [the Corporation] *Nasdaq* shall have express or other notice thereof.

## Transfers of Stock

Sec. [6.4]9.5 (a) The Board [of Directors] may make such rules and regulations as it may deem expedient, not inconsistent with law, the *Restated*

Certificate of Incorporation, or these By-Laws, concerning the issuance, transfer, and registration of certificates for [share] shares of capital stock of [the Corporation] *Nasdaq*. The Board [of Directors] may appoint, or authorize any principal officer to appoint, one or more transfer agents or one or more transfer clerks and one or more registrars and may require all certificates for capital stock to bear the signature or signatures of any of them.

(b) Transfers of capital stock shall be made on the books of [the Corporation] *Nasdaq* only upon delivery to [the Corporation] *Nasdaq* or its transfer agent of: (i) a written direction of the registered holder named in the certificate or such holder's attorney lawfully constituted in writing[.]; (ii) the certificate for the shares of capital stock being transferred[.]; and (iii) a written assignment of the shares of capital stock evidenced thereby.

## Cancellation

Sec. [6.5]9.6 Each certificate for capital stock surrendered to [the Corporation] *Nasdaq* for exchange or transfer shall be canceled and no new certificate or certificates shall be issued in exchange for any existing certificate other than pursuant to [Sec. 6.6. of these By-Laws] *Section 9.7* until such existing certificate shall have been canceled.

## Lost, Stolen, Destroyed, and Mutilated Certificates

Sec. [6.6]9.7 In the event that any certificate for shares of capital stock of [the Corporation] *Nasdaq* shall be mutilated, [the Corporation] *Nasdaq* shall issue a new certificate in place of such mutilated certificate. In [case] *the event that* any such certificate shall be lost, stolen, or destroyed [the Corporation], *Nasdaq* may, in the discretion of the Board [of Directors] or a committee [designated] *appointed* thereby with power so to act, issue a new certificate for capital stock in the place of any such lost, stolen, or destroyed certificate. The applicant for any substituted certificate or certificates shall surrender any mutilated certificate or, in the case of any lost, stolen, or destroyed certificate, furnish satisfactory proof of such loss, theft, or destruction of such certificate and of the ownership thereof. The Board [of Directors] or such committee may, in its discretion, require the owner of a lost or destroyed certificate, or [his] *the owner's* representatives, to furnish to [the Corporation] *Nasdaq* a bond with an acceptable surety or sureties and in such sum as will be sufficient to indemnify [the Corporation] *Nasdaq* against any claim that may be made

against it on account of the lost, stolen, or destroyed certificate or the issuance of such new certificate. A new certificate may be issued without requiring a bond when, in the judgment of the Board [of Directors], it is proper to do so.

## Fixing of Record [Dates] Date

Sec. [6.7]9.8 *The Board may fix a record date in accordance with Delaware law.* [(a) In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or to express consent or dissent to corporate action in writing without a meeting, or to exercise any rights with respect to any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, which shall not be more than sixty nor less than ten days before the date of any meeting of stockholders, nor more than sixty days prior to any other action. Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of and to vote at such meeting or any adjournment thereof, or to give such consent or dissent, or to exercise such rights with respect to any such change, conversion or exchange of stock, or to participate in any such action, notwithstanding the transfer of any stock on the books of the Corporation after any record date so fixed.]

[(b) If no record date is fixed by the Board of Directors:

(i) The record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or if notice is waived, at the close of business on the day next preceding the day on which the meeting is held;

(ii) The record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be at the close of business on the day on which the first written consent is expressed; and

(iii) The record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.]

[(c) A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of

Directors may fix a new record date for the adjourned meeting.]

#### Article [VII] X

#### Miscellaneous Provisions

##### Corporate Seal

Sec. [7.1]10.1 The seal of [the Corporation] *Nasdaq* shall be circular in form and shall bear, in addition to any other emblem or device approved by the Board [of Directors], the name of [the Corporation] *Nasdaq*, the year of its incorporation, and the words "Corporate Seal" and "Delaware[ ]". The seal may be used by causing it to be affixed or impressed, or a facsimile thereof may be reproduced or otherwise used in such manner as the Board [of Directors] may determine.

##### Fiscal Year

Sec. [7.2]10.2 The fiscal year of [the Corporation] *Nasdaq* shall begin the 1st day of January in each year, or such other month as the Board [of Directors] may determine by resolution.

##### Waiver of Notice

Sec. [7.3]10.3 (a) Whenever notice is required to be given by law, the *Restated* Certificate of Incorporation, or these By-Laws, a written waiver thereof, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the [stockholders, directors] *stockholder*, *Directors*, or members of a committee of [directors] *Directors* need be specified in any written waiver of notice.

(b) Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

##### Execution of Instruments, Contracts, Etc.

Sec. [7.4.]10.4 (a) All checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money shall be signed in the name of [the Corporation] *Nasdaq* by such officer or officers or person or persons[,] as the Board [of Directors], or a duly authorized committee thereof, may from time to time designate. Except as otherwise provided by law, the Board [of Directors], any committee given specific authority in the premises by the Board [of Directors], or any committee given authority to exercise generally the

powers of the Board [of Directors] during intervals between meetings of the Board [of Directors], may authorize any officer, employee, or agent, in the name of and on behalf of [the Corporation] *Nasdaq*, to enter into or execute and deliver deeds, bonds, mortgages, contracts, and other obligations or instruments, and such authority may be general or confined to specific instances.

(b) All applications, written instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, may be executed in the name of [the Corporation] *Nasdaq* by any principal officer or subordinate officer of [the Corporation] *Nasdaq*, or, to the extent designated for such purpose from time to time by the Board [of Directors], by an employee or agent of [the Corporation] *Nasdaq*. Such designation may contain the power to substitute, in the discretion of the person named, one or more other persons.

##### Form of Records

Sec. [7.5]10.5 Any records maintained by [the Corporation] *Nasdaq* in the regular course of business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, magnetic tape, computer disk, or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time.

#### Article [VIII] XI

##### Amendments; Emergency By-Laws

##### By [Stockholders] *Stockholder*

Sec. [8.1]11.1 These By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any meeting of [stockholders by the vote of the holders of not less than a majority of the outstanding shares of stock entitled to vote thereat] *the stockholder*, provided that, in the case of a special meeting, notice that an amendment is to be considered and acted upon shall be inserted in the notice or waiver of notice of said meeting.

##### By Directors

Sec. [8.2]11.2 To the extent permitted by the *Restated* Certificate of Incorporation, these By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any regular or special meeting of the Board [of Directors] by a resolution adopted by a vote of a majority of the whole Board [of Directors].

##### Emergency By-Laws

Sec. [8.3]11.3 The Board [of Directors] may adopt emergency By-Laws subject to repeal or change by action of the [stockholders] *stockholder* which shall, notwithstanding any different provision of law, the *Restated* Certificate of Incorporation, or these By-Laws, be operative during any emergency resulting from any nuclear or atomic disaster, an attack on the United States or on a locality in which [the Corporation] *Nasdaq* conducts its business or customarily holds meetings of the Board [of Directors] or stockholders] *or the stockholder*, any catastrophe, or other emergency condition, as a result of which a quorum of the Board [of Directors] or a committee thereof cannot readily be convened for action. Such emergency By-Laws may make any provision that may be practicable and necessary [for] *under* the circumstances of the emergency.

\* \* \* \* \*

##### Plan of Allocation and Delegation of Functions by NASD to Subsidiaries

##### I. NASD, Inc.

The NASD, Inc. (referenced as "NASD"), the Registered Section 15A Association, is the parent company of the wholly-owned Subsidiaries NASD Regulation, Inc. (referenced individually as "[NASDR] *NASD Regulation*") and The Nasdaq Stock Market, Inc. (referenced individually as "Nasdaq") (referenced collectively as the "Subsidiaries"). The term "Association" shall refer to the NASD and the Subsidiaries collectively.

A. Governors, Directors and Committee Members *The terms "Industry Governors," "Non-Industry Governors," "Public Governors," "Industry Directors," "Non-Industry Directors," "Public Directors," "Industry committee members," "Non-Industry committee members," and "Public committee members," as used herein, shall have the meanings set forth in the By-Laws of the NASD, NASD Regulation and Nasdaq, as applicable.*

[The following definitions are applicable to Governors of the NASD, Directors of the Subsidiaries, and Members of Committees of the NASD and the Subsidiaries.]

[1. "Industry" Governors, Directors or Committee Members shall include (a) officers, directors and employees of brokers and dealers and persons who have been employed in any such capacity at any time within the prior three years; and (b) persons who have consulting or employment relationships with or provided professional services

to the Association and persons who have had any such relationship or provided any such services at any time within the prior three years.]

[2. "Non-industry" Governors, Directors or Committee Members shall be (a) Public Governors; (b) officers and employees of issuers of securities listed on The Nasdaq Stock Market or traded in the over-the-counter market; (c) persons affiliated with brokers and dealers that operate solely to assist the securities-related activities of the business of non-member affiliates (such as a broker or dealer established to:

(i) Distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (d) employees of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who are primarily engaged in the business of the non-member entity; and (e) other individuals who would not be Industry Governors, Directors or Committee Members.]

[3. "Public" Governors, Directors or Committee Members shall be non-industry persons who have no material business relationship with a broker, dealer or the Association.]

B. Functions and Authority of the NASD—The NASD shall have ultimate responsibility for the rules and regulations of the Association and its operation and administration. As set forth below in Sections II.A. and III.A., the NASD has delegated certain authority and functions to its [subsidiaries] *Subsidiaries*. Actions taken pursuant to delegated authority, however, remain subject to review, ratification or rejection by the NASD Board in accordance with procedures established by that Board. Any function or responsibility as a registered securities association under the *Securities Exchange Act of 1934* ("Act"), or as set forth in the [articles of incorporation] *Restated Certificate of Incorporation* or the by-laws is hereby reserved, except as expressly delegated to the [subsidiaries] *Subsidiaries*. In addition, the NASD expressly retains the following authority and functions:

1. To exercise overall responsibility for ensuring that the Association's statutory and self-regulatory obligations and functions are fulfilled.

2. To delegate authority to the Subsidiaries to take actions on behalf of the NASD.

3. To elect the Subsidiary Boards of Directors.

4. To review the rulemaking and disciplinary decisions of the

Subsidiaries (See Sections [II.C.] *II.B.* and [III.C.] *III.B.* below).

5. To coordinate actions of the Subsidiary Boards as necessary.

6. To resolve any disputes between the Subsidiaries.

7. To administer common overhead and technology of the Subsidiaries.

8. To administer the Office of Internal Review as provided in [Section I.D.4 below] *the NASD By-Laws*.

9. To manage external Association relations on major policy issues.

10. To direct the Subsidiaries to take action necessary to effectuate the purposes and functions of the Association.

11. *To take action ab initio in an area of responsibility delegated to NASD Regulation in Section II or to Nasdaq in Section III.*

[C. Board of Governors

1. Composition: The NASD Board of Governors ("NASD Board") shall be composed of at least Nine (9) and no more than Thirteen (13) Governors, a majority of whom shall be Non-industry (including at least Two (2) Public Governors). The Chief Executive Officer ("CEO") of NASD shall be a Governor. In the event that the NASD Board shall consist of Eleven (11) or more Governors, at least Three (3) shall be Public Governors.]

[2. Election Procedures

a. Commencing with the selection of Governors to take office in April of 1997, Governors (except the CEO of NASD) shall be elected by a majority vote of those members of the NASD casting ballots on a slate of nominees presented to the NASD membership by the National Nominating Committee for election by secret ballot.

b. National Nominating Committee

(1) The National Nominating Committee shall be composed of at least Six (6) and not more than Nine (9) members, equally balanced between Industry and Non-industry Committee Members (including at least Two (2) Public Committee Members). In the event that the Nominating Committee shall consist of Seven (7) or more members at least Three (3) shall be Public Committee Members. If at any time there shall be an odd number of members of the National Nominating Committee, Non-industry Committee Members shall be in the majority. No officer or employee of the Association shall serve as a member of the National Nominating Committee in any voting or non-voting capacity. Two members of the National Nominating Committee shall be selected by each of the Subsidiaries and the NASD. No more

than three of the Committee Members and no more than two of the Industry Committee Members shall be current members of the NASD Board or of the Board of Directors of one of the Subsidiaries (collectively the "Association Boards"). Any member of the National Nominating Committee who is a current member of any Association Board shall be in his/her final year of service on any Association Board.

(2) Members of the National Nominating Committee shall be appointed annually by the NASD Board and may be removed for cause by a majority vote of the NASD Board.

(3) The National Nominating Committee shall propose to the NASD Board one or more nominees for each vacant or new Governor position, and for each Director position on the Boards of Directors of the Subsidiaries.]

[3. Contested Elections

a. A candidate for the NASD Board who has not been nominated pursuant to Section 2.b(3) above may be nominated by petition, for the term of office specified by the Board for the vacant governorship, if the candidate presents duly executed petitions to the National Nominating Committee demonstrating that such candidate has the support of Two (2) percent of the members of the NASD.

b. A candidate for the NASD Board may be included on the ballot only if the Committee certifies that the candidate's petitions are duly executed by the requisite number of members of the NASD and that the candidate meets the qualifications for the position to be filled, as defined in Section I.A. above.]

[4. Term of Office

a. Each Governor shall hold office for a term of not more than three years, or until a successor is elected and qualified, or until death, disqualification, resignation, or removal. Except as provided in paragraphs (b) and (c), Governors may not serve more than two consecutive terms of office on any Association Board.

b. The CEO of the NASD shall serve as a member of the NASD Board until a successor is selected and qualified, or until death, resignation, disqualification, or removal.

c. Where a Governor is appointed to fill a term of less than one year, such Governor shall not be precluded from serving two additional terms of office.]

[5. Vacancies

a. If a Governor position becomes vacant before the expiration of the Governor's term of office, the National Nominating Committee shall recommend, and the NASD Board shall

elect by majority vote of the remaining Governors, a person satisfying the criteria for a Governor position of the type (Industry, Non-industry or Public), vacated as defined in Section I.A. above, unless such Governor has a remaining term of office of no more than six months, in which case no replacement will be required.

b. If a Governor no longer satisfies the criteria for the category in which he or she was elected (Industry, Non-industry or Public) and has a remaining term of office of more than six months, such Governor shall be automatically removed from office unless the remaining members of the NASD Board determine otherwise by a majority vote and the failure to remove the Governor does not affect the proportional representation set forth in Section I.C.1. above.]

#### [D. Audit Committee

1. The Audit Committee shall be a committee of the NASD Board and shall include the following functions:

a. To ensure the existence of adequate controls and the integrity of the financial reporting process of the Association.

b. To recommend to the NASD Board, and to monitor the independence and performance of, the certified public accountants retained as outside auditors by the NASD.

c. To direct and oversee all the activities of the Association's internal review function, including but not limited to management's responses to the internal review function.]

[2. Composition: The Audit Committee shall be composed of Four (4) or Five (5) members of the NASD Board, none of whom are officers or employees of the Association. The Committee shall include at least one Public Committee Member who shall serve as Chairperson of the Committee. The Committee shall have no more than two Industry Committee Members. If the Committee shall have Four (4) members it shall have not more than One (1) Industry Committee Member. In the event that the size of the NASD Board shall at any time consist of Eleven (11) or more members, the Audit Committee shall include Two (2) Public Committee Members. In addition, each Subsidiary shall designate a Public Member of its Board as a liaison to the Audit Committee. The Audit Committee may consult with that person on issues relating to the functions of the Subsidiary, but neither the liaison nor any officer or employee of the Association shall serve on the Audit Committee in any voting or non-voting capacity.]

[3. No member of the Audit Committee shall participate in the consideration or decision of any matter relating to a particular NASD member, company or individual if he or she has a material interest in, or a professional, business or personal relationship with, that member, company or individual or if such participation shall create an appearance of impropriety. Committee members shall consult with the General Counsel of NASD to determine if recusal is necessary. In the event that a member of the Committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Committee.]

[4. Office of Internal Review: The Audit Committee shall have exclusive authority: (a) To hire or terminate the Director of Internal Review, (b) to determine the compensation of the Director of Internal Review, and (c) to determine the budget for the Office of Internal Review. The Office of Internal Review shall report directly to the Audit Committee. The Audit Committee may, in its discretion, direct that the Office of Internal Review also report to senior management of the NASD on matters it deems appropriate and may request that senior NASD management perform such operational oversight as necessary and proper, consistent with preservation of the independence of the internal review function.]

#### [E.]C. Management Compensation Committee

1. The Management Compensation Committee shall be a Committee of the NASD Board and shall have the following functions: To consider and recommend compensation policies, programs, and practices for employees of the Association.

2. Composition: The Management Compensation Committee shall [be composed] consist of no fewer than [Four (4)] *four and no more than seven* [or more Members of the NASD Board, equally balanced between Industry and Non-industry]Governors. [If at any time there shall be an odd number of members of the Management Compensation Committee, Non-industry Committee Members shall be in the majority.] *The number of Non-Industry committee members shall equal or exceed the number of Industry committee members. The Chief Executive Officer shall be an ex-officio, non-voting member of the Management Compensation Committee. Each member shall serve a term of office of one year.*

3. *Quorum: At all meetings of the Management Compensation Committee,*

*a quorum for the transaction of business shall consist of a majority of the Management Compensation Committee, including not less than 50 percent of the Non-Industry committee members. In the absence of a quorum, a majority of the committee members present may adjourn the meeting until a quorum is present.*

[F.] D. Access to and Status of Officers, Directors, Employees, Books, Records, and Premises of Subsidiaries

Notwithstanding the delegation of authority to the Subsidiaries, as set forth in Sections II.A. and III.A. below, the staff, books, records, and premises of the Subsidiaries are the staff, books, records, and premises of the NASD subject to oversight pursuant to the [Securities Exchange Act of 1934 ("Act")] Act, and all officers, directors, employees, and agents of the Subsidiaries are officers [and], directors, employees, and agents of the NASD for purposes of the Act.

#### II. NASD Regulation, Inc. ("NASDR] *NASD Regulation*")

##### A. Delegation of Functions and Authority:

1. *Subject to Section I.B.11, [The] the NASD hereby delegates to [the NASDR and the NASDR] *NASD Regulation and NASD Regulation* assumes the following responsibilities and functions as a registered securities association:*

a. To establish *and interpret* rules and regulations *and provide exemptions* for NASD members including, but not limited to fees [and], membership requirements [and the Code of Arbitration and Mediation Procedure], *and arbitration procedures.*

b. To determine Association policy, including developing and adopting necessary or appropriate rule changes, relating to the business and sales practices of NASD members and associated persons with respect to, but not limited to, (i) arbitration of disputes among and between NASD members, associated persons and customers, (ii) public and private sale or distribution of securities including underwriting arrangements and compensation, (iii) financial responsibility, (iv) qualifications for NASD membership and association with NASD members, (v) clearance and settlement of securities transactions *and other financial responsibility and operational matters affecting members in general and securities listed on The Nasdaq Stock Market and on other markets operated by The Nasdaq Stock Market,* (vi) NASD member advertising practices, (vii) administration, interpretation, and enforcement of Association rules, (viii) administration

and enforcement of Municipal Securities Rulemaking Board ("MSRB") rules, the federal securities laws, and other laws, rules and regulations that the Association has the authority to administer or enforce, and (ix) standards of proof for violations and sanctions imposed on NASD members and associated persons in connection with disciplinary actions.

c. To take necessary or appropriate action to assure compliance with Association policy, Association and MSRB rules, the federal securities laws, and other laws, rules and regulations that the Association has the authority to administer or enforce, through examination, surveillance, investigation, enforcement, disciplinary, and other programs.

d. To administer programs and systems for the surveillance and enforcement of rules governing NASD members' conduct and trading activities in The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market, the third market for securities listed on a registered exchange, and the over-the-counter market.

e. To examine and investigate NASD members and associated persons to determine if they have violated Association or MSRB rules, the federal securities laws, and other laws, rules, and regulations that the Association has the authority to administer, interpret, or enforce.

f. To administer Association enforcement and disciplinary programs, including investigation, adjudication of cases and the imposition of fines and other sanctions.

g. To administer the Association's office of professional hearing officers.

h. To conduct arbitrations, mediations, and other dispute resolution programs.

i. To conduct qualification examinations and continuing education programs.

j. To operate the Central Registration Depository ["CRD"].

k. To determine whether applicants for NASD membership have met the requirements for membership established by the Association.

l. To place restrictions on the business activities of NASD members consistent with the public interest, the protection of investors, and the federal securities laws.

m. To determine whether persons seeking to register as associated persons of NASD members have met such qualifications for registration as may be established by the Association, including whether statutorily disqualified persons will be permitted to associate with particular NASD

members and the conditions of such association.

n. To oversee all District Office activities.

o. To establish the annual budget and business plan for [NASDR] *NASD Regulation*.

p. To determine allocation of [NASDR] *NASD Regulation* resources.

q. To establish and assess fees and other charges on NASD members, persons associated with NASD members, and others using the services or facilities of [NASDR] *NASD Regulation*.

r. To manage external relations on enforcement, regulatory, and other policy issues with Congress, the Securities and Exchange Commission ["SEC"] ("*Commission*"), state regulators, other self-regulatory organizations, business groups, and the public.

s. To establish internal procedures for considering complaints by members, associated persons, and members of the public who request an investigation or disciplinary action by the Association.

t. *To operate Stockwatch in conjunction with Nasdaq pursuant to Section IV.*

2. All action taken pursuant to authority delegated pursuant to (1) shall be subject to the review, ratification, or rejection by the NASD Board in accordance with procedures established by the NASD Board.

[B. Board of Directors

1. Subsequent to January of 1997, the NASDR Board of Directors ("NASDR Board") shall be composed of at least Twenty-one (21) and no more than Twenty-five (25) Directors. The President of NASDR shall be a member of the NASDR Board and the remaining members shall be equally balanced between Industry and Non-industry Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-industry. The NASDR Board shall include Seven (7) representatives of NASD members representing geographical regions defined by the NASDR Board, and at least Three (3) at-large industry representatives. The NASDR Board shall include at least Ten (10) Non-industry Directors, including at least Three (3) Public Directors. In the event that the NASDR Board shall consist of more than Twenty-two (22) Members, at least Four (4) shall be Public Directors. The NASDR Board shall include representatives of an issuer of investment company shares or an affiliate of such an issuer and an insurance company or an affiliated

NASD member. The CEO of NASD shall be an ex-officio non-voting member of the NASDR Board.]

[2. Election Procedures

a. The National Nominating Committee shall propose to the NASD Board nominees for each position on the NASDR Board.

b. The Seven (7) Industry Members of the NASDR Board shall be nominated by Regional Nominating Committees for consideration by the National Nominating Committee. A Regional Nominating Committee shall consist of equal numbers of members from each district comprising the regions and members shall be selected by the District Committee for that District.

c. Any officer, director or employee of an NASD member who has not otherwise been nominated by the Regional Nominating Committee may seek nomination if the candidate presents duly executed petitions to the Regional Nominating Committee for the appropriate geographical region demonstrating that such candidate has the support of at least ten (10) percent of the NASD members in that region. The Regional Nominating Committee shall submit the names of its nominees and of all the candidates presenting qualifying petitions to the members in that region for nomination by secret ballot. The Regional Nominating Committee shall nominate to the National Nominating Committee the candidate receiving the most votes.

d. Terms of Office and Vacancies: The terms of office of Directors and the procedures for the filling of vacancies shall be the same as those set forth under Section I.C.4. and 5. above.]

[C]B. [NASDR] *NASD Regulation* Board Procedures

[1. Disciplinary Actions—Any disciplinary decision of the Association, including dismissals, may be appealed or called for review pursuant to the Rules of the Association.]

[2. Statutory Disqualification Decisions—Any decision of the NBCC with respect to statutory disqualification may be called for review pursuant to the Rules of the Association.]

[3]1. Rule Filings—[Any rule change adopted by the NASDR Board that imposes fees or other charges on persons or entities other than NASD members or that the NASDR Board refers to the NASD Board because in the view of the NASDR Board it raises significant policy issues shall be reviewed and ratified by the NASD Board before becoming the final action of the Association.] *The NASD Board shall review and ratify a rule change adopted by the NASD Regulation Board*

before the rule change becomes the final action of the Association if the rule change: (a) Imposes fees or other charges on persons or entities other than NASD members; (b) raises significant policy issues in the view of the NASD Regulation Board, and the NASD Regulation Board refers the rule change to the NASD Board; or (c) is materially inconsistent with a recommendation of the National Adjudicatory Council. If the [NASDR] NASD Regulation Board does not refer a rule change to the NASD Board for review, the [NASDR] NASD Regulation Board action [will] shall become the final action of the Association unless called for review by any member of the NASD Board not later than the NASD Board [its] meeting next following the [NASDR] NASD Regulation Board's action [but which is 15 calendar days or more following the action of the [NASDR] Board]. During the process of developing rule proposals, [NASDR] NASD Regulation staff shall consult with and seek the advice of Nasdaq staff before presenting any rule proposal to the [NASDR] NASD Regulation Board.

[4. Notwithstanding the requirements set forth in paragraph 3 of this Section, the NASD Board may determine it is advisable to call or not call for review any rule change within the 15 calendar day period following the decision of the NASDR Board.]

## 2. Petitions for Reconsideration

a. If the NASD Regulation Board or NASD Board takes action on a rule change relating to the business and sales practices of NASD members or associated persons or enforcement policies, including policies with respect to fines and other sanctions, and such action is materially inconsistent with the recommendation of the National Adjudicatory Council, the NASD Regulation Board or the NASD Board, as applicable, shall provide written notice of its action to the National Adjudicatory Council within one calendar day.

b. Within two calendar days after receipt of such notice, the National Adjudicatory Council, by majority vote, may petition the NASD Board for reconsideration. Such petition shall be in writing and include a statement explaining in detail why the National Adjudicatory Council believes that the NASD Regulation Board's or NASD Board's action should be set aside.

c. The NASD Executive Committee shall act on a timely and complete petition for reconsideration within three calendar days after its receipt. If the NASD Executive Committee grants reconsideration, the matter shall be

added to the agenda of the next regularly scheduled meeting of the NASD Board. If the NASD Executive Committee denies reconsideration, the NASD Regulation Board's or NASD Board's previous action on the rule shall be final, and staff shall submit the necessary rule filing to the SEC.

## [D.] C. Supplemental Delegation Regarding [the Formation of Committees] Committees

[1. The NASDR board may designate one or more committees and delegate to such committees such powers and authority, as necessary and appropriate, to act on behalf of the NASDR Board in carrying out the functions and authority delegated to the NASDR by the NASD. Such delegations shall be in conformance with law, the charter and the by-laws and the requirements as set forth below as part of this Plan of Allocation and Delegation. Any action taken by a committee pursuant to delegated authority shall be subject to review, ratification or rejection by the NASDR Board in accordance with procedures established by the NASDR Board.]

[(a) National Business Conduct Committee—A National Business Conduct Committee may be created for the purpose of:

(i) Hearing and deciding appeals of initial disciplinary decisions of the Association.

(ii) Considering and recommending to the NASDR Board policy and rule changes relating to the business and sales practices of NASD members and associated persons.

(iii) Considering and recommending Association enforcement policies, including policies with respect to fines and other sanctions.]

[(b) The NBCC shall be composed of at least Eight (8) members of the NASDR Board equally balanced between Industry and Non-industry Committee Members (including at least one Public Member). If at any time there shall be an odd number of Committee Members, a majority of the Members shall be Non-industry. Each NBCC Member shall be elected to serve a one-year term.]

### 1. Market Regulation Committee

a. The Market Regulation Committee shall advise the NASD Regulation Board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting, and trading practices; advise the NASD Regulation Board in its administration of programs and systems for the surveillance and enforcement of rules governing NASD members' conduct and trading activities in The Nasdaq Stock Market, other markets operated by The Nasdaq Stock

Market, the third market for securities listed on a registered exchange, and the over-the-counter market; provide a pool of panelists for those hearing panels that the Chief Hearing Officer or his or her designee determines should include a member of the Market Regulation Committee pursuant to the Rules of the Association; participate in the training of hearing panelists on issues relating to quotations, executions, trade reporting, and trading practices; and review and recommend to the National Adjudicatory Council changes to the Association's Sanction Guidelines.

b. The NASD Regulation Board shall appoint the Market Regulation Committee by resolution. The members of the Market Regulation Committee shall be balanced between Industry and Non-Industry committee members.

c. At all meetings of the Market Regulation Committee, a quorum for the transaction of business shall consist of a majority of the Market Regulation Committee, including not less than 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that not less than 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived.

[2. Other Committees—With respect to any other committees that may be formed pursuant to this Section D for purposes other than those set forth in (1) above, such committee shall be created in accordance with the by-laws by resolution or resolutions adopted by a majority of the whole NASDR Board.]

## 2. National Arbitration and Mediation Committee

a. The National Arbitration and Mediation Committee shall have the powers and authority pursuant to the Rules of the Association to advise the NASD Regulation Board on the development and maintenance of an equitable and efficient system of dispute resolution that will equally serve the needs of public investors and Association members, to monitor rules and procedures governing the conduct of dispute resolution, and to have such other powers and authority as is necessary to effectuate the purposes of the Rules of the Association.

b. The NASD Regulation Board shall appoint the National Arbitration and Mediation Committee by resolution. The National Arbitration and Mediation Committee shall consist of no fewer than ten and no more than 25 members. The members of the National

Arbitration and Mediation Committee shall be equally balanced between Industry and Non-Industry committee members.

c. At all meetings of the National Arbitration and Mediation Committee, a quorum for the transaction of business shall consist of a majority of the National Arbitration and Mediation Committee, including not less than 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that not less than 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived.

### 3. Operations Committee

a. The Operations Committee shall have the following functions:

i. to issue interpretations or rulings with respect to the Uniform Practice Code ("UPC");

ii. to advise the NASD Regulation Board and, where applicable, the Nasdaq Listing and Hearing Review Council, with respect to the clearance and settlement of securities transactions and other financial responsibility and operational matters that may require modifications to the UPC or other Rules of the Association; and

iii. to maintain a Nasdaq Liaison Subcommittee to provide advice to Nasdaq staff on policy making related to the UPC and financial responsibility issues related to The Nasdaq Stock Market or other markets operated by The Nasdaq Stock Market and to issue interpretations or rulings with respect to the application of the UPC to cancellations of new issues, due bills, and similar situations that arise with respect to securities listed on The Nasdaq Stock Market or traded on other markets operated by The Nasdaq Stock Market.

b. The NASD Regulation Board shall appoint the Operations Committee by resolution. The Operations Committee shall have not more than 50 percent of its members directly engaged in market-making activity or employed by a member firm whose revenues from market-making activity exceed ten percent of its total revenues.

### III. Delegation to Nasdaq

#### A. Delegation of Functions and Authority

1. Subject to Section I.B.11., [The] the NASD hereby delegates to Nasdaq and Nasdaq assumes the following responsibilities and functions as a registered securities association:

a. To operate The Nasdaq Stock Market, automated systems supporting The Nasdaq Stock Market, and other markets or systems for non-Nasdaq securities.

b. To provide and maintain a telecommunications network infrastructure linking market participants for the efficient processing and handling of quotations, orders, transaction reports, and comparisons of transactions.

c. To collect, process, consolidate, and provide to [NASDR] NASD Regulation the information requisite to operation of the surveillance audit trail.

d. To develop and adopt rule changes (i) applicable to the collection, processing, and dissemination of quotation and transaction information for securities traded on The Nasdaq Stock Market, on other markets operated by The Nasdaq Stock Market, in the third market for securities listed on a registered exchange, and in the over-the-counter market, (ii) for Nasdaq-operated trading systems for these securities, and (iii) establishing trading practices with respect to these securities.

e. To develop and adopt rules, interpretations, policies, and procedures and provide exemptions to maintain and enhance the integrity, fairness, efficiency, and competitiveness of The Nasdaq Stock Market and other markets operated by The Nasdaq Stock Market.

f. To act as a Securities Information Processor for quotations and transaction information related to securities traded on The Nasdaq Stock Market and other markets operated by The Nasdaq Stock Market.

g. To act as processor under the Nasdaq/Unlisted Trading Privileges Plan to collect, consolidate, and disseminate quotation and transaction reports in eligible securities from all Plan Participants in a fair and non-discriminatory manner.

h. To administer the Association's involvement in National Market System Plans related to Nasdaq/Unlisted Trading Privileges or trading in the third market for securities listed on a registered exchange.

i. To develop, adopt, and administer rules governing listing standards applicable to securities traded on The Nasdaq Stock Market and the issuers of those securities.

j. To establish standards for participation in The Nasdaq Stock Market[,] and other markets or systems operated by Nasdaq, and determine in accordance with Association and Nasdaq procedures if: (i) persons seeking to participate in any of such markets and systems have met the standards established for participants;

and (ii) persons participating in any of the markets or systems continue to meet the standards established for participants.

k. To establish and assess listing fees upon issuers and fees for the products and services offered by Nasdaq.

l. To establish the annual budget and business plan for Nasdaq.

m. To determine allocation of Nasdaq resources.

n. To manage external relations on matters related to trading on and the operation and functions of The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market and systems operated by the Nasdaq Stock Market with Congress, the [SEC] Commission, state regulators, other self-regulatory organizations, business groups, and the public.

o. To operate Stockwatch in conjunction with NASD Regulation pursuant to Section IV.

2. All action taken pursuant to authority delegated pursuant to (1) shall be subject to the review, ratification, or rejection by the NASD Board in accordance with procedures established by the NASD Board.

#### [B. Board of Directors

1. Composition—As of January of 1997 the Nasdaq Board of Directors ("Nasdaq Board") shall be composed of at least Eleven (11) and not more than Fifteen (15) Directors. The President of Nasdaq shall be a member of the Nasdaq Board and the remaining Members shall be equally balanced between Industry and Non-industry Directors, including at least two (2) Public Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-industry. In the event that the Nasdaq Board shall consist of more than Twelve (12) Members, at least Three (3) shall be Public Directors. The CEO of NASD shall be an ex-officio non-voting member of the Nasdaq Board.]

#### [2. Election Procedures

a. The National Nominating Committee shall propose to the NASD Board nominees for each position on the Nasdaq Board.

b. Terms of Office and Vacancies: The terms of office of Directors and the procedures for the filling of vacancies shall be the same as those set forth under I.C.4. and 5. above.]

#### [C.] B. Nasdaq Board Procedures

1. Listing/Delisting Decisions—Any initial decision of Nasdaq staff concerning the listing or delisting of securities on The Nasdaq Stock Market may be appealed to the Nasdaq Listing

and Hearing Review [Committee] *Council* ("Listing [Committee] *Council*") within 15 calendar days, or called for review by any member of the Listing [Committee] *Council* within 45 days, as set forth in the [Code of Procedure] *Rules of the Association*. [A decision of the Listing Committee may be called for review by any member of the Nasdaq Board not later than its meeting next following the Listing Committee's decision.] A decision of the [Nasdaq Board] *Listing Council* may be called for review by any member of the NASD Board not later than *the NASD Board* [its] meeting next following the [Nasdaq Board's] *Listing Council's* decision but which is 15 calendar days or more following the decision of the Listing [Committee] *Council* [or the Nasdaq Board]. *Notwithstanding the preceding sentence, the NASD Board may determine it is advisable to call for review any listing/delisting decision with the 15 calendar day period following the decision of the Listing Council.* Any decision not appealed or called for review shall become the final action of the Association upon expiration of the time allowed for appeal or call for review. An issuer has the right to appeal a final action of the Association taken by the Listing [Committee] *Council*, [Nasdaq Board] or NASD to the [SEC] *Commission*.

2. Rule Filings—[Any rule change adopted by the Nasdaq Board that imposes fees or other charges on persons or entities other than NASD members or issuers or that the Nasdaq Board determines to refer to the NASD Board because in the view of the Nasdaq Board it raises significant policy issues shall be reviewed and ratified by the NASD Board before becoming the final action of the Association.] *The NASD Board shall review and ratify a rule change adopted by the Nasdaq Board before the rule change becomes the final action of the Association if the rule change: (a) Imposes fees or other charges on persons or entities other than NASD members or issuers; (b) raises significant policy issues in the view of the Nasdaq Board, and the Nasdaq Board refers the rule change to the NASD Board; or (c) is materially inconsistent with a recommendation of the Nasdaq Listing and Hearing Review Council.* If the Nasdaq Board does not refer a rule change to the NASD Board for review, the Nasdaq Board action [will] *shall* become the final action of the Association unless called for review by any member of the NASD Board not later than *the NASD Board* [its] meeting next following the Nasdaq Board's action [but which is 15 calendar days or

more following the action of the Nasdaq Board]. During the process of developing rule proposals, Nasdaq staff shall consult with and seek the advice of [NASDR] *NASD Regulation* staff before presenting any rule proposal to the Nasdaq Board.

[3. Waiver of 15-day Period— Notwithstanding the requirements set forth in paragraphs 1 and 2 of this Section, the NASD Board may determine it is advisable to call for review any listing/delisting decision or rule change within the 15 calendar day period following the decision of the Listing Committee or the Nasdaq Board, as applicable.]

### 3. *Petitions for Reconsideration*

a. *If the Nasdaq Board or NASD Board takes action on a listing-related rule change, and such action is materially inconsistent with the recommendation of the Nasdaq Listing and Hearing Review Council, the Nasdaq Board or the NASD Board, as applicable, shall provide written notice of its action to the Nasdaq Listing and Hearing Review Council within one calendar day.*

b. *Within two calendar days after receipt of such notice, the Nasdaq Listing and Hearing Review Council, by majority vote, may petition the NASD Board for reconsideration. Such petition shall be in writing and include a statement explaining in detail why the Nasdaq Listing and Hearing Review Council believes that the Nasdaq Board's or NASD Board's action should be set aside.*

c. *The NASD Executive Committee shall act on a timely and complete petition for reconsideration within three calendar days after its receipt. If the NASD Executive Committee grants reconsideration, the matter shall be added to the agenda of the next regularly scheduled meeting of the NASD Board. If the NASD Executive Committee denies reconsideration, the Nasdaq Board's or NASD Board's previous action on the rule shall be final, and staff shall submit the necessary rule filing to the SEC.*

### [D] C. Supplemental Delegation Regarding [the Formation of Committees] *Committees*

[The Nasdaq Board may designate one or more committees and delegate to such committees such powers and authority, as necessary and appropriate, to act on behalf of the Nasdaq Board in carrying out the functions and authority delegated to Nasdaq by the NASD. Such delegations shall be in conformance with law, the charter and the by-laws and the requirements as set forth below as part of this Plan of Allocation and

Delegation. Any action taken by a committee pursuant to delegated authority shall be subject to review, ratification or rejection by the Nasdaq Board.]

#### [1. Specific Committees]

##### [a.] 1. Quality of Markets Committee ("QOMC")

[(1)](a) The QOMC shall be a committee appointed by the Nasdaq Board and shall have the following functions:

(i) To provide advice and guidance to the Nasdaq Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market, and systems operated by The Nasdaq Stock Market from the perspective of investors, both individual and institutional, retail firms, market making firms, Nasdaq-listed companies, and other participants in The Nasdaq Stock Market.

(ii) To advise the Nasdaq Board with respect to national market systems plans and linkages between the facilities of Nasdaq and registered exchanges.

[(2)](b) The QOMC will have broad representation that is equally balanced between [industry] *Industry* and [non-industry] *Non-Industry* committee members. The committee members shall include broad representation of participants in The Nasdaq Stock Market, including investors, market makers, integrated retail firms, and order entry firms.

(c) *At all meetings of the QOMC, a quorum for the transaction of business shall consist of a majority of the QOMC, including not less than 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that not less than 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived.*

##### [b] 2. Market Operations Review Committee ("MORC")

[(1)](a) The MORC shall be a committee appointed by the Nasdaq Board and shall exercise the functions contained in [Section 70] *Rule 11890* of the [Uniform Practice Code ("UPC"),] *Rules of the Association* in accordance with the procedures specified therein. [NASDR] *NASD Regulation* shall receive weekly reports of all determinations made by the staff or MORC under [Section 70 of the UPC] *Rule 11890* for regulatory review.

[(2)](b) The MORC shall be appointed by resolution of the Nasdaq Board and shall have no more than [Fifty (50)] 50 percent of its members directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed [10 %] ten percent of its total revenues.

[c. Firm Operations and Clearance Committee ("FOCC")]

(1) The FOCC shall be a committee appointed by the Nasdaq Board and shall have the following functions:

(i) To issue interpretations or rulings with respect to Sections 4-10, 12, 46, 67-68 and 71 of the UPC as well as any other provision of the UPC pertaining to transactions and post execution processing.

(ii) To advise the Nasdaq Board with respect to modifications to the UPC dealing with the transactions and post execution processing.]

[d. Nasdaq Listing and Hearing Review Committee ("Listing Committee")]

(1) The Listing Committee shall be a committee appointed by the Nasdaq Board and shall have the following functions:

(i) To advise the Nasdaq Board on the formulation or modification of initial or maintenance eligibility criteria and fees applicable to securities listed on The Nasdaq Stock Market or traded on other markets operated by The Nasdaq Stock Market.

(ii) To exercise the functions set forth in Article IX of the Code of Procedure, in accordance with the procedures specified therein.

(2) The Listing Committee shall be appointed by resolution of the Nasdaq Board and shall have no more than Fifty (50) percent of its members directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed 10% of its total revenues.]

#### [2. Other Committees

With respect to any other committees that may be formed pursuant to this Section D for purposes other than those set forth in (1) above, such committee shall be created in accordance with the By-laws by resolution or resolutions adopted by a majority of the whole Nasdaq Board.]

#### [E.] IV. Stockwatch

The Stockwatch section handles the trading halt functions for The Nasdaq Stock Market and exchange-listed securities traded in the over-the-counter market (i.e., the Third Market). Review of all questionable market activity, possible rule infractions or any other matters that require any type of investigative or regulatory follow-up

will be referred to and conducted by [NASDR] *NASD Regulation*, which will assume sole responsibility for the matter until resolution. This responsibility will include examinations, investigations, document requests, and any enforcement actions that [the NASDR] *NASD Regulation* may deem necessary. [NASDR] *NASD Regulation* staff at all times will have access to all records and files of the Stockwatch function.

\* \* \* \* \*

Restated Certificate of Incorporation of National Association of Securities Dealers, Inc.

The present name of the corporation is National Association of Securities Dealers, Inc. [(the "Corporation"). The Corporation] ("*NASD*"). *The NASD* was originally incorporated as a nonstock corporation under the name of Investment Bankers Conference, Inc., and its original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on September 3, 1936. This Restated Certificate of Incorporation of the [Corporation] *NASD*, which both restates and further amends the provisions of the [Corporation's] *NASD's* Certificate of Incorporation as heretofore amended, was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.

#### Name

First: The name of the [Corporation] *corporation* is National Association of Securities Dealers, Inc.

#### Delaware Office and Agent

Second: The registered office of the [Corporation] *NASD* in the State of Delaware is located at 1209 Orange Street, in the City of Wilmington, County of New Castle. The name and address of its registered agent is the Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware.

#### Objects or Purposes

Third: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, and, without limiting the generality of the foregoing, the business or purposes to be conducted or promoted shall include the following:

(1) To promote through cooperative effort the investment banking and securities business, to standardize its principles and practices, to promote therein high standards of commercial

honor, and to encourage and promote among members observance of Federal and [State] State securities laws;

(2) To provide a medium through which its membership may be enabled to confer, consult, and cooperate with governmental and other agencies in the solution of problems affecting investors, the public, and the investment banking and securities business;

(3) To adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors;

(4) To promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members;

(5) To establish, and to register with the Securities and Exchange Commission as, a national securities association pursuant to Section 15A of the Securities Exchange Act of 1934, as amended, and thereby to provide a medium for effectuating the purposes of said [section;] *Section*; and

(6) To transact business and to purchase, hold, own, lease, mortgage, sell, and convey any and all property, real and personal, necessary, convenient, or useful for the purposes of the [Corporation;] *NASD*.

The objects and purposes specified in the foregoing clauses shall, except where otherwise expressed, not be limited or restricted by reference to, or inference from, the terms of any other clause in this [certificate of incorporation] *Restated Certificate of Incorporation*, but the objects and purposes specified in each of the foregoing clauses of this [article] *Article* shall be regarded as independent objects and purposes.

#### Form of Organization

Fourth: [This Corporation] *The NASD* shall be a membership corporation and shall have no capital stock. The [Corporation] *NASD* is not organized and shall not be conducted for profit, and no part of its net revenues or earnings shall inure to the benefit of any individual, subscriber, contributor, or member.

Except as may be otherwise provided by [applicable law] *the General Corporation Law of the State of Delaware* or this Restated Certificate of Incorporation, the members of the [Corporation] *NASD* shall have no voting rights. Notwithstanding the foregoing, the members shall be entitled to vote for the election of Governors and on any amendment to the By-Laws of the [Corporation] *NASD* in accordance

with the procedures for such a vote as provided in the By-Laws.

Except as may be otherwise provided by the *General Corporation Law of the State of Delaware*, other applicable law or this Restated Certificate of Incorporation, the conditions, method of admission, qualifications and classifications of membership, the limitations, rights, powers and duties of members, the dues, assessments, and contributions of members, the method of expulsion from and termination of membership, and all other matters pertaining to the membership and the conduct, management, and control of the business, property, and affairs of the [Corporation] NASD shall be as provided from time to time in the By-Laws of the [Corporation] NASD and the *Rules of the Association*.

#### Indemnification; Governor Liability

Fifth: (a) [To] *The NASD shall indemnify, and hold harmless, to the fullest extent permitted by [applicable law] the General Corporation Law of the State of Delaware as it presently exists or may [hereafter be amended, the Corporation shall indemnify any person who was or is made] thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a Governor, officer, employee or committee member of the NASD, or is or was a Governor, officer, or employee of the NASD who is or was serving at the request of the NASD as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, is or was a party, or is threatened to be made a party [or is otherwise involved in any] to:*

(i) *Any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative [or investigative,], or investigative (other than an action by or in the right of the NASD) against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or*

(ii) *Any threatened, pending, or completed action or suit by or in the right of the NASD to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit.*

(b) *A Governor of the Corporation shall not be liable to the Corporation or its members for monetary damages for breach of fiduciary duty as a Governor, except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law as the same exists or may hereafter by amended.]*

(b) *The NASD shall advance expenses (including attorneys' fees and disbursements) to persons described in Article Fifth (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article Fifth or otherwise.*

(c) *The NASD may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by the General Corporation Law of the State of Delaware as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he[, or a person for whom he is the legal representative, is or was a Governor or officer of the Corporation] or she is or was an agent of the NASD or is or was an agent of the NASD who is or was serving at the request of the [Corporation] NASD as a director, officer, employee, or agent of another corporation [or of a], partnership, [joint venture,] trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, [against all expenses, liability, and loss reasonably incurred or suffered by such person, and the Corporation shall advance expenses (including attorneys' fees) to such person] was or is a party, or is threatened to be made a party to any action or proceeding described in Article Fifth (a).*

(d) *The NASD may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition; provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article Fifth or otherwise.*

(e) *Notwithstanding the foregoing [ , the Corporation shall be required to indemnify a person and advance*

*expenses to such person in connection with a proceeding (or part thereof) commenced by such person only if the commencement of such proceeding (or part thereof) was authorized by the Board of Governors. The Board of Governors may indemnify and/or advance expenses to any employee or agent of the Corporation to the extent it deems appropriate and to the extent permitted by applicable law. The rights conferred on any person by this Article Fifth(a) shall not be] or any other provision of these By-Laws, no advance shall be made by the NASD to an agent or non-officer employee if a determination is reasonably and promptly made by the Board by a majority vote of those Governors who have not been named parties to the action, even though less than a quorum, or, if there are no such Governors or if such Governors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) The person seeking advancement of expenses (i) acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of the NASD; (2) with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to the NASD.*

(f) *The indemnification provided by this Article Fifth in a specific case shall not be deemed exclusive of any other rights [which such person may have or hereafter acquire under any statute, provision of this Restated Certificate of Incorporation, By-Law, agreement, vote of members or disinterested Governors or otherwise] to which a person seeking indemnification may be entitled, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Governor, officer, employee, or agent and shall inure to the benefit of such person's heirs, executors, and administrators.*

(g) *Notwithstanding the foregoing, but subject to Article Fifth (j), the NASD shall be required to indemnify any person identified in Article Fifth (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.*

(h) *The NASD's obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation,*

partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

(i) Any repeal or modification of the [first sentence] foregoing provisions of this Article Fifth(b) shall not adversely affect any right or protection [of a Governor of the Corporation existing hereunder with respect to] hereunder of any person respecting any act or omission occurring prior to the time of such repeal or modification.

(j) If a claim for indemnification or advancement of expenses under this Article Fifth is not paid in full within 60 days after a written claim therefor by an indemnified person has been received by the NASD, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, the NASD shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under the General Corporation Law of the State of Delaware.

(k) The NASD shall have power to purchase and maintain insurance on behalf of any person who is or was a Governor, officer, employee, or agent of the NASD, or is or was serving at the request of the NASD as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the NASD would have the power to indemnify such person against such liability hereunder.

(l) A Governor shall not be liable to the NASD or its members for monetary damages for breach of fiduciary duty as a Governor, except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as it presently exists or may hereafter be amended.

#### Perpetual Existence

Sixth: The [Corporation] NASD shall have perpetual existence.

#### Members' Liability

Seventh: The private property of the members shall not be subject to the payment of corporate debts to any extent whatever.

#### Governors

Eighth: To the fullest extent permitted by Sections 141(a), 141(j), and 215 of the General Corporation Law of the State of Delaware and other applicable law, the business and affairs of the [Corporation] NASD shall be managed and the election of Governors shall be conducted in the manner provided in this Restated Certificate of Incorporation and the By-Laws of the [Corporation] NASD. To the extent there is any inconsistency between the provisions of this Restated Certificate of Incorporation and the By-Laws relating to such matters and the General Corporation Law, the provisions of this Restated Certificate of Incorporation and the By-Laws shall govern to the fullest extent permitted by the General Corporation Law and other applicable law. To the fullest extent permitted by the General Corporation Law of the State of Delaware and other applicable law, the Board of Governors may delegate such powers, authority, and functions as it shall determine from time to time, in a manner not inconsistent with the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," approved by the Securities and Exchange Commission, as amended from time to time.

The [Corporation] NASD shall be managed under the direction of a Board of Governors having such powers and duties as shall be provided from time to time in this Restated Certificate of Incorporation or the By-Laws of the [Corporation] NASD. The Board of Governors shall be the governing body of the [Corporation] NASD. The members of the Board of Governors shall be elected by a plurality of the votes of the members of the [Corporation] NASD present in person or represented by proxy at the annual meeting of the members of the [Corporation] NASD and entitled to vote thereat. Elections shall be by written ballot. Any Governor so elected must be nominated by the National Nominating Committee or certified by the Secretary of the NASD (as provided in the By-[laws] Laws) and must satisfy the other qualifications for Governors set forth in the By-Laws or established by resolution of the Board of Governors from time to time, which qualifications shall be consistent with the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries[" as approved by the Securities and Exchange Commission, as amended from time to time. ]." The By-Laws may also provide for such assistants to the Board of Governors, and such officers, agents, and employees, as may be deemed necessary

to administer affairs of the [Corporation] NASD.

[The Board of Governors shall be divided into three classes. Each Governor shall hold office for a term of not more than three years, such term to be fixed by the Board at the time of the nomination of such Governor, or until his successor is duly elected and qualified, or until his death, resignation, disqualification, or removal. Except for the Chief Executive Officer, no Governor may serve more than two consecutive terms, provided, however, that if a Governor is appointed to fill a term of less than one year, such Governor may serve up to two consecutive terms following the expiration of such Governor's current term. The Chief Executive Officer of the Corporation shall serve as a member of the Board until his successor is selected and qualified, or until his death, resignation, disqualification, or removal.]

The Board of Governors shall consist of the Chief Executive Officer and the Chief Operating Officer of the NASD, the Presidents of NASD Regulation, Inc. ("NASD Regulation") and The Nasdaq Stock Market ("Nasdaq"), the Chair of the National Adjudicatory Council of NASD Regulation, and Governors elected by the members of the NASD.

The Chief Executive Officer and the Chief Operating Officer of the NASD and the Presidents of NASD Regulation and Nasdaq shall serve as Governors until a successor is elected, or until death, resignation, or removal.

The Chair of the National Adjudicatory Council shall serve as a Governor for a term of one year, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Chair of the National Adjudicatory Council may not serve more than two consecutive terms as a Governor, unless a Chair of the National Adjudicatory Council is appointed to fill a term of less than one year for such office. In such case, the Chair may serve an initial term as Governor and up to two consecutive terms as a Governor following the expiration of the initial term. After serving as a Chair of the National Adjudicatory Council, an individual may serve as a Governor elected by the NASD members.

The Governors elected by the members of the NASD shall be divided into three classes and shall hold office for a term of not more than three years, such term to be fixed by the Board at the time of the nomination or certification of each such Governor, or until a successor is duly elected and qualified, or until death, resignation, disqualification, or removal. A Governor

electd by the members of NASD may not serve more than two consecutive terms. If a Governor is elected by the Board to fill a term of less than one year, the Governor may serve up to two consecutive terms following the expiration of the Governor's initial term.

In furtherance and not in limitation of the powers granted by [applicable law] the General Corporation Law of the State of Delaware, the Board of Governors is expressly authorized unless the By-Laws otherwise provide, to make, alter, or repeal the By-Laws of the [Corporation] NASD.

In the event of the refusal, failure, neglect, or inability of any member of the Board of Governors to discharge [his] such member's duties, or for any cause affecting the best interest of the [Corporation] NASD the sufficiency of which the Board of Governors shall be the sole judge, the Board shall have the power, by the affirmative vote of two-thirds of the Governors then in office, to remove such member and declare [his] such member's position vacant and that it shall be filled in accordance with the provisions of the By-Laws.

The [Corporation] NASD may, in its By-Laws, confer powers upon its Board of Governors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon them by [applicable law] the General Corporation Law of the State of Delaware.

#### Meetings and Offices

Ninth: Both members and the Board of Governors shall have power, if the By-Laws so provide, to hold their meetings and to have one or more offices within or without the State of Delaware and to keep the books of the [Corporation] NASD (subject to the provision of the statutes), outside the State of Delaware at such places as may be from time to time designated by the Board of Governors.

#### Right to Amend Certificate of Incorporation

Tenth: The [Corporation] NASD reserves the right to amend, alter, change, or repeal any provisions contained in this [certificate of incorporation] Restated Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon members herein are granted subject to this reservation.

IN WITNESS WHEREOF, this Restated Certificate of Incorporation has been signed under the seal of the [Corporation] NASD this \_\_\_\_\_ day of \_\_\_\_\_, [1996] 1997.

\* \* \* \* \*

Restated Certificate of Incorporation of NASD Regulation, Inc.

The undersigned, Mary Schapiro, President of NASD Regulation, Inc. ("NASD Regulation"), a Delaware corporation, does hereby certify:

First: That [The] the name of the corporation is NASD Regulation, Inc. The date of filing of its original Certificate of Incorporation with the Secretary of State of the State of Delaware was January 25, 1996. The name under which NASD Regulation was originally incorporated was NASD Regulation, Inc.

Second: [The address of the Corporation's] That the Certificate of Incorporation of NASD Regulation has been amended and restated in its entirety as follows:

#### Article First

The name of the corporation is NASD Regulation, Inc.

#### Article Second

The address of NASD Regulation's registered office in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, 19801. The name of [the Corporation's] NASD Regulation's registered agent at such address is The Corporation Trust Company.

#### Article Third

[Third:] The purpose of [the Corporation] NASD Regulation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware[,], and, without limiting the generality of the foregoing business or purposes to be conducted or promoted, shall include the responsibilities and functions set forth in the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," as approved by the Securities and Exchange Commission, as amended from time to time. NASD Regulation [The Corporation] is not organized for profit and no part of the net earnings of [the Corporation] NASD Regulation shall inure to the benefit of any private stockholder or individual.

#### Article Fourth

[Fourth:] The total number of shares of stock which [the Corporation] NASD Regulation shall have authority to issue is 2,000, par value \$0.01 per share, all of which shall be shares of common stock.

#### Article Fifth

[Fifth:] (a) The business and affairs of [the Corporation] NASD Regulation shall be managed by or under the

direction of the Board of Directors. The qualifications, number, tenure, powers, and duties of the members of the Board of Directors shall be provided in the By-Laws. Except as otherwise provided in this Restated Certificate of Incorporation, the By-Laws shall specify the manner by which directors of [the Corporation] NASD Regulation shall be nominated and elected.

(b) Unless and except to the extent that the By-Laws of NASD Regulation [the Corporation] shall so require, the election of directors of [the Corporation] NASD Regulation need not be by written ballot.

[Sixth: To the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, the Corporation shall indemnify any person who was or is made or is threatened to be made a party or is otherwise involved in any action, suit, or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he, or a person for whom he is the legal representative, is or was a director or officer of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, enterprise or non-profit entity, including service with respect to employee benefit plans, against all expenses, liability, and loss reasonably incurred or suffered by such person, and the Corporation shall advance expenses (including attorneys' fees) to such person. Notwithstanding the foregoing, the Corporation shall be required to indemnify a person and advance expenses to such person in connection with a proceeding (or part thereof) commenced by such person only if the commencement of such proceeding (or part thereof) was authorized by the Board of Directors. The rights conferred on any person by this Article Sixth shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of this Certificate of Incorporation, By-Law, agreement, vote of stockholders or disinterested directors or otherwise.]

#### Article Sixth

[Seventh:] A director of [the Corporation] NASD Regulation shall not be liable to [the Corporation] NASD Regulation or its [stockholders] stockholder for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law as the same exists or may hereafter be amended. Any repeal

or modification of the first sentence of this Article [Seventh] *Sixth* shall not adversely affect any right or protection of a director of [the Corporation] *NASD Regulation* existing hereunder with respect to any act or omission occurring prior to such repeal or modification.

#### Article Seventh

[Eighth:] In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized and empowered to make, alter, and repeal the By-Laws of [the Corporation] *NASD Regulation*, subject to the power of the [stockholders of the Corporation] *stockholder of NASD Regulation* to alter or repeal any By-Law made by the Board of Directors.

#### Article Eighth

[Ninth: The Corporation] *NASD Regulation* reserves the right [at any time, and from time to time,] to amend, alter, change, or repeal any provision contained in this *Restated Certificate of Incorporation*, [and other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted,] in the manner now or hereafter prescribed by [law; and all rights, preferences and privileges of whatsoever nature conferred upon stockholders, directors or any other persons whomsoever by and pursuant to this Certificate of Incorporation in its present form or as hereafter amended] *statute, and all rights conferred herein* are granted subject to [the rights reserved in this Article Ninth] *this reservation*.

#### Article Ninth

[Tenth: The Corporation] *NASD Regulation* shall have perpetual existence.

[Eleventh: The name and mailing address of the incorporator is Joseph R. Hardiman, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006.]

[Twelfth: The powers of the Incorporator shall terminate upon the filing of this Certificate of Incorporation. The names and mailing addresses of the persons who are to serve as the directors of the Corporation until the first annual meeting of the stockholders of the Corporation, or until their successors are elected and qualified are Joseph R. Hardiman, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006, Richard G. Ketchum, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006 and Mary Schapiro, c/o National Association of

Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006.]

*Third: That such Restated Certificate of Incorporation has been duly adopted by the stockholder of NASD Regulation in accordance with the applicable provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.*

In witness whereof, [I, the undersigned, being the sole incorporator hereinabove named, hereby acknowledge that the foregoing Certificate of Incorporation is my act and deed and further certify that the facts hereinabove stated are truly set forth, and accordingly I have hereunto set my hand this \_\_\_\_\_ day of January, 1996] *the undersigned have executed this certificate this day of, 1997.*

\* \* \* \* \*

Restated Certificate of Incorporation of the NASDAQ Stock Market, Inc.

[Adopted in accordance with the provisions of Section 242 and Section 245 of the General Corporation Law of the State of Delaware]

[The undersigned, Joseph R. Hardiman] *The undersigned, Alfred Berkeley*, President of The Nasdaq Stock Market, Inc. ("*Nasdaq*"), a Delaware corporation [(the "*Corporation*")], does hereby certify:

First: That the name of the [Corporation] *corporation* is The Nasdaq Stock Market, Inc. The date of filing of its original Certificate of Incorporation with the Secretary of State of the State of Delaware was November 13, 1979. The name under which [the Corporation] *Nasdaq* was originally incorporated was "*NASD Market Services, Inc.*"

Second: That the Certificate of Incorporation of [the Corporation] *Nasdaq* has been amended and restated in its entirety as follows:

#### Article First

The name of the [Corporation] *corporation* is The Nasdaq Stock Market, Inc.

#### Article Second

The address of [the Corporation's] *Nasdaq's* registered office in the State of Delaware is 1209 Orange Street, *City of Wilmington*, [Delaware 19801,] County of New Castle, *Delaware 19801*. The name of [its] *Nasdaq's* registered agent at such address is The Corporation Trust Company.

#### Article Third

The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity

for which corporations may be organized under the General Corporation Law of the State of Delaware, and, without limiting the generality of the foregoing business or purposes to be conducted or promoted, *shall include the responsibilities and functions set forth in the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," as approved by the Securities and Exchange Commission, as amended from time to time.* [shall include the following:

(a) To investigate, study, organize, develop, maintain and operate, and to assist and contract with others for the investigation, study, organization, development, maintenance and operation of systems for collecting, processing, and preparing for distribution and publication, and otherwise assisting, participating in, and coordinating the distribution and publication of information with respect to transactions in and quotations for securities by means of an electronic data processing system or systems, as such may be required or permitted by federal statute and regulation (in particular the Securities Exchange Act of 1934 ("*Exchange Act*") and the regulations thereunder, as either may be amended from time to time) on a current and continuing basis, consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets in securities, and the removal if impediments to and perfection of the mechanism of a national market system;

(b) To organize, develop, operate and maintain securities markets and related systems that assure: (i) Economically efficient execution, clearance and settlement of securities transactions; (ii) fair competition among brokers and dealers, and among exchange markets and markets other than exchange markets; (iii) the practicability of broker/dealers executing inventors' orders in the best market; (iv) the linking of all markets for qualified securities through communications and data processing facilities; and (v) appropriate regulatory oversight;

(c) To develop, organize, operate and maintain securities markets and related systems that will assist the National Association of Securities Dealers, Inc. in carrying out its regulatory responsibilities under the Exchange Act, particularly Sections 11A and 15A and all applicable rules promulgated under the Exchange Act;

(d) To establish terms, conditions, rules, regulations, orders, and schedules for the operation, maintenance, and regulation of methods, means and

systems established by the Corporation; and

(e) To offer consulting services respecting the organization, development, operation, and maintenance of securities market systems and facilities, including systems and procedures for regulatory oversight of trading in securities markets.]

#### Article Fourth

[The Corporation] *Nasdaq* shall be authorized to issue a total of 2,000 shares of common stock with no par value.

#### Article Fifth

[The Corporation] *Nasdaq* shall be governed by the Board of Directors of such number and having such qualifications, powers, and duties[,] as shall be provided in the By-Laws. The Board shall be selected in such manner, and shall serve for such term, as shall be stated in the By-Laws. The Board of Directors shall have the power to adopt,

alter, or repeal the By-Laws of [the Corporation] *Nasdaq* at any meeting at which a quorum is present by the affirmative vote of the majority of the whole Board of Directors.

A [Director of this Corporation] *director of Nasdaq* shall not be liable to [the Corporation] *Nasdaq* or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended.

Any repeal or modification of the foregoing paragraph shall not adversely affect any right or protection of a director of [the Corporation] *Nasdaq* existing hereunder with respect to any act or omission occurring prior to such repeal or modification.

#### Article Sixth

*Nasdaq reserves the right to amend, alter, change, or repeal any provisions*

*contained in this Restated Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred herein are granted subject to this reservation.*

#### Article Seventh

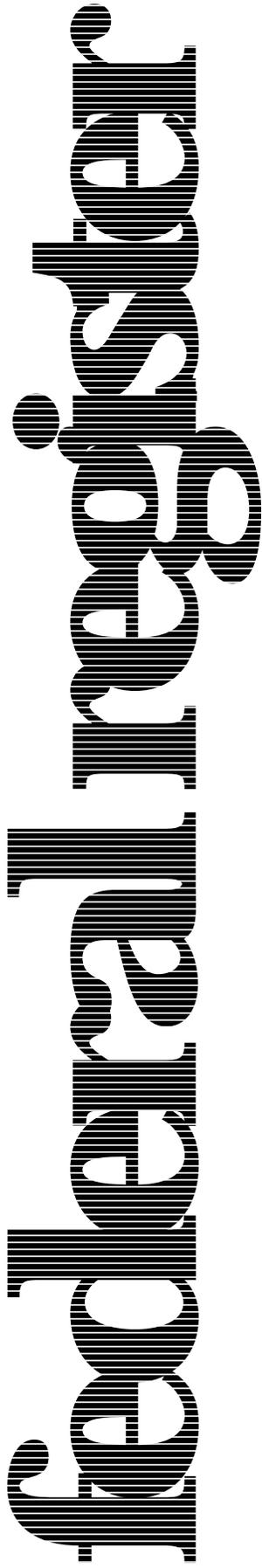
[The Corporation] *Nasdaq* shall have perpetual existence.

Third: That such Restated Certificate of Incorporation has been duly adopted by the [stockholders of the Corporation] *stockholder of Nasdaq* in accordance with the applicable provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.

In witness whereof, the undersigned have executed this certificate this [20th] \_\_\_\_ day of [December] \_\_\_\_\_, [1993] 1997.

[FR Doc. 97-26522 Filed 10-9-97; 8:45 am]

BILLING CODE 8010-01-P



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Friday  
October 10, 1997

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**Part III**

**Department of  
Commerce**

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**Patent and Trademark Office**

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**37 CFR Part 1, et al.  
Changes to Patent Practice and  
Procedure; Final Rule**

## DEPARTMENT OF COMMERCE

## Patent and Trademark Office

## 37 CFR Parts 1, 3, 5, 7, and 10

[Docket No. : 960606163-7130-02]

RIN 0651-AA80

## Changes to Patent Practice and Procedure

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Final rule.

**SUMMARY:** The Patent and Trademark Office (Office) is amending the rules of practice to simplify the requirements of the rules, rearrange portions of the rules for better context, and eliminate unnecessary rules or portions thereof as part of a government-wide effort to reduce the regulatory burden on the American public. Exemplary changes include: simplification of the procedure for filing continuation and divisional applications; amendment of a number of rules to permit the filing of a statement that errors were made without deceptive intent, without a requirement for a further showing of facts and circumstances; and elimination of the requirement that the inventorship be named in an application on the day of its filing, which eliminates the need for certain petitions to correct inventorship.

EFFECTIVE DATE: December 1, 1997.

## FOR FURTHER INFORMATION CONTACT:

Hiram H. Bernstein or Robert W. Bahr, Senior Legal Advisors, by telephone at (703) 305-9285, or by mail addressed to: Box Comments— Patents, Assistant Commissioner for Patents, Washington, DC 20231 marked to the attention of Mr. Bernstein or by facsimile to (703) 308-6916.

**SUPPLEMENTARY INFORMATION:** This rule change implements the Administration's program of reducing the regulatory burden on the American public in accordance with the changes proposed in the Notice of Proposed Rulemaking entitled "1996 Changes to Patent Practice and Procedure" (Notice of Proposed Rulemaking), published in the **Federal Register** at 61 FR 49819 (September 23, 1996), and in the *Official Gazette* at 1191 *Off. Gaz. Pat. Office* 105 (October 22, 1996). The changes involve: (1) simplification of procedures for filing continuation and divisional applications, establishing lack of deceptive intent in reissues, petition practice, and in the filing of papers correcting improperly requested small entity status; (2) elimination of unnecessary requirements, such as certain types of petitions to correct

inventorship under § 1.48; (3) removal of rules and portions thereof that merely represent instructions as to the internal management of the Office more appropriate for inclusion in the Manual of Patent Examining Procedure (MPEP); (4) rearrangement of portions of rules to improve their context; and (5) clarification of rules to aid in understanding of the requirements that they set forth.

Changes to Proposed Rules: This Final Rule contains a number of changes to the text of the rules as proposed for comment. The significant changes (as opposed to additional grammatical corrections) are discussed below. Familiarity with the Notice of Proposed Rulemaking is assumed.

*Discussion of Specific Rules and Response to Comments:* Forty-three written comments were received in response to the Notice of Proposed Rulemaking. The written comments have been analyzed. For contextual purposes, the comment on a specific rule and response to the comment are provided with the discussion of the specific rule. Comments in support of proposed rule changes generally have not been reported in the responses to comments sections.

Title 37 of the Code of Federal Regulations, Parts 1, 3, 5, 7, and 10 are amended as follows:

**Part 1***Section 1.4*

Section 1.4, paragraphs (d)(1) and (2), are amended to be combined into § 1.4 paragraphs (d)(1)(i) and (d)(1)(ii). Section 1.4(d)(1)(ii) is also amended to include the phrase "direct or indirect copy" to clarify that the copy of the document(s) constituting the correspondence submitted to the Office may be a copy of a copy (of any generation) of the original document(s), or a direct copy of the original document(s).

Section 1.4(d)(2) is amended to provide that the presentation to the Office (whether by signing, filing, submitting, or later advocating) of any paper by a party, whether a practitioner or non-practitioner, constitutes a certification under § 10.18(b), and that violations of § 10.18(b)(2) may subject the party to sanctions under § 10.18(c). That is, by presenting a paper to the Office, the party is making the certifications set forth in § 10.18(b), and is subject to sanctions under § 10.18(c) for violations of § 10.18(b)(2), regardless of whether the party is a practitioner or non-practitioner. The sentence "[a]ny practitioner violating § 10.18(b) may also be subject to disciplinary action"

clarifies that a practitioner may be subject to disciplinary action in lieu of or in addition to sanctions under § 10.18(c) for violations of § 10.18(b).

Section 1.4(d)(2) is amended so that the certifications set forth in § 10.18(b) are automatically made upon presenting any paper to the Office by the party presenting the paper. The amendments to §§ 1.4(d) and 10.18 support the amendments to §§ 1.6, 1.8, 1.10, 1.27, 1.28, 1.48, 1.52, 1.55, 1.69, 1.102, 1.125, 1.137, 1.377, 1.378, 1.804, 1.805, (§§ 1.821 and 1.825 will be reviewed at a later date in connection with other matters), 3.26, and 5.4 that delete the requirement for verification (MPEP 602) of statements of facts by applicants and other parties who are not registered to practice before the Office. The absence of a required verification has been a source of delay in the prosecution of applications, particularly where such absence is the only defect noted. The change to §§ 1.4(d) and 10.18 automatically incorporates required averments thereby eliminating the necessity for a separate verification for each statement of facts that is to be presented, except for those instances where the verification requirement is retained. Similarly, the amendments to §§ 1.4(d) and 10.18 support an amendment to § 1.97 (§§ 1.637 and 1.673 will be reviewed at a later date in connection with other matters) that changes the requirements for certifications to requirements for statements. This change in practice does *not* affect the separate verification requirement for an oath or declaration under § 1.63, affidavits or declarations under §§ 1.130, 1.131, and 1.132, or statements submitted in support of a petition under § 5.25 for a retroactive license. The statements in §§ 1.494(e) and 1.495(f) that verification of translations of documents filed in a language other than English may be required is also maintained, as such requirements are made rarely and only when deemed necessary (*e.g.*, when persons persist in translations which appear on their face to be inaccurate). The requirements for certification of service on parties in §§ 1.248, 1.510, 1.637 and 10.142 are also maintained.

Section 1.4 is also amended to add a new paragraph (g) related to an applicant who has not made of record a registered attorney or agent being required to state whether assistance was received in the preparation or prosecution of a patent application. This is transferred from § 1.33(b) for consistent contextual purposes.

### Section 1.6

Section 1.6(d)(3) is amended to provide that continued prosecution applications under § 1.53(d) may be transmitted to the Office by facsimile. However, the procedures described in § 1.8 do not apply to, and no benefit under § 1.8 will be given to, a continued prosecution application under § 1.53(d). That is, an applicant may file a continued prosecution application by facsimile transmission, but the filing date accorded such continued prosecution application will be the date the complete transmission of the continued prosecution application is received in the Office. For example, a continued prosecution application transmitted by facsimile from California at 10:30 p.m. (Pacific time) on November 18, 1997, and received in the Office at 1:30 a.m. (Eastern time) on November 19, 1997, will be accorded a filing date of November 19, 1997. An applicant filing a continued prosecution application by facsimile transmission bears the responsibility of transmitting such application in a manner and at a time that will ensure its complete and timely (§ 1.53(d)(1)(ii)) receipt in the Office.

An applicant filing an application under § 1.53(d) (a continued prosecution application) by facsimile must include an authorization to charge (at least) the basic filing fee to a deposit account, or the application must be treated under § 1.53(f) as having been filed without the basic filing fee (as fees cannot otherwise be transmitted by facsimile). To avoid paying the late filing surcharge under § 1.16(e), an application (including an application under § 1.53(d)) must include the basic filing fee (§ 1.16(e)). As such, payment of the basic filing fee for an application under § 1.53(d) on any date later than the filing date of the application under § 1.53(d) (even if paid within the period for reply to the last action in the prior application) is ineffective to avoid the late filing surcharge under § 1.16(e). Therefore, unless an application under § 1.53(d) filed by facsimile includes an authorization to charge the basic filing fee to a deposit account, the applicant will be given a notification requiring payment of the appropriate filing fee (§ 1.53(d)(3)) and the late filing surcharge under § 1.16(e) to avoid abandonment of the § 1.53(d) application.

Section 1.6(d)(3) is also amended to delete the reference to § 1.8(a)(2)(ii)(D) as this paragraph was deleted in the Final Rule entitled "Communications with the Patent and Trademark Office" ("Communications with the Office"),

published in the **Federal Register** at 61 FR 56439, 56443 (November 1, 1996), and in the *Official Gazette* at 1192 *Off. Gaz. Pat. Office* 95 (November 26, 1996).

Section 1.6(d)(6) is amended to reflect the transfer of material from §§ 5.6, 5.7, and 5.8 to §§ 5.1 through 5.5.

Section 1.6(e)(2) is amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

Section 1.6(f) is added to provide for the situation in which the Office has no evidence of receipt of an application under § 1.53(d) (a continued prosecution application) transmitted to the Office by facsimile transmission. Section 1.6(f) requires that a showing thereunder include, *inter alia*, a copy of the sending unit's report confirming transmission of the application under § 1.53(d) or evidence that came into being after the complete transmission of the application under § 1.53(d) and within one business day of the complete transmission of the application under § 1.53(d). Therefore, applicants are advised to retain copies of the sending unit's reports in situations in which such unit is used to transmit applications under § 1.53(d) to the Office or otherwise maintain a log book of the transmission of any application under § 1.53(d) to the Office. *See also* "Communications with the Patent and Trademark Office" Final Rule.

No comments were received regarding the proposed change to § 1.6.

### Section 1.8

Section 1.8(a)(2)(i)(A) is amended to specifically refer to a request for a continued prosecution application under § 1.53(d) as a correspondence filed for the purposes of obtaining an application filing date, which is excluded by § 1.8(a)(2)(i)(A) from the procedure set forth in § 1.8. The purpose of this amendment is to render it clear that, notwithstanding that a continued prosecution application under § 1.53(d) may be filed by facsimile transmission, the procedure set forth in § 1.8 does not apply to a request for a continued prosecution application under § 1.53(d) (or any correspondence filed for the purpose of obtaining an application filing date). That is, the date on the certificate of transmission (§ 1.8(a)) of an application under § 1.53(d) is not controlling (or even relevant), in that an application under § 1.53(d) (a continued prosecution application) filed by facsimile transmission will not be accorded a filing date as of the date on the certificate of transmission (§ 1.8(a)), unless Office records indicate, or applicant otherwise establishes pursuant to § 1.6(f), receipt in the Office

of the complete application under § 1.53(d) on the date on the certificate of transmission, and that date is not a Saturday, Sunday, or Federal holiday.

Section 1.8(b)(3) is amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

### Section 1.9

Section 1.9(d) is amended to define a small business concern as used in 37 CFR Chapter I as any business concern meeting the size standards set forth in 13 CFR Part 121 to be eligible for reduced patent fees. The regulations of the Small Business Administration (SBA) set forth the size standards of a business concern to be eligible for reduced patent fees. *See* 13 CFR 121.802. Thus, the language in § 1.9(d) duplicating such size standards is deleted as redundant, and to avoid confusion in the event that such size standards are subsequently changed by the SBA. The MPEP will include SBA's regulations concerning size standards for a business concern to be eligible for reduced patent fees.

Section 1.9(f) is amended to add the phrase "eligible for reduced patent fees" to clarify that a small entity as used in 37 CFR Chapter I is limited to an independent inventor, a small business concern or a non-profit organization that is eligible for reduced patent fees under 35 U.S.C. 41(h)(1).

### Section 1.10

Sections 1.10 (d) and (e) are amended to remove the requirement for a statement that is verified.

*Comment 1:* One comment suggested that § 1.10 be amended to clearly set forth the controlling date for correspondence filed by "Express Mail" under § 1.10.

*Response:* Section 1.10 was substantially amended in the "Communications with the Office" Rule Final (discussed *supra*). Section 1.10(a) as amended in the aforementioned Final Rule provides that: (1) correspondence received by the Office that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) under § 1.10 will be considered filed in the Office on the date of deposit with the USPS; (2) the date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation; and (3) if the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date.

### Section 1.11

Section 1.11(b) is amended to provide that the filing of a continued prosecution application under § 1.53(d) of a reissue application will not be announced in the *Official Gazette*. Although the filing of a continued prosecution application of a reissue application constitutes the filing of a reissue application, the announcement of the filing of such continued prosecution application would be redundant in view of the announcement of the filing of the prior reissue application in the *Official Gazette*.

### Section 1.14

Section 1.14(a) is amended to: (1) clarify the provisions of § 1.14(a); (2) provide that copies of an application-as-filed may be provided to any person on written request accompanied by the fee set forth in § 1.19(b), without notice to the applicant, if the application is incorporated by reference in a U.S. patent; and (3) treat applications in the file jacket of a pending application under § 1.53(d) as pending rather than abandoned in determining whether copies of, and access to, such applications will be granted.

Under current practice, the public is entitled to access to the original disclosure (or application-as-filed) of an application, when the application is incorporated by reference into a U.S. patent. See *In re Gallo*, 231 USPQ 496 (Comm'r Pat. 1986). Section 1.14(a)(2) is added to avoid the need for a petition under § 1.14(e) to obtain a copy of the original disclosure (or application-as-filed) of an application that is incorporated by reference into a U.S. patent.

Section 1.14 is also amended to add a paragraph (f) to recognize the change to § 1.47 (a) and (b) which add exceptions to maintaining pending applications in confidence by providing public notice to nonsigning inventors of the filing of a patent application.

*Comment 2:* One comment stated that the change from "applications preserved in secrecy" to "applications preserved in confidence" suggests a lower level of security for the applications permitting greater discovery by third parties.

*Response:* The term "secrecy" in § 1.14 was changed to "confidence" in the Final Rule entitled "Miscellaneous Changes in Patent Practice" ("Miscellaneous Changes in Patent Practice"), published in the **Federal Register** at 61 FR 42790 (August 19, 1996), and in the *Official Gazette* at 1190 *Off. Gaz. Pat. Office* 67 (September 17, 1996). This change did not represent a change in practice, but merely

conformed the language of § 1.14 to that of 35 U.S.C. 122 (the term "secrecy" is a term of art in regard to matters of national security, and its former use in § 1.14 was inappropriate).

### Section 1.16

Section 1.16 is amended to add new paragraphs (m) and (n) including the unassociated text following paragraphs (d) and (l).

No comments were received concerning § 1.16.

### Section 1.17

Section 1.17 (and § 1.136(a)) adds a recitation to an extension of time fee payment for a reply filed within a fifth month after a nonstatutory or shortened statutory period for reply was set.

Section 1.17(a) is subdivided into paragraphs (a)(1) through (a)(5), with paragraphs (a)(1) through (a)(4) setting forth the amounts for one-month through four-month extension fees. Section 1.17(a)(5) provides the small entity and other than small entity amounts for the new fifth-month extension fee.

Section 1.17(a) is being amended to permit a petition for a fifth-month extension of time. As the Office may set a shortened statutory period for reply of one-month or thirty days, whichever is longer, this authority for a petition under § 1.136(a) will permit an applicant to extend the period for reply until the six-month statutory maximum (35 U.S.C. 133) without resorting to a petition under § 1.136(b), or to extend by five months, pursuant to § 1.136(a), a non-statutory period for taking action (e.g., the time period in § 1.192(a) for filing an appeal brief).

Section 1.17 paragraphs (e), (f), and (g) are rewritten as § 1.17 paragraphs (b), (c), and (d).

Section 1.17(h) is amended to delete references to petitions under §§ 1.47, 1.48, and 1.84. Sections 1.47, 1.48, and 1.84 (a) and (b) are amended to contain a reference to the petition fee set forth in § 1.17(i), rather than the petition fee set forth in § 1.17(h).

Section 1.17(i) is amended to: (1) add a petition under § 1.41 to supply the name(s) of the inventor(s) after the filing date without an oath or declaration as prescribed by § 1.63, except in provisional applications; (2) add a petition under § 1.47 for filing by other than all the inventors or a person not the inventor; (3) add a petition under § 1.48 for correction of inventorship, except in provisional applications; (4) add a petition under § 1.59 for expungement and return of information; (5) delete the references to petitions under §§ 1.60 and 1.62 in view of the

deletion of §§ 1.60 and 1.62; (6) add a petition under § 1.84 for accepting color drawings or photographs; and (7) add a petition under § 1.91 for entry of a model or exhibit.

Section 1.17(q) is amended to add a petition under § 1.41 to supply the name(s) of the inventor(s) after the filing date without a cover sheet as prescribed by § 1.51(c)(1) in a provisional application.

Section 1.17, as well as §§ 1.103, 1.112, 1.113, 1.133, 1.134, 1.135, 1.136, 1.142, 1.144, 1.146, 1.191, 1.192, 1.291, 1.294, 1.484, 1.485, 1.488, 1.494, 1.495, (§§ 1.530, 1.550, 1.560, 1.605, 1.617, 1.640, and 1.652 will be reviewed at a later date in connection with other matters), 1.770, 1.785, (§ 1.821 will be reviewed at a later date in connection with other matters), and 5.3 are also amended to replace the phrases "response" and "respond" with the phrase "reply" for consistency with § 1.111.

*Comment 3:* One comment questioned why the terms "respond" and "response" in the rules of practice were being replaced with the term "reply."

*Response:* It is appropriate to use a single term ("reply") throughout the rules of practice, to the extent possible, to refer to that "reply" by an applicant to an Office action required to avoid abandonment and continue prosecution.

*Comment 4:* At least one comment noted that there is no statutory authority under 35 U.S.C. 41(a)(8)(C) for the \$2,010 amount set for the fifth month extension of time.

*Response:* While the Notice of Proposed Rulemaking proposed a fifth month extension fee of \$2010, a Notice of Proposed Rulemaking entitled "Revision of Patent and Trademark Fees for Fiscal Year 1998" ("1998 Fee Revision"), published in the **Federal Register** at 62 FR 24865 (May 7, 1997), and in the *Official Gazette* at 1198 *Off. Gaz. Pat. Office* 97 (May 27, 1997), proposed that this fee be set at \$2060. The Office is now adopting the \$2060 fifth month extension fee as proposed in the "1998 Fee Revision" Notice of Proposed Rulemaking.

Under 35 U.S.C. 41(a)(8)(C) (1991), the Commissioner is authorized to charge \$340 for any third or subsequent petition for a one-month extension of time. However, under 35 U.S.C. 41(f), the additional fee established pursuant to 35 U.S.C. 41(a)(8)(C) for a subsequent petition for a one-month extension of time has been increased to \$560 (i.e., \$560 is the current difference (established under 35 U.S.C. 41(a)(8)(C)) between the \$1510 fee for a four-month extension of time and the \$950 three-month extension of time). The \$1510 fee

for a four-month extension of time plus the \$560 fee for an additional month is \$2070 (this differs from the \$2060 fee proposed in the "1998 Fee Revision" Notice of Proposed Rulemaking due to rounding). Therefore, the Office is authorized under 35 U.S.C. 41(a)(8) to establish a fee of \$2060 for a five-month extension of time.

#### Section 1.21

Section 1.21(l) is amended for consistency with § 1.53, and § 1.21(n) is amended to change the reference to an improper application under §§ 1.60 or 1.62 to a reference to an application in which proceedings are terminated pursuant to § 1.53(e).

No comments were received regarding the proposed change to § 1.21.

#### Section 1.26

Section 1.26(a) is amended to better track the statutory language of 35 U.S.C. 42(d) and to add back language relating to refunds of fees paid that were not "required" that was inadvertently dropped in the July 1, 1993, publication of title 37 CFR, and from subsequent publications.

No comments were received regarding the proposed change to § 1.26.

#### Section 1.27

Section 1.27 paragraphs (a) through (d) are amended to remove the requirement that a statement filed thereunder be "verified," and to replace "aver" and "averring" with "state" and "stating." See comments relating to § 1.4(d). Section 1.27(b) is also amended for clarification with the movement of a clause relating to "any verified statement" within a sentence.

No comments were received regarding the proposed change to § 1.27.

#### Section 1.28

Section 1.28(a) is amended to remove the requirement for a statement that is "verified." See comments relating to § 1.4(d).

Section 1.28(a) is also amended to provide that a new small entity statement is not required for a continuing or reissue application where small entity status is still proper and reliance is placed on a reference to a small entity statement filed in a prior application or patent or a copy thereof is supplied. Section 1.28(a) is further amended to state that the payment of a small entity basic statutory filing fee in a nonprovisional application, which claims benefit under 35 U.S.C. 119(e), 120, 121, or 365(c) of a prior application (including a continued prosecution application) or in a reissue application, where the prior application or the

patent has small entity status, will constitute a reference in the continuing or reissue application to the small entity statement in the prior application or in the patent, thereby establishing small entity status in such a nonprovisional application.

Section 1.28(a) is also amended to require a new determination of continued entitlement to small entity status for continued prosecution applications filed under § 1.53(d) and to clarify that the refiling of applications as continuations, divisions and continuation-in-part applications and the filing of reissue applications also require a new determination of continued entitlement to small entity status prior to reliance on small entity status in a prior application or patent.

*Comment 5:* One comment asked whether the change to § 1.28 regarding small entity requires that a small entity statement be filed with each continuing application.

*Response:* While the filing of a continuing application requires a new determination of entitlement to small entity status, § 1.28(a) continues to permit reliance on a small entity statement filed in a prior application for nonprovisional continuing applications.

Section 1.28(c) is amended to remove the requirement for a statement of facts explaining how an error in payment of a small entity fee(s) occurred in good faith and how and when the error was discovered. A fee deficiency payment under § 1.28(c) must include the difference between fee(s) originally paid as a small entity and the other than small entity fee(s) in effect at the time of payment of the complete fee deficiency. A fee deficiency payment under § 1.28(c) will be treated as a representation by the party submitting the payment that small entity status was established in good faith and that the original payment of small entity fees was made in good faith. Any paper submitted under § 1.28(c) will be placed in the appropriate file without review after the processing of any check or the charging of any fee deficiency payment specifically authorized.

*Comment 6:* One comment suggested that § 1.28(c) be amended to clarify current Office practice regarding the acceptance of papers under § 1.28(c)(2) in light of two recent District Court decisions: (1) *Haden Schweitzer Corp. v. Arthur B. Myr Industries, Inc.*, 901 F. Supp. 1235, 36 USPQ2d 1020 (E.D. Mich. 1995); and (2) *DH Technology, Inc. v. Synergstex International, Inc.*, 937 F. Supp. 902, 40 USPQ2d 1754 (N.D. Cal. 1996).

*Response:* The Office is also aware of a recent District Court decision in

*Jewish Hospital of St. Louis v. Idexx Laboratories*, 951 F. Supp 1, 42 USPQ2d 1720 (D. Me. 1996), that relies on § 1.28(c)(2) exclusively. The changes to § 1.28(c) are not directed to the issue of whether § 1.28(c)(2) must be viewed as the exclusive remedy. Nevertheless, an applicant or patentee can avoid undesirable results by not claiming small entity status unless it is absolutely certain that the applicant or patentee is entitled to small entity status (*i.e.*, resolving any doubt, uncertainty, or lack of information in favor of payment of the full fee). See MPEP 509.03 ("Small entity status must not be established unless the person or persons signing the \* \* \* statement can *unequivocally* make the required self-certification" (emphasis added)).

#### Section 1.33

Section 1.33 is amended to no longer provide that the required residence and post office address of the applicant can appear elsewhere than in the oath or declaration under § 1.63. Section 1.63(a)(3) is amended to require that the post office address as well as the residence be identified therein and not elsewhere. Permitting the residence to be elsewhere in the application other than the oath or declaration, as was in § 1.33(a), would be inconsistent with unamended § 1.63(c) that states that the residence must appear in the oath or declaration. The requirement for placement of the post office address is equivalent to the requirement for the residence to eliminate confusion between the two, which often are the same destination and are usually provided in the oath or declaration. The reference in § 1.33(a) to the assignee providing a correspondence address has been moved within § 1.33(a) for clarification. Other clarifying language includes a reference to § 1.34(b), use of the terms "provided," "furnished" rather than "notified," and "application" rather than "case," and deletion of the expression "of which the Office."

The former language of § 1.33(b) is transferred to new § 1.4(g). Section 1.33(b) is amended to set forth the signature requirement for papers filed in an application (formerly in § 1.33(a)). Section 1.33(b) is specifically amended to provide that amendments and other papers filed in an application must be signed by: (1) an attorney or agent of record appointed in compliance with § 1.34(b); (2) a registered attorney or agent not of record who acts in a representative capacity under the provisions of § 1.34(a); (3) the assignee of record of the entire interest (if there is such); (4) an assignee of record of an

undivided part interest (if there is such), so long as the amendment or other paper is also signed by any assignee(s) of the remaining interest and any applicant retaining an interest; or (5) all of the applicants, including applicants under §§ 1.42, 1.43 and 1.47, unless there is an assignee of record of the entire interest and such assignee has chosen to prosecute the application to the exclusion of the applicant(s), and, as such, has taken action in the application in accordance with §§ 3.71 and 3.73. This is not a change in practice, but simply a clarification of current signature requirements.

No comments were received regarding the proposed change to § 1.33.

#### Section 1.41

Section 1.41(a) (and § 1.53) is amended to no longer require that a patent be applied for in the name of the actual inventors for an application for patent to be accorded a filing date. The requirement for use of full names is moved to § 1.63(a) for better context. Section 1.41(a) is specifically amended: (1) To provide that a patent is applied for in the name(s) of the actual inventor(s); (2) to add paragraphs (a)(1) and (a)(2) indicating how the inventorship is set forth in a nonprovisional and provisional application; and (3) to add paragraph (a)(3) indicating the need for an identifier consisting of alphanumeric characters if no name of an actual inventor is provided.

Section 1.41(a)(1) provides that the inventorship of a nonprovisional application is that inventorship set forth in the oath or declaration as prescribed by § 1.63, except as provided for in §§ 1.53(d)(4) and 1.63(d). Section 1.41(a)(1) also provides that if an oath or declaration as prescribed by § 1.63 is not filed during the pendency of a nonprovisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(b), unless a petition under this paragraph accompanied by the fee set forth in § 1.17(i) is filed supplying the name(s) of the inventor(s).

Section 1.41(a)(2) provides that the inventorship of a provisional application is that inventorship set forth in the cover sheet as prescribed by § 1.51(c)(1). Section 1.41(a)(2) also provides that if a cover sheet as prescribed by § 1.51(c)(1) is not filed during the pendency of a provisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(c), unless a petition under this paragraph accompanied by the fee set forth in

§ 1.17(q) is filed supplying the name(s) of the inventor(s).

35 U.S.C. 120 and § 1.78(a) require, *inter alia*, that an application have at least one inventor in common with a prior application to obtain the benefit of the filing date of such application. Considering the executed oath or declaration (or cover sheet in a provisional application) the sole mechanism for naming the inventor(s) would operate as a trap in the event that an application were abandoned prior to the filing of an oath or declaration in favor of a continuing application (or in the event that a cover sheet was not filed in a provisional application). To avoid this result, § 1.41 as adopted provides that the inventorship is that inventorship named in an executed oath or declaration under § 1.63 (or in the cover sheet under § 1.51(c)(1) in a provisional application), but that if no executed oath or declaration under § 1.63 (or cover sheet under § 1.51(c)(1) in a provisional application) is filed during the pendency of the application, the inventorship will be considered to be the inventor(s) named in the original application papers.

In the peculiar situation in which no inventor is named in the original application papers (or the correct inventor(s) are not named in the original application papers), and no executed oath or declaration under § 1.63 (or cover sheet under § 1.51(c)(1) in a provisional application) is filed during the pendency of the application, it will be necessary for the applicant to file a petition under § 1.41(a) (and appropriate fee) to name the inventor(s). No explanation (other than that the paper is supplying or changing the name(s) of the inventor(s) or showing of facts concerning the inventorship or any delay in naming the inventorship is required or desired in a petition under § 1.41(a). The petition fee is required to cover (or defray in a provisional application) the costs of updating the Office's records for the application.

Where no inventor(s) is named on filing, the Office requests that an identifying name be submitted for the application. The use of very short identifiers should be avoided to prevent confusion. Without supplying at least a unique identifying name the Office may have no ability or only a delayed ability to match any papers submitted after filing of the application and before issuance of an identifying application number with the application file. Any identifier used that is not an inventor's name should be specific, alphanumeric characters of reasonable length, and should be presented in such a manner that it is clear to application processing

personnel what the identifier is and where it is to be found. It is strongly suggested that applications filed without an executed oath or declaration under § 1.63 or 1.175 include the name of the person(s) believed to be the inventor for identification purposes. Failure to apprise the Office of the application identifier being used may result in applicants having to resubmit papers that could not be matched with the application and proof of the earlier receipt of such papers where submission was time dependent.

As any inventor(s) named in the original application papers is considered to be the inventor(s) only when no oath or declaration under § 1.63 is filed in a nonprovisional application or cover sheet under § 1.51(c)(1) filed in a provisional application, the recitation of the inventorship in an application submitted under § 1.53 (b) or (d) without an executed oath or declaration or cover sheet, respectively, for purposes of identification may be changed merely by the later submission of an oath or declaration executed by a different inventive entity without recourse to a petition under § 1.41 or 1.48.

*Comment 7:* One comment noted that when an application is filed only an alphanumeric identifier may be used, which would of necessity require a correction of inventorship, and questioned how a verified statement under § 1.48(a) could be filed as there would be no person to sign such statement, whether the Office will require that the name(s) of the inventor(s) be submitted within a specified period, and whether the filing date will be lost if the name(s) of the inventor(s) is not submitted within such period.

*Response:* The name(s) of the inventor(s) in a nonprovisional application are provided in the oath or declaration under § 1.63 (§ 1.41(a)(2)) and the name(s) of the inventor(s) in a provisional application are provided in the cover sheet (§ 1.41(a)(3)). Thus, an application filed without the name(s) of the inventor(s) must also have been filed without an oath or declaration under § 1.63 (nonprovisional) or cover sheet (provisional).

The Office will set a time period in a nonprovisional application filed without an oath or declaration under § 1.63 for the filing of such an oath or declaration (§ 1.53(f)). The Office will set a time period in a provisional application filed without a cover sheet for the filing of such cover sheet (§ 1.53(g)). The subsequently filed oath or declaration or cover sheet will

provide the name(s) of the inventor(s). No petition under § 1.48(a) would be required where there was an alphanumeric identifier (and not a name of a person) or where the person(s) set forth as the inventor(s) was incorrect.

In the event that an oath or declaration or cover sheet is not timely filed, the application will become abandoned and the inventorship will be considered to be the inventor(s) named in the original application papers. The failure to timely file an oath or declaration, cover sheet, or the name(s) of the inventor(s) is not a filing date issue.

*Comment 8:* One comment thought that the proposed change eliminating the need to identify any inventor would lead to sloppy filing procedures and that it should in almost all cases be possible for practitioners to correctly identify the inventors at the time of filing.

*Response:* Experience has demonstrated that a significant number of applications filed under § 1.53(b) without an executed oath or declaration have been filed with incorrect inventorships with explanations running from "there was no time to investigate the inventorship" to "the inventors contacted either did not understand the inventorship requirements under U.S. patent law or did not appreciate that the claims as filed included or did not include the contribution of the omitted or erroneously added inventor." Additionally, Office experience is that while almost all § 1.48(a) petitions concerning such matters are eventually granted, only a small percentage are granted on the initial petition thereby causing a prolonged prosecution period, which is undesirable in view of the amendment to 35 U.S.C. 154 contained in the Uruguay Round Agreements Act (URAA), Pub. L. 103-465, 108 Stat. 4809 (1994).

#### Section 1.47

Section 1.47 paragraphs (a) and (b) are amended, pursuant to 35 U.S.C. 116 and 35 U.S.C. 118, to provide for publication in the *Official Gazette* of a notice of filing for all applications, except for continued prosecution applications under § 1.53(d), submitted under this section rather than only when notice to the nonsigning inventor(s) is returned to the Office undelivered or when the address of the nonsigning inventor(s) is unknown. The information to be published, after grant of the § 1.47 petition, will include: The application number, filing date, invention title and name(s) of the nonsigning inventor(s). Letters returned as undeliverable are difficult to match with the related

application file, and when matched with the file, the applications are burdensome to flag as requiring further action by the Office. Accordingly, the return of letters is not a desirable means of triggering publication of a notice to a nonsigning inventor as to the filing of the application. Furthermore, when a returned letter is used as such a trigger, another review of the application must be made for returned correspondence. As the best time for review of returned letters is after allowance, but before issuance, of an application, processing of the application would be delayed and done at a time that could be best used for printing related processing requirements. Printing of notice of the filing of all applications wherein § 1.47 status is granted does not require any such review to be made. In order to best balance the obligation of providing notice to inventors and efficient processing of applications, notice in the *Official Gazette* of the filing of § 1.47 applications will be prepared essentially at the same time that the letter notice is directly sent to the nonsigning inventor.

Paragraphs (a) and (b) of this section are also amended to exclude the filing of continued prosecution applications under § 1.53(d) from the notice requirement.

Section 1.47 is also amended for clarification purposes. A reference to an "omitted inventor" in § 1.47(a) is replaced with "nonsigning inventor." The statements in § 1.47 paragraphs (a) and (b) that a patent will be granted upon a satisfactory showing to the Commissioner are deleted as unnecessary. Section 1.47(b) is amended to clarify that it applies only where none of the inventors are willing or can be found to sign the oath or declaration by substitution of "an inventor" by "all the inventors." The use of "must state" in regard to the last known address is deleted as redundant in view of the explicit requirement for such address in the rule. The sentence in § 1.47(b) referring to the filing of the assignment, written agreement to assign or other evidence of proprietary interest is deleted as redundant in view of the requirement appearing earlier in § 1.47(b) calling for "proof of pertinent facts."

*Comment 9:* One comment believed that the amendment to § 1.47(b) results in a change in practice permitting an assignee to proceed thereunder only where all the inventors refuse to sign, and that the assignee should not be precluded from making the required declaration where only one inventor refuses to cooperate as the other inventors may not have personal knowledge of the facts.

*Response:* While the specific language of § 1.47(b) is amended to recite the condition that "all the inventors refuse to execute an application" the prior use of the term "inventor" was intended to mean and was interpreted as meaning all inventors. See MPEP 409.03(b). Accordingly, the language clarification is not a change in practice.

Although it is unclear as to what particular "facts" the comment is addressed to that the other inventors would not have personal knowledge of, facts as to the inventorship of the noncooperating inventor would better lie with the other inventors who are after all required to be joint inventors, 35 U.S.C. 116, and therefore the other inventors should have the best knowledge of the facts required for a declaration under § 1.63. Any declaration of facts, in support of the petition, to show, e.g., that an inventor has refused to sign a declaration after having been given an opportunity to do so, should be made by someone with first-hand knowledge of the events, such as the attorney who presented the inventor with the application papers.

#### Section 1.48

Section 1.48 provides for correction of inventorship in an application (other than a reissue application). Section 1.324 provides for correction of inventorship in a patent. Sections 1.171 and 1.175 provide for correction of inventorship in a patent *via* a reissue application.

Section 1.48 is amended in its title to clarify that the section concerns patent applications, other than reissue applications, and not patents. Where a patent names an incorrect inventive entity, the inventorship error may be corrected by reissue. See MPEP 1402. Where a reissue application names an incorrect inventive entity in the executed reissue oath or declaration (whether the reissue application is filed for the sole purpose or in-part to correct the inventorship, or is filed for purposes other than correction of the inventorship), a new reissue oath or declaration in compliance with § 1.175 may be submitted with the correct inventorship without a petition under § 1.48. This is because it is the inventorship of the patent being reissued that is being corrected (*via* a reissue application).

35 U.S.C. 251, ¶ 3, provides that the provisions of title 35, U.S.C., relating to applications apply to reissue applications. 35 U.S.C. 116, ¶ 3, authorizes the Commissioner to permit correction of inventorship in an application under such terms as the Commissioner prescribes. The

Commissioner has determined that correction of inventorship in a reissue application may be accomplished under 35 U.S.C. 251 *via* the reissue oath or declaration, without resort to a petition under § 1.48. Therefore, § 1.48 has been amended to specifically exclude its applicability to correction of inventorship in a reissue application.

Section 1.48(a) will not require correction of the inventorship if the inventorship or other identification under § 1.41 was set forth in error on filing of the application. Section 1.48(a) is amended to apply only to correction of inventor or inventors, in applications, other than reissue applications, from that named in an originally filed executed oath or declaration and not to the naming of inventors or others for identification purposes under § 1.41. The statement to be submitted will be required only from the person named in error as an inventor or from the person who through error was not named as an inventor rather than from all the original named inventors so as to comply with 35 U.S.C. 116. The requirement that any amendment of the inventorship under § 1.48(a) be "diligently" made has been removed. The applicability of a rejection under 35 U.S.C. 102(f) or (g) against an application with the wrong inventorship set forth therein and any patent that would issue thereon is a sufficient motivation for prompt correction of the inventorship without the need for a separate requirement for diligence.

*Comment 10:* Two comments expressed opposition to deletion of the diligence requirement in § 1.48 paragraphs (a) through (c) in that removal thereof would seem to promote delay in correction of the inventorship and decrease the importance of having the correct inventorship.

*Response:* In addition to the motivation noted in the explanation of the rules for not allowing a patent to issue with improper inventorship, the criteria for correction of the inventorship becomes more restrictive subsequent to issuance under § 1.324 (having a statutory basis under 35 U.S.C. 256) than under § 1.48(a) (having a statutory basis under 35 U.S.C. 116). 35 U.S.C. 256 requires participation by all the parties including each original named inventor, which participation may be harder to obtain after the patent has issued. Petitions under § 1.48(a) filed earlier while the application is pending may seek waiver under § 1.183 of participation of some of the parties needed to participate. Additionally, petitions under § 1.48 in pending applications are not entered as a matter of right in rejected (the criteria of § 1.116 applies) or allowed (the criteria

of § 1.312 applies) applications. See § 1.48(a) and MPEP 201.03.

A clarifying reference to § 1.634 is added in § 1.48(a) for instances when inventorship correction is necessary during an interference and has been moved from § 1.48(a)(4) for improved contextual purposes.

The § 1.48(a)(1) statement requires a statement only as to the lack of deceptive intent rather than a statement of facts to establish how the inventorship error was discovered and how it occurred, since the latter requirement is deleted. Additionally, the persons from whom a statement is required now includes any person who through error was not named as an inventor but limits statements from the original named inventors to only those persons named in error as inventors rather than all persons originally named as inventors including those correctly named. The paragraph is amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

*Comment 11:* One comment opposed the removal of the Office from examining the issue of inventorship as substantive law invalidates patents that have issued in the names of incorrect inventors and the Office is charged with the duty of examining applications for the purpose of denying issue to those applications that do not meet the standards of patentability. Where an oath has originally been filed asserting the proper inventor is one entity and a subsequent paper asserts that the proper inventor is another, under such circumstances "the facts are inherently suspect" and an investigation by the Office is warranted and required by statute.

*Response:* The amendments to § 1.48 have otherwise received overwhelming support.

The Office has pursued the existence of improper inventorship in applications by rejection under 35 U.S.C. 102(f) or (g) and will continue to do so independent of the change in the verified statement requirements under § 1.48 paragraphs (a) or (c). A request to change inventorship, however, often requested by the current inventors or assignee on their own initiative is not seen to be inherently fraught with deceptive intent as to warrant a close and detailed examination absent more. A statement that the error was made without deceptive intent is seen to be a sufficient investigation complying with the statutory requirement under 35 U.S.C. 116, particularly as most petitions are eventually granted or an application can be refiled naming the new desired inventive entity. Refiling of

the application to change the inventorship will not cause the Office, absent more, to initiate an investigation as to the correct inventorship or cause a rejection under 35 U.S.C. 102(f) or (g) to be made. Additionally, it should be noted that the Office views a petition under § 1.48 to be a procedural matter and not to represent a substantive determination as to the actual inventorship. See MPEP 201.03, Verified Statement of Facts.

For those situations where there was deceptive intent, the Office is lacking certain necessary tools for a thorough inquiry (*e.g.*, subpoena authority) to ascertain the truth thereof (as in other situations under §§ 1.28 and 1.56). However, the inquiry cannot be waived by the Office due to the statutory requirement under 35 U.S.C. 116. There is no other reasonable course of action than to accept as an explanation for the execution of a § 1.63 oath or declaration setting forth an erroneous inventive entity that the inventor did not remember the contribution of the omitted inventor at the time the oath or declaration was executed (absent subpoena power and *inter partes* hearings), and therefore further inquiries into the matter other than a statement of lack of deceptive intent are a waste of Office resources.

*Comment 12:* One comment suggested that in limiting the submission of a verified statement of facts to only the parties being added or deleted as inventors, agreement of the original named inventors should also be obtained as is currently done when verified statements of facts from all the original named inventors are required.

*Response:* Agreement or acquiescence of the original named inventors, to the extent that they remain as inventors, to the new inventorship will be obtained through the retained requirement that the actual inventive entity complete a new oath or declaration under § 1.63, which must set forth the new inventive entity. Additionally, through the rule changes to this section and §§ 1.28 and 1.175 the Office is decreasing its investigation of claims relating to a lack of deceptive intent. The remaining purpose of these rules is to force the applicant(s) to merely make an assertion as to a lack of deceptive intent thereby permitting subsequent reviewers (tribunals or otherwise) to determine, in light of all the available facts, whether the applicant(s) complied with the statute.

Section 1.48(a)(2) is amended for clarification purposes to indicate the availability of §§ 1.42, 1.43 or 1.47 in meeting the requirement for an executed oath or declaration under § 1.63 from

each actual inventor. Section 1.47 is only applicable to the person to be added as an inventor (inventors named in an application transmittal letter can be deleted without petition). For those persons already having submitted an executed oath or declaration under § 1.63, a petition under § 1.183, requesting waiver of reexecution of an oath or declaration, may be an appropriate remedy. The requirement for an oath or declaration is maintained in § 1.48(a) notwithstanding its replacement in § 1.324 for issued patents by a statement of agreement or lack of disagreement with the requested change in view of the need to satisfy the duty of disclosure requirement in a pending application that is set forth in a § 1.63 oath or declaration.

Section 1.48(a)(4) is amended to include a citation to § 3.73(b) to clarify the requirements for submitting a written consent of assignee, which is subject to the requirement under § 3.73(b), and to delete the reference to an application involved in an interference, which is being moved to § 1.48(a). Section 1.48(a)(4) is also amended to clarify that the assignee required to submit its written consent is only the existing assignee of the original named inventors at the time the petition is filed and not any party that would become an assignee based on the grant of the inventorship correction.

Section 1.48(b) is also amended to remove the requirement that a petition thereunder be diligently filed. The applicability of a rejection under 35 U.S.C. 102 (f) or (g) against an application with the wrong inventorship set forth therein and any patent that would issue thereon is sufficient motivation for prompt correction of the inventorship without the need for a separate requirement for diligence.

Section 1.48(b) is amended to have a clarifying reference to § 1.634 added for instances when inventorship correction is necessary during an interference.

*Comment 13:* A comment noted that the literal wording of § 1.48(b) permits correction thereunder only where the correct inventors were named on filing thereby excluding correction under § 1.48(b) where an incorrect inventorship was named on filing that was subsequently corrected under § 1.48(a) and, subsequent to the correction prosecution of the application, required additional correction under § 1.48(b).

*Response:* The comment is accepted and § 1.48(b) has been modified to delete "when filed" after "nonprovisional application" for clarification purposes. Additionally, the term "originally" in the first sentence of

paragraph (b) has been replaced with "currently."

Section 1.48(c) is amended so that a petition thereunder no longer needs to meet the current requirements of § 1.48(a), which are also changed. A statement from each inventor being added that the inventorship amendment is necessitated by amendment of the claims and that the error occurred without deceptive intent is required under § 1.48(c)(1) rather than the previous requirement of a statement from each original named inventor. The previous requirements under § 1.48(a) for an oath or declaration, the written consent of an assignee and the written consent of any assignee are retained, but are now separately set forth in §§ 1.48 paragraphs (c)(2) through (c)(4). The particular circumstances of a petition under this paragraph, adding an inventor due to an amendment of the claims that incorporates material attributable to the inventor to be added, is seen to be indicative of a lack of deceptive intent in the original naming of inventors. Accordingly, all that must be averred to is that an amendment of the claims has necessitated correction of the inventorship and that the inventorship error existing in view of the claim amendment occurred without deceptive intent. The previous requirement for diligence in filing the petition based on an amendment to the claims is not retained as applicants have the right, prior to final rejection or allowance, to determine when particular subject matter is to be claimed.

Applicants should note that any petition under § 1.48 submitted after allowance is subject to the requirements of § 1.312, and a petition submitted after final rejection is not entered as a matter of right.

Section 1.48(c)(2) is amended to clarify the availability of §§ 1.42, 1.43 and 1.47 in meeting the requirement for an executed oath or declaration under § 1.63. Section 1.47 is only applicable to the person to be added as an inventor. For those persons already having an executed oath or declaration under § 1.63, a petition under § 1.183, requesting waiver of reexecution of an oath or declaration, may be an appropriate remedy.

Section 1.48(c)(4) is amended to clarify that the assignee required to submit its written consent is only the existing assignee of the original named inventors at the time the petition is filed and not any party that would become an assignee based on the grant of the inventorship correction. A citation to § 3.73(b) is presented.

Section 1.48(d) is amended by addition of "their part" to replace "the

part of the actual inventor or inventors" and of "omitted" to replace "actual" to require statements from the inventors to be added rather than from all the actual inventors so as to comply with 35 U.S.C. 116.

Section 1.48(d)(1) is also clarified to specify that the error to be addressed is the inventorship error. It is not expected that the party filing a provisional application will normally need to correct an error in inventorship under this paragraph by adding an inventor therein except when necessary under § 1.78 to establish an overlap of inventorship with a continuing application.

Section 1.48(d)(1) is also amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

Section 1.48(e)(1) is amended to replace a requirement in provisional applications that the required statement be one "of facts" directed towards "establishing that the error" being corrected "occurred without deceptive intention," requiring only a statement that the inventorship error occurred without deceptive intent. Paragraph (e)(1) is also amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18. It is not expected that the party filing a provisional application would need to file a petition under this paragraph since the application will go abandoned by operation of law (35 U.S.C. 111(b)(5)), and the need to delete an inventor will not affect the overlap of inventorship needed to claim priority under § 1.78(a)(3) for any subsequently filed nonprovisional application.

Section 1.48(e)(3) is amended to clarify that the assignee required to submit its written consent is only the prior existing assignee before correction of the inventorship is granted and not any party that would become an assignee based on the grant of the inventorship correction. A reference to § 3.73(b) is added.

Section 1.48(f) is added to provide that the later filing of an executed oath or declaration (or cover sheet (§ 1.51(c)(1)) in a provisional application) during the pendency of the application would act to correct the inventorship without a specific petition for such correction and will be used to further process the application notwithstanding any inventorship or other identification name earlier presented.

Section 1.48(g) is added to specifically recognize that the Office may require such other information as may be deemed appropriate under the

particular circumstances surrounding a correction of the inventorship.

#### Section 1.51

Section 1.51, paragraphs (a)(1) and (a)(2), are re-written as § 1.51, paragraphs (b) and (c), respectively, and § 1.51(b) is re-written as § 1.51(d). Section 1.51(c) covering the use of an authorization to charge a deposit account is removed as unnecessary in view of § 1.25(b).

No comments were received regarding the proposed change to § 1.51.

#### Section 1.52

Section 1.52, paragraphs (a) and (d), are amended to remove the requirement that the translation be verified in accordance with the change to §§ 1.4(d)(2) and 10.18. Section 1.52, paragraph (c), is amended to remove the reference to §§ 1.123 through 1.125 to: (1) reflect a transfer of material from §§ 1.123 and 1.124 to § 1.121; (2) further clarify that § 1.125 is not a vehicle amendment of an application; and (3) to clarify that alterations to application papers may be made on, as well as before, the signing of the oath or declaration. Section 1.52, paragraphs (a) and (d), are also amended to clarify the need for a statement that the translation being offered is an accurate translation, as in § 1.69(b).

*Comment 14:* Two comments were received asking whether the attorney can sign the statement that the translation is accurate, and how much firsthand knowledge does a practitioner need to know that the translation is accurate.

*Response:* The Office will accept a statement that the translation is accurate from any party. However, any party signing such statement must keep in mind the averments that are made under §§ 1.4(d) and 10.18. The actual firsthand knowledge needed by a practitioner is that amount of knowledge to comply with the averments in §§ 1.4(d) and 10.18.

*Comment 15:* A comment questioned whether there is any difference between the previous language of "verified translation" and the present language of "accurate translation."

*Response:* The previous language was directed at a verification that the translation is accurate. A verification requirement is now unnecessary due to the amendments to §§ 1.4(d) and 10.18. Thus, § 1.52(d) is amended to include the more direct term "accurate."

#### Section 1.53

Section 1.53 is amended to include headings for each paragraph for purposes of clarity.

Section 1.53(a) is amended to state that "[a]ny papers received in the Patent and Trademark Office which purport to be an application for a patent will be assigned an application number for identification purposes." That is, the Office will refer to papers purporting to be an application for a patent as an "application" and assign such "application" an application number for identification purposes. This reference, however, does not imply that such papers meet the requirements in § 1.53(b) to be accorded a filing date or constitute an "application" within the meaning of 35 U.S.C. 111.

Section 1.53(b) is amended to provide that: (1) the filing date of an application for patent filed under § 1.53(b) is the date on which a specification as prescribed by 35 U.S.C. 112 containing a description pursuant to § 1.71 and at least one claim pursuant to § 1.75, and any drawing required by § 1.81(a) are filed in the Office; (2) no new matter may be introduced into an application after its filing date; (3) a continuation or divisional application filed by all or by fewer than all of the inventors named in a prior nonprovisional application may be filed under § 1.53(b) or (d); and (4) a continuation or divisional application naming an inventor not named in the prior nonprovisional application or a continuation-in-part application must be filed under § 1.53(b).

Section 1.53(c) is amended to provide for provisional applications (formerly provided for in § 1.53(b)(2)). Section 1.53(c) includes the language of former § 1.53(b)(2), with certain changes for purposes of clarity. Section 1.53(c)(i), for example, includes language requiring either the provisional application cover sheet required by § 1.51(c)(1) or a cover letter identifying the application as a provisional application. The cover letter may be an application transmittal letter or some other paper identifying the accompanying papers as a provisional application.

Section 1.53(d) is amended to provide for continued prosecution applications. Section 1.53(d)(1) provides that a continuation or divisional application, but not a continuation-in-part, of a prior nonprovisional application may be filed as a continued prosecution application under § 1.53(d), subject to the conditions specified in paragraph (d)(1)(i) and (d)(1)(ii). That is, an application under § 1.53(d) cannot be a continuation-in-part application, and the prior application cannot be a provisional application.

Section 1.53(d)(1)(i) specifies that the prior application be either: (1) Complete as defined by § 1.51(b) and filed on or

after June 8, 1995; or (2) the national stage of an international application in compliance with 35 U.S.C. 371 and filed on or after June 8, 1995. The phrase "prior" application in § 1.53(d)(1) means the application immediately prior to the continued prosecution application under § 1.53(d), in that a continued prosecution application under § 1.53(d) may claim the benefit under 35 U.S.C. 120, 121, or 365(c) of applications filed prior to June 8, 1995 so long as the application that is immediately prior to the continued prosecution application under § 1.53(d) was filed on or after June 8, 1995.

Section 1.53(d)(1)(ii) specifies that the application under § 1.53(d) be filed before the earliest of: (1) Payment of the issue fee on the prior application, unless a petition under § 1.313(b)(5) is granted in the prior application; (2) abandonment of the prior application; or (3) termination of proceedings on the prior application.

Section 1.53(d)(2) provides that the filing date of a continued prosecution application is the date on which a request on a separate paper for an application under § 1.53(d) is filed. That is, a request for an application under § 1.53(d) cannot be submitted within papers filed for another purpose (e.g., the filing of a "conditional" request for a continued prosecution application within an amendment after final for the prior application is an improper request for a continued prosecution application under § 1.53(d)).

In addition, a "conditional" request for a continued prosecution application will not be permitted. Any "conditional" request for a continued prosecution application submitted (as a separate paper) with an amendment after final in an application will be treated as an unconditional request for a continued prosecution application of such application. This will result (by operation of § 1.53(d)(2)(v)) in the abandonment of such (prior) application, and (if so instructed in the request for a continued prosecution application) the amendment after final in the prior application will be treated as a preliminary amendment in the continued prosecution application.

Section 1.53(d)(2) further provides that an application filed under § 1.53(d): (1) Must identify the prior application (§ 1.53(d)(i)); (2) discloses and claims only subject matter disclosed in the prior application (i.e., is a continuation or divisional, but not a continuation-in-part) (§ 1.53(d)(1)(ii)); (3) names as inventors the same inventors named in the prior application on the date the application under § 1.53(d) was filed, except as provided in § 1.53(d)(4)

(§ 1.53(d)(2)(iii)); (4) includes the request for an application under § 1.53(d), will utilize the file jacket and contents of the prior application, including the specification, drawings and oath or declaration, from the prior application to constitute the new application, and will be assigned the application number of the prior application for identification purposes (§ 1.53(d)(2)(iv)); and (5) is a request to expressly abandon the prior application as of the filing date of the request for an application under § 1.53(d) (§ 1.53(d)(2)(v)).

Section 1.53(d)(3) provides that the filing fee for a continued prosecution application filed under § 1.53(d) is: (1) The basic filing fee as set forth in § 1.16; and (2) any additional § 1.16 fee due based on the number of claims remaining in the application after entry of any amendment accompanying the request for an application under § 1.53(d) and entry of any amendments under § 1.116 not entered in the prior application which applicant has requested to be entered in the continued prosecution application. See 35 U.S.C. 41(a) (1)–(4).

Section 1.53(d)(4) provides that an application filed under § 1.53(d) may be filed by fewer than all the inventors named in the prior application, provided that the request for an application under § 1.53(d) when filed is accompanied by a statement requesting deletion of the name or names of the person or persons who are not inventors of the invention being claimed in the new application, and that no person may be named as an inventor in an application filed under § 1.53(d) who was not named as an inventor in the prior application on the date the application under § 1.53(d) was filed, except by way of a petition under § 1.48. Thus, an application under § 1.53(d) must name as inventors either the same as (§ 1.53(d)(2)(iii)) or fewer than all of (§ 1.53(d)(4)) the inventors named in the prior application. A request for an application under § 1.53(d) purporting to name as an inventor a person not named as an inventor in the prior application (even if accompanied by a new oath or declaration under § 1.63 listing that person as an inventor) will be treated as naming the same inventors named in the prior application (§ 1.53(d)(2)(iii)).

Section 1.53(d)(5) provides that: (1) Any new change must be made in the form of an amendment to the prior application; (2) no amendment in an application under § 1.53(d) (a continued prosecution application) may introduce new matter or matter that would have been new matter in the prior

application; and (3) any new specification filed with the request for an application under § 1.53(d) will not be considered part of the original application papers, but will be treated as a substitute specification in accordance with § 1.125. Pursuant to the provisions of § 1.53(d)(5), where applicant desires entry of an amendment in the application under § 1.53(d) that was previously denied entry under § 1.116 in the prior application, the applicant must request its entry (and pay any additional claims fee required by § 1.53(d)(3)(ii)) in the application under § 1.53(d) prior to action by the Office in the application under § 1.53(d). Any amendment submitted with the request for an application under § 1.53(d) that seeks to add matter that would have been new matter in the prior application will be objected to under § 1.53(d), and the applicant will be required to cancel the subject matter that would have been new matter in the prior application.

Section 1.53(d)(6) provides that the filing of a continued prosecution application under § 1.53(d) will be construed to include a waiver of confidentiality by the applicant under 35 U.S.C. 122 to the extent that any member of the public who is entitled under the provisions of § 1.14 to access to, copies of, or information concerning either the prior application or any continuing application filed under the provisions of this paragraph may be given similar access to, copies of, or similar information concerning, the other application(s) in the application file.

Section 1.53(d)(7) provides that a request for an application under § 1.53(d) is a specific reference under 35 U.S.C. 120 to every application assigned the application number identified in such request, and that no amendment in a continued prosecution application under § 1.53(d) shall delete this specific reference to any prior application. That is, other than the identification of the prior application in the request required by § 1.53(d) for a continued prosecution application, a continued prosecution application needs no further identification of or reference to the prior application (or any prior application assigned the application number of such application under § 1.53(d)) under 35 U.S.C. 120 and § 1.78(a)(2).

Section 1.53(d)(8) provides that in addition to identifying the application number of the prior application, applicant is urged to furnish in the request for an application under § 1.53(d) the following information relating to the prior application to the best of his or her ability: (1) Title of

invention; (2) name of applicant(s); and (3) correspondence address.

Section 1.53(d)(9) provides that: (1) Envelopes containing only requests and fees for filing an application under § 1.53(d) should be marked "Box CPA" and (2) requests for an application under § 1.53(d) filed by facsimile transmission should be clearly marked "Box CPA."

Section 1.53(e)(1) provides that if an application deposited under § 1.53 paragraphs (b), (c), or (d) does not meet the respective requirements in § 1.53 paragraphs (b), (c), or (d) to be entitled to a filing date, applicant will be so notified, if a correspondence address has been provided, and given a time period within which to correct the filing error.

Section 1.53(e)(2) provides that: (1) Any request for review of a notification pursuant to § 1.53(e)(1), or a notification that the original application papers lack a portion of the specification or drawing(s), must be by way of a petition pursuant to § 1.53(e); (2) any petition under § 1.53(e) must be accompanied by the fee set forth in § 1.17(i) in an application filed under § 1.53 paragraphs (b) or (d), and the fee set forth in § 1.17(q) in an application filed under § 1.53(c); and (3) in the absence of a timely (§ 1.181(f)) petition pursuant to this paragraph, the filing date of an application in which the applicant was notified of a filing error pursuant to paragraph (e)(1) of this section will be the date the filing error is corrected.

Section 1.53(e)(3) provides that if an applicant is notified of a filing error pursuant to § 1.53(e)(1), but fails to correct the filing error within the given time period or otherwise timely (§ 1.181(f)) take action pursuant to § 1.53(e)(2), proceedings in the application will be considered terminated, and that where proceedings in an application are terminated pursuant to § 1.53(e)(3), the application may be disposed of, and any filing fees, less the handling fee set forth in § 1.21(n), will be refunded.

Section 1.53(f) is amended to include the language of former § 1.53(d)(1) and to provide that the oath or declaration required for a continuation or divisional application under § 1.53(b) may be a copy of the executed oath or declaration filed in the prior application (under § 1.63(d)).

Section 1.53 paragraphs (g), (h), (i), and (j) are added and include the language of former § 1.53 paragraphs (d)(2), (e)(1), (e)(2), and (f), respectively.

*Comment 16:* The majority of the comments supported the deletion of §§ 1.60 and 1.62 in favor of the proposed amendment to § 1.53.

*Response:* The Office is deleting §§ 1.60 and 1.62 in favor of an amended § 1.53.

*Comment 17:* Several comments suggested that the Office adopt a continued prosecution procedure for applications filed on or after June 8, 1995 similar to the practice set forth in § 1.129(a), rather than the continued prosecution application practice set forth in § 1.53(d).

*Response:* Section 532(a)(2)(A) of Pub. L. 103-465 provides specific authorization for the practice set forth in § 1.129(a). There is currently no statutory authority for the Office to simply charge the patent fees set forth in 35 U.S.C. 41(a) for further examination of an application. 35 U.S.C. 41(d) would authorize the Office to further examine an application for a fee that recovers the estimated average cost to the Office of such further examination; however, as 35 U.S.C. 41(h) is applicable only to fees under 35 U.S.C. 41 (a) and (b), the Office would not be authorized to provide a small entity reduction in regard to such fee. Thus, the only mechanism by which the Office may provide further examination for a fee to which the small entity reduction is applicable is *via* a continuing application.

Section 209 of H.R. 3460, 104th Cong., 2d Sess. (1996), would have provided statutory authority for the further reexamination of an application for a fee to which the small entity reduction was applicable. Section 209 of H.R. 400, 105th Cong., 1st Sess. (1997), if enacted, will provide statutory authority for the further reexamination of an application for a fee to which the small entity reduction will be applicable.

*Comment 18:* One comment stated that the combination of §§ 1.53, 1.60, and 1.62 into a single § 1.53 was complex and confusing. Another comment suggested that § 1.53 be split into a number of sections, or that headings be used in § 1.53 in the manner that headings are used in §§ 1.84 and 1.96.

*Response:* Placing the provisions of § 1.53 into multiple sections, rather than multiple paragraphs of a single section, would not result in a simplification of its provisions. The Office considers it appropriate to place the filing provisions concerning all applications (nonprovisional, provisional, and continued prosecution) into a single section to reduce the confusion as to the filing requirements for any application for patent. Section 1.53 as adopted includes headings in each paragraph of § 1.53 to indicate the subject to which each of these paragraphs pertains.

*Comment 19:* One comment suggested amending § 1.53 to require applicants to indicate changes to the disclosure in a continuation or divisional application.

*Response:* The suggestion is not adopted. The Office did not propose to amend § 1.53 to require applicants to indicate changes to the disclosure in any continuing application. Thus, adopting a change to impose this additional burden on an applicant is not considered appropriate in this Final Rule.

*Comment 20:* One comment suggested that the Office permit applicants to file a statement requesting deletion of an inventor in a continuation or divisional application any time prior to or coincident with the mailing of an issue fee payment. The comment questioned whether the time period in § 1.53(e)(1) addresses this issue.

*Response:* Unless a statement requesting the deletion of the names of the person or persons who are not inventors in the continuation or divisional application accompanies the copy of the executed oath or declaration submitted in accordance with § 1.63(d) in an application filed pursuant to § 1.53(b), or accompanies the request for an application under § 1.53(d) in an application filed pursuant to § 1.53(d), the inventorship of the continuation or divisional application filed under § 1.53(b) using a copy of the oath or declaration of the prior application pursuant to § 1.63(d) or filed under § 1.53(d) will be considered identical to that in the prior application, and correction of the inventorship (if appropriate) must be by way of § 1.48. Identification of the inventorship is necessary to the examination of an application (e.g., 35 U.S.C. 102(f) and (g)). As such, the Office must require identification of the inventorship prior to examination of an application.

Section 1.53(e)(1) applies in those instances in which papers filed as an application under § 1.53 (b), (c), or (d) do not meet the respective requirements of § 1.53 (b), (c), or (d) to be entitled to a filing date. Submitting an oath or declaration is not a filing date issue, and naming the inventors is no longer a filing date issue. Thus, the provisions of § 1.53(e) do not apply to the filing of a statement requesting deletion of an inventor in a continuation or divisional application.

*Comment 21:* One comment questioned whether § 1.53(d) applies only to applications filed on or after June 8, 1995, and questioned whether § 1.53(d) should be made applicable to pending applications filed prior to June 8, 1995. The comment also questioned

the relationship between § 1.129(a) and § 1.53(d).

*Response:* Section § 1.53(d), by its terms, permits the filing of a continuation or divisional thereunder of only a nonprovisional application that, *inter alia*, is either: (1) Complete as defined by § 1.51(b) and filed on or after June 8, 1995 or; (2) resulted from entry into the national stage of an international application in compliance with 35 U.S.C. 371 filed on or after June 8, 1995. While § 1.53(d) and § 1.129(a) both provide for the continued prosecution of an application, these sections are distinct in that they apply to a virtually mutually exclusive class of applications and have separate requirements (e.g., a request for a § 1.53(d) application may be filed subsequent to the filing of an appeal brief, so long as the request is filed before the earliest of: (1) Payment of the issue fee on the prior application, unless a petition under § 1.313(b)(5) is granted in the prior application; (2) abandonment of the prior application; or (3) termination of proceedings on the prior application).

*Comment 22:* One comment suggested that the rules of practice permit the execution of copies of an oath or declaration by fewer than all of the inventors, without cross-reference to the other copies to facilitate contemporaneous executions by geographically separated inventors.

*Response:* The suggestion is not adopted. Section 1.63(a)(3) requires that an oath (or declaration), *inter alia*, identify each inventor. The rules of practice permit inventors to execute separate oaths (or declarations), so long as each oath (or declaration) sets forth all of the inventors (the necessary cross-reference). That is, § 1.63(a)(3) prohibits the execution of separate oaths (or declarations) in which each oath (or declaration) sets forth only the name of the executing inventor. An amendment to the rules of practice to permit an inventor to execute an oath or declaration that does not set forth each inventor would not only lead to confusion as to the inventorship of an application, but would be inconsistent with the requirement in 35 U.S.C. 115 that the applicant make an oath (or declaration) that the applicant believes himself (or herself) to be the original and first inventor of the subject matter for which a patent is sought, as the oaths or declarations would conflict as to the inventorship of the application.

*Comment 23:* Several comments suggested that the statement required under 35 U.S.C. 120 in a continued prosecution application will be confusing as the continued prosecution

application will have the same application number as the prior application. One comment indicated that this will cause confusion: (1) As to which application is being referenced in a 35 U.S.C. 120 statement in the divisional application when a divisional application under § 1.53(b) and a continued prosecution application filed under § 1.53(d) are filed from the same prior application; and (2) in docketing applications as most commercially available software identify applications by application number. Another comment questioned what sentence was required pursuant to § 1.78(a)(2) in a continued prosecution application.

Response: 35 U.S.C. 120 provides that an application may obtain the benefit of the filing date of an earlier filed application if, *inter alia*, the application "contains or is amended to contain a specific reference to the earlier filed application." Section 1.78(a) requires that this specific reference be in the first sentence of the specification and identify each earlier filed application by application number or international application number and international filing date and relationship of the applications. Thus, while a "specific reference to the earlier filed application" is a requirement of statute (35 U.S.C. 120), the particulars of this specific reference (by application number, filing date, and relationship) is a requirement of regulation (§ 1.78(a)), not the patent statute.

The purpose of the "specific reference" requirement of 35 U.S.C. 120 is to provide notice to the public of the filing date upon which a patentee may rely to support the validity of the patent:

[35 U.S.C. 120] embodies an important public policy. The information required to be disclosed is information that would enable a person searching the records of the Patent Office to determine with a minimum of effort the exact filing date upon which a patent applicant is relying to support the validity of his application or the validity of a patent issued on the basis of one of a series of applications. In cases such as this, in which two or more applications have been filed and the validity of a patent rests upon the filing date of an application other than that upon which the patent was issued, a person, even if he had conducted a search of the Patent Office records, could unwittingly subject himself to exactly this type of infringement suit unless the later application adequately put him on notice that the applicant was relying upon a filing date different from that stated in the later application.

*Sampson v. Ampex Corp.*, 463 F.2d 1042, 1045, 174 USPQ 417, 419 (2d Cir. 1972); see also *Sticker Indus. Supply Corp. v. Blaw-Knox Co.*, 405 F.2d 90, 93, 160 USPQ 177, 179 (7th Cir. 1968) ("Congress may well have thought

that [35 U.S.C.] 120 was necessary to eliminate the burden on the public to engage in long and expensive search of previous applications in order to determine the filing date of a later patent \* \* \*. The inventor is the person best suited to understand the relation of his applications, and it is no hardship to require him to disclose this information").

To reduce the delay in processing a continued prosecution application, the Office will maintain in its records (e.g., in the Patent Application Locating and Monitoring (PALM) records for an application) for identification purposes the application number and filing date of the prior application. Thus, in a continued prosecution application, the application number of the continued prosecution application will be the application number of the prior application, and the filing date indicated on any patent issuing from a continued prosecution application will be the filing date of the prior application (or, in a chain of continued prosecution applications, the filing date of the application immediately preceding the first continued prosecution application in the chain). In addition, as a continued prosecution application will use the file wrapper of the prior application, the prior application will be available upon inspection of the continued prosecution application.

Unless excepted from § 1.78(a)(2), the first sentence of a continued prosecution application would consist of a reference to that application as a continuation or divisional of an application having the identical application number and the effective filing date of (the filing date to be printed on any patent issuing from) the continued prosecution application. Such a sentence would provide no useful information to the public.

Therefore, § 1.53(d)(7) as adopted provides that a request for an application under § 1.53(d) is a specific reference under 35 U.S.C. 120 to every application assigned the application number identified in such request, and § 1.78(a)(2) as adopted provides that the request for a continued prosecution application under § 1.53(d) is the specific reference under 35 U.S.C. 120 to the prior application. That is, the continued prosecution application includes the request for an application under § 1.53(d) (§ 1.53(d)(2)(iv)), and the recitation of the application number of the prior application in such request (as required by § 1.53(d)) is the "specific reference to the earlier filed application" required by 35 U.S.C. 120. No further amendment to the specification is required by 35 U.S.C.

120 or § 1.78(a) for a continued prosecution application for such continued prosecution application to contain the required specific reference to the prior application, as well as any other application assigned the application number of the prior application (e.g., in instances in which a continued prosecution application is the last in a chain of continued prosecution applications).

Where an application claims a benefit under 35 U.S.C. 120 of a chain of applications, the application must make a reference to the first (earliest) application and every intermediate application. See *Sampson*, 463 F.2d at 1044-45, 174 USPQ at 418-19; *Sticker Indus. Supply Corp.*, 405 F.2d at 93, 160 USPQ at 179; *Hovlid v. Asari*, 305 F.2d 747, 751, 134 USPQ 162, 165 (9th Cir. 1962); see also MPEP 201.11. In addition, every intermediate application must also make a reference to the first (earliest) application and every application after the first application and before such intermediate application.

In the situation in which there is a chain of continued prosecution applications, each continued prosecution application in the chain will, by operation of § 1.53(d)(7), contain the required specific reference to its immediate prior application, as well as every other application assigned the application number identified in such request. Put simply, a specific reference to a continued prosecution application by application number and filing date will constitute a specific reference to: (1) The non-continued prosecution application originally assigned such application number (the prior application as to the first continued prosecution application in the chain); and (2) every continued prosecution application assigned the application number of such non-continued prosecution application.

Where the non-continued prosecution application originally assigned such application number itself claims the benefit of a prior application or applications under 35 U.S.C. 120, 121, or 365(c), § 1.78(a)(2) continues to require that such application contain in its first sentence a reference to any such prior application(s). As a continued prosecution application uses the specification of the prior application, such a specific reference in the prior application (as to the continued prosecution application) will constitute such a specific reference in the continued prosecution application, as well as every continued prosecution application in the event that there is a

chain of continued prosecution applications.

Where an applicant in an application filed under § 1.53(b) seeks to claim the benefit of an application filed under § 1.53(d) under 35 U.S.C. 120 or 121 (as a continuation, divisional, or continuation-in-part), § 1.78(a)(2) requires a reference to the continued prosecution application by application number in the first sentence of such application. Section 1.78(a)(2) has been amended to also provide that “[t]he identification of an application by application number under this section is the specific reference required by 35 U.S.C. 120 to every application assigned that application number.” Thus, where a referenced continued prosecution application is in a chain of continued prosecution applications, this reference will constitute a reference under 35 U.S.C. 120 and § 1.78(a)(2) to every continued prosecution application in the chain as well as the non-continued prosecution application originally assigned such application number.

Therefore, regardless of whether an application is filed under § 1.53(b) or (d), a claim under 35 U.S.C. 120 to the benefit of a continued prosecution application is, by operation of § 1.53(d)(7) and § 1.78(a)(2), a claim to every application assigned the application number of such continued prosecution application. In addition, applicants will not be permitted to choose to delete such a claim as to certain applications assigned that application number (e.g., for patent term purposes).

Finally, while it is recognized that using a common application number (and file wrapper) for a continued prosecution application and its prior application (which may also be a continued prosecution application) will necessitate docketing modifications (as well as the Office’s PALM system), the burden of such modifications is outweighed by the benefits that will result from the elimination of the initial processing of such applications.

*Comment 24:* One comment suggested that the phrase “now refiled” be used in lieu of “now abandoned” to reflect the status of the prior application.

*Response:* Under 35 U.S.C. 120, the status of an application is one of three conditions: (1) pending; (2) patented; or (3) abandoned. See *In re Morganroth*, 6 USPQ2d 1802, 1803 (Comm’r Pat. 1988). As the filing of a continued prosecution application under § 1.53(d) operates to expressly abandon the prior application under § 1.53(d)(2)(v), the status of the prior application is appropriately designated as “abandoned.”

*Comment 25:* Several comments suggested that the proposed continued prosecution application practice be made applicable in instances in which the prior application was filed prior to June 8, 1995, to expedite the prosecution of such applications.

*Response:* Permitting the continued prosecution application practice to be applicable in instances in which the prior application was filed prior to June 8, 1995, would result in confusion as to whether the patent issuing from the continued prosecution application is entitled to the provisions of 35 U.S.C. 154(c). As the continued prosecution application practice was not in effect prior to June 8, 1995, no patent issuing from a continued prosecution application is entitled to the provisions of 35 U.S.C. 154(c).

As discussed *supra*, the application number of a continued prosecution application will be the application number of the prior application, and the filing date indicated on any patent issuing from a continued prosecution application will be the filing date of the prior application (or, in a chain of continued prosecution applications, the filing date of the application immediately preceding the first continued prosecution application in the chain). Thus, any patent issuing from a continued prosecution application, where the prior application was filed prior to June 8, 1995, will indicate that the filing date of the application for that patent was prior to June 8, 1995, which will confuse the public (and possible the patentee) into believing that such patent is entitled to the provisions of 35 U.S.C. 154(c).

The Office has implemented § 532(a)(2)(A) of Pub. L. 103-465 in § 1.129(a) to conclude the examination of applications pending at least two years as of June 8, 1995, taking into account any reference made in such application to any earlier filed application under 35 U.S.C. 120, 121, and 365(c). Further examination of any application may be obtained *via* the filing of a continuing application under § 1.53(b). Requiring applications filed prior to June 8, 1995, that are not eligible for the transitional procedure set forth in § 1.129(a) to obtain further examination *via* the filing of a continuing application under § 1.53(b) is a reasonable requirement to avoid confusion as to whether a patent issuing from a continued prosecution (§ 1.53(d)) application is entitled to the provisions of 35 U.S.C. 154(c).

*Comment 26:* One comment suggested that the phrase “most immediate prior national application” rather than “prior application” was confusing. The

comment further stated that if the prior application was one filed under § 1.62, there is no copy in that complete application of the (oath or) declaration filed in the application under § 1.62.

*Response:* The phrase “most immediate prior national application for which priority is claimed under 35 U.S.C. 120, 121 or 365(c)” is changed to “prior application.” An application under §§ 1.53(d), 1.60, or 1.62 must ultimately be a continuing application of an application filed under § 1.53(b). Where the prior application is an application under § 1.60, the oath or declaration is the copy of the oath or declaration from the prior application *vis-à-vis* the application under § 1.60 submitted in accordance with § 1.60(b)(2). Where the prior application is an application under §§ 1.62 or 1.53(d), the oath or declaration is the oath or declaration from the prior application *vis-à-vis* the application under §§ 1.62 or 1.53(d). Where there is a chain of applications under §§ 1.62 or 1.53(d) preceding the prior application to an application under § 1.53(d), the oath or declaration of the prior application will be the oath or declaration of the application under §§ 1.53 or 1.60 immediately preceding the chain of applications under §§ 1.62 or 1.53(d), as each application in the chain of applications under §§ 1.62 or 1.53(d) utilizes the oath or declaration of the prior application.

*Comment 27:* One comment suggested that applications filed under § 1.53(d) should be taken up as amended applications, rather than as newly filed applications.

*Response:* The comment implies that taking up a continued prosecution application as an amended application may result in the examiner acting on the application in a more timely manner than if the application were accounted for as a new application. The matter is under consideration along with other administrative issues, and a decision shall be made in due course.

*Comment 28:* One comment suggested that § 1.129(a) be amended so as not to be limited to applications under final rejection, such that an applicant in an application in which a notice of allowance under § 1.311 has been mailed may obtain entry of an information disclosure statement without regard to the requirements of § 1.97(d).

*Response:* The Notice of Proposed Rulemaking did not propose to amend § 1.129(a). While the language of § 532(a)(2)(A) of Pub. L. 103-465 does not expressly exclude the further examination of an application that has been allowed (as opposed to an

application under a final rejection), § 102(d) of Pub. L. 103-465 provides that "[t]he statement of administrative action approved by the Congress under section 101(a) shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." The statement of administrative action specifies that such further examination is to facilitate the completion of prosecution of applications pending before the Office, and to permit applicants to present a submission after the Office has issued a final rejection on an application. See H.R. Rep. 826(i), 103rd Cong., 2nd Sess. 1005-06, *reprinted* in 1984 U.S.C.C.A.N. 3773, 4298.

Upon mailing of a notice of allowance under § 1.311, prosecution of an application before the Office is concluded. The proposed amendment to obtain further examination pursuant to § 1.129(a) after allowance would nullify (rather than facilitate) the completion of prosecution of the above-identified application, and, as such, would be inconsistent with the purpose for the provisions of § 532(a)(2)(A) of Pub. L. 103-465.

*Comment 29:* One comment questioned how the filing of a continued prosecution application would result in less delay than the filing of a continuing application under § 1.53(b), as a continued prosecution application would be subject to pre-examination processing delays.

*Response:* The Office will not issue a new filing receipt for a continued prosecution application under § 1.53(d). See § 1.54(b). By not issuing a filing receipt for a continued prosecution application, the Office will be able to perform the pre-examination of any continued prosecution application in the examining group to which the prior application was assigned. Likewise, § 1.6(d) has been amended to permit an applicant to file a continued prosecution application under § 1.53(d) by facsimile, and the use of this means of filing a continued prosecution application will avoid the delay inherent in routing an application (or any paper) from the mailroom to the appropriate examining group. These provisions will enable the Office to process a continued prosecution application in the manner that a submission under § 1.129(a) is processed.

*Comment 30:* One comment questioned whether the filing date of a continued prosecution application is the

filing date for determining patent term, or is significant only in establishing copendency. Another comment questioned what filing date was relevant for determining patent term.

*Response:* Notwithstanding that a continued prosecution application is assigned the application number of the prior application, the filing date of the continued prosecution application is the date on which the request for such continued prosecution application was filed (§ 1.53(d)). While the filing date of the continued prosecution application is relevant to establishing the copendency required by 35 U.S.C. 120 and § 1.78(a) between the continued prosecution application and the prior application, the filing date of a continued prosecution application will never be relevant to the term under 35 U.S.C. 154(b) of any patent issuing from the continued prosecution application.

Any continued prosecution application under § 1.53(d) will be filed on or after June 8, 1995, and will claim the benefit of an earlier application as a continuation or divisional application. Section 1.53(d)(7) specifically provides that:

A request for an application under this paragraph is the specific reference required by 35 U.S.C. 120 to every application assigned the application number identified in such request. No amendment in an application under this paragraph shall delete this specific reference to any prior application.

Thus, an application under § 1.53(d) cannot be amended to delete the specific reference to the prior application, as well as the specific reference to any application to which the prior application contains a specific reference under 35 U.S.C. 120, 121, and 365(c). As an application under § 1.53(d) will also contain a specific reference to at least one other application under 35 U.S.C. 120, 121, and 365(c), the expiration date under 35 U.S.C. 154(b)(2) of any patent issuing from the application under § 1.53(d) will be based upon the filing date of the prior application (or the earliest application to which the prior application contains a specific reference under 35 U.S.C. 120, 121, and 365(c)).

*Comment 31:* One comment argued that the Office should address not only the filing requirements for continuing applications, but also the cause of the filing of continuing applications. The comment specifically argued that the current second action final practice should be reevaluated as an applicant no longer has an incentive to delay the prosecution of an application due to Pub. L. 103-465.

*Response:* The suggestion is being taken under advisement as part of a comprehensive effort by the Office to reengineer the entire patent process. However, it should be noted that any changes to the current second action final practice to provide additional examination of an application prior to a final Office action would necessitate a corresponding increase in patent fees.

*Comment 32:* One comment suggested that the Office simply eliminate the "true copy" requirement of § 1.60, rather than add new provisions permitting the use of a copy of the oath or declaration of a prior application. The comment also suggested that the Office simply amend § 1.62 to eliminate the requirement that the Office assign a new application number to the application, rather than add a new § 1.53(d).

*Response:* The amendments to § 1.53 do not simply make minor changes to §§ 1.60 and 1.62. Sections 1.60 and 1.62 are anachronisms that have outlived their usefulness. A significant number of applications filed under § 1.60 do not meet the requirements of § 1.60 (and, as such are improper), but would be proper under § 1.53 (in the absence of a reference to § 1.60). The elimination of § 1.60 will result in a reduction in the Office's burden in treating and the applicant's burden in correcting these improper applications under § 1.60, as such applications would generally have been proper applications if filed under § 1.53 (without a reference to § 1.60). Section 1.63(d) retains most of the benefits of § 1.60, but eliminates the filing "traps" of § 1.60.

Section 1.62 practice also causes problems concerning its prohibition against including a new or substitute specification, and its permitting the filing of a continuation-in-part. To avoid continued prosecution application practice under § 1.53(d) being confused with the former file-wrapper-continuation practice under § 1.62, the Office has deemed it advisable to use a new § 1.53(d) rather than § 1.62 in regard to continued prosecution application practice.

*Comment 33:* One comment stated that the Office should anticipate the filing of applications containing a reference to § 1.60 or § 1.62 for some period.

*Response:* That applications containing a reference to §§ 1.60 or 1.62 will continue to be filed has been anticipated. The treatment of such applications is discussed *infra* with respect to the elimination of §§ 1.60 and 1.62.

*Comment 34:* One comment stated that the safeguard in § 1.60 concerning

the filing of an application lacking all of the pages of specification or sheets of drawings of the prior application has not been retained in § 1.53(b). The comment suggested that § 1.53 contain a presumption that a continuation or divisional be presumed, absent evidence to the contrary, to be the filing of an application identical to the prior application.

*Response:* The Court of Customs and Patent Appeals (CCPA) has held that a mere reference to another application, patent, or publication is not an incorporation of anything therein into the application containing such reference. See *In re de Seversky*, 474 F.2d 671, 177 USPQ 144 (CCPA 1973); see also *Dart Industries v. Banner*, 636 F.2d 684, 207 USPQ 273 (CCPA 1980) (related decision). These decisions relied upon *In re Lund*, 376 F.2d 982, 153 USPQ 625 (CCPA 1967), which considered the incorporation by reference issue in the context of whether a prior art patent adequately incorporated by reference a prior application. The court, in *Lund*, specifically stated:

There is little in the term "continuation-in-part" which would suggest to the reader of the patent that a disclosure of the nature of Example 2 is present in the earlier application and should be considered a part of the patent specification. Thus, we cannot agree that the subject matter of claim 3 is tacitly "described" in the Margerison patent within the meaning of § 102(e).

*Id.* at 989, 153 USPQ 631-32 (footnote discussing the definition of "continuation-in-part" as set forth in MPEP 201.08 omitted). While the holdings in *Dart Industries, de Seversky* and *Lund* appear to be based upon the definitions of the various categories of continuing applications set forth in the MPEP (and thus could be changed by a revision to the MPEP), the Office is not at this time inclined to disturb settled law in this area.

Nevertheless, an applicant may incorporate by reference the prior application by including, in the continuing application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition.

#### Section 1.54

Section 1.54(b) is amended to add the phrase "unless the application is an application filed under § 1.53(d)." To

minimize application processing delays in applications filed under § 1.53(d), such applications will not be processed by the Office of Initial Patent Examination as new applications.

No comments were received regarding the proposed change to § 1.54.

#### Section 1.55

Section 1.55(a) is amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

No comments were received regarding the proposed change to § 1.55.

#### Section 1.59

Section 1.59 is amended: (1) By revising the title to indicate that expungement of information from an application file would come under this section; (2) by revising the existing paragraph and designating it as paragraph (a)(1); and (3) by adding paragraphs (a)(2), (b) and (c). Section 1.59(a)(1) retains the general prohibition on the return of information submitted in an application, but no longer limits that prohibition to an application that has been accorded a filing date under § 1.53. The portion of the paragraph relating to the Office furnishing copies of application papers has been shifted to new paragraph (c). Section 1.59(a)(2) makes explicit that information, forming part of the original disclosure (*i.e.*, written specification including the claims, drawings, and any preliminary amendment specifically incorporated into an executed oath or declaration under §§ 1.63 and 1.175) will not be expunged from the application file.

Section 1.59(b) provides an exception to the general prohibition of paragraph (a) on the expungement and return of information and would allow for such when it is established to the satisfaction of the Commissioner that the requested expungement and return is appropriate. Section 1.59(b) covers the current practice set forth in MPEP 724.05 where information is submitted as part of an information disclosure statement and the submitted information has initially been identified as trade secret, proprietary, and/or subject to a protective order and where applicant may file a petition for its expungement and return that will be granted upon a determination by the examiner that the information is not material to patentability. Any such petition should be submitted in reply to an Office action closing prosecution so that the examiner can make a determination of materiality based on a closed record. Any petition submitted earlier than close of prosecution may be dismissed as premature or returned unacted upon. In

the event pending legislation for pre-grant publication of applications, which provides public access to the application file, is enacted, then the timing of petition submissions under this section will be reconsidered.

Petitions to expunge were formerly considered under § 1.182, with the Office of Petitions consulting with the examiner on the materiality of the information at issue prior to rendering a decision. A possible result of the amendment to § 1.59 would be to have petitions under § 1.59 to expunge simply decided by the examiner who determines the materiality of the information.

*Comment 35:* One comment suggested that petitions to expunge under § 1.59 should be decided by Group Directors or officials in the Office of Petitions, rather than by examiners. The comment argued that any individual examiner would decide such a petition so rarely that it would be difficult to produce uniform and consistent decisions.

*Response:* The preamble has been amended to reflect that a possible result of the rule change is to have petitions under § 1.59 decided by the examiners. The heart of most petitions to expunge is a determination as to whether the material sought to be expunged is material to examination, a matter that is now referred to examiners prior to a decision on the petition. Given the major role examiners now play in expungement matters, it is not clear why examiners would be rendering inconsistent decisions, particularly as so many other matters are routinely assigned to examiners including petitions under § 1.48. Nevertheless, the comment is not germane to § 1.59 as proposed (or adopted), but concerns the internal Office delegation of such petitions for consideration. Moreover, a petition to expunge a part of the original disclosure would have to be filed under § 1.183 and would continue to be decided in the Office of Petitions.

*Comment 36:* A comment in requesting some examples of things that may be expunged asked whether a design code listing as an appendix in an application may be expunged.

*Response:* The standard set forth in paragraph (b) of § 1.59 permits information other than what is enumerated in paragraph (a) of the section to be expunged if it is established to the satisfaction of the Commissioner that the return of the information is appropriate. The types of information and rationales why the information may be returned are varied and will be evaluated on a case-by-case basis with the basic inquiry being whether the information is material to

examination of the application. However, to the extent that an appendix to a specification of an application is considered part of the original disclosure it cannot be expunged from the file under § 1.59(a)(2).

Section 1.59(b) also covers information that was unintentionally submitted in an application, provided that: (1) The Office can effect such return prior to the issuance of any patent on the application in issue; (2) it is stated that the information submitted was unintentionally submitted and the failure to obtain its return would cause irreparable harm to the party who submitted the information or to the party in interest on whose behalf the information was submitted; (3) the information has not otherwise been made public; (4) there is a commitment on the part of the petitioner to retain such information for the period of any patent with regard to which such information is submitted; and (5) it is established to the satisfaction of the Commissioner that the information to be returned is not material information under § 1.56. A request to return information that has not been clearly identified as information that may be later subject to such a request by marking and placement in a separate sealed envelope or container shall be treated on a case-by-case basis. It should be noted that the Office intends to start electronic scanning of all papers filed in an application, and the practicality of expungement from the electronic file created by a scanning procedure is not as yet determinable. Applicants should also note that unidentified information that is a trade secret, proprietary, or subject to a protective order that is submitted in an Information Disclosure Statement may inadvertently be placed in an Office prior art search file by the examiner due to the lack of such identification and may not be retrievable.

Section 1.59(b) also covers the situation where an unintended heading has been placed on papers so that they are present in an incorrect application file. In such a situation, a petition should request return of the papers rather than transfer of the papers to the correct application file. The grant of such a petition will be governed by the factors enumerated above in regard to the unintentional submission of information. Where the Office can determine the correct application file that the papers were actually intended for, based on identifying information in the heading of the papers (e.g., Application number, filing date, title of invention and inventor(s) name(s)), the Office will transfer the papers to the

correct application file for which they were intended without the need of a petition.

Section 1.59(c) retains the practice that copies of application papers will be furnished by the Office upon request and payment of the cost for supplying such copies.

#### Section 1.60

Section 1.60 is removed and reserved.

Section 1.60 is now unnecessary due to the amendment to § 1.63(d) to expressly permit the filing in a continuation or divisional application using a copy of the oath or declaration filed in the prior application, and to provide (§ 1.63(d)(2)) for the filing of a continuation or divisional application by all or by fewer than all the inventors named in a prior application.

See comments relating to § 1.53.

#### Section 1.62

Section 1.62 is removed and reserved.

Section 1.62 is unnecessary due to the addition of § 1.53(d) to permit the filing of a continued prosecution application.

It is anticipated that applications purporting to be applications filed under §§ 1.60 or 1.62 will be filed until the deletion of §§ 1.60 and 1.62 become well known among patent practitioners. An application purporting to be an application filed under § 1.60 will simply be treated as a new application filed under § 1.53 (i.e., the reference to § 1.60 will simply be ignored).

Applications purporting to be an application filed under § 1.62 will be treated as continued prosecution applications under § 1.53(d), and those applications that do not meet the requirements of § 1.53(d) (e.g., continuation-in-part applications or continuations or divisional of applications filed before June 8, 1995) will be treated as improper continued prosecution applications under § 1.53(d). Such an improper application under § 1.53(d) may be accepted and treated as a proper application under § 1.53(b) by way of petition under § 1.53(e) (and submission of the \$130 fee pursuant to § 1.17(i)).

A petition under § 1.53(e) to accept and treat an improper application under § 1.53(d) as a proper application under § 1.53(b) must include: (1) The \$130 petition fee; (2) a true copy of the complete application designated as the prior application in the purported § 1.62 application papers; (3) any amendments entered in the prior application; and (4) any amendments submitted but not entered in the prior application and directed to be entered in the purported § 1.62 application papers. In an application purporting to be a

continuation or divisional application under § 1.62, the true copy of the prior application will constitute the original disclosure of the application under § 1.53(b), and any amendments entered in the prior application or not entered in the prior application but directed to be entered in the purported § 1.62 application papers and submitted with the § 1.53(e) petition will be entered in the application under § 1.53(b) and considered by the examiner for new matter under 35 U.S.C. 112, ¶ 1, and 132. In an application purporting to be a continuation-in-part application under § 1.62, the true copy of the prior application, any amendments entered in the prior application or not entered in the prior application but directed to be entered in the purported § 1.62 application papers and submitted with the § 1.53(e) petition, and any preliminary amendment submitted with the purported § 1.62 application will constitute the original disclosure of the application under § 1.53(b).

See comments relating to § 1.53.

#### Section 1.63

Section 1.63(a)(3) is amended to require the post office address to appear in the oath or declaration and to have the requirement from § 1.41(a) for the full names of the inventors placed therein.

*Comment 37:* Two comments raised the issue regarding the continued requirement that both a post office address and a residence be supplied and indicated that the residence is not required by statute, the post office address is sufficient for communication purposes, and that the burden of submitting both far outweighs the infrequent need to contact any particular inventor bypassing counsel so that the residence alone should be sufficient.

*Response:* Under the proposed comment the applicants would still be required to submit either the residence or post office address. To request that they also supply the other or state that both are the same is not seen to be a significant burden as the information is to be supplied on the oath or declaration form that they must sign anyway and spaces can be provided to ensure that the information is supplied. While neither the residence nor the post office address are statutory requirements, the Office requires this information for the applicant's benefit. As more than one person may have the same name, a person's name is often not sufficient to provide a unique identification of the inventor. Thus, the Office also requires an inventor's residence (which is not required to be sufficiently detailed to

suffice as a post office address) to specifically identify the person(s) named in the oath or declaration as the inventor(s), which is a common practice for legal documents. The post office address is also required in the event that the Office finds it necessary to directly contact the inventor(s). It is not uncommon for an inventor to revoke a power of attorney or authorization of agent in a paper providing no address for future correspondence from the Office. Also, the Office will need to directly contact the inventor if the Office is notified of the death of a sole attorney or agent of record (MPEP 406).

Section 1.63(d) is amended to: (1) relocate its current language in a new § 1.63(e); and (2) provide that a newly executed oath or declaration is not required under § 1.51(b)(2) and 1.53(f) in a continuation or divisional application filed by all or by fewer than all of the inventors named in a prior nonprovisional application containing an oath or declaration as prescribed by § 1.63, provided that a copy of the executed oath or declaration filed in the prior application is submitted for the continuation or divisional application and the specification and drawings filed in the continuation or divisional application contain no matter that would have been new matter in the prior application. The copy of the oath or declaration must show the signature of the inventor(s) or contain an indication thereon that the oath or declaration was signed (e.g., the notation "/s/" on the line provided for the signature).

A continuation or divisional application may be filed under 35 U.S.C. 111(a) using the procedures set forth in § 1.53(b), by providing either: (1) A copy of the prior application, including a copy of the oath or declaration in such prior application, as filed; or (2) a new specification and drawings and a copy of the oath or declaration as filed in the prior application so long as no matter is included in the new specification and drawings that would have been new matter in the prior application. The specification and drawings of a continuation or divisional application is not limited to a reproduction or "true copy" of the prior application, but may be revised for clarity or contextual purposes *vis-à-vis* the prior application in the manner that an applicant may file a substitute specification (§ 1.125) or amend the drawings of an application so long as it does not result in the introduction of new matter. Of course, 35 U.S.C. 115 requires that a supplemental oath or declaration meeting the requirements of § 1.63 be

filed in the continuation or divisional application, if a claim is allowed in the continuation or divisional application which is drawn to subject matter originally shown or described in the prior application but not substantially embraced in the statement of the invention or claims originally presented in the prior application as filed. See § 1.67(b).

The patent statute and rules of practice do not require that an oath or declaration include a date of execution, and the Examining Corps has been directed not to object to an oath or declaration as lacking either a recent date of execution or any date of execution. The applicant's duty of candor and good faith including compliance with the duty of disclosure requirements of § 1.56 is continuous and applies to the continuing application.

A new application containing a copy of an oath or declaration under § 1.63 referring to an attached specification is indistinguishable from a continuation or divisional application containing a copy of an oath or declaration from a prior application submitted pursuant to § 1.63(d). Unless an application is submitted with a statement that the application is a continuation or divisional application (§ 1.78(a)(2)), the Office will process such application as a new non-continuing application. Applicants are advised to clearly designate any continuation or divisional application as such to avoid the issuance of a filing receipt that does not indicate that the application is a continuation or divisional.

To continue the practice in § 1.60(b)(4) of permitting the filing of a continuation or divisional application by all or by fewer than all of the inventors named in a prior application without a newly executed oath or declaration, new § 1.63(d)(2) provides that the copy of the oath or declaration submitted for a continuation or divisional application under § 1.63(d) must be accompanied by a statement from applicant, counsel for applicant or other authorized party requesting the deletion of the names of the person or persons who are not inventors in the continuation or divisional application. Where the continuation or divisional application and copy of the oath or declaration from the prior application is filed without a statement from an authorized party requesting deletion of the names of any person or persons named in the prior application, the continuation or divisional application will be treated as naming as inventors the person or persons named in the copy of the executed oath or declaration from the prior application. Accordingly,

if a petition under § 1.48 (a) or (c) was granted in the prior application, an oath or declaration filed in a continuation or divisional application pursuant to § 1.63(d) should be the oath or declaration also executed by the added inventor(s). For situations where an inventor or inventors are to be added in a continuation or divisional application, see § 1.63(d)(5).

The statement requesting the deletion of the names of the person or persons who are not inventors in the continuation or divisional application must be signed by person(s) authorized pursuant to § 1.33(b) to sign an amendment in the continuation or divisional application.

Section 1.63(d)(3) provides for the situation in which the executed oath or declaration of which a copy is submitted for a continuation or divisional application was originally filed in a prior application accorded status under § 1.47. Section 1.63(d)(3)(i) requires a copy of any decision granting a petition to accord § 1.47 status to such application, unless each nonsigning inventor(s) or legal representative (pursuant to § 1.42 or 1.43) has filed an oath or declaration to join in an application of which the continuation or divisional application claims a benefit under 35 U.S.C. 120, 121 or 365(c). Where a nonsigning inventor or legal representative (pursuant to § 1.42 or 1.43) subsequently joins in any application of which the continuation or divisional application claims a benefit under 35 U.S.C. 120, 121 or 365(c), § 1.63(d)(3)(ii) also requires a copy of any oath or declaration filed by an inventor or legal representative to subsequently join in such application.

Section 1.63(d)(4) provides that where the power of attorney (or authorization of agent) or correspondence address was changed during the prosecution of the prior application, the change in power of attorney (or authorization of agent) or correspondence address must be identified in the continuation or divisional application, or the Office may not recognize in the continuation or divisional application the change of power of attorney (or authorization of agent) or correspondence address during the prosecution of the prior application.

A newly executed oath or declaration will continue to be required in a continuation or divisional application naming an inventor not named in the prior application, or a continuation-in-part application, and § 1.63(d)(5) expressly states that a newly executed oath or declaration must be filed in a continuation or divisional application naming an inventor not named in the prior application.

New § 1.63(e) provides that a newly executed oath or declaration must be filed in a continuation-in-part application, which application may name all, more, or fewer than all of the inventors named in the prior application, and includes the language relocated from former § 1.63(d) concerning an oath or declaration in a continuation-in-part application.

*Comment 38:* One comment suggested that the practice of permitting the use of an executed oath or declaration of a prior application creates a trap for the unwary in the situation in which an applicant believes in error that no new matter has been added in the "continuation" application and does not file a new declaration.

*Response:* The situation outlined in the comment is less of a trap for the unwary than the situation in which an applicant files a substitute specification and believes in error that no new matter has been added, in that the error in the "continuation" may be corrected by redesignation of the application as a continuation-in-part and the filing of a new oath or declaration. Nevertheless, it remains the applicant's responsibility to review any substitute specification or new specification submitted for a continuation application to determine that it contains no new matter. See MPEP 608.01(q). An applicant is advised to simply file a continuing application with a newly executed oath or declaration when it is questionable as to whether the continuing application adds material that would have been new matter if presented in the prior application.

*Comment 39:* One comment suggested that the option of submitting "a copy of an unexecuted oath or declaration, and a statement that the copy is a true copy of the oath or declaration that was subsequently executed and filed to complete \* \* \* the most immediate prior national application for which priority is claimed under 35 U.S.C. 120, 121 or 365(c)" was strange at best as the applicant or representative should have a copy of the oath or declaration that was filed to complete the prior application or could obtain one from Office records.

*Response:* The suggestion is adopted. Section 1.63(d) as adopted provides that: "[a] newly executed oath or declaration is not required under § 1.51(b)(2) and § 1.53(f) in a continuation or divisional application filed by all or by fewer than all of the inventors named in a prior nonprovisional application containing an oath or declaration as prescribed by paragraphs (a) through (c) of this section, provided that a copy of the

executed oath or declaration filed in the prior application is submitted for the continuation or divisional application."

*Comment 40:* One comment questioned whether § 1.53 (or § 1.63) is consistent with § 1.48 as to whether the oath or declaration filed in a continuing application adding an inventor must be executed by all of the inventors, or just the added inventor.

*Response:* The oath or declaration filed in a continuing application adding an inventor or a continuation-in-part application must name and be executed by all of the inventors. Sections 1.48 and 1.63(e) are consistent in this regard.

*Comment 41:* One comment questioned whether, in a continuation or divisional application following a chain of continuation or divisional applications, the copy of the executed oath or declaration may be a copy of the oath or declaration filed in the immediate prior application (which may itself be a copy of an oath or declaration from a prior application), or must be a direct copy of the originally executed oath or declaration.

*Response:* Section 1.63(d) requires a copy of the oath or declaration from the prior application. In instances in which the oath or declaration filed in the prior application is itself a copy of an oath or declaration from a prior application, either a copy of the copy of the oath or declaration in the prior application or a direct copy of the original oath or declaration is acceptable, as both are a copy of the oath or declaration in the prior application. See § 1.4(d)(1)(ii).

#### Section 1.67

Section 1.67 paragraph (b) is amended to change "§ 1.53(d)(1)" to "§ 1.53(f)" for consistency with § 1.53.

No comments were received regarding § 1.67.

#### Section 1.69

Section 1.69(b) is amended to remove the requirement that the translation be verified in accordance with the change to §§ 1.4(d)(2) and 10.18. Section 1.69(b) is also amended to clarify the need for a statement that the translation being offered is an accurate translation, as in § 1.52 paragraphs (a) and (d).

Two comments were received in regard to § 1.69 that also raised similar issues in regard to § 1.52, which comments are treated with § 1.52.

#### Section 1.78

Section 1.78(a)(1) is amended to remove the references to §§ 1.60 and 1.62 in view of the deletion of §§ 1.60 and 1.62, and to include a reference to an "international application entitled to a filing date in accordance with PCT

Article 11 and designating the United States of America." Section 1.78(a)(2) is amended for consistency with the changes to § 1.53, and to provide that "[t]he identification of an application by application number under this section is the specific reference required by 35 U.S.C. 120 to every application assigned that application number."

No comments were received regarding the proposed change to § 1.78.

#### Section 1.84

Section 1.84(b) is amended by removing references to the filing of black and white photographs in design applications as unnecessary in view of the reference in § 1.152 to § 1.84(b). Section 1.84 paragraphs (c) and (g) are amended for consistency in regard to the English equivalents (5/8 inch.) for 1.5 cm.

No adverse comments were received regarding the proposed change to § 1.84.

#### Section 1.91

The title of § 1.91 is amended to clarify that a certain type of material is not generally admitted in the file record by substitution of "admitted" for "required."

Section 1.91 is also amended to clarify the type of material that is not generally admitted into the file record of an application. Section 1.91(a) specifically requires a petition (with the fee set forth in § 1.17(i)) including an appropriate showing why entry of the model or exhibit into the file record is necessary to demonstrate patentability, unless the model or exhibit: (1) substantially conforms with § 1.52 or § 1.84; or (2) was required by the Office.

Section 1.91 is also amended to state that a model, working model or other physical exhibit, whose submission by applicants is generally not permitted, may be required by the Office if deemed necessary for any purpose in the examination of the application. This language is moved from § 1.92.

*Comment 42:* Several adverse comments were received expressing concern that the addition of the term "exhibits" to the bar against admission of models, unless specifically required by the Office, would prevent applicants from making their best possible case for patentability, and that exhibits would be interpreted by the Office as barring two-dimensional as well as three-dimensional exhibits.

*Response:* The preamble of the proposed rule indicated that the change to the rule is in the nature of a clarification and not a change in practice. Further clarification has been added to the rule by reference to § 1.52

or § 1.84 and to the instant discussion of the rule to indicate that the use of the term "exhibits" is in the nature of other three-dimensional models, such as videos, and will not bar two-dimensional exhibits currently being accepted. Additionally, a petition route has been added to the rule that would permit entry of three-dimensional models or exhibits where they are necessary to establish patentability. Section 1.91 is also amended to expressly provide for the filing of a petition thereunder (rather than to require the filing of a petition under § 1.183) such that an applicant may gain entry of a model or exhibit, without a showing of an extraordinary situation where justice requires grant of the relief sought.

The fact that a three-dimensional model or exhibit will not generally be entered in the record absent an appropriate showing does not prevent an applicant from showing the exhibit to the examiner for purposes of clarifying the examiner's understanding of the invention and reducing the model or exhibit to two-dimensional conformance with § 1.52 or § 1.84 for entry of that reduction to the record (which issues are separate and distinct from the questions as to whether the later presented material was originally required for an understanding of the invention and its subsequent addition being subject to a new matter objection under 35 U.S.C. 132).

Due to the unusual difficulties of storage for three-dimensional materials and little demonstrated need for their presence in the file record over what would be provided for *via* petition under § 1.91, it is not seen to be appropriate to permit unrestricted entry of three-dimensional exhibits in the file record.

#### Section 1.92

Section 1.92 is removed and reserved and the language transferred to § 1.91(b) for improved contextual purposes.

No comments were received regarding the proposed change to § 1.92.

#### Section 1.97

Sections 1.97 (c) through (e) are amended by replacement of "certification" by "statement" (see comments relating to § 1.4(d)), and by clarifying the current use of "statement" by the terms "information disclosure."

Section 1.97(e)(2) is further amended to replace "or" by "and" to require that no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of

the person signing the statement, after making reasonable inquiry, no item of information contained in the information disclosure was known to any individual designated in § 1.56(c) more than three months prior to the filing of the information disclosure statement. The use of "and" rather than "or" is in keeping with the intent of the rule as expressed in the MPEP 609(B)(2)(ii), that the conjunction be conjunctive rather than disjunctive. The mere absence of an item of information from a foreign patent office communication was clearly not intended to represent an opportunity to delay the submission of the item when known more than three months prior to the filing of an information disclosure statement to an individual having a duty of disclosure under § 1.56.

No comments were received regarding the proposed change to § 1.97.

#### Section 1.101

Section 1.101 is removed and reserved as relating to internal Office instructions.

*Comment 43:* A number of comments opposed the deletion of the rules that solely govern Office procedure. The reasons given for this opposition are: (1) The Office should subject its procedures to the notice and comment provisions of the Administrative Procedure Act (APA); (2) the inclusion of such procedures in the rules of practice imparts the force and effect of law to such procedures; (3) the greater deference given to procedures set forth in the rules of practice, rather than the MPEP, during court action.

*Response:* The CCPA has held that applicants before the Office are entitled to rely not only on the patent statute and rules of practice, but on the provisions of the MPEP, during the prosecution of an application for patent. See *In re Kaghan*, 387 F.2d 398, 401, 156 USPQ 130, 132 (CCPA 1967). Thus, there is in practice little, if any, benefit to applicants before the Office in having the Office procedure set forth in the rules of practice, rather than the MPEP. In any event, no comment pointed to any specific decision, and the Office is not aware of any decision, in which the result turned on the inclusion of Office procedure in the rules of practice (rather than simply in the MPEP).

Nevertheless, in view of the concern expressed in the comments as to the rules of practice setting forth the fundamentals of the examination of an application, the Office will retain the substance of §§ 1.104 and 1.105 in the rules of practice. See *In re Phillips*, 608 F.2d 879, 883 n.6, 203 USPQ 971, 974 n.6 (CCPA 1979) (although irrelevant to

the result, the Office was criticized for piecemeal examination contrary to §§ 1.104 and 1.105). The substance of §§ 1.104, 1.105, 1.106, 1.107, and 1.109, however, will be combined into § 1.104 paragraphs (a)–(e).

The Office will also retain § 1.351 in the rules of practice, as it has been relied upon as the notice that the Office will provide concerning changes to the rules of practice in 37 CFR Part 1. See *In re Nielson*, 816 F.2d 1567, 1571, 2 USPQ2d 1525, 1527 (Fed. Cir. 1987). Finally, the Office will retain § 1.181 paragraphs (d), (e), and (g) to avoid confusing petition practice, and § 1.325 to avoid confusion as to the requirements for correction of a patent.

The Office, however, will delete §§ 1.101, 1.108, 1.122, 1.184, 1.318, and 1.352 from 37 CFR Part 1. The procedures set forth in §§ 1.101, 1.122, 1.184, and 1.318 do not provide meaningful safeguards to applicants (e.g., § 1.101 does not ensure or give an applicant the right to examination of an application within any reasonably specific time frame). The proscription in § 1.108 is simply an administrative instruction based upon the fact that, unless otherwise publicly available, abandoned applications do not constitute prior art under 35 U.S.C. 102 (and thus 103). Finally, as former § 1.352 included a "whenever required by law" prerequisite, it provided no independent requirement that the Office publish proposed rule changes for comment.

#### Section 1.102

Section 1.102(a) is amended to remove the requirement that the showing be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

No comments were received regarding the proposed change to § 1.102.

#### Section 1.103

Section 1.103(a) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.103.

#### Section 1.104

Section 1.104 is amended to include paragraphs (a) through (e) including the substance of former §§ 1.104, 1.105, 1.106, 1.107, and 1.109. The re-writing of §§ 1.104, 1.105, 1.106, 1.107, and 1.109 as § 1.104 (a) through (e) involves no change in substance.

See comment relating to § 1.101.

**Section 1.105**

Section 1.105 is removed and reserved as the subject matter was transferred to § 1.104(b).

See comment relating to § 1.101.

**Section 1.106**

Section 1.106 is removed and reserved as the subject matter was transferred to § 1.104(c).

See comment relating to § 1.101.

**Section 1.107**

Section 1.107 is removed and reserved as the subject matter was transferred to § 1.104(d).

See comment relating to § 1.101.

**Section 1.108**

Section 1.108 is removed and reserved as relating to internal Office instructions.

See comment relating to § 1.101.

**Section 1.109**

Section 1.109 is removed and reserved as the subject matter was transferred to § 1.104(e).

See comment relating to § 1.101.

**Section 1.111**

Section 1.111 is amended to consistently refer to a "reply" to an Office action. The prior section used the term "response" and "reply" in an inconsistent manner and created some confusion. Paragraph (b) of § 1.111 is also amended to explicitly recognize that a reply must be reduced to a writing which must point out the specific distinctions believed to render the claims, including any newly presented claims, patentable. It is noted that an examiner's amendment reducing a telephone interview to writing would comply with § 1.2.

*Comment 44:* One comment asked whether pointing out one distinction is sufficient or must applicant provide an exhaustive list of all distinctions. Additionally, inquiry is made as to whether it is sufficient to point out the impropriety of a rejection under 35 U.S.C. 102 that should have been a rejection under 35 U.S.C. 103, or must a rejection under 35 U.S.C. 103 be anticipated and answered.

*Response:* A distinction should be kept in mind between what is necessary for a reply to be considered sufficient to continue prosecution of the application and what will advance the application to issuance in the most efficient manner. While pointing out only one distinction, such as why a rejection under 35 U.S.C. 102 is inappropriate, would comply with the requirements of § 1.111, advancement of the prosecution of the application would best be served by

pointing out all possible distinctions, so that if the argument for one distinction is not persuasive, another may be. Similarly, anticipation of and argument against a rejection under 35 U.S.C. 103 where a rejection under 35 U.S.C. 102 should have been made under 35 U.S.C. 103 could possibly prevent making of the rejection under 35 U.S.C. 103 by the examiner and an earlier issuance of the application thereby preserving patent term under 35 U.S.C. 154 as amended by Pub. L. 103-465.

*Comment 45:* Three comments pointed to instances where a reply would not necessarily require that distinctions be pointed out, such as: (1) where context and arguments presented make the distinctions clear beyond doubt; (2) where a *prima facie* case has not been established or motivation for modification of a reference is lacking; (3) a secondary reference is from a nonanalogous art improperly combined; or (4) no reference has been applied.

*Response:* The comment has been adopted to the extent that the paragraph (b) of the rule has been amended to refer to "any" rather than "the" applied references. Any argument that would make the distinctions clear beyond doubt would seem to require identification of the distinctions therein. Where a reply contains an argument that motivation for a modification of a reference made by an examiner does not exist, or that a nonanalogous secondary reference has been improperly combined, the identification of the claim element involved and the particular factual basis that makes the modification or combination relating to that claim element inappropriate are necessary elements of a reply. That an applicant considers a rejection, objection, or other requirement in an Office action to be inappropriate does not relieve the applicant of the burden under 35 U.S.C. 133 of prosecuting the application to avoid abandonment.

*Comment 46:* A comment suggested that the requirement for supplying claim distinctions for a newly presented claim is at odds with the Office's burden in the first instance of explaining any objection or rejection of an applicant's claim, and that the existing requirement that an applicant distinctly and specifically point out the errors in the examiner's action and reply to every ground of objection and rejection are sufficient without the added language. Another comment noted that it is believed that the rule already requires that specific distinctions be supplied and questions what new requirements are being added by that additional language.

*Response:* To the extent that the already existing language would require that claim distinctions be presented, the added language is seen to clarify what is required of an applicant in replying to an Office action and is not seen to be at odds with the Office's burden in first going forward with a rejection of the claims. Once a claim is rejected, there is a duty on applicants under § 1.111 to provide an appropriate reply as defined therein for applicant to be entitled to reconsideration or further examination.

**Section 1.112**

Section 1.112 is amended to remove as unnecessary the statement that "any amendments after a second Office action must ordinarily be restricted to the rejection, objections or requirements made in the office action" to reflect actual practice, in which amendments after the second action need not be restricted to the rejection or the objections or requirements set forth in an Office action. The heading of § 1.112 is also amended to add "before final action" to clarify that such reconsideration does not apply after a final Office action.

No comments were received regarding the proposed change to § 1.112.

**Section 1.113**

Section 1.113(a) is amended to add "by the examiner" after "examination or consideration," change "objections to form" to "objections as to form" for clarity, and replace "response" with "reply" in accordance with the change to § 1.111.

Section 1.113(b) is amended to change "clearly stating the reasons therefor" to "clearly stating the reasons in support thereof" for clarity.

*Comment 47:* A number of comments argued that first action final practice should be eliminated without regard to an amendment to § 1.116 as: (1) 35 U.S.C. 132 does not authorize first action final practice; and (2) the filing fee paid in a continuing application should entitle an applicant to an examination and reexamination in the continuing application.

*Response:* The argument that 35 U.S.C. 132 does not authorize first action final practice has been considered by the Office and rejected in *In re Bogese*, 22 USPQ2d 1821 (Comm'r Pat. 1992). Specifically, continuing applications have historically been considered part of a continuous proceeding in regard to the prior application. *Id.* at 1827. First action final practice denies an applicant the delay inherent in an additional Office action in a continuation application, thus compelling the applicant to draft

claims in a continuation application in view of the prosecution history of the parent application (*i.e.*, the rejections and prior art of record in the parent application), and thus make a *bona fide* effort to define the issues for appeal or allowance. *Id.* at 1824–25.

In addition, under the current patent fee structure, a significant portion of the Office's costs of examining patent applications is recovered through issue and maintenance fees. That is, the filing fees required by 35 U.S.C. 41(a) (1)–(4) and § 1.16 for an application do not cover the Office's full costs of examining that application pursuant to 35 U.S.C. 131 and 132. Therefore, the argument that first action final practice is inherently unfair in view of the filing fees paid by the applicant fails to appreciate the current patent fee structure.

Due to the overwhelming opposition to the proposed changes to § 1.116 to simplify after final practice, the proposed change to § 1.113 to eliminate first action final practice and the proposed changes to § 1.116 to simplify after final practice are not adopted in this Final Rule. The Office will give further consideration to the elimination of first action final practice.

*Comment 48:* One comment suggested that § 1.113 should be clarified to reflect the intent of the rule change that a first action final rejection not issue in a continuation application.

*Response:* The proposed change to § 1.113 to prohibit a first action final rejection is not being adopted.

#### Section 1.115

Section 1.115 has been removed and reserved, rather than amended to contain the material of former §§ 1.117 through 1.118, 1.123 and 1.124. The subject matter proposed to be included in § 1.115 has been transferred to § 1.121. The change does not constitute a change in substance; the material of the deleted sections has simply been rearranged and edited for clarity and contextual purposes in § 1.121. The reference in § 1.115(b)(2) relating to the rejection of claims containing new matter has not been retained in § 1.121 as unnecessary.

*Comment 49:* One comment recognizing that the subject matter of § 1.118 is transferred to § 1.115 (now § 1.121) noted that the particular material of the second and third sentences of paragraph (a) of § 1.118(a) was not so transferred and should be.

*Response:* While the exact language of the second and third sentences of paragraph (a) of § 1.118 was not transferred to 1.121 (§ 1.115 as originally proposed), the concept is

retained in § 1.121, paragraphs (a)(6), (b)(5), and (c)(1), in condensed form.

*Comment 50:* One comment objected to the requirement of paragraph (d) of § 1.115 (now § 1.121) where a disclosure must be amended to secure correspondence between the claims, the specification and the drawings. Forcing the specification to parrot the language of new claims, where only new claims originally use a term not found in the original disclosure and in the original claims, is said to impose an undue burden on applicant and jeopardize the validity of all the claims if the new term is found to be new matter.

*Response:* The comment does not explain why a specification containing a later added expression subsequently found to contain new matter will adversely affect claims that do not contain that expression, particularly if a portion of the specification is retained that provides support for claims not containing that expression.

Additionally, the requirement being criticized is not a new requirement but was material transferred from § 1.117. However, the comment was adopted in part in that § 1.121, paragraphs (a)(5) and (b)(4), require only "substantial correspondence" between the claims, the remainder of the specification, and the drawings.

*Comment 51:* One comment suggested that the term "sketch" in paragraph (e) of § 1.115 (now § 1.121) be broadened to "drawing."

*Response:* Sections 1.121(a)(3)(ii) and 1.121(b)(3)(ii) recite sketch, which has been interpreted by the Office to include a copy. The use of sketch is seen to be the broader term in allowing a handwritten alteration of a copy of the previously submitted drawing to be done without the need for a color copy being obtained.

*Comment 52:* One comment suggested that paragraph (f) of § 1.115 (now § 1.121), requiring no interlineations to appear in a clause as finally presented, is inconsistent with the requirements of § 1.121 requiring brackets and underlining of the subject matter deleted and added.

*Response:* The comment was adopted by clarifying § 1.121(a)(iii) as adopted by reciting that the interlineation prohibition relates to previous amendments being depicted in a subsequent amendment, and to limit its applicability to applications other than reissue applications (thereby also excluding reexamination proceedings) in that all changes from the patent are required to be shown in reissue applications and reexamination proceedings.

#### Section 1.116

Section 1.116 is amended by adding the phrase "or appeal" to its heading. This change clarifies the current practice that paragraphs (b) and (c) apply to amendments filed after an appeal, regardless of whether the application was subject to a final rejection prior to the appeal.

Section 1.116(a) is also amended for clarity to limit amendments after a final rejection or other final action (§ 1.113) to those amendments cancelling claims or complying with any requirement of form set forth in a previous Office action, and replaces the phrase "any proceedings relative thereto" with "any related proceedings" for clarity. The amendment does not represent a change in practice under § 1.116(a) as was originally proposed, but merely a clarification of when an applicant is entitled to entry of an amendment under § 1.116(a).

*Comment 53:* Almost every comment relating to the proposed change to § 1.116 to limit entry of amendments after a final Office action based on simplification of issues for appeal opposed the change. The various rationales included: (1) A liberal practice by examiners in entering amendments after final rejection based on a willingness to engage in significant negotiations after final rejection; (2) an increased burden on the Board of Patent Appeals and Interferences (Board); (3) a loss of potential patent term under 35 U.S.C. 154 if refiling an application was routinely required; (4) a loss of clarity by applicant and the examiner of the issues involved, in that it is frequently only after the second action that the issues become clarified, particularly as counsel are not aware of the art that may actually be applied against the claims and therefore do not submit claims that can read over such art; (5) to the extent the need to enter amendments causes refiling of an application, greater resources from the Office are required as opposed to simply entering the amendment in the prior application; (6) there will be an increase in the requests for interviews after first action; (7) the change represents encouragement for examiners to cut down on papers entered particularly in view of the crediting system; and (8) the proposal is not helpful to applicant and is only a revenue generator.

Several alternative suggestions were made including: (1) A fee to have amendments after final entered as a matter of right; (2) discretion for examiners to enter any amendment should be explicitly stated in the rule; (3) consider substantive amendments if

submitted at least one month in advance of the end of the reply period; (4) eliminate applicant's concern for expedited handling of § 1.116 amendments by having a new period for appealing or refiling; (5) entry of amendment to solely correct rejections under 35 U.S.C. 112, ¶ 2, should be permitted; (6) first after final submission permitted entry under simplification of issues standard and any subsequent submission would only be permitted under standard as proposed without simplification of issues available; (7) merging of a dependent claim into an independent claim ought to be explicitly permitted as a matter of right; (8) provide a standard of entry dependent upon good and sufficient reason as to why the amendment after final was not made earlier; (9) permit consideration of the amendment for allowable subject matter to save applicant cost of refiling for such determination; and (10) change should be linked with a prohibition on applying a new reference in a final rejection.

*Response:* In view of the issues raised and the alternative suggestions presented, it has been determined that further study is required. The comments have been adopted *solely* to the extent that the proposed change to delete simplification of issues for purpose of appeal, as a basis for entry of an amendment after final rejection, will not be implemented at this time.

#### Section 1.117

Section 1.117 is removed and reserved as the subject matter was transferred to § 1.121.

No comments were received regarding the proposed change to § 1.117.

#### Section 1.118

Section 1.118 is removed and reserved and its subject matter transferred to § 1.121.

See first comment related to § 1.115.

#### Section 1.119

Section 1.119 is removed and reserved as duplicative of the provisions of §§ 1.111 and 1.121.

No comments were received regarding the proposed change to § 1.119.

#### Section 1.121

Section 1.121, paragraphs (a) through (f), are replaced with paragraphs (a) through (c), which separately treat amendments in non-reissue nonprovisional applications (paragraph (a)), amendments in reissue applications (paragraph (b)), and amendments in reexamination proceedings (paragraph (c)). The intent of the changes is to

retain amendment practice in regard to non-reissue applications prior to the changes proposed in the Notice of Proposed Rulemaking and to make final the changes in amendment practice in regard to reissue applications proposed in the Notice of Proposed Rulemaking, except for requiring copies of all claims as of the date of submission of an amendment and a constructive cancellation in their absence. Additionally, while retaining the previous amendment practice in non-reissue applications, the regulations have been clarified by deletion of §§ 1.115, 1.117 through 1.118, 1.123, and 1.124 and placement of subject matter thereof in § 1.121.

*Comment 54:* Most comments received on the proposed change in amendment practice as it relates to non-reissue applications to bring it into line with reissue and reexamination amendment practices were very negative. In particular, the proposed changes to present a complete copy of the claims when any amendment to the claims is made, and to hold a constructive cancellation for any claim copy not presented were alarming. However, similar comments were not received in regard to the proposed changes to bring reissue and reexamination practice closer together.

*Response:* The comments were adopted in that the proposed changes, other than clarifications of current practice, will not be implemented now and further study will be undertaken to include suggestions presented in regard to this rule.

*Comment 55:* Several comments offered suggestions and requested clarifications: (1) Whether this was an attempt to push the practice closer to PCT where substitute pages are used; (2) use of different markings such as strikeouts of word processors; (3) only require complete copy of claims at issue; (4) only have a status listing of all claims not complete copy with each response; (5) continuations or divisions should be filed showing markups; (6) require only that new claims pages be substituted; (7) objection to the submission of a separate complete set of claims in addition to the amendments being made; (8) some instances separate set may be appropriate and not too much of a burden; and (9) there should be exception, liberal reinstatement, or rebuttable presumption for constructive cancellation if clerical omission.

*Response:* Paragraphs (a) and (b) of § 1.121 each separately treat amendment of the specification (paragraphs (a)(1) and (b)(1)), and of the claims (paragraphs (a)(2) and (b)(2)). In comparing amendment practice to the

specification for non-reissue and reissue applications, all amendments in the reissue application are to be made relative to (*i.e.*, *vis-à-vis*) the specification (including the claims) and drawings of the original patent as of the date of the filing of the reissue application. Changes are shown using underlining and bracketing relative to the patent specification. In addition, the entire paragraph of disclosure with the changes and the entire claim with the changes must be presented, in making the amendment. On the other hand, amendments in a non-reissue application are to be made relative to prior amendments (with underlining and bracketing in a reproduced claim reflecting changes made relative to the prior amendment), and insertions and deletions can be made without reproducing the entire paragraph of disclosure or the entire claim. Further (for a non-reissue application), in amending the text of the disclosure other than the claims, changes are not shown by underlining and bracketing, even where a paragraph of disclosure is reproduced.

Paragraph (a) of § 1.121 relates to amendments in non-provisional applications, other than reissue applications, and retains a reference to § 1.52. Paragraph (a)(1) relates to the manner of making amendments in the specification, other than in the claims. Paragraph (a)(1)(i) requires the precise point in the specification to be indicated where an addition is to be inserted. Paragraph (a)(1)(ii) requires the precise point in the specification to be indicated where a deletion is to be made. This should be compared to addition or cancellation of material from the patent specification in a reissue application (paragraph (b)(1)(ii)) or in a reexamination proceeding (§ 1.530(d)(1)(ii), *e.g.*, by way of a copy of the rewritten material). An amendment containing deletions mixed with additions will be treated according to both paragraphs (a)(1)(i) and (a)(1)(ii). Amendments to the specification, additions or deletions, do not require markings, only identification of an insertion point. However, where the changes made are not readily apparent the applicant may be requested by the examiner to provide an explanation of the changes or a marked up copy showing the changes made. Paragraph (a)(1)(iii) provides that to reinstate matter previously deleted it must be reinstated by a new amendment inserting the matter.

Paragraph (a)(2) of § 1.121 relates to the manner of making amendments in the claims of a non-reissue application.

Paragraph (a)(2)(i) permits amendment by instructions to the Office for a deletion, paragraph (a)(2)(i)(A), or for an addition limited to five words in any one claim, paragraph (a)(2)(i)(B). The ability to provide directions to the Office for the handwritten deletion of five words or less for each claim does not encompass deletion of equations, charts or other non-word material. Paragraph (a)(2)(ii) sets forth that a claim may be amended by a direction to cancel the claim, or by rewriting the claim with markings showing material to be added and deleted. Additionally, previously rewritten claims are required to be so marked and not to have interlineations showing amendment(s) previous to the one currently being submitted.

Paragraph (a)(3) of § 1.121 clarifies that amendments to the original application drawings for non-reissue applications are not permitted and are to be made by way of a substitute sheet for each original drawing sheet that is to be amended. The paragraph contains material from cancelled § 1.115.

Paragraph (a)(4) of § 1.121 requires that any amendment presented in a substitute specification must be presented under the provision of this section either prior to or concurrent with the submission of the substitute specification. The paragraph contains material from cancelled § 1.115.

Paragraph (a)(5) of § 1.121 requires amendment of the disclosure in certain situations (*i.e.*, to correct inaccuracies of description and definition) and to secure substantial correspondence. The paragraph contains material from cancelled § 1.117. The previous requirement for "correspondence" has been modified by use of "substantial correspondence." See comments to § 1.115.

Paragraph (a)(6) prohibits the introduction of new matter into the disclosure of a non-reissue, non-provisional application.

Paragraph (b) of § 1.121 applies to amendments in reissue applications. Paragraph (b)(1) of § 1.121 relates to the manner of making amendments to the specification, other than in the claims, in reissue applications. Paragraph (b)(1)(i) requires that amendments including deletions be made by submission of a copy of one or more newly added or rewritten paragraphs with markings, except that an entire paragraph may be deleted by a statement deleting the paragraph without presentation of the text of the paragraph. Paragraph (b)(1)(ii) requires indication of the precise point in the specification where the paragraph which is being amended is located.

When a change in one sentence, paragraph or page results in only format changes to other pages (*e.g.*, shifting of non-amended text to subsequent pages) not otherwise being amended, such format changes are not to be submitted. Compare to amendments to the specification, other than in the claims, of non-reissue applications wherein deletions are permitted, paragraph (a)(1)(ii) of this section. Paragraph (b)(1)(iii) defines the marking set forth in paragraph (b)(1)(ii) of this section. Proposed paragraph (b)(1)(iii), relating to a requirement for submission of all amendments be presented when any amendment to the specification is made, was not implemented.

Paragraph (b)(2) of § 1.121 relates to the manner of making amendments to the claims in reissue applications. Paragraph (b)(2)(i)(A) of § 1.121 requires the entire text of each patent claim that is being amended by the current amendment and of each claim being added by the current amendment. Requests that the Office hand-enter changes of five or less words, former § 1.121(c)(2), will no longer be permitted. Pending claims, whether previously amended or not, that are not being amended by the current amendment are not to be resubmitted. This procedure is different from § 1.121(a)(2)(i)(B), which permits requests that the Office hand-enter changes of five or less words in a non-reissue application. Additionally, provision is made for the cancellation of a patent claim by a direction to cancel without the need for marking by brackets. Paragraph (b)(2)(i)(B) requires that patent claims not be renumbered. Paragraph (b)(2)(i)(C) identifies the type of marking required by paragraph (b)(2)(i)(A), single underlining for added material and single brackets for material deleted.

Paragraph (b)(2)(ii) of § 1.121 requires that each amendment submission set forth the status (*i.e.*, pending or cancelled) of all patent claims and all added claims as of the date of the submission, as not all claims (non-amended claims) are to be presented with each submission, paragraph (b)(2)(iv). The absence of submission of the claim status would result in an incomplete reply (§ 1.135(c)).

Paragraph (b)(2)(iii) of § 1.121 requires that each claim amendment be accompanied by an explanation of the support in the disclosure of the patent for the amendment. The absence of an explanation would result in an incomplete reply (§ 1.135(c)).

*Comment 56:* One comment requested that the Office clarify how an applicant would satisfy this requirement when the

amendment involves a simple editorial change, or when the amendment uses terms that find no explicit support in the patent.

*Response:* When it is clear that the amendment simply involves an editorial change and does not add material for which support in the disclosure is required, the reply may simply explain that the amendment is merely making an editorial change. When the amendment uses terms that find no explicit support in the specification, the reply must set forth where the specification provides, at least implicitly, support for the amendment as required by 35 U.S.C. 112, ¶ 1. In addition, an amendment to the specification to secure correspondence between the specification and the claims will also be required. See § 1.75(d)(1) and MPEP 608.01(o). Obviously, an amendment that does not find either explicit or at least implicit support in the specification as required by 35 U.S.C. 112, ¶ 1, is not permitted. See 35 U.S.C. 251, ¶ 1, (last sentence).

Proposed paragraphs (b)(2)(iv) and (v) of this section, relating to a requirement for presentation of all amendments as of the date any amendment to the claims is made, and to the treatment of the failure to submit a copy of any added claim as a direction to cancel that claim, were not implemented.

Paragraph (b)(3) of § 1.121 clarifies that amendments to the patent drawings are not permitted and that any change must be by way of a new sheet of drawings with the amended figures being identified as "amended" and with added figures identified as "new" for each sheet that has changed. The paragraph contains material from cancelled § 1.115.

Paragraph (b)(4) of § 1.121, added in view of the deletion of § 1.115 paragraph (d), requires amendment of the disclosure in certain situations (*i.e.*, to correct inaccuracies of description and definition) and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings. The previous requirement for "correspondence" has been modified by use of "substantial correspondence." See comments to § 1.115.

Paragraph (b)(5) of § 1.121, containing material transferred from proposed paragraph (b)(2)(vi) (now deleted), clarifies that: (1) No reissue patent will be granted enlarging the scope of the claims unless applied for within two years from the grant of the original patent (additional broadening outside the two-year limit is appropriate as long as some broadening occurred within the two-year period, *In re Doll*, 419 F.2d 925, 164 USPQ 218 (CCPA 1970)); and

(2) no amendment may introduce new matter or be made in an expired patent.

Paragraph (b)(6) of § 1.121 has been added to clarify that all amendments must be made relative to (*i.e.*, *vis-à-vis*) the specification (including the claims) and drawings of the original patent as of the date of the filing of the reissue application. If there was a prior change to the patent (made *via* a prior reexamination certificate, reissue of the patent, certificate of correction, *etc.*), the first amendment must be made relative to the patent specification as changed by the prior proceeding or other mechanism for changing the patent. In addition, all amendments subsequent to the first amendment must be made relative to the patent specification in effect as of the date of the filing of the reissue application, and not relative to the prior amendment.

Paragraph (c) of § 1.121 clarifies that amendments in reexamination proceedings are to be made in accordance with § 1.530(d).

Section 1.121 as applied to reissue applications does not provide for replacement pages whereby a new page would be physically substituted for a currently existing page.

However, an applicant can direct that a page or pages ("Page(s) \_\_\_\_\_") be cancelled and that updated materials be inserted in its place.

The wide availability of word processing should enable applicants to more easily submit updated material providing greater accuracy and thereby eliminating the need for the Office to hand-enter amendments. To that end, § 1.125 is amended to reflect current practice that a substitute specification may be submitted in an application, other than a reissue application, at any point up to payment of the issue fee as a matter of right, provided that such substitute specification is submitted in compliance with the requirements set forth in § 1.125.

#### Section 1.122

Section 1.122 is removed and reserved as representing internal Office instruction.

See comments related to § 1.101.

#### Section 1.123

Section 1.123 is removed and reserved and its subject matter transferred to § 1.121 for better context.

No comments were received regarding the proposed change to § 1.123.

#### Section 1.124

Section 1.124 is removed and reserved and its subject matter transferred to § 1.121 for better context.

No comments were received regarding the proposed change to § 1.124.

#### Section 1.125

Section 1.125 is amended by addition of paragraphs (a) through (d). Section 1.125(a) retains the current practice that a substitute specification may be required by the examiner and has been clarified to note that if the legibility of the application papers shall render it difficult to consider the application, the Office may require a substitute specification.

Section 1.125 is amended in view of the continued prosecution application under § 1.53(d), to reflect the current liberalized practice as set forth in MPEP 608.01(q), and to delete the verification requirement for the no new matter statement. See comments to § 1.4(d).

Section 1.125(b) specifically provides for the filing of a substitute specification, excluding the claims, at any point up to payment of the issue fee, if it is accompanied by: (1) A statement that the substitute specification includes no new matter; and (2) a marked-up copy of the substitute specification showing the matter being added to and the matter being deleted from the specification of record (*i.e.*, the specification to be replaced by the substitute specification). While § 1.125(b)(2) requires the marked-up copy show the additions and deletions, it does not require that such additions and deletions be shown by underlining and bracketing. Rather, it permits the use of other indicia (*e.g.*, redlining and strikeouts) to show additions and deletions so that the document-compare feature of conventional word-processing programs can be used to produce the marked-up substitute specification.

Section 1.125(b), as proposed, would have required that a substitute specification contain only changes that were previously or concurrently submitted by an amendment under § 1.121. The Office, however, is not adopting this proposal. Creating a copy of the substitute specification showing the additions and deletions is relatively easy using the document-compare feature of a conventional word-processing program, when compared to the burden of preparing an amendment under § 1.121(a)(1) showing numerous changes to a specification. Thus, the Office is adopting the requirement currently set forth in MPEP 608.01(q) for a marked-up copy of the substitute specification showing the additions and deletions.

*Comment 57:* One comment stated that it is not clear exactly what is to be submitted with the substitute

specification under paragraph (b)(2) of this section even though paragraph (c) requires it to be in clean form without markings.

*Response:* Section 1.125 requires an applicant filing a substitute specification to submit: (1) the substitute specification in clean form without markings (§ 1.125(c)); (2) a marked-up copy showing the additions and deletions relative to the specification it is replacing (§ 1.125(b)(2)); and (3) a statement that the substitute specification includes no new matter (§ 1.125(b)(1)).

Section 1.125(c) is amended to clarify that a substitute specification is to be submitted without markings as to amended material.

Section 1.125(d) does not permit a substitute specification in reissue or reexamination proceedings as markings for changes from the patent are required therein.

#### Section 1.126

Section 1.126 is amended to delete the phrase " , except when presented in accordance with § 1.121(b)" for consistency with the change to § 1.121.

No comments were received regarding § 1.126.

#### Section 1.133

Section 1.133(b) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.133.

#### Section 1.134

Section 1.134 is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.134.

#### Section 1.135

Section 1.135 paragraphs (a) and (c) are amended by replacement of "response" with "reply" in accordance with the change to § 1.111. Section 1.135(b) is amended to clarify that the admission of or refusal to admit any amendment after final rejection, and not just an amendment not responsive to the last Office action, shall not operate to save the application from abandonment.

Section 1.135(c) is amended to provide that a new "time period" under § 1.134 may be given if a reply to a non-final Office action is substantially complete but consideration of some matter or compliance with some requirement has been inadvertently omitted. This replaces the practice in which an applicant may be given an

opportunity to supply the omission through the setting of a "time limit" of one month that is not extendable. Under § 1.135(c) as adopted, a one-month shortened statutory time period will generally be set enabling an applicant to petition for extensions of time under § 1.136(a). Where 35 U.S.C. 133 requires a period longer than one month (i.e., actions mailed in the month of February), a shortened statutory period of 30 days will be set.

The setting of a time period for reply under § 1.134 (rather than a time limit) results in the date of abandonment (when no further reply is filed) being the expiration of the new time period rather than the date of expiration of the period of reply set in the original Office action for which an incomplete reply was filed. Thus, the amendment to § 1.135(c) permits the filing of a continuing application as an alternative to completing the reply, whereas the previous practice required an applicant to complete the reply that was held to be incomplete or else the application was held to be abandoned (retroactively) as of the expiration of the original period for reply. Thus, applicants had to file an unnecessary reply to preserve pendency where their only intent was to file a continuing application. Section 1.135(c), as amended, sets forth a new period within which a continuing application can be filed, without the applicant having to supply the omission in the prior application to preserve pendency. In addition, applicant may file any other reply as may be appropriate under § 1.111, regardless of whether a continuing application is filed.

*Comment 58:* Two comments objected to the change on the basis that it is subject to intentional misuse. It is argued that it encourages an applicant to send in piecemeal replies and permits use of the time period as a subterfuge for extending prosecution as § 1.135(c) does not specify how many times an incomplete reply can be given.

*Response:* 35 U.S.C. 154 as amended by Pub. L. 103-465 should provide the necessary incentive for applicants to prosecute an application without undue delay. Additionally, the examiner can determine that the failure to provide a complete reply was not "inadvertent" (especially where an applicant was previously notified of the deficiencies in the reply), and not set a period under § 1.135(c).

*Comment 59:* One comment suggested amending § 1.135(c) from "may" to "shall" so that an examiner must provide an opportunity to an applicant to complete a reply, and that § 1.135(c) should not be limited to replies to non-

final Office actions so that if an application is in condition for allowance except for an inadvertent omission it would be beneficial for all parties to provide the same benefit as for non-final actions.

*Response:* The term "may" is used rather than "shall" to encourage applicants to provide a complete reply, in that an applicant providing an incomplete reply cannot be certain of being provided with an additional time period to prosecute the application.

Section 1.113(a) provides that the only reply to a final Office action effective to avoid abandonment of an application is: (1) an amendment under § 1.116 that *prima facie* places the application in condition for allowance; or (2) a notice of appeal (and appeal fee) under § 1.191. Thus, the only reply under § 1.113(a) that will ensure that abandonment of the application will be avoided is: (1) an amendment under § 1.116 that cancels all of the rejected claims; or (2) a notice of appeal (and appeal fee) under § 1.191 (§ 1.113(a)). That is, an applicant filing a proposed amendment under § 1.116 or arguments in reply to a final Office action has no assurance that such reply will necessarily result in allowance of the application. Given the limited nature of the replies under § 1.113 to a final Office action, it is not appropriate to provide a time period under § 1.135(c) to complete a reply to a final Office action.

Section 1.135(c) is also amended to remove an unnecessary reference to consideration of the question of abandonment and to clarify that the reply for which applicant may be given a new time period to reply to must be a "non-final" Office action.

#### Section 1.136

Section 1.136(a)(1) is amended to recite the availability of a maximum of five rather than four months as an extension of time, subject to any maximum period for reply set by statute. For example, when a one-month or 30-day period is set for reply to a restriction requirement or for completing a reply under § 1.135(c), that period may be extended up to the six-month statutory (35 U.S.C. 133) maximum. In addition, as the two-month period set in § 1.192(a) for filing an appeal brief is not subject to the six-month maximum period specified in 35 U.S.C. 133, the period for filing an appeal brief may be extended up to seven months.

*Comment 60:* At least one comment noted that there is no statutory authority under 35 U.S.C. 41(a)(8)(C) for the

\$2,010 amount set for the fifth month extension of time.

*Response:* See the response to comment 5.

Section 1.136(a)(1) is also amended by replacement of "respond" with "reply" in accordance with the change to § 1.111 and for clarification.

Section 1.136(a)(2) is amended by replacement of "respond" with "reply" in accordance with the change to § 1.111 and other clarification changes.

*Comment 61:* One comment questioned whether the addition in paragraph (a)(2) of § 1.136 that requires a reply to be filed prior to the expiration of the period of extension to avoid abandonment of the application will affect the timely filing of a reply under §§ 1.8 or 1.10 where the mail date rather than the receipt date is the end of the period for reply.

*Response:* The referred to addition has been noted to be a clarification and not a change in practice. The added language does not change current practice under §§ 1.8 and 1.10.

Section 1.136 is amended by addition of paragraph (a)(3) that provides for the filing in an application a general authorization to treat any reply requiring a petition for an extension of time for its timely submission as containing a request therefor for the appropriate length of time. The authorization may be filed at any time prior to or with the submission of a reply that would require an extension of time for its timely submission, including submission with the application papers. Previously, the mere presence of a general authorization, submitted prior to or with a reply requiring an extension of time, to charge all required fees does not amount to a petition for an extension of time for that reply (MPEP 201.06 and 714.17) and under the proposed amended rule the submission of a reply requiring an extension of time for its timely submission would not be treated as an inherent petition for an extension of time absent an authorization for all necessary extensions of time. The Office will continue to treat all petitions for an extension of time as requesting the appropriate extension period notwithstanding an inadvertent reference to a shorter period for extension and will liberally interpret comparable papers as petitions for an extension of time. Applicants are advised to file general authorizations for payment of fees and petitions for extensions of time as separate papers rather than as sentences buried in papers directed to other matters (such as an application transmittal letter). The use of individual papers directed only

to an extension of time or to a general authorization for payment of fees would permit the Office to more readily identify the presence of such items and list them individually on the application file jacket, thus facilitating future identification of these authorizations.

*Comment 62:* Two comments requested that it be clarified whether the reference to submission of a paper with an authorization is to be construed as allowing for submission of a standard sentence in a general reply to an Office action that includes a check box on an application transmittal form.

*Response:* The comments have been adopted and the proposed language of paragraph (a)(3) of § 1.136 modified to replace the reference to "paper" with "written request."

Section 1.136(a)(3) is additionally amended to provide that general authorizations to charge fees are effective to meet not only the requirement for the extension of time fee for replies filed concurrent or subsequent to the authorization but also represent a constructive petition for an extension of time, which is a change from current practice wherein a general authorization to charge additional fees does not represent a petition for an extension of time, which petition must be separately requested.

Section 1.136(a)(3) also includes the sentence "[s]ubmission of the fee set forth in § 1.17(a) will also be treated as a constructive petition for an extension of time in any concurrent reply requiring a petition for an extension of time under this paragraph for its timely submission." This provides for those instances in which an applicant files a reply with a check (or other means of payment under § 1.23) for the requisite fee under § 1.17(a) (1) through (5) for the petition under § 1.136(a) required to render such reply timely, but omits a request (*i.e.*, a petition) for an extension of time under § 1.136(a). In such instances, the mere submission of the appropriate fee will be treated as a constructive petition for the extension of time to render the reply timely.

Section 1.136(b) is amended for clarity and to replace the phrase "response" with the phrase "reply" for consistency with § 1.111.

#### Section 1.137

Section 1.137 is amended to, *inter alia*, incorporate revival of abandoned applications and lapsed patents for the failure: (1) to timely reply to an Office requirement in a provisional application (§ 1.139); (2) to timely pay the issue fee for a design application (§ 1.155); (3) to timely pay the issue fee for a utility or

plant application (§ 1.316); or (4) to timely pay any outstanding balance of the issue fee (§ 1.317) (lapsed patents).

Section 1.137(a) is amended to provide: (1) that it is the paragraph that applies to petitions under the "unavoidable" standard; (2) that "where the delay in reply was unavoidable, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to [§ 1.137(a)]"; and (3) the requirements for a grantable petition pursuant to § 1.137(a) in paragraphs (a)(1) through (a)(4).

Section 1.137(a)(1) (and § 1.137(b)(1)) are amended to provide that a grantable petition pursuant to § 1.137(a) must be accompanied by "[t]he required reply, unless previously filed." Section 1.137(a)(1) (and § 1.137(b)(1)) is amended to further provide that "[i]n a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application" and that "[i]n an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof."

Under § 1.137(a)(1) (and § 1.137(b)(1)), a continuing application is a permissive (*i.e.*, "may be met") reply in a nonprovisional application abandoned for failure to prosecute, in that an applicant in a nonprovisional application abandoned for failure to prosecute may file a reply under § 1.111 to a non-final Office action or a reply under § 1.113 (*e.g.*, notice of appeal) to a final Office action, or may simply file a continuing application as the required reply. The Office, however, may require a continuing application (or request for further examination pursuant to § 1.129(a)) to meet the reply requirement of § 1.137(a)(1) (or § 1.137(b)(1)) where, under the circumstances of the application, treating a reply under §§ 1.111 or 1.113 would place an inordinate burden on the Office.

Exemplary circumstances of when treating a reply under §§ 1.111 or 1.113 may place an inordinate burden on the Office are: (1) an application abandoned for an inordinate period of time; (2) the application file containing multiple or conflicting replies to the last Office action; and (3) the submission of a reply or replies under § 1.137(a)(1) (or § 1.137(b)(1)) that are questionable as to compliance with §§ 1.111 or 1.113.

While the revival of applications abandoned for failure to timely prosecute and for failure to timely pay the issue fee are incorporated together in § 1.137, the statutory provisions for the revival of an application abandoned for failure to timely prosecute and for

failure to timely submit the issue fee are mutually exclusive. *See Brenner versus Ebbert*, 398 F.2d 762, 157 USPQ 609 (D.C. Cir.), *cert. denied* 393 U.S. 926, 159 USPQ 799 (1968). 35 U.S.C. 151 authorizes the acceptance of a delayed payment of the issue fee, if the issue fee "is submitted \* \* \* and the delay in payment is shown to have been unavoidable." 35 U.S.C. 41(a)(7) likewise authorizes the acceptance of an "unintentionally delayed payment of the fee for issuing each patent." Thus, 35 U.S.C. 41(a)(7) and 151 each require payment of the issue fee as a condition of reviving an application abandoned or patent lapsed for failure to pay the issue fee. Therefore, the filing of a continuing application without payment of the issue fee or any outstanding balance thereof is not an acceptable proposed reply in an application abandoned or patent lapsed for failure to pay the issue fee or any portion thereof.

The Notice of Allowance requires the timely payment of the issue fee in effect on the date of its mailing to avoid abandonment of the application. In instances in which there is an increase in the issue fee by the time of payment of the issue fee required in the Notice of Allowance, the Office will mail a notice requiring payment of the balance of the issue fee then in effect. *See In re Mills*, 12 USPQ2d 1847 (Comm'r Pat. 1989). The phrase "for failure to pay the issue fee or any portion thereof" applies to those instances in which the applicant fails to pay either the issue fee required in the Notice of Allowance or the balance of the issue fee required in a subsequent notice. In such instances, the proposed reply must be the issue fee then in effect, if no portion of the issue fee was previously submitted, or any outstanding balance of the issue fee then in effect, if a portion of the issue fee was previously submitted.

These changes to § 1.137(a)(1) (and § 1.137(b)(1)) are necessary to incorporate into § 1.137 the revival of abandoned applications and lapsed patents for the failure to: (1) Timely reply to an Office requirement in a provisional application (§ 1.139), (2) timely pay the issue fee (§§ 1.155 and 1.316), or (3) timely pay any outstanding balance of the issue fee (§ 1.317).

Section 1.137(a)(3) is amended to provide that a grantable petition pursuant to § 1.137(a) must be accompanied by "[a] showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable."

Section 1.137(a) deletes the requirement that a petition thereunder be "promptly filed after the applicant is notified of, or otherwise becomes aware of, the abandonment." The genesis of the "promptly filed" requirement in § 1.137(a) is the legislative history of Pub. L. 97-247, § 3, 96 Stat. 317 (1982) (which provides for the revival of an "unintentionally" abandoned application), which provides, *inter alia*, that:

In order to prevent abuse and injury to the public the Commissioner could require a terminal disclaimer equivalent to the period of abandonment and could require applicants to act *promptly* after becoming aware of the abandonment.

See H.R. Rep. No. 542, 97th Cong., 2d Sess. 7 (1982), reprinted in 1982 U.S.C.C.A.N. 771 (emphasis added).

Nevertheless, 35 U.S.C. 133 and 151 each require a showing that the "delay" was "unavoidable," which requires not only a showing that the delay which resulted in the abandonment of the application was unavoidable, but also a showing of unavoidable delay until the filing of a petition to revive. See *In re Application of Takao*, 17 USPQ2d 1155 (Comm'r Pat. 1990). The burden of continuing the process of presenting a grantable petition in a timely manner likewise remains with the applicant until the applicant is informed that the petition is granted. *Id.* Thus, an applicant seeking to revive an "unavoidably" abandoned application must cause a petition under § 1.137(a) to be filed without delay (*i.e.*, promptly upon becoming notified, or otherwise becoming aware, of the abandonment of the application).

An applicant who fails to file a petition under § 1.137(a) "promptly" upon becoming notified, or otherwise becoming aware, of the abandonment of the application will not be able to show that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(a)] was unavoidable." The removal of the language in § 1.137(a) requiring that any petition thereunder be "promptly filed after the applicant is notified of, or otherwise becomes aware of, the abandonment" should *not* be viewed as: (1) Permitting an applicant, upon becoming notified, or otherwise becoming aware, of the abandonment of the application, to delay the filing of a petition under § 1.137(a); or (2) changing (or modifying) the result in *In re Application of S*, 8 USPQ2d 1630 (Comm'r Pat. 1988), in which a petition under § 1.137(a) was denied due to the applicant's deliberate deferral in filing a

petition under § 1.137. An applicant who deliberately chooses to delay the filing of a petition under § 1.137 (as in *Application of S*) will not be able to show that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(a)] was unavoidable" or even make an appropriate statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(b)] was unintentional."

Therefore, the requirement in § 1.137(a) that a petition thereunder be "promptly filed after the applicant is notified of, or otherwise becomes aware of, the abandonment" is deleted solely because it is considered redundant in light of the requirement for a showing that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to § 1.137(a) was unavoidable.

Section 1.137(a)(3) (and § 1.137(b)(3)) is further amended to delete the requirement that the showing (statement) must be a verified showing or statement if made by a person not registered to practice before the Patent and Trademark Office. Section 1.56 currently provides that each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith. Sections 1.4(d) and 10.18 are amended to provide that a signature on a paper submitted to the Office constitutes an acknowledgment that willful false statements are punishable under 18 U.S.C. 1001, and may jeopardize the validity of the application or any patent issuing thereon. Therefore, requiring additional verification of a showing or statement under § 1.137 would be redundant. In addition, this requirement results in delays in the treatment of the merits of petitions that include unverified statements.

Section 1.137(a)(4) (and § 1.137(b)(4)) are added to provide that a grantable petition under § 1.137 must be accompanied by "[a]ny terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to [§ 1.137(c)]."

Section 1.137(b) is amended to provide: (1) That it is the paragraph that applies to petitions under the "unintentional" standard; (2) that "where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to [§ 1.137(b)]"; and (3) the requirements for a grantable petition pursuant to § 1.137(b) in paragraphs (b)(1) through (b)(4).

Section 1.137(b)(1) is amended (as discussed *supra*) to provide that a grantable petition under § 1.137(b) must be accompanied by "[t]he required reply, unless previously filed." Section 1.137(b)(1) is amended to further provide that "[i]n a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application" and that "[i]n an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof."

Section 1.137(b)(3) is amended to provide that a grantable petition under § 1.137(b) must be accompanied by "[a] statement that the entire delay in providing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional" and that "[t]he Commissioner may require additional information where there is a question whether the delay was unintentional." While the Office will generally require only the statement that the entire delay in providing the required reply from the due date for the reply until the filing of a grantable petition pursuant to § 1.137(b) was unintentional, the Office may require an applicant to carry the burden of proof to establish that the delay from the due date for the reply until the filing of a grantable petition was unintentional within the meaning of 35 U.S.C. 41(a)(7) and § 1.137(b) where there is a question whether the entire delay was unintentional. See *In re Application of G*, 11 USPQ2d 1378, 1380 (Comm'r Pat. 1989).

Section 1.137(b)(4) is amended to delete the one-year filing period requirement. Section 1.137(b)(4) is amended to provide that a grantable petition under § 1.137 must be accompanied by "[a]ny terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to [§ 1.137(c)]."

*Requirement That the Entire Delay Until the Filing of a Grantable Petition Was Unavoidable (§ 1.137(a)) or Unintentional (§ 1.137(b))*

There are three periods to be considered during the evaluation of a petition under § 1.137: (1) The delay in reply that originally resulted in the abandonment; (2) the delay in filing an initial petition pursuant to § 1.137 to revive the application; and (3) the delay in filing a *grantable* petition pursuant to § 1.137 to revive the application.

Where the applicant deliberately permits an application to become

abandoned (e.g., due to a conclusion that the claims are unpatentable, that a rejection in an Office action cannot be overcome, or that the invention lacks sufficient commercial value to justify continued prosecution), the abandonment of such application is considered to be a deliberately chosen course of action, and the resulting delay cannot be considered as "unintentional" within the meaning of § 1.137(b). See *Application of G*, 11 USPQ2d at 1380. Likewise, where the applicant deliberately chooses not to seek or persist in seeking the revival of an abandoned application, or where the applicant deliberately chooses to delay seeking the revival of an abandoned application, the resulting delay in seeking revival of the abandoned application cannot be considered as "unintentional" within the meaning of § 1.137(b). An intentional delay resulting from a deliberate course of action chosen by the applicant is not affected by: (1) The correctness of the applicant's (or applicant's representative's) decision to abandon the application or not to seek or persist in seeking revival of the application; (2) the correctness or propriety of a rejection, or other objection, requirement, or decision by the Office; or (3) the discovery of new information or evidence, or other change in circumstances subsequent to the abandonment or decision not to seek or persist in seeking revival. Obviously, delaying the revival of an abandoned application, by a deliberately chosen course of action, until the industry or a competitor shows an interest in the invention (a submarine application) is the antithesis of an "unavoidable" or "unintentional" delay. An intentional abandonment of an application, or an intentional delay in seeking either the withdrawal of a holding of abandonment in or the revival of an abandoned application, precludes a finding of unavoidable or unintentional delay pursuant to § 1.137. See *In re Maldague*, 10 USPQ2d 1477, 1478 (Comm'r Pat. 1988).

The Office does not generally question whether there has been an intentional or otherwise impermissible delay in filing an initial petition pursuant to § 1.137 (a) or (b), when such petition is filed: (1) Within three months of the date the applicant is first notified that the application is abandoned; and (2) within one year of the date of abandonment of the application. Thus, an applicant seeking revival of an abandoned application is advised to file a petition pursuant to § 1.137 within three months of the first notification

that the application is abandoned to avoid the question of intentional delay being raised by the Office (or by third parties seeking to challenge any patent issuing from the application).

Where a petition pursuant to § 1.137 (a) or (b) is not filed within three months of the date the applicant is first notified that the application is abandoned, the Office may consider there to be a question as to whether the delay was unavoidable or even unintentional. In such instances, the Office may require: (1) A showing as to how the delay between the date the application was first notified that the application was abandoned and the date a § 1.137(a) petition was filed was "unavoidable"; or (2) further information as to the cause of the delay between the date the applicant was first notified that the application was abandoned and the date a § 1.137(b) petition was filed, and how such delay was "unintentional." To avoid delay in the consideration of a petition under § 1.137 (a) or (b) in instances in which such petition was not filed within three months of the date the applicant was first notified that the application was abandoned, applicants should include a showing as to how the delay between the date the applicant is first notified by the Office that the application is abandoned and filing of a petition under § 1.137 was: (1) "Unavoidable" in a petition under § 1.137(a); or (2) "unintentional" in a petition under § 1.137(b).

Where a petition pursuant to § 1.137 (a) or (b) is not filed within one year of the date of abandonment of the application (note that abandonment takes place by operation of law, rather than the mailing of a Notice of Abandonment), the Office may require: (1) Further information as to when the applicant (or the applicant's representative) first became aware of the abandonment of the application; and (2) a showing as to how the delay in discovering the abandoned status of the application occurred despite the exercise of due care or diligence on the part of the applicant (or the applicant's representative) (see *Ex parte Pratt*, 1887 Dec. Comm'r Pat. 31 (1887)). To avoid delay in the consideration of a petition under § 1.137 (a) or (b) in instances in which such petition was not filed within one year of the date of abandonment of the application, applicants should include: (1) The date that the applicant first became aware of the abandonment of the application; and (2) a showing as to how the delay in discovering the abandoned status of the application occurred despite the

exercise of due care or diligence on the part of the applicant.

In either instance, applicant's failure to carry the burden of proof to establish that the "entire" delay was "unavoidable" or "unintentional" may lead to the denial of a petition under § 1.137(a) or § 1.137(b), regardless of the circumstances that originally resulted in the abandonment of the application.

Section 1.137(d) specifies a time period within which a renewed petition pursuant to § 1.137 must be filed to be considered timely. So long as a renewed petition is timely filed under § 1.137(d) (including any properly obtained extensions of time), the Office will consider the delay in filing a renewed petition under § 1.137(a) "unavoidable" under § 1.137(a)(3), and will consider the delay in filing a renewed petition under § 1.137(b) "unintentional" under § 1.137(b)(3). Where an applicant files a renewed petition, request for reconsideration, or other petition seeking review of a prior decision on a petition pursuant to § 1.137 outside the time period specified in § 1.137(d), the Office may require, *inter alia*, a specific showing as to how the entire delay was "unavoidable" (§ 1.137(a)) or "unintentional" (§ 1.137(b)). As discussed *supra*, a delay resulting from the applicant deliberately choosing not to persist in seeking the revival of an abandoned application cannot be considered "unavoidable" or "unintentional" within the meaning of § 1.137, and the correctness or propriety of the decision on the prior petition pursuant to § 1.137, the correctness of the applicant's (or the applicant's representative's) decision not to persist in seeking revival, the discovery of new information or evidence, or other change in circumstances subsequent to the abandonment or decision to not persist in seeking revival are immaterial to such intentional delay caused by the deliberate course of action chosen by the applicant.

#### *Retroactive Application of § 1.137(b)*

There was no prohibition in former § 1.137(b) against requests for waiver of its one-year filing period requirement; however, waiver of the one-year filing period requirement of former § 1.137(b) was subject to strictly limited conditions (§ 1.183). See Final Rule entitled "Changes in Procedures for Revival of Patent Applications and Reinstatement of Patents," published in the **Federal Register** at 58 FR 44277 (August 20, 1993), and in the *Official Gazette* at 1154 *Off. Gaz. Pat. Office* 35 (September 14, 1993). Thus, under the terms of former § 1.137, an applicant in an application abandoned for more than

one year could file either a petition under § 1.137(a) to revive the application on the basis of "unavoidable" delay, or a petition under §§ 1.183 and 1.137(b) to revive the application on the basis of "unintentional" delay. That is, where an application was abandoned for more than one year, and the delay was "unintentional" but not "unavoidable," it was incumbent upon an applicant desiring revival of the application to promptly file a petition under §§ 1.183 and 1.137(b) to revive the application.

While § 1.137(b), as amended, is, by its terms, applicable to applications abandoned prior to its effective date, § 1.137(b) requires, by its terms, "[a] statement that the entire delay in providing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional." Thus, where an applicant (or the applicant's representative) previously chose not to seek revival of an application (e.g., due to the opinion that the former provisions of § 1.137 (a) or (b) did not permit revival thereunder), the resulting delay in seeking revival of the application cannot be considered "unintentional" within the meaning of § 1.137(b). Likewise, where an applicant (or the applicant's representative) previously requested revival of an application, received an adverse decision (e.g., a dismissal or denial), and chose not to persist in seeking revival of the application (e.g., by request for reconsideration or review), the resulting delay in seeking revival of the application likewise cannot be considered "unintentional" within the meaning of § 1.137(b). The elimination of the one-year filing period requirement in § 1.137(b) does not create a new right to overcome any prior intentional delay caused by a deliberate course of action (or inaction) chosen by the applicant. Thus, any applicant filing a petition under § 1.137 after the effective date of this Final Rule, but outside the period set in § 1.137(d) for seeking reconsideration of a prior adverse decision on a request to revive an application will be considered to have acquiesced in the abandonment of the application or lapse of the patent.

Section 1.137(c) is amended to change the introductory phrase "[i]n all applications filed before June 8, 1995, and in all design applications filed on or after June 8, 1995" to "[i]n a design application, a utility application filed before June 8, 1995, or a plant application filed before June 8, 1995" for clarity. Section 1.137(c) is further amended to change the phrase "any petition to revive pursuant to paragraph

(a) of this section" to "any petition to revive pursuant to this section," and the phrase "not filed within six months of the date of abandonment of the applications" is deleted. Section 1.137(c) is further amended to change the phrase "must also apply to any patent granted on any continuing application entitled under 35 U.S.C. 120 to the benefit of the filing date of the application for which revival is sought" to "must also apply to any patent granted on any continuing application that contains a specific reference under 35 U.S.C. 120, 121, or 365(c) to the application for which revival is sought," since it is the claim for, and not the entitlement to, the benefit of the filing date of the application for which revival is sought that triggers the requirement for the filing of a terminal disclaimer in the continuing application.

Section 1.137(d) is amended to change "application" to "abandoned application or lapsed patent" to incorporate into § 1.137 the revival of lapsed patents. In view of the elimination of a time period from § 1.137(b), the provisions of former § 1.137(e) are incorporated into § 1.137(d) as "[u]nless a decision indicates otherwise, this time period may be extended under the provisions of § 1.136."

Section 1.137(e) is amended to expressly provide that a provisional application, abandoned for failure to timely reply to an Office requirement, may be revived pursuant to § 1.137(a) or (b) so as to be pending for a period of no longer than twelve months from its filing date. In accordance with 35 U.S.C. 111(b)(5), § 1.137(e) clearly indicates that "[u]nder no circumstances will a provisional application be regarded as pending after twelve months from its filing date." Prior § 1.139 (a) and (b) each provided that a provisional application may be revived so as to be pending for a period of no longer than twelve months from its filing date, and that under no circumstances will a provisional application be regarded as pending after twelve months from its filing date.

*Comment 63:* The majority of comments opposed amending § 1.137(a) and (b) to include time limits based upon the mail date of a notification of abandonment, as well as the retroactive application of such a change to the rules of practice. While these comments recognized that any filing period requirement § 1.137 is better based upon the date of notification, rather than the date of abandonment, they argued that there will inevitably be instances in which a blameless applicant will not be able to meet the filing period

requirement due to extenuating circumstances. The majority of comments supported amending § 1.137 (a) and (b) to remove the filing period requirement, as well as the retroactive application of such a change to the rules of practice.

*Response:* The Office will adopt a § 1.137 that does not include filing period requirements, and will not limit the retroactive application of § 1.137(b) as adopted, other than by the terms of the rule (as discussed supra).

*Comment 64:* One comment generally supported the change to § 1.137(b) to remove the filing period requirement, but expressed concerns as to the routine revival of abandoned applications. The comment specifically suggested that the Office continue to require a high showing to justify the revival of an abandoned application, especially where the petition was filed substantially after abandonment or applicant's receipt of the notice of abandonment.

*Response:* The Office does not consider the revival of an abandoned application to be a "routine" matter. The Office will require, *inter alia*, a "showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(a)] was unavoidable" as a prerequisite to the grant of any petition based upon unavoidable delay (§ 1.137(a)). The Office will require, *inter alia*, a "statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(b)] was unintentional" by a registered practitioner or other party in interest having firsthand knowledge of the circumstances surrounding the delay as a prerequisite to the grant of any petition based upon unintentional delay (§ 1.137(b)). The Office expects that such statement made by a registered practitioner not having firsthand knowledge of the circumstances surrounding the delay be based upon a reasonable investigation of the circumstances surrounding the abandonment of the application (§ 10.18), and that such statement by any person be consistent with the duty of candor and good faith and the duty to disclose material information to the Office (§ 1.56).

Regardless of the length of the delay, § 1.137(a) requires that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to § 1.137(a) was unavoidable. Likewise, regardless of the length of the delay, § 1.137(b)

requires that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to § 1.137(b) was unintentional. As "unintentional" delay does not require that the delay have occurred despite the exercise of due care and diligence (as does "unavoidable" delay), the Office does not routinely require a "showing" of unintentional delay for a petition under § 1.137(b). However, where there may be a question whether the delay was unintentional, the Office may require a showing of unintentional delay for a petition under § 1.137(b). Such question may arise from papers submitted to the Office prior to the petition under § 1.137(b) (e.g., a letter of express abandonment, or other communication evidencing a desire to discontinue prosecution) or from facts set forth in the petition itself. Such question may also arise simply from the length of the delay between the date the applicant was notified of the abandoned status of the application and the date action was taken to revive the abandoned application, or the length of the period of abandonment. Specifically, where there is a delay of three months between the date the applicant was notified of the abandoned status of the application (i.e., the mail date of the notice of abandonment) and the date a petition under § 1.137(b) was filed, or where the application was abandoned for more than one year prior to the date a petition under § 1.137(b) was filed, the Office may require further information and a showing that the delay was unintentional.

Finally, it should be stressed that the mere fact that a petition under § 1.137(b) was filed within three months of the date the applicant was notified of the abandoned status of the application (i.e., the mail date of the notice of abandonment) or within one year of the date of abandonment does not imply that the delay was "unintentional." That is, an applicant who deliberately delays the filing of a petition under § 1.137 until three months from the mail date of the notice of abandonment (or based upon the one-year anniversary of the date of abandonment) cannot appropriately make the statement that "the delay was unintentional." This time frame is provided simply as an indication as to when an applicant should expect the Office to inquire further into the circumstances of the abandonment of an application for which a petition under § 1.137(b) is filed, and in which case the applicant may expedite consideration of such petition by providing information as to

when applicant was notified of the abandoned status of the application, and the cause of the delay between the date of notification and the date a petition under § 1.137 was filed.

*Comment 65:* One comment suggested that the Office include in § 1.137 all of the basic interpretations and guidelines by which the Office applies § 1.137. The comment specifically suggested that § 1.137 include the time periods (e.g., three months) by which the Office measures the applicant's diligence in taking action to revive the application and the differences between post-abandonment delay in taking action to revive the application and any pre-abandonment delay which may have resulted in the abandonment.

*Response:* The Office will adopt a § 1.137 that does not include filing period requirements, but requires that the "entire" delay was "unavoidable" (§ 1.137(a)) or "unintentional" (§ 1.137(b)). The requirements for a petition to revive an abandoned application or lapsed patent are set forth in § 1.137; additionally, the Office will set forth its basic interpretations and guidelines for application of § 1.137 (instructional information) in the MPEP.

Section 1.181 provides the basis for generic requests for relief by petition, and sets forth a two-month time period therein for the timely filing of a petition (§ 1.181(f)). While the three-month time frame employed by the Office during the consideration petitions under § 1.137 exceeds the two-month period in § 1.181(f) for the timely filing of a petition, this three-month period is the most frequently set period for reply by an applicant (see MPEP 710.02(b)). While the Office considers the two-month period in § 1.181(f) to be the appropriate period by which the timeliness of a petition should be determined, it is certainly reasonable to expect that any applicant desiring to restore an abandoned application to pending status will file a petition under § 1.137 to revive such abandoned application no later than three months after notification of abandonment of the application. See *In re Kokaji*, 1 USPQ2d 2005, 2006 (Comm'r Pat. 1986).

The "three-month" time frame set forth in this Final Rule is a guideline as to when an applicant can expect further inquiry by the Office (and, as such, should attempt to provide the relevant information in the initial petition to avoid delay), in that: (1) it is possible that an applicant is incapable of filing a petition under § 1.137 within three months of the date of notification of abandonment (e.g., *pro se* applicant incapacitated from date of notification of abandonment until action taken to

revive the application) rendering the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition unavoidable; and (2) it is also possible that an applicant, by a deliberately chosen course of action, delays the filing of a petition under § 1.137 until exactly three months after the date of notification of abandonment to use this period as an extension of time, in which case a statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional" is not appropriate. To avoid substitution of the three-month time frame for review by the Office for the requirement for unavoidable or unintentional delay, the Office will not amend § 1.137 to include this time frame.

*Comment 66:* One comment indicated that the phrase "the delay was unintentional" is unclear. The comment recited a specific example in which an applicant, under final rejection, submits an amendment or other correspondence which is believed by the applicant to place the application in condition for allowance (and thus constitute a reply within the meaning of § 1.113), and, as such, the applicant, in a deliberate course of action/inaction, takes no further steps to ensure the filing a reply within the meaning of § 1.113 (e.g., a notice of appeal) to the final rejection. The comment suggested that § 1.137 is unclear as to whether the delay in this situation, which may be deliberate or intentional in the literal sense, would constitute an "unintentional" delay within the meaning of § 1.137(b).

*Response:* The Office has amended § 1.137 to require that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition" was "unavoidable" (§ 1.137(a)) or "unintentional" (§ 1.137(b)). Thus, intentional delays occurring prior to the due date for reply to avoid abandonment do not preclude relief pursuant to § 1.137. Should the delay in the example given extend past the extendable due date for reply (under § 1.113) to the final rejection, an appropriate statement of unintentional delay could be made as the applicant did not intend to have the deadline for reply under § 1.113 to the final rejection expire.

In addition, there is a distinction between: (1) a delay resulting from an error in judgment as to whether to permit an application to become abandoned (whether to prosecute the application) or whether to seek or persist in seeking the revival of the abandoned application; and (2) a delay

resulting from an error in judgment as to the steps necessary to continue the prosecution delay in seeking revival of the application. Where the abandonment and ensuing delay results from an error in judgment as to whether to permit an application to become abandoned (whether to prosecute the application) or whether to seek or persist in seeking the revival of the abandoned application, the abandonment of such application is considered a deliberately chosen course of action, and the resulting delay cannot be considered "unintentional" within the meaning of § 1.137(b). Where, however, an error in judgment as to the steps necessary to continue prosecution results in abandonment of the application, the abandonment of such application is not necessarily considered a deliberately chosen course of action, and the resulting delay may be considered "unintentional" within the meaning of § 1.137(b).

However, §§ 1.116 and 1.135(b) are manifest that proceedings concerning an amendment after final rejection will not operate to avoid abandonment of the application in the absence of a timely and proper appeal. Unless the applicant is informed in writing that the application is allowed prior to the expiration of the period for reply to the final Office action, it is the applicant's responsibility to timely file a notice of appeal (and fee) to avoid the abandonment of the application. The abandonment of an application subject to a final Office action is not "unavoidable" within the meaning of 35 U.S.C. 133 and § 1.137(a) in the situation in which the applicant simply permits the maximum extendable statutory period for reply to a final Office action to expire while awaiting a notice of allowance or other action.

*Comment 67:* One comment opposed the changes to § 1.137 on the bases that: (1) it permits submarine patents, in that an applicant may permit an application to become abandoned and wait to see whether the invention was developed by other entities; and (2) the revival of a long-abandoned application will have an adverse impact on the examiner, in that the examiner who originally examined that application may no longer be at the Office, or will have to reacquaint himself or herself with the application.

*Response:* The change to § 1.137(b) does not permit an applicant to obtain revival where either: (1) the applicant deliberately permitted the application to become abandoned; or (2) the applicant deliberately delayed seeking revival to see whether the invention was developed by other entities. It is well

established that where applicant deliberately permits an application to become abandoned, the abandonment of such application is considered a deliberately chosen course of action, and the resulting delay cannot be considered "unintentional" within the meaning of § 1.137(b). *See Application of G*, 11 USPQ2d at 1380. Likewise, where the applicant deliberately chooses not to either seek or persist in seeking the revival of an abandoned application, the resulting delay in seeking revival of the application cannot be considered "unintentional" within the meaning of § 1.137(b). The intentional abandonment of an application, or an intentional delay in seeking either the withdrawal of a holding of abandonment in or the revival of an abandoned application, precludes a finding of unavoidable or unintentional delay pursuant to § 1.137. *See Maldague*, 10 USPQ2d at 1478.

While it is possible for an applicant to make a misleading statement that the delay was unintentional to obtain revival of an abandoned application, the Office simply must rely upon the candor and good faith of those prosecuting patent applications (e.g., it is equally possible for a party to fabricate evidence and obtain the revival of a long-abandoned application on the basis of unavoidable delay). Any applicant obtaining revival based upon a misleading statement that the delay was unintentional may find the achievement short-lived as a result of the question of intentional delay being raised by third parties challenging any patent issuing from the application.

The revival of any long-abandoned application will have an adverse impact on the examiner; however, long-abandoned applications have been previously revived pursuant to § 1.137(a) on the basis of unavoidable delay. *See In re Lonardo*, 17 USPQ2d 1455 (Comm'r Pat. 1990) (application revived after being abandoned for more than sixteen years). Thus, this change to § 1.137(b) will not create a burden on examiners that did not exist before, and could in fact reduce the burden as a result of the requirement that in applications abandoned for excessive periods of time would have to show that the entire delay was "unavoidable" or "unintentional."

*Comment 68:* One comment suggested that the two-year limitation in 35 U.S.C. 41(c) is a "good compromise" in regard to a filing period for filing petitions to revive based upon unintentional delay.

*Response:* The suggestion is not adopted. Changing the one-year filing period requirement in § 1.137(b) to a two-year filing period requirement

would not substantially change the problem caused by a filing period requirement, namely, that it causes inequitable results in certain instances. In addition, the inclusion of any filing period requirement in § 1.137(a) or (b) will likely induce applicants, or their representatives, to delay the filing of a petition under § 1.137 until the end of such filing period. *See Application of S*, 8 USPQ2d at 1632. The Office has no discretion in regard to the twenty-four month filing period requirement in 35 U.S.C. 41(c), but the presence of a twenty-four month filing period requirement in 35 U.S.C. 41(c) does not imply that the Office must place a twenty-four month filing period requirement into the rules implementing 35 U.S.C. 41(a)(7), which contains no filing period requirement.

*Comment 69:* One comment opposed the changes to § 1.137 on the basis that the right to revive an abandoned application should be limited due to the public's right to practice a technology "that an applicant has abandoned."

*Response:* 35 U.S.C. 41(a)(7) authorizes the Office to revive an abandoned application where the abandonment was unintentional (or unavoidable, the epitome of unintentional), but not where the abandonment was intentional. Section 1.137 does not authorize the revival of an abandoned application where the applicant, by deliberate course of action, has abandoned an application or delayed seeking its revival. Additionally, in many instances the disclosure in a patent maturing from a revived application would not have been disclosed and the technology therein would not be public knowledge, but for the revival of the application.

*Comment 70:* One comment suggested the need for an intervening rights provision to protect innocent infringers.

*Response:* The issue of intervening rights relates to the enforcement of patent rights, which does not directly concern the conduct of proceedings in the Office. Thus, it is unclear whether the Office is authorized under 35 U.S.C. 6 to promulgate regulations including an intervening rights provision.

*Comment 71:* Several comments suggested that § 1.137(b) be amended to include the "promptly filed" requirement of § 1.137(a).

*Response:* The suggestion is effectively adopted, although via a different mechanism as explained below. While there is considerable merit to the suggestion for the inclusion of a "promptly filed" requirement in both § 1.137(a) and (b), the Office has eliminated the "promptly filed" requirement from § 1.137(a) to avoid

confusion between "promptly filed" and "unavoidable delay." The phrase "promptly filed" has been associated with § 1.137(a) and its requirement for "unavoidable" delay, and, as such, the inclusion of a "promptly filed" requirement in § 1.137(b) might cause confusion in regard to the distinction between the circumstances that constitute unavoidable delay and the circumstances that constitute unintentional delay.

Section 1.137(a)(3) and (b)(3) as adopted requires that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition" has been "unavoidable" (§ 1.137(a)) or "unintentional" (§ 1.137(b)) to clarify the requirements for a petition under § 1.137(a) and (b). As discussed *supra*, an applicant who fails to file a petition under § 1.137(a) or (b) "promptly" upon becoming notified, or otherwise becoming aware, of the abandonment of the application will not be able to show that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(a)] was unavoidable," and will probably not even be able to make an appropriate statement that "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to [§ 1.137(b)] was unintentional." Obviously, any petition under § 1.137(a) or (b) should be "promptly filed" upon discovery of abandonment to avoid a question as to whether the filing of such a petition was intentionally delayed.

*Comment 72:* One comment questioned how a patent could lapse for failure to pay the issue fee, as a patent does not issue unless the issue fee is paid.

*Response:* 35 U.S.C. 151 provides that where an applicant timely submits the sum specified in the Notice of Allowance as the issue fee, but a balance of the issue fee remains outstanding (due to a fee increase), the patent will lapse unless the balance of the issue fee is timely paid. See *Mills*, 12 USPQ2d at 1848; see also *Ex parte Crissy*, 201 USPQ 689 (Bd. Pat. App. 1976).

*Comment 73:* One comment suggested that § 1.137(a)(1) and (b)(1) not require a continuing application if the application became abandoned for failure to reply to a non-final Office action.

*Response:* Section 1.137(a)(1) and (b)(1) each provide that a petition thereunder include:

The required reply, unless previously filed. In a nonprovisional application abandoned

for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

As discussed *supra*, there may be circumstances under which the Office may require a continuing application to meet this reply requirement. Nevertheless, in a nonprovisional application abandoned for failure to prosecute, a continuing application is generally a permissive (*i.e.*, "may be met") reply, in that an applicant in a nonprovisional application abandoned for failure to prosecute may file a reply under § 1.111 to a non-final Office action or a reply under § 1.113 (*e.g.*, notice of appeal) to a final Office action, or may simply file a continuing application as the required reply. In an application or patent, abandoned or lapsed for failure to pay any portion of the required issue fee, the issue fee or any outstanding balance thereof is the mandatory (*i.e.*, "must be") reply. As the "continuing application" option is limited to an abandoned nonprovisional application, the reply in an abandoned provisional application must be any outstanding reply to an Office requirement.

*Comment 74:* One comment suggested that § 1.137(c) be amended to take into account the provision in 35 U.S.C. 154(c) that an application (other than a design application) is entitled to a patent term of not less than twenty years from its filing date, or if the application contains a specific reference to an earlier filed application(s) under 35 U.S.C. 120, 121, or 365(c), the date twenty years from the filing date of the earliest such application(s).

*Response:* The suggestion is not adopted. The Office considers this situation to be applicable to a relatively small class of applications, and, as such, does not deem it prudent to introduce into § 1.137(c) the complexity necessary to account for this situation. Applicants in this situation (*e.g.*, instances in which an application filed prior to June 8, 1995, is to be revived solely for purposes of copendency with an application filed on or after June 8, 1995) may file a petition pursuant to § 1.183 requesting that the Office waive the provisions of § 1.137(c) to the extent that § 1.137(c) requires a disclaimer of the period in excess of the date twenty years from the filing date of the application, or if the application contains a specific reference to an earlier filed application(s) under 35 U.S.C. 120, 121, or 365(c), the date twenty years from the filing date of the

earliest such application(s). The Office will refund the § 1.17(h) petition fee if the § 1.183 petition is granted.

*Comment 75:* One comment suggested that the last paragraph of § 1.137 read:

Under no circumstance may a petition to revive a provisional application be filed more than twelve months after the filing date of the provisional application. No application filed more than twelve months after the filing date of a provisional application is entitled to a claim of priority from the provisional [application], notwithstanding the copendency of any petition to revive the provisional application.

*Response:* The suggestion is not adopted. 35 U.S.C. 111(b)(3)(C) authorizes the revival of an abandoned application on the basis of unavoidable or unintentional delay. 35 U.S.C. 111(b)(5) provides that a "provisional application shall be regarded as abandoned 12 months after the filing date of such application and shall not be subject to revival thereafter." 35 U.S.C. 111(b) does not contain any limitation on the filing date of a petition to revive an abandoned provisional application (or the date by which such a petition must be granted), but only a limitation as to the period of pendency of the provisional application. Thus, § 1.137(e) as adopted provides that "[a] provisional application \* \* \* may be revived \* \* \* so as to be pending for a period of no longer than twelve months from its filing date. Under no circumstances will a provisional application be regarded as pending after twelve months from its filing date."

#### Section 1.139

Section 1.139 is removed and reserved and its subject matter added to § 1.137.

No comments were received regarding the proposed change to § 1.139.

#### Section 1.142

Section 1.142 is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.142.

#### Section 1.144

Section 1.144 is amended for clarification purposes.

No comments were received regarding the proposed change to § 1.144.

#### Section 1.146

Section 1.146 is amended for clarification purposes.

No comments were received regarding the proposed change to § 1.146.

*Section 1.152*

Section 1.152 is amended to place its former provisions into paragraphs (a), (a)(1), and (a)(2) for clarification.

Section 1.152 is also amended to remove the prohibition against color drawings and color photographs in design applications. Section 1.152 is amended to permit the use of color photographs and color drawings in design applications subject to the petition requirements of § 1.84(a)(2) inasmuch as color may be an integral element of the ornamental design. While pen and ink drawings may be lined for color, a clear showing of the configuration of the design may be obscured by this drafting method. New technologies, such as holographic designs, fireworks and laser light displays may not be accurately disclosed without the use of color.

The term "article" of § 1.152(a) is replaced by the term "design" as 35 U.S.C. 171 requires that the claim be directed to the "design for an article" not the article, *per se*. Therefore, to comply with the requirements of 35 U.S.C. 112, ¶ 1, it is only necessary that the design as embodied in the article be fully disclosed and not the article itself. The term "must" has been replaced by the term "should" to allow for latitude in the illustration of articles whose configuration may be understood without surface shading. Clarification language has been added to note that the use of solid black surfaces is permitted for representation of the color black as well as color contrast and that photographs and ink drawings must not be combined as formal drawings in one application.

A new § 1.152(b) is added to clarify Office practice concerning details disclosed in the ink drawings, color drawings, or photographs deposited with the original application papers. Specifically, § 1.152(b) provides that any details disclosed in the ink or color drawings, or photographs deposited with the original application papers constitutes an integral part of the disclosed and claimed design, except as otherwise provided in § 1.152(b). Section 1.152(b) further specifies that this detail may include color or contrast, graphic or written indicia, including identifying indicia of a proprietary nature (*e.g.*, a company logo), surface ornamentation on an article, or any combination thereof. The "but not limited to" phrase in § 1.152(b) clarifies that this list is exemplary, not exhaustive.

Section 1.152(b)(1) provides that when any detail shown in informal drawings or photographs does not

constitute an integral part of the disclosed and claimed design, a specific disclaimer must appear in the original application papers either in the specification or directly on the drawings or photographs. This specific disclaimer in the original application papers will provide antecedent basis for the omission of the disclaimed detail(s) in later-filed drawings or photographs. That is, in the absence of such a disclaimer, later-filed formal or informal drawings not including any detail disclosed in the original drawings will be considered to contain new matter, and will be treated accordingly. See 35 U.S.C. 112, ¶ 1; § 1.121(a)(6).

*Comment 76:* One comment stated that applicant may misunderstand the implications of submitting a design drawing in color and suggested that § 1.152 should explain and give notice of the consequences of submitting an initial color drawing in design applications.

*Response:* The comment has been adopted.

Section 1.152(b)(2) provides that when informal color drawings or photographs are deposited with the original application papers without a disclaimer pursuant to § 1.152(b)(1), formal color drawings or photographs, or a black and white drawing lined to represent color, will be required.

*Section 1.154*

The heading of § 1.154 is amended to read "[a]rrangement of application elements" for consistency with §§ 1.77 and 1.163. Section 1.154 paragraph (a) is amended to clarify that a voluntary submission (see comments under § 1.152 relating to substitution of "design" for "article") may and should be made of "a brief description of the nature and intended use of the article in which the design is embodied." It is current practice for design examiners, in appropriate cases, to inquire as to the nature and intended use of the article in which a claimed design is embodied. The submission of such description will allow for a more accurate initial classification, and aid in providing a proper and complete search at the time of the first action on the merits. In those instances where this feature description is necessary to establish a clear understanding of the article in which the design is embodied, provision of the feature description would help in reducing pendency by eliminating the necessity for time-consuming correspondence. Specifically, requests for information prior to first action would be avoided. Absent an amendment requesting deletion of the

description it would be printed on any patent that would issue.

No comments were received regarding the proposed change to § 1.154.

*Section 1.155*

Section 1.155 is amended to include only the language of former § 1.155(a). The subject matter of former paragraphs (b) through (f) of § 1.155 were added to § 1.137.

No comments were received regarding the proposed change to § 1.155.

*Section 1.163*

The heading of § 1.163 is amended to read "[s]pecification and arrangement of application elements" for consistency with §§ 1.77 and 1.154. Section 1.163(b) is amended to remove an unnecessary and outmoded reference to a "legible carbon copy of the original" specification for plant applications.

No comments were received regarding the proposed change to § 1.163.

*Section 1.165*

The proposed amendment to § 1.165 to remove the reference to the artistic and competent execution of plant patent drawings is withdrawn.

*Comment 77:* One comment argued that the language proposed to be deleted was actually relied upon by examiners to obtain new and better illustrations.

*Response:* The comment was adopted to the extent that the proposed change is withdrawn to allow for further study of what language related to the type of plant drawings should appear in § 1.165.

*Section 1.167*

Section 1.167 is amended to include only the language of former § 1.167(a), in that paragraph (b) is removed as unnecessary in view of § 1.132.

*Comment 78:* One comment questioned whether § 1.132 covers paragraph (b) of § 1.167, which paragraph has been deleted.

*Response:* Paragraph (b) of § 1.167 provided for the submission of affidavits by qualified agricultural or horticultural experts regarding the novelty and distinctiveness of the variety of plant. Section 1.132 relates to affidavits traversing grounds of rejection, and is recognized as the appropriate rule under which an affidavit may be submitted which does not fall within or under other specific rules. See MPEP 716.

*Section 1.171*

Section 1.171 is amended to no longer require an order for a title report in reissue applications as the requirement for a certification on behalf of all the assignees under concomitantly amended

§ 1.172(a) obviates the need for a title report and fee therefor. Section 1.171 is also amended by deletion of the requirement for an offer to surrender the patent, which offer is seen to be redundant in view of § 1.178.

No adverse comments were received regarding the proposed change to § 1.171.

#### Section 1.172

Section 1.172 is amended to require that all assignees establish their ownership interest in compliance with § 3.73(b). The amendment as originally proposed repeated requirements found in § 3.73(b) rather than incorporating § 3.73(b), as assignees of a part interest are frequently involved in reissue applications.

*Comment 79:* One comment noted that the proposed amendment repeated requirements already found in § 3.73(b) and was unnecessary.

*Response:* The comment was adopted, in that § 1.172 is amended to simply reference § 3.73(b). Section 3.73(b) is amended to replace a reference to an assignee of the entire right, title and interest with a reference to an assignee, so as to include assignees of a part interest.

#### Section 1.175

Section 1.175 relating to the content of the reissue oath or declaration (MPEP 1414), as well as §§ 1.48 and 1.324 relating to correction of inventorship in an application and in a patent, respectively, are amended to remove the requirement for a factual showing relating to a matter in which a lack of deceptive intent must be established. A statement as to a lack of deceptive intent is sufficient to meet the statutory requirement under 35 U.S.C. 251 of a lack of deceptive intent relating to the error(s) to be corrected by reissue, and a factual showing of how the error(s) to be corrected by reissue arose or occurred is not required. As the Office no longer investigates fraud and inequitable conduct issues and a reissue applicant's statement of a lack of deceptive intent is normally accepted on its face (See MPEP 1448), the requirement in former § 1.175(a)(5) that it be shown how the error(s) being relied upon arose or occurred without deceptive intent on the part of the applicant appears to be unduly burdensome upon applicants and the Office, and is deleted. This applies to the initially identified error(s), under paragraph (a), and any subsequently identified error(s) under paragraph (b).

*Comment 80:* Although the elimination of the requirement for a factual showing relating to how the

errors arose or occurred enjoyed overwhelming support, three comments cited the need for continued investigation by the Office. One comment, while agreeing that some relaxation of reissue oath or declaration requirements are in order, stated that the Office should not decline to investigate entirely or adopt a *pro forma* requirement that can merely be incanted. Two comments stated that it is hard to get the courts to review this issue and that the courts and the public are at a disadvantage absent an explanation of how the error occurred.

*Response:* Current Office practice is to reject reissue applications only where there is "smoking gun" evidence of deceptive intent, which will not be demonstrated by the type of inquiry limited to a showing of how the error arose or occurred without the ability to subpoena witnesses or evidence. Accordingly, the burden presented on all reissue applicants based on the mere collection of such information for every error is not seen to be warranted.

*Comment 81:* One comment suggested that a final declaration is not needed, and that, as an alternative, counsel should be allowed to submit a statement based on information and belief counsel is not aware of deceptive intent.

*Response:* 35 U.S.C. 251 requires that an error have been made without deceptive intention to be corrected *via* reissue. Accordingly, all errors being corrected by reissue must have been made without deceptive intention, in that an error made with deceptive intention cannot be bootstrapped onto an error made without deceptive intention and corrected *via* reissue. The parties with the best knowledge of the lack of deceptive intention are the patentees and owners of the patent, not counsel for the reissue application.

An initial reissue oath or declaration filed pursuant to § 1.175(a) is limited to identification of the cause(s) of the reissue, and stating generally that all errors being corrected in the reissue application at the time of filing of the oath or declaration arose without deceptive intent. Paragraph (a)(1) requires the identification of at least one error and only one error may be identified as the basis for reissue. The current practice under § 1.175 (a)(3) and (a)(5) of specifically identifying all errors being corrected at the time of filing the initial oath or declaration is not retained. Although only one error need be identified to provide a basis for reissue, where only one error among more than one is so identified, applicant should carefully monitor that the error is retained or submit a supplemental

oath or declaration identifying another error or errors.

*Comment 82:* One comment suggested that since a reissued patent and a reexamined patent may also be reissued, paragraph (a)(1) of § 1.175 may be clarified to substitute for "original patent," "reissued," or "existing patent" as what is wholly or partly inoperative or invalid.

*Response:* The effect of a reissue or reexamination proceedings is to cause a substitution for the original patent so that the reissued or reexamined patent becomes the original patent.

Paragraph (b)(1) of § 1.175 requires a supplemental reissue oath or declaration for errors corrected that were not covered by an earlier presented reissue oath or declaration, such as the initial oath or declaration pursuant to paragraph (a) of this section or one submitted subsequent thereto (a supplemental oath or declaration under this paragraph), stating generally that all errors being corrected, which are not covered by an earlier presented oath or declaration pursuant to § 1.175 (a) and (b), arose without any deceptive intention on the part of the applicant. A supplemental oath or declaration that refers to all errors that are being corrected, including errors covered by a reissue oath or declaration submitted pursuant to paragraph (a) of this section, would be acceptable. The specific requirement for a supplemental reissue oath or declaration to cover errors sought to be corrected subsequent to the filing of an initial reissue oath or declaration is not a new practice, but merely recognition of a current requirement for a supplemental reissue oath or declaration when additional errors are to be corrected. However, the current practice of specifically identifying all supplemental errors being corrected in a supplemental reissue oath or declaration is not retained.

A supplemental oath or declaration under paragraph (b)(1) must be submitted prior to allowance. The supplemental oath or declaration may be submitted with any amendment prior to allowance, paragraph (b)(1)(i), or in order to overcome a rejection under 35 U.S.C. 251 made by the examiner where there are errors sought to be corrected that are not covered by a previously filed reissue oath or declaration, paragraph (b)(1)(ii). Any such rejection by the examiner will include a statement that the rejection may be overcome by submission of a supplemental oath or declaration, which oath or declaration states that the errors in issue arose without any deceptive intent on the part of the applicant. An

examiner ordinarily will be introducing a rejection under 35 U.S.C. 251 based on the lack of a supplemental declaration for the first time in the prosecution once the claims are determined to be otherwise allowable. The introduction of a new ground of rejection under 35 U.S.C. 251 will not prevent an action from being made final, except first actions pursuant to § 1.113(c), because of the combination of the following factors: (1) The finding of the case in condition for allowance is the first opportunity that the examiner has to make the rejection; (2) the rejection is being made in response to an amendment of the application (to deal with the errors in the patent); (3) all applicants are on notice that this rejection will be made upon finding of the case otherwise in condition for allowance where errors have been corrected subsequent to the last oath or declaration filed in the case, therefore, the rejection should have been expected by applicant; and (4) the rejection will not prevent applicant from exercising any rights as to curing the rejection, since applicant need only submit the supplemental oath or declaration with the above-described language, and it will be entered to cure the rejection provided it raises no additional issue, such as an informality or substantive reissue question (e.g., a previously omitted claim for priority under 35 U.S.C. 119).

A supplemental oath or declaration under paragraph (b) of this section would only be required for errors sought to be corrected during prosecution of the reissue application. Where an Office action contains only a rejection under 35 U.S.C. 251 and indicates that a supplemental oath or declaration under this paragraph would overcome the rejection, applicants are encouraged to authorize the payment of the issue fee at the time the supplemental reissue oath or declaration is submitted in view of the clear likelihood that the reissue application will be allowed on the next Office action. Such authorization will reduce the delays in the Office awaiting receipt of the issue fee. Where there are no errors to be corrected over those already covered by an oath or declaration submitted under paragraphs (a) and (b)(1) of this section (e.g., the application is allowed on first action), or where a supplemental oath or declaration has been submitted prior to allowance and no further errors have been corrected, a supplemental oath or declaration under this paragraph, or additional supplemental oath or declaration under paragraph (b)(1), would not be required.

Paragraph (b)(2) provides that for any error sought to be corrected after allowance (e.g., under § 1.312), a supplemental oath or declaration must accompany the requested correction stating that the error(s) to be corrected arose without any deceptive intent on the part of the applicant.

The quotes around lack of deceptive intent, currently found in § 1.175(a)(6), are removed as the exact language is not required. The reference to § 1.56, currently found in § 1.175(a)(7), is removed as unnecessary in view of the reference to § 1.56 in § 1.63 that is also referred to by § 1.175(a). The stated ability of applicant to file affidavits or declarations of others and the ability of the examiner to require additional information, currently found in § 1.175(b), is deleted as unnecessary in view of 35 U.S.C. 131 and 35 U.S.C. 132.

New paragraph (c) of § 1.175 has been rewritten to clarify its intent that a subsequently submitted oath or declaration under this section need not identify any errors other than what was identified in the original oath or declaration provided at least one of the originally identified errors to be corrected is retained to provide a basis for the reissue.

In new paragraph (d) of § 1.175 a reference to § 1.53(f) is inserted to clarify that the initial oath or declaration under § 1.175(a) including those requirements under § 1.63 need not be submitted (with the specification, drawing and claims) in order to obtain a filing date.

#### Section 1.176

The adoption of a final change to § 1.176 is held in abeyance pending further consideration by the Office of the decision by the Federal Circuit in *In re Graff*, 111 F.3d 874, 42 USPQ2d 1471 (Fed. Cir. 1997). *Graff* involved two issues: (1) whether it is permissible to have a continuation of a reissue application when the reissue application has issued as a reissue patent; and (2) whether broadened claims can be presented more than two years after the original patent date in a reissue application which was filed within two years but did not include any broadened claims. While *Graff* is more directly related to § 1.177 than § 1.176, §§ 1.176 and 1.177 are sufficiently interrelated that the Office considers it appropriate to hold the final changes to both § 1.176 and § 1.177 in abeyance pending further consideration by the Office of the decision in *Graff*.

*Comment 83:* A comment requested clarification regarding how restriction, between claims added in a reissue application and the original patent

claims, by the examiner would be permitted in § 1.176 while § 1.177 would prohibit multiple reissue patents except among the distinct and separate parts of the thing patented.

*Response:* The comment will receive further consideration when a final change to § 1.176 is adopted.

#### Section 1.177

Section 1.177 was proposed to be amended to discontinue the current practice that copending reissue applications must be issued simultaneously unless ordered otherwise by the Commissioner pursuant to petition. As discussed *supra*, the adoption of a final change to § 1.177 is held in abeyance pending further consideration by the Office of the decision in *Graff*.

*Comment 84:* One comment would limit the granting of multiple reissue patents on different dates to where a petition for the grant of multiple reissue patents has been approved prior to the issuance of any reissue patent. Another comment thought that only one petition fee should be charged notwithstanding whether a petition in more than one reissue application is required.

*Response:* The comments will receive further consideration when a final change to § 1.177 is adopted.

#### Section 1.181

The proposed change to § 1.181 will not be made, see comments relating to § 1.101.

*Comment 85:* One comment requested that the material to be deleted from § 1.181, paragraphs (d), (e), and (g) should be retained as they give fair warning to all and the consequences of failure to pay a petition fee.

*Response:* The comment has been adopted.

#### Section 1.182

Section 1.182 is amended by providing that a petition under the section may be granted "subject to such other requirements as may be imposed" by the Commissioner, language similar to that appearing for petitions under § 1.183. The proposal to remove the statement that a decision on a petition thereunder will be communicated to interested parties in writing is withdrawn.

*Comment 86:* One comment opposed the proposal to remove the statement that a decision on a petition under § 1.182 will be communicated to interested parties in writing, arguing that it would not be appropriate for the Office to decide a petition under § 1.182 without communicating the decision to the interested parties in writing.

*Response:* The suggestion is adopted. The Office did not propose to remove the statement that a decision on a petition under § 1.182 will be communicated to interested parties in writing because the Office intended to discontinue providing written decisions on petitions under § 1.182 (or any other petition), but because it was considered unnecessary to state as much in the rule itself. While the Office will communicate the decision on any petition under § 1.182 to the interested parties in writing, such decision may not always take the form of a traditional decision on petition. For example, the grant of a petition under § 1.182 to accept the omitted page(s) or drawing(s) in a nonprovisional application and accord the date of such submission as the application filing date will be indicated by the issuance of a new filing receipt stating the filing date accorded the application. See Notice entitled "Change in Procedure Relating to an Application Filing Date" published in the **Federal Register** at 61 FR 30041, 30043 (June 13, 1996), and in the *Official Gazette* at 1188 *Off. Gaz. Pat. Office* 48, 50-51 (July 9, 1996).

#### Section 1.184

Section 1.184 is removed and reserved as representing internal instructions.

*Comment 87:* Comments suggested that § 1.184 not be deleted notwithstanding its internal directions. See response to comment relating to § 1.101.

Section 1.184 relates to the refusal of a subsequent Commissioner to reconsider a case once decided by a previous Commissioner, except in accordance with principles which govern the granting of new trials. As the Commissioner is free to waive any requirement of the rules not required by statute, the prohibition against reconsideration is ineffective. Additionally, the deletion of the material does not necessarily represent an intent to engage in reconsideration of matters previously decided.

#### Section 1.191

Section 1.191(a) is amended to permit every applicant, and every owner of a patent under reexamination, any of whose claims have been twice or finally (§ 1.113) rejected (rather than "any of the claims of which have been twice rejected or given a final rejection (§ 1.113)"), to file an appeal to the Board of Patent Appeals and Interferences (Board) to better track the language of 35 U.S.C. 134. Section 1.191(a) is also amended to: (1) explicitly refer to a "notice of appeal" to provide

antecedent for such term in § 1.192; (2) replace "response" with "reply" in accordance with the change to § 1.111; and (3) refer to § 1.17(b) for consistency with the change to § 1.17.

*Comment 88:* One comment argued that the proposed change to § 1.191, limiting the "twice rejected" requirement for appeal to a particular application, was inconsistent with 35 U.S.C. 134, as indicated by the Board in the unpublished decision *Ex parte Lemoine*, Appeal No. 94-0216 (Bd. Pat. App. & Inter., December 27, 1994). A second comment argued that § 1.191 should permit an appeal based on one rejection in a prior application and one rejection in a continuing application to avoid requiring an applicant to file a *pro forma* reply to meet the requirement that the particular application be twice rejected.

*Response:* The comments have been adopted by elimination of the limitation to twice rejected being related to a particular application. To avoid inconsistency between § 1.191 and 35 U.S.C. 134, § 1.191 as adopted tracks the language of 35 U.S.C. 134, except that § 1.191 states "twice or finally (§ 1.113) rejected" rather than "twice rejected." The patent statute and rules of practice do not permit an application to be finally rejected (even under first action final practice) under 35 U.S.C. 132, unless the applicant is one "whose claims have been twice rejected" within the meaning of 35 U.S.C. 134. Thus, the phrase "or finally (§ 1.113)" may be viewed as redundant. Nevertheless, as applicants generally delay appeal until final action (although Pub. L. 103-465 may change this practice), and there has been some confusion as to when 35 U.S.C. 134 and § 1.191 permit an applicant to appeal a rejection, § 1.191(a) as adopted states "twice or finally (§ 1.113) rejected."

Section 1.191(b) is amended to eliminate the requirement for a notice of appeal to: (1) be signed; or (2) identify the appealed claims. These two requirements have been deleted as being redundant of the requirements of § 1.192 for an appeal brief, which is necessary to avoid dismissal of the appeal. Section 1.33 requires that an appeal brief filed in either an application (§ 1.33(b)) or a reexamination proceeding (§ 1.33(c)) be signed. Thus, a signed appeal brief under § 1.192 (which must be filed to avoid dismissal of the appeal) will serve to, in effect, ratify any unsigned notice of appeal under § 1.191. Likewise, the former requirement of § 1.191(b) for an identification of the appealed claims is unnecessary as § 1.192(c)(3) requires that the appeal brief, *inter alia*, identify the "claims appealed." While it is no

longer specifically required by § 1.191(b), an applicant or patent owner should continue to sign notice of appeals under § 1.191(b) (like other papers) and to also identify the claims appealed. The change to § 1.191(b), in effect, permits an appeal brief to constitute an automatic "correction" of a notice of appeal that is not signed or does not identify the appealed claims.

The failure to timely file an appeal brief will result in dismissal of an appeal (§ 1.192(b)). Thus, the failure to timely file an appeal brief (signed in compliance with § 1.33(b) or (c)) after the filing of an unsigned notice of appeal will result in dismissal of the appeal as of the expiration date (including any extensions of time actually obtained) for filing such appeal brief. It will not result in treatment of the application or patent under reexamination as if the notice of appeal had never been filed. This distinction is significant in an application containing allowed claims, in that dismissal of an appeal results in cancellation of the rejected claims and allowance of the application, not abandonment of the application (which would have occurred if the notice of appeal had never been filed).

The Office has eliminated the requirements for a notice of appeal to be signed and to identify the appealed claims to avoid the delay and expense to the applicant and the Office that is involved in treating a defective notice of appeal. These changes were not made to encourage the filing of unsigned notices of appeal or notices of appeal that do not identify the claims being appealed; rather, a notice of appeal should be signed and identify the claims appealed. As the change to § 1.191(b) does not affect other papers submitted with a notice of appeal (e.g., an amendment under § 1.116) or other actions contained within the notice of appeal (e.g., an authorization to charge fees to a deposit account), the failure to sign a notice of appeal (or accompanying papers) may have adverse effects notwithstanding the change to § 1.191(b). For example, an unsigned notice of appeal filed with an authorization (unsigned) to charge the appeal fee to a deposit account as payment of the notice of appeal fee (§ 1.17(b)) will be unacceptable as lacking the appeal fee, as § 1.191(b) applies to the notice of appeal, but not to an authorization to charge a deposit account that happens to be included in the notice of appeal.

#### Section 1.192

Section 1.192(a) is amended by replacement of "response" with "reply"

in accordance with the change to § 1.111, and to refer to § 1.17(c) for consistency with the change to § 1.17.

*Comment 89:* One comment suggested that the appeal process could be improved by the imposition of a reasonable page limit on briefs.

*Response:* The suggestion will be reviewed for further consideration.

#### Section 1.193

Section 1.193, as well as §§ 1.194, 1.196, and 1.197, are amended to change "the appellant" to "appellant" for consistency. Section 1.193 is also amended by revision of paragraph (a) into paragraphs (a)(1) and (a)(2) and revision of paragraph (b) into paragraphs (b)(1) and (b)(2). Paragraph (a)(1) retains the subject matter of current paragraph (a), except that the phrase "and a petition from such decision may be taken to the Commissioner as provided in § 1.181" is deleted as superfluous. Section 1.181(a), by its terms, authorizes a petition from any action or requirement of an examiner in the *ex parte* prosecution of an application which is not subject to appeal.

Section 1.193(a)(2) specifically prohibits the inclusion of a new ground of rejection in an examiner's answer, but also expressly provides that when (1) an amendment under § 1.116 proposes to add or amend one or more claims, (2) appellant was advised (in an advisory action) that the amendment under § 1.116 would be entered for purposes of appeal, and (3) the advisory action indicates which individual rejection(s) set forth in the action from which the appeal was taken (e.g., the final rejection) would be used to reject the added or amended claim(s), then (1) the appeal brief must address the rejection(s) of the claim(s) added or amended by the amendment under § 1.116 as indicated in the advisory action, and (2) the examiner's answer may include the rejection(s) of the claim(s) added or amended by the amendment under § 1.116 as indicated in the advisory action. This provision of § 1.193(a)(2) is intended for those situations in which a rejection is stated (i.e., applied to some claim) in the final Office action, but due to an amendment under § 1.116 (after final) such rejection is now applicable to a claim that was added or amended under § 1.116. For example, when an amendment under § 1.116 cancels a claim (the "canceled claim") and incorporates its limitations into the claim upon which it depends or rewrites the claim as a new independent claim (the "appealed claim"), the appealed claim has become the canceled claim since it now contains the

limitations of the canceled claim (i.e., the only difference between the canceled claim and the canceled claim is the claim number). In such situations, the appellant has been given a fair opportunity to react to the ground of rejection (albeit to a claim having a different claim number). Thus, the Office does not consider such a rejection to constitute a "new ground of rejection" within the meaning of § 1.193(b). Nevertheless, § 1.193(b)(2) expressly permits such a rejection on appeal and further provides that "[t]he filing of an amendment under § 1.116 which is entered for purposes of appeal represents appellant's consent that when so advised any appeal proceed on those claim(s) added or amended by the amendment under § 1.116 subject to any rejection set forth in the action from which the appeal was taken" to eliminate controversy as to the rejection(s) to which claim(s) added or amended under § 1.116 may be subject on appeal.

The phrase "individual rejections" in § 1.193(a)(2) addresses the situation in which claim 2 (which depends upon claim 1) was rejected under 35 U.S.C. 103 on the basis of A in view of B and claim 3 (which depends upon claim 1) was rejected under 35 U.S.C. 103 on the basis of A in view of C, but no claim was rejected under 35 U.S.C. 103 on the basis of A in view of B and C, and an amendment under § 1.116 proposes to combine the limitations of claims 2 and 3 together into new claim 4. In this situation, the action from which the appeal is taken sets forth no rejection on the basis of A in view of B and C, and, as such, § 1.193(a)(2) does not authorize the inclusion of rejection of newly proposed claim 4 under 35 U.S.C. 103 on the basis of A in view of B and C in the examiner's answer. Of course, as a claim including the limitations of both claim 2 and claim 3 is a newly proposed claim in the application, such an amendment under § 1.116 may properly be refused entry as raising new issues. Conversely, that § 1.193(a)(2) would authorize the rejection in an examiner's answer of a claim sought to be added or amended in an amendment under § 1.116 has no effect on whether the amendment under § 1.116 is entitled to entry. The provisions of § 1.116 control whether an amendment under § 1.116 is entitled to entry; the provisions of § 1.193(a)(2) control the rejections to which a claim added or amended in an amendment under § 1.116 may be subject in an examiner's answer.

While § 1.193(a) generally prohibits a new ground of rejection in an examiner's answer, it does not prohibit the examiner from expanding upon or

varying the rationale for a ground of rejection set forth in the action being appealed. That is, the parenthetical definition of "new ground of rejection" in MPEP 1208.01 as including an "other reason for rejection" of the appealed claims means another basis for rejection of the appealed claims, and not simply another argument, rationale, or reason submitted in support of a rejection previously of record.

There is no new ground of rejection when the basic thrust of the rejection remains the same such that an appellant has been given a fair opportunity to react to the rejection. See *In re Kronig*, 539 F.2d 1300, 1302-03, 190 USPQ 425, 426-27 (CCPA 1976). Where the statutory basis for the rejection remains the same, and the evidence relied upon in support of the rejection remains the same, a change in the discussion of or rationale for supporting the rejection does not constitute a new ground of rejection. *Id.* at 1303, 190 USPQ at 427 (reliance upon fewer references in affirming a rejection under 35 U.S.C. 103 does not constitute a new ground of rejection). Where the examiner simply changes (or adds) a rationale for supporting a rejection, but relies upon the same statutory basis and evidence in support of the rejection, there is no new ground of rejection.

In any event, an allegation that an examiner's answer contains an impermissible new ground of rejection is waived if not timely (§ 1.181(f)) raised by way of a petition under § 1.181(a).

Section 1.193(b)(1) provides appellant with a right to file a reply brief in reply to an examiner's answer which is not dependent upon a new point of argument being present in the examiner's answer. The former practice of permitting reply briefs based solely on a finding of a new point of argument, as set forth in former paragraph (b), is eliminated thereby preventing present controversies as to whether a new point of argument has been made by the primary examiner. Appellant would be assured of having the last submission prior to review by the Board. Upon receipt of a reply brief, the examiner would either acknowledge its receipt and entry or reopen prosecution to respond to any new issues raised in the reply brief. Should the Board desire to remand the appeal to the primary examiner for comment on the latest submission by appellant or to clarify an examiner's answer (MPEP 1211, 1211.01, and 1212), appellant would be entitled to submit a reply brief in reply to the answer by the examiner to the Board's inquiry, which answer would be by way of a supplemental examiner's answer.

Thus, § 1.193(a)(2) does not permit a new ground of rejection in an examiner's answer, and § 1.193(b)(1) does not, in the absence of a remand by the Board, permit an answer (other than a mere acknowledgment) to a timely filed reply brief. Section 1.193 requires the examiner to reopen prosecution to either: (1) enter a new ground of rejection; or (2) provide a substantive answer to a reply brief.

Section 1.193(b)(2) provides that if appellant desires that the appeal process be reinstated in reply to the examiner's reopening of prosecution under § 1.193(b)(1), appellant would be able to file a request to reinstate the appeal and a supplemental appeal brief as an alternative to filing a reply (under §§ 1.111 or 1.113, as appropriate) to the Office action. Amendments, affidavits or other new evidence, however, would not be entered if submitted with a request to reinstate the appeal. Like a reply brief, a supplemental appeal brief submitted pursuant to § 1.193(b)(2)(ii) need not reiterate the contentions set forth in a previously filed appeal brief (or reply brief), but need only set forth appellant's contention with regard to the new ground of rejection(s) raised in the Office action that reopened prosecution. The supplemental appeal brief will automatically incorporate all issues and arguments raised in the previously filed appeal brief (or reply brief), unless appellant indicates otherwise.

The intent of the change to § 1.193(b) is to give appellant (rather than the examiner) the option to continue the appeal if desired (particularly under Pub. L. 103-465), or to continue prosecution before the examiner in the face of a new ground of rejection. Should a supplemental appeal brief be elected as the reply to the examiner reopening prosecution based on a new ground of rejection under § 1.193(b)(1), the examiner may under § 1.193(a)(1) issue an examiner's answer. Where an appeal is reinstated pursuant to § 1.193(b)(2)(ii), no additional appeal fee is currently required.

*Comment 90:* A number of comments favored permitting appellants to file a reply brief as a matter of right. One comment argued that the Board, rather than the examiner, should determine whether the appellant should be permitted to file a reply brief.

*Response:* Section 1.193 as adopted permits an appellant to file a reply brief as a matter of right. This change eliminates the authority of an examiner to refuse entry of a timely filed reply brief.

*Comment 91:* One comment suggested that a reasonable page limit could be placed on reply briefs.

*Response:* The comment will be studied.

*Comment 92:* A number of comments opposed the proposed change to require a substitute appeal brief, rather than a reply brief. These comments argued that requiring an entirely new brief reiterating previously submitted arguments, rather than a mere reply to the examiner's answer, would result in a less readable and coherent record.

*Response:* Section 1.193 as adopted permits a reply brief (rather than a substitute appeal brief) where the appellant desires to reply to an examiner's answer or and a supplemental appeal brief where the appellant requests reinstatement of an appeal. Contentions (or information) set forth in a previously filed appeal (or reply brief) need not be reiterated in a reply brief or supplemental appeal brief.

*Comment 93:* A number of comments favored prohibiting a new ground of rejection in an examiner's answer.

*Response:* Section 1.193 as adopted prohibits a new ground of rejection in an examiner's answer, except under the limited circumstance specifically provided for in § 1.193(a)(2).

*Comment 94:* Two comments suggested that if the examiner reopens prosecution after an appeal brief has been filed, §§ 1.193 or 1.113 should be amended to state that the action issued by the examiner cannot be made final.

*Response:* The finality of an Office action is determined under MPEP 706.07(a), which states that "any second or subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection not necessitated by amendment of the application by applicant." Whether the action subsequent to the reopening of prosecution may be made final will be determined solely by whether such action includes a new ground of rejection not necessitated by amendment of the application by the applicant. Thus, where an amendment under § 1.116 entered as a result of reopening of prosecution necessitates a new ground of rejection, the action immediately subsequent to the reopening of prosecution may be made final. See MPEP 706.07(a) and 1208.01.

*Comment 95:* One comment would go further in permitting applicant to reinstate an appeal as a reply to the examiner reopening prosecution by permitting amendments, affidavits and other evidence to address the new ground of rejection. Another comment desired the ability to reply directly to

the Board for any new ground of rejection raised by the Board.

*Response:* The comments amount to having the Board conduct the prosecution of the application and not act as an appellate review. Amended claims, affidavits and other evidence should be seen by the examiner first for a determination as to whether a new search is required, to conduct any newly required search, and also to evaluate the newly submitted and any newly discovered material at the examination level. See comments to § 1.196(d).

*Comment 96:* One comment would further amend § 1.193 to waive any subsequent appeal notice fee and appeal brief fee, and start the time period for extension of patent from the time of first appeal in that if the examiner did his or her duty properly there would be no need to reopen prosecution.

*Response:* Under current practice, a new fee is due for each notice of appeal, each brief, and each request for an oral hearing, so long as a decision on the merits by the Board resulted from the prior notice of appeal, brief, and request for an oral hearing. Thus, when an examiner reopens prosecution after appeal but prior to a decision by the Board on the appeal, the fee for the notice of appeal, brief, and request for an oral hearing will apply to a later appeal. The change to § 1.193 in this Final Rule is not germane to patent term extension under 35 U.S.C. 154(b) and § 1.701.

In any event, that prosecution is reopened subsequent to the filing of an appeal brief is not necessarily a concession that the rejection of the appealed claims was in error. It is often the case that prosecution is reopened subsequent to the filing of an appeal brief in the situation in which the examiner considers the rejection of the appealed claims to be appropriate (and thus the appeal to be without merit), but discovers a better basis for rejecting the claims at issue (e.g., even better prior art references). To characterize an examiner, who decides to reopen prosecution to avoid wasting the Board's resources (and the appellant's time) with a rejection that is not the best possible rejection of the appealed claims, as an examiner who is not properly performing his or her duties, would be non-sensical.

*Comment 97:* One comment opposed prohibiting a new ground of rejection in an examiner's answer. The comment argued that this change will result in unnecessary delays in prosecution.

*Response:* The proposal to prohibit a new ground of rejection in an examiner's answer otherwise received overwhelming support. Under Pub. L.

103-465, any delay in prosecution resulting from the reopening of prosecution is to the detriment of the applicant. Thus, it is considered appropriate to give the applicant the choice of whether to prosecute the application before the examiner or reinstate the appeal.

#### Section 1.194

Section 1.194(b) is amended to provide that a request for an oral hearing must be filed in a separate paper, and to refer to § 1.17(d) for consistency with the change to § 1.17.

Section 1.194(c) is amended to provide that appellant will be notified when a requested oral hearing is unnecessary (e.g., a remand is required).

*Comment 98:* One comment argued that § 1.194 leaves an open statement as to when the Board may decide that an oral hearing is not necessary, in that this section does not limit considering an oral hearing not necessary to when the application has been remanded to the examiner.

*Response:* The situation in which an application has been remanded to the examiner was simply an exemplary situation of special circumstances in which the Board may determine that an oral hearing is not necessary. Section 1.194 was not meant to limit the discretion of the Board to determine that an oral hearing is not necessary to those situations when the application has been remanded to the examiner.

#### Section 1.196

Section 1.196 paragraphs (b) and (d) are combined by amending paragraph § 1.196(b) to specifically provide therein for a new ground of rejection for both appealed claims and for allowed claims present in an application containing claims that have been appealed rather than the current practice under § 1.196(d) of recommending a rejection of allowed claims that is binding on the examiner. The effect of an explicit rejection of an allowed claim by the Board is not seen to differ from a recommendation of a rejection and would serve to advance the prosecution of the application by having the rejection made at an earlier date by the Board rather than waiting for the application to be forwarded and acted upon by the examiner. The former practice that the examiner is not bound by the rejection should appellant elect to proceed under § 1.196(b)(1) and an amendment or showing of facts not previously of record in the opinion of the examiner overcomes the new ground of rejection, is not changed. A period of two months is now explicitly set forth for a reply to a decision by the Board

containing a new ground of rejection pursuant to § 1.196(b), which would alter the one month previously set forth for replies to recommended rejections of previously allowed claims. See MPEP 1214.01. Extensions of time continue to be governed by § 1.196(f) and § 1.136(b) (and not by § 1.136(a)).

The last sentence of § 1.196(b)(2) is amended to clarify that appellants do not have to both appeal and file a request for rehearing where only a rehearing of a portion of the decision is sought. A decision on a request for rehearing will incorporate the earlier decision for purposes of appeal of the earlier decision in situations in which only a partial request for rehearing has been filed. Additionally, it is clarified that decisions on rehearing are final unless noted otherwise in the decision in that under some circumstances it may not be appropriate to make a decision on rehearing final as is currently automatically provided for. Section 1.196(b) is also amended to clarify that the appellant must exercise one of the two options with respect to the new ground of rejection under § 1.196(b) to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims.

Section 1.196(b)(2) (and §§ 1.197(b) and 1.304(a)(1)) are amended to change the phrase "request for reconsideration" to "request for rehearing" for consistency with 35 U.S.C. 7(b). See *In re Alappat*, 33 F.3d 1526, 1533, 31 USPQ2d 1545, 1548 (Fed. Cir. 1994)(en banc)(noting "imprecise regulation drafting" in regard to the phrase "request for reconsideration" in § 1.197).

Section 1.196(d) is amended to provide the Board with explicit authority to have an appellant clarify the record in addition to what is already provided by way of remand to the examiner (MPEP 1211), and appellant's compliance with the requirements of an appeal brief (§ 1.192(d)). Section 1.196(d) specifically provides that an appellant may be required to address any matter that is deemed appropriate for a reasoned decision on the pending appeal, which may include: (1) The applicability of particular case law that has not been previously identified as relevant to an issue in the appeal; (2) the applicability of prior art that has not been made of record; or (3) the availability of particular test data that would be persuasive in rebutting a ground of rejection. Section 1.196(d) also provides that appellant would be given a non-extendable time period (not a time limit) within which to reply to any requirement under § 1.196(d).

*Comment 99:* One comment suggested that § 1.196(b) would appear to

authorize the Board to reverse a restriction requirement, as § 1.196(b) authorizes the Board to reject any pending claim. The comment suggested that § 1.196(b) authorize the Board to reject any examined (rather than pending) claim.

*Response:* Section 1.196(b) authorizes, but does not require, the Board to reject claims not involved in the appeal. The Board has held that a restriction requirement is not an adverse decision within the meaning of 35 U.S.C. 7 and 134 subject to appeal, and the CCPA and Federal Circuit have supported this position. See *In re Hengehold*, 440 F.2d 1395, 169 USPQ 473 (CCPA 1971); see also *In re Watkinson*, 900 F.2d 230, 14 USPQ2d 1407 (Fed. Cir. 1990). Thus, concerns that the Board will use the provisions of § 1.196(b) to review restriction requirements are misguided.

*Comment 100:* Several comments opposed the change to § 1.196(d) on the basis that it places the Board in the position of acting as an examiner in the first instance.

*Response:* Section 1.196(d) authorizes, but does not require, the Board to require an appellant to clarify the record without remanding the application to the examiner. This change will authorize the Board to obtain clarification directly from the appellant in those situations in which the Board considers a remand to or further action by the examiner unnecessary. Where the Board considers action by an examiner in the first instance to be necessary or desirable, the Board retains the authority to remand the application to the examiner for such action. Additionally, after reply to an inquiry under § 1.196(d) (e.g., does there exist test data that would be persuasive in rebutting a particular ground of rejection), a remand to the examiner may be deemed to be appropriate (e.g., to evaluate test data received in reply to an inquiry).

#### Section 1.197

Section 1.197(b) is amended to eliminate its use of the passive voice. Section 1.197(b) is also amended to change "reconsideration or modification" to "rehearing" for consistency with 35 U.S.C. 7(b). For consistency with the two-month period set forth in § 1.196(b), § 1.197(b) is also amended to provide a two-month period (rather than a one-month period) within which an appellant may file the single request for rehearing permitted by § 1.197(b).

No comments were received regarding the proposed change to § 1.197.

**Section 1.291**

Section 1.291(c) is amended by removing the blanket limitation of one protest per protestor and would provide for a second or subsequent submission in the form of additional prior art. Mere argument that is later submitted by an initial protestor would continue not to be entered and would be returned unless it is shown that the argument relates to a new issue that could not have been earlier raised. See MPEP 1901.07(b). Although later submitted prior art would be made of record by a previous protestor without a showing that it relates to a new issue, it should be noted that entry of later submitted prior art in the file record does not assure its consideration by the examiner if submitted late in the examination process. Accordingly, initial protests should be as complete as possible when first filed.

In view of the amendment to § 1.291(a) in the "Miscellaneous Changes in Patent Practice" Final Rule (discussed *supra*) to require that a protest be filed prior to the mailing of a notice of allowance under § 1.311 to be considered timely (§ 1.291(a)(1)), the restriction of protests by number is deemed unnecessary and is recognized as ineffective, in that a party may effectively file multiple protests by submitting each protest through a third party agent acting on behalf of such party.

**Comment 101:** One comment suggested that permitting more than one submission by a particular party relating to prior art poses a risk that a third party may sequentially submit individual pieces of prior art as a delaying factor.

**Response:** Any delay in submission of a piece of prior art by a third party poses the risk that the later submitted prior art will not be considered, particularly if it is seen as part of a pattern. The review of any piece of prior art, assuming it is not part of a large package, to determine its value is not seen to result in any delay in issuing an Office action. It is recognized that some delay may result where a piece of prior art in a second submission by a third party is utilized in a rejection that could have been made sooner if that art had been submitted earlier; however, on balance the Office would prefer to delay prosecution of an application and consider and apply a newly submitted reference not found by the examiner rather than issue an invalid claim.

Section 1.291(c) is also amended to (1) delete the sentence "[t]he Office may communicate with the applicant regarding any protest and may require the applicant to reply to specific

questions raised by the protest" as superfluous as the Office may communicate with an applicant regarding any matter, and require the applicant to reply to specific questions, concerning the application; (2) replace "respond" with "reply" in accordance with the change to § 1.111.

**Section 1.293**

Section 1.293 paragraph (c) is amended to replace the reference to § 1.106(e) with a reference to § 1.104(c)(5), to reflect a transfer of material.

**Section 1.294**

Section 1.294 paragraph (b) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.294.

**Section 1.304**

Section 1.304(a)(1) is amended to replace "consideration" by "reconsideration" to correct a typographical error.

No comments were received regarding the proposed change to § 1.304.

**Section 1.312**

Section 1.312(b) is amended to have a reference to § 1.175(b) added in view of the change in § 1.175(b) referencing § 1.312(b).

No comments were received regarding the proposed change to § 1.312.

**Section 1.313**

Section 1.313 will not be amended with the addition of paragraph (c) informing applicants that unless written notification is received that the application has been withdrawn from issue at least two weeks prior to the projected date of issue, applicants should expect that the application will issue as a patent. The matter will be further studied. It should be noted, however, that once an application has issued, the Office is without authority to grant a request under § 1.313 notwithstanding submission of the request prior to issuance of the patent.

**Section 1.316**

Section 1.316 is amended to include only the language of former § 1.316(a). The subject matter of former paragraphs (b) through (f) of § 1.316 were added to § 1.137.

No comments were received regarding the proposed change to § 1.316.

**Section 1.317**

Section 1.317 is amended to include only the language of former § 1.317(a).

The subject matter of former paragraphs (b), (c), (e) and (f) of § 1.317 were added to § 1.137.

No comments were received regarding the proposed change to § 1.317.

**Section 1.318**

Section 1.318 is removed and reserved as being an internal Office instruction.

See comments relating to § 1.101.

**Section 1.324**

Section 1.324 is amended by creating paragraphs (a) and (b). The requirement for factual showings to establish a lack of deceptive intent is deleted, with a statement to that effect being sufficient, paragraph (a).

Office practice is to require the same type and character of proof of facts as in petitions under § 1.48(a). See MPEP 1481. Unlike former § 1.48, former § 1.324 contained no diligence requirement. See *Stark v. Advanced Magnetics, Inc.*, 29 F.3d 1570, 1574, 31 USPQ2d 1290, 1293 (Fed. Cir. 1994). Section 1.324 (and § 1.48) as adopted contain no diligence requirement, for the reasons set forth in the discussion of § 1.48.

Section 1.324(b)(1) is amended to explicitly require a statement relating to the lack of deceptive intent only from each person who is being added or deleted as an inventor, as opposed to the current practice of requiring a statement from each original named inventor and any inventor to be added.

The current requirements for an oath or declaration under § 1.63 by each actual inventor is replaced, paragraph (b)(2) of § 1.324, by a statement from the current named inventors who have not submitted a statement under paragraph (b)(1) of § 1.324 either agreeing to the change of inventorship or stating that they have no disagreement in regard to the requested change. Not every original named inventor would necessarily have knowledge of each of the contributions of the other inventors and/or how the inventorship error occurred, in which case their lack of disagreement to the requested change would be sufficient.

Paragraph (b)(3) of § 1.324 requires the written consent of the assignees of all parties who submitted a statement under paragraph (b)(1) and (b)(2) of this section similar to the current practice of consents by the assignees of all the existing patentees. A clarification reference to § 3.73(b) is added.

Paragraph (b)(4) of § 1.324 states the requirement for a petition fee as set forth in § 1.20(b).

No adverse comments were received regarding the proposed change to § 1.324.

*Section 1.325*

The proposed removal of § 1.325 is withdrawn. See comments relating to § 1.101.

*Section 1.351*

The proposed removal of § 1.351 is withdrawn. See comments relating to § 1.101.

*Section 1.352*

Section 1.352 is removed and reserved as unnecessary as an internal instruction.

See comments relating to § 1.101.

*Section 1.366*

Section 1.366(b) is amended to remove the term "certificate" as unnecessary. Section 1.366(c) is amended for clarity by changing "serial number" to "application number," which consists of the serial number and the series code (e.g., "08/").

Paragraph (d) removes the request for the information concerning the issue date of the original patent and filing date of the application for the original patent as unnecessary. The term "serial" is also removed from paragraph (d).

No comments were received regarding the proposed change to § 1.366.

*Section 1.377*

Section 1.377(c) is amended to remove the requirement that the petition be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

No comments were received regarding the proposed change to § 1.377.

*Section 1.378*

Section 1.378(d) is amended to remove the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

No comments were received regarding the proposed change to § 1.378.

*Section 1.425*

Section 1.425 is amended by removing paragraph (a) and its requirement for proof of the pertinent facts relating to the lack of cooperation or unavailability of the inventor for which status is sought. In addition, § 1.425 is further amended by deleting paragraph (b) and its requirements for proof of the pertinent facts, presence of a sufficient proprietary interest, and a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage.

Additionally, the requirement that the last known address of the non-signing inventor be stated has been removed. The current requirements are thought to be unnecessary in view of the need for submission of the same information in

a petition under § 1.47 during the national stage. The paragraph added parallels the requirement in PCT Rule 4.15 for a statement explaining to the satisfaction of the Commissioner the lack of the signature concerned for submission of the international application.

No comments were received regarding the proposed change to § 1.425.

*Section 1.484*

Section 1.484 paragraphs (d) through (f) are amended by replacement of "response" and "respond" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.484.

*Section 1.485*

Section 1.485(a) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.485.

*Section 1.488*

Section 1.488(b)(3) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.488.

*Section 1.492*

Section 1.492 is amended to add new paragraph (g). See the amendment to § 1.16 adding a new paragraph (m).

No comments were received regarding the proposed change to § 1.492.

*Section 1.494*

Section 1.494(c) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.494.

*Section 1.495*

Section 1.495(c) is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.495.

*Section 1.510*

Section 1.510(e) is amended to replace a reference to § 1.121(f) with a reference to § 1.530(d), which sets forth the requirements for an amendment in a reexamination proceeding.

No comments were received regarding the proposed change to § 1.510.

*Section 1.530*

The title has been changed by the addition of a semicolon to clarify that the section is intended to cover not only amendments submitted with the statement, but also amendments submitted at any other stage of the reexamination proceedings.

Section 1.530(d) is replaced by paragraphs (d)(1) through (d)(7) removing the reference to § 1.121(f) in accordance with the deletion of § 1.121(f). The manner of proposing amendments in reexamination proceedings is governed by § 1.530 (d)(1) through (d)(6). Paragraph (d)(1) is directed to the manner of proposing amendments in the specification, other than in the claims. Paragraph (d)(1)(i) requires that amendments including deletions be made by submission of a copy of one or more newly added or rewritten paragraphs with markings, except that an entire paragraph may be deleted by a statement deleting the paragraph without presentation of the text of the paragraph. Paragraph (d)(1)(ii) requires indication of the precise point in the specification where the paragraph which is being amended is located. When a change in one sentence, paragraph, or page results in only format changes to other pages (e.g., shifting of non-amended text to subsequent pages) not otherwise being amended, such format changes are not to be submitted. Paragraph (d)(1)(iii) defines the markings set forth in paragraph (d)(1)(ii). Proposed paragraph (d)(1)(iii), relating to a requirement for submission of all amendments be presented when any amendment to the specification is made, was not implemented.

Paragraph (d)(2) of § 1.530 relates to the manner of proposing amendments to the claims in reexamination proceedings. Paragraph (d)(2)(i)(A) of § 1.530 requires that a proposed amendment include the entire text of each patent claim which is proposed to be amended by the current amendment and each proposed new claim being added by the current amendment. Additionally, provision has been made for the cancellation of a patent claim or of a previously proposed new claim by a direction to cancel without the need for marking by brackets. Paragraph (d)(2)(i)(B) prohibits the renumbering of the patent claims and requires that any proposed new claims follow the number of the highest numbered patent claim. Paragraph (d)(2)(i)(C) identifies the type of markings required by paragraph (d)(2)(i)(A), single underlining for added material and single brackets for material deleted.

Paragraph (d)(2)(ii) requires the patent owner to set forth the status (*i.e.*, pending or cancelled) of all patent claims, and of all currently proposed new claims, as of the date of the submission of each proposed amendment. The absence of claim status would result in a notice of informal response.

Paragraph (d)(2)(iii) of § 1.530 requires an explanation of the support in the disclosure for any amendments to the claims presented for the first time on pages separate from the amendments along with any additional comments. The absence of an explanation would result in a notice of informal response.

Proposed paragraphs (d)(2) (iv) and (v), relating to a requirement for presentation of all amendments as of the date any amendment to the claims is made, and to the treatment of the failure to submit a copy of any added claim as a direction to cancel that claim, were not implemented.

Paragraph (d)(3) of § 1.530 provides that: (1) an amendment may not enlarge the scope of the claims of the patent, (2) no amendment may be proposed for entry in an expired patent, and (3) no amendment will be incorporated into the patent by certificate issued after the expiration of the patent.

Paragraph (d)(4) of § 1.530 provides that amendments proposed to a patent during reexamination proceedings will not be effective until a reexamination certificate is issued. This replaces paragraph (e) of § 1.530, which has been removed and reserved.

Paragraph (d)(5) of § 1.530 provides the criteria for the form of amendments in reexamination proceedings (*i.e.*, paper size must be either letter size or A4 size, and not legal size).

Paragraph (d)(6) of § 1.530 clarifies that proposed amendments to the patent drawing sheets are not permitted and that any change must be by way of a new sheet of drawings with the proposed amended figures being identified as "amended" and with proposed added figures identified as "new" for each sheet that has changed. Material in paragraph (d)(6) has been transferred from cancelled § 1.115.

Paragraph (d)(7) of § 1.530, has been added in view of the deletion of § 1.115 paragraph (d), requires amendment of the disclosure in certain situations (*i.e.*, to correct inaccuracies of description and definition) and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings. The previous requirement for "correspondence" has been modified by use of "substantial correspondence." See comments to § 1.115.

Paragraph (d)(8) of § 1.530 has been added to clarify that all amendments to the patent being reexamined must be made relative to (*i.e.*, *vis-à-vis*) the patent specification in effect as of the date of the filing of the request for reexamination (the patent specification includes the claims). If there was a prior change to the patent (made *via* a prior reexamination certificate, reissue of the patent, certificate of correction, *etc.*), the first amendment must be made relative to the patent specification as changed by the prior proceeding or other mechanism for changing the patent. In addition, all amendments subsequent to the first amendment must be made relative to the patent specification in effect as of the date of the filing of the request for reexamination, and not relative to the prior amendment.

Paragraph (e) of § 1.530 has been removed with the material formerly contained therein transferred to new paragraph (d)(4) of § 1.530.

The proposed change in §§ 1.530, 1.550, and 1.560 to replace "response," "responses" and "respond" with "reply" in accordance with the change to § 1.111 is not being adopted at this time. As the term "reply" in a reexamination proceeding refers to the "reply" of a third party requester (§ 1.535), the Office is withdrawing for further consideration what term should consistently be used for the "reply" or "response" by the patent owner and what term should consistently be used for the "reply" by a third party requester.

#### Section 1.550

Paragraph (a) of § 1.550 is amended to conform the citation to §§ 1.104 through 1.119 to the changes to §§ 1.104 through 1.119. Paragraphs (b) and (e) of § 1.550 are amended for clarification purposes. Paragraph (e) of § 1.550 clarifies present Office practice of requiring, after filing of a request for reexamination by a third party requester, the service of any document filed by either the patent owner or the third party on the other party in the reexamination proceeding in the manner provided in § 1.248.

No comments were received regarding the proposed change to § 1.550.

#### Section 1.770

Section 1.770 is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.770.

#### Section 1.785

Section 1.785 is amended by replacement of "response" with "reply"

in accordance with the change to § 1.111.

No comments were received regarding the proposed change to § 1.785.

#### Section 1.804

Section 1.804(b) is clarified grammatically by changing "shall state" to "stating" and is amended to delete the requirement that the statement be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

No comments were received regarding the proposed change to § 1.804.

#### Section 1.805

Section 1.805(c) is amended by deleting "verified" in accordance with the change to §§ 1.4(d) and 10.18 and removing unnecessary language noting that an attorney or agent registered to practice need not verify their statements.

No comments were received regarding the proposed change to § 1.805.

### Part 3

Portions of Part 3 are amended to incorporate Part 7, which part is removed and reserved.

No comments were received regarding the proposed change to Part 3.

#### Section 3.11

Section 3.11(a) is created for the current subject matter and a new paragraph (b) is added citing Executive Order 9424 of February 18, 1944 (9 FR 1959, 3 CFR 1943-1949 Comp., p. 303) and its requirements that several departments and other executive agencies of the Government forward items for recording.

#### Section 3.21

Section 3.21 is amended to replace the reference to "§ 1.53(b)(1)" with a reference to "§ 1.53(b)" and to delete the reference to "§ 1.62" for consistency with the amendment to § 1.53 and the deletion of § 1.62.

#### Section 3.26

Section 3.26 is amended to remove the requirement that an English language translation be verified in accordance with the change to §§ 1.4(d)(2) and 10.18.

#### Section 3.27

The current subject matter of § 3.27 is designated as paragraph (a), and a paragraph (b) is added to cite Executive Order 9424 and a mailing address therefor.

#### Section 3.31

Section 3.31(c) is added to require that: (1) The cover sheet must indicate

that the document is to be recorded on the Governmental Register; (2) the document is to be recorded on the Secret Register (if applicable); and (3) the document does not affect title (if applicable).

#### Section 3.41

The current subject matter of § 3.41 is designated as paragraph (a), and a paragraph (b) is added to specify when no recording fee is required for documents required to be filed pursuant to Executive Order 9424.

#### Section 3.51

Section 3.51 is amended by removing the term "certification" as unnecessary in accordance with the change to §§ 1.4(d)(2) and 10.18.

#### Section 3.58

Section 3.58 is added to provide for the maintaining of a Department Register to record Government interests required by Executive Order 9424 in § 3.58(a). New § 3.58(b) provides that the Office maintain a Secret Register to record Government interests also required by the Executive Order.

#### Section 3.73

Section 3.73(b) is amended to remove the sentence requiring an assignee to specifically state that the evidentiary documents have been reviewed and to certify that title is in the assignee seeking to take action. The sentence is deemed to be unnecessary in view of the amendment to §§ 1.4(d) and 10.18.

Section 3.73 paragraph (b) has also been amended to replace the language "assignee of the entire right, title and interest" with "assignee." This change provides for the applicability of the paragraph to assignees with a partial interest, such as is often encountered in reissue applications.

Section 3.73(b) is clarified by addition of a reference to an example of documentary evidence that can be submitted.

### Part 5

No comments were received regarding the proposed change to Part 5.

#### Section 5.1

Section 5.1 is amended by removing the current subject matter as being duplicative of material in the other sections of this part and is replaced by subject matter deleted from § 5.33.

#### Section 5.2

Section 5.2(b) is amended by removing the subject matter as being duplicative of material in the other sections of this part and is replaced with

subject matter of the first sentence from § 5.7. Section 5.2 paragraphs (c) and (d) are removed as repetitive of material in the other sections of this part.

#### Section 5.3

Section 5.3 is amended by replacement of "response" with "reply" in accordance with the change to § 1.111.

#### Section 5.4

Section 5.4 is amended by removing unnecessary subject matter from paragraph (a), eliminating, in paragraph (d), the requirement that the petition be verified in accordance with the amendment to §§ 1.4(d)(2) and 10.18, and by adding the first and second sentences of § 5.8 to § 5.4(d).

#### Section 5.5

Section 5.5 is amended by removing unnecessary subject matter from paragraph (b) and by replacing current § 5.5(e) with subject matter removed from § 5.6(a).

#### Section 5.6

Section 5.6 is removed and reserved with the subject matter of § 5.6(a) being placed in § 5.5(e).

#### Section 5.7

Section 5.7 is removed and reserved with the first sentence thereof being placed in § 5.2(b).

#### Section 5.8

Section 5.8 is removed and reserved with the subject matter from the first and second sentences thereof being placed in § 5.4(d).

#### Sections 5.11

Section 5.11, paragraphs (b), (c) and (e), are amended to update the references to other parts of the Code of Federal Regulations.

#### Section 5.12

Section 5.12(b) is amended to clarify that the petition fee (§ 1.17(h)) is required only when expedited handling is sought for the petition.

#### Section 5.13

Section 5.13 is amended by removing the last two sentences which are considered to be unnecessary. Section 5.13 is also amended to remove the language concerning the requirement for the petition fee (§ 1.17(h)) for expedited handling of a petition under § 5.12(b), which is duplicative of the provisions of § 5.12(b). This amendment does not change current practice.

#### Section 5.14

Section 5.14(a) is amended by removing unnecessary subject matter and replacing "serial number" with the more appropriate designation "application number." Section 5.14(a) is also amended to remove the language concerning the requirement for the petition fee (§ 1.17(h)) for expedited handling of a petition under § 5.12(b), which is duplicative of the provisions of § 5.12(b). This amendment does not change current practice.

#### Section 5.15

Section 5.15, paragraphs (a), (b), (c), and (e), are amended by removing unnecessary subject matter and to update the references to other parts of the Code of Federal Regulations.

#### Section 5.16

Section 5.16 is removed and reserved as unnecessary.

#### Section 5.17

Section 5.17 is removed and reserved as unnecessary.

#### Section 5.18

Section 5.18 is amended to update the references to other parts of the Code of Federal Regulations.

#### Sections 5.19

Sections 5.19 (a) and (b) are amended to update the references to other parts of the Code of Federal Regulations. Section 5.19(c) is removed as unnecessary.

#### Section 5.20

Section 5.20 is amended to include only the language of former § 5.20(a).

#### Section 5.25

Section 5.25(c) is removed as unnecessary.

#### Section 5.31

Section 5.31 is removed and reserved as unnecessary.

#### Section 5.32

Section 5.32 is removed and reserved as unnecessary.

#### Section 5.33

Section 5.33 is removed and reserved and its subject matter added to § 5.1.

### Part 7

Part 7 is removed and reserved as the substance thereof is incorporated into part 3.

No comments were received regarding the proposed change to Part 7.

**Part 10***Section 10.18*

The heading of § 10.18 is amended to read “[s]ignature and certificate for correspondence filed in the Patent and Trademark Office” to reflect that it, as amended, applies to correspondence filed by non-practitioners as well as practitioners.

Section 10.18(a) is amended to provide that for all documents filed in the Office in patent, trademark, and other non-patent matters, except for correspondence that is required to be signed by the applicant or party, each piece of correspondence filed by a practitioner in the Patent and Trademark Office must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1). This amendment is simply a clarification of the requirements of former § 10.18(a).

Section 10.18 is further amended (in § 10.18 paragraphs (b) and (c)) to include the changes proposed to § 1.4 paragraphs (d)(2) and (d)(3). These changes to 37 CFR Part 10 are to avoid a dual standard between 37 CFR Parts 1 and 10 as to practitioners. In addition, by operation of § 1.4(d)(2), the provisions of § 10.18 paragraphs (b) and (c) are applicable to any party (whether a practitioner or non-practitioner) presenting any paper to the Office. As any party (whether a practitioner or non-practitioner) presenting any paper to the Office is subject to the provisions of § 10.18 paragraphs (b) and (c), this change also avoids a dual standard between practitioners and non-practitioners as to the certification provisions of § 10.18(b) and the sanctions provisions of § 10.18(c). The only difference between a practitioner and a non-practitioner as to § 10.18 paragraphs (b) and (c) is that a practitioner may also be subject to disciplinary action for violations of § 10.18(b) in addition to or in lieu of sanctions under § 10.18(c).

Section 10.18(b)(1) is specifically amended to provide that, by presenting to the Office (whether by signing, filing, submitting, or later advocating) any paper, the party presenting such paper (whether a practitioner or non-practitioner) is certifying that all statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Patent and Trademark Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any

false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and that violations of this paragraph may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom.

Section 10.18(b)(2) is specifically amended to provide that, by presenting to the Office any paper, the party presenting such paper (whether a practitioner or non-practitioner) is certifying that to the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that: (1) the paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of prosecution before the Office; (2) the claims and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief.

As discussed *supra*, the amendments to § 10.18, in combination with the amendment to § 1.4(d), will permit the Office to eliminate the verification requirement for a number of the rules of practice.

Section 10.18(c) specifically provides that violations of § 10.18(b)(1) may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom, and that violations of any of § 10.18 paragraphs (b)(2)(i) through (iv) are, after notice and reasonable opportunity to respond, subject to such sanctions as deemed appropriate by the Commissioner, or the Commissioner's designee, which may include, but are not limited to, any combination of: (1) holding certain facts to have been established; (2) returning papers; (3) precluding a party from filing a paper, or presenting or contesting an issue; (4) imposing a monetary sanction; (5) requiring a terminal disclaimer for the period of the

delay; or (6) terminating the proceedings in the Patent and Trademark Office.

With regard to the sanctions enumerated in § 10.18(c), 35 U.S.C. 6(a) provides that “[t]he Commissioner \* \* \* may, subject to the approval of the Secretary of Commerce, establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent and Trademark Office.” The issue of whether the Office is authorized to impose monetary sanctions was addressed in the rulemaking entitled “Patent Appeal and Interference Practice,” published in the **Federal Register** at 60 FR 14488 (March 17, 1995), and in the *Official Gazette* at 1173 *Off. Gaz. Pat. Office* 36 (April 11, 1995).

The Commissioner's authority under 35 U.S.C. 6(a) to impose monetary sanctions is limited to sanctions which are remedial, and does not extend to sanctions that are punitive. *Id.* at 14494-96, 1173 *Off. Gaz. Pat. Office* at 41-43. An enabling statute (35 U.S.C. 6(a)) alone is not the express statutory authorization required for an agency to impose penal monetary sanctions. See, e.g., *Commissioner v. Acker*, 361 U.S. 87, 91 (1959); *Gold Kist, Inc. v. Department of Agriculture*, 741 F.2d 344, 348 (11th Cir. 1984). Thus, the line of demarcation between permissible and impermissible monetary sanctions under 35 U.S.C. 6(a) is that: (1) the imposition of a monetary sanction to cover the costs incurred by the Office due to the violation of § 10.18(b)(2) is a remedial (and thus permissible) sanction; and (2) the imposition of a monetary sanction that has no relationship to the costs incurred by the Office due to the violation of § 10.18(b)(2) (e.g., a pre-established or arbitrary fine or penalty) is a punitive (and thus impermissible) sanction. See *United States v. Frame*, 885 F.2d 1119, 1142-43 (3rd Cir. 1989) (late payment charge no higher than reasonable to cover lost interest and administrative costs incurred in the collection effort is a remedial sanction, and not a penalty, and, as such, is authorized by rulemaking enabling statute), *cert. denied*, 493 U.S. 1094 (1990); see also *Griffin & Dickson v. United States*, 16 Cl. Ct. 347, 356-57 (1989) (agency has the inherent authority to manage its caseload by imposing sanctions including precluding party from presenting further evidence, disciplining of representative, or imposing costs against the representative or the party in interest). As the Office is an entirely fee-funded entity, it is reasonable to impose a monetary sanction on a party causing an unnecessary and inordinate expenditure

of Office resources to cover the costs incurred by the Office due to such action, rather than impose these costs on the Office's customers in general.

Nevertheless, the Office has amended §§ 1.4(d)(2) and 10.18 with the objective of discouraging the filing of frivolous or patently unwarranted correspondence in the Office, not to routinely review correspondence for compliance with § 10.18(b)(2) and impose sanctions under § 10.18(c). Thus, the amendment to §§ 1.4(d)(2) and 10.18 should cause no concern to practitioners and *pro se* applicants engaging in the ordinary course of business before the Office. The Office anticipates that sanctions under § 10.18(c) will be imposed only in rare situations in which such action is necessary for the Office to halt a clear abuse that is resulting in a needless and inordinate expenditure of Office resources.

Where the circumstances of an application or other proceeding warrant a determination of whether there has been a violation of § 10.18(b), the file or the application or other proceeding will be forwarded to the Office of Enrollment and Discipline (OED) for a determination of whether there has been a violation of § 10.18(b). In the event that OED determines that a provision of § 10.18(b) has been violated, the Commissioner, or the Commissioner's designee, will determine what (if any) sanction(s) under § 10.18(c) is to be imposed in the application or other proceeding. In addition, if OED determines that a provision of § 10.18(b) has been violated by a practitioner, OED will determine whether such practitioner is to be subject to disciplinary action (see §§ 1.4(d)(2) and 10.18(d)). That is, OED will provide a determination of whether there has been a violation of § 10.18(b), and if such violation is by a practitioner, whether such practitioner is to be subject to disciplinary action; however, OED will not be responsible for imposing sanctions under § 10.18(c) in an application or other proceeding.

Section 10.18(d) provides that any practitioner violating the provisions of this section may also be subject to disciplinary action. This paragraph (and the corresponding provision of § 1.4(d)(2)) clarifies that a practitioner may be subject to disciplinary action in lieu of, or in addition to, the sanctions set forth in § 10.18(c) for violations of § 10.18.

*Comment 102:* A number of comments supported the changes to § 1.4(d) to make its certification applicable to all papers signed and submitted to the Office.

*Response:* The Office will adopt the changes to make such a certification applicable to all papers filed in the Office, but will do so by placing the certification requirement in § 10.18, and providing in § 1.4(d) that the presentation of any paper to the Office, whether by a practitioner or non-practitioner, constitutes a certification under § 10.18. Thus, the presentation of a paper to the Office by any person (even a non-practitioner) constitutes a certification under § 10.18.

*Comment 103:* A number of comments opposed the change to § 1.4(d) as increasing the burden on persons presenting papers to the Office, and, as such, inconsistent with the stated goal of reducing the burden on the public. One comment indicated that new burdens in § 1.4(d) on signers of papers submitted to the Office include: (1) conducting a reasonable inquiry concerning the document to be submitted to the Office; (2) not submitting the document to harass or seek a needless increase in the cost of prosecution; and (3) submitting only documents likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

*Response:* The change to §§ 1.4(d) and 10.18 should discourage the filing of frivolous papers in the Office, and thus reduce the cost to the Office of treating such papers, which cost is ultimately borne by the Office's customers. Thus, this change to §§ 1.4(d) and 10.18 will reduce the burden on the public and to the Office's customers in general. There is no reasonable argument as to why a person filing a document in the Office should be permitted to avoid the "burden" of conducting a reasonable inquiry concerning the document to be submitted to the Office, not submitting the document to harass or seek a needless increase in the cost of prosecution, or submitting only documents likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

*Comment 104:* Several comments opposed the addition of § 1.4(d)(2) (now § 10.18(b)(2)) on the basis that the phrase "formed after an inquiry reasonable under the circumstances" was too vague or was unclear as to how much of an inquiry must be made to meet the "reasonable inquiry" requirement.

*Response:* The phrase "formed after an inquiry reasonable under the circumstances" is taken from Rule 11(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 11(b)), which provides that:

Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

See Fed. R. Civ. P. 11(b)(1993).

Section 10.18(b)(2) tracks the language of Fed. R. Civ. P. 11(b)(1993) to avoid confusion as to what certifications a signature entails. The advisory committee notes to Fed. R. Civ. P. 11(b) provide further information on the "inquiry reasonable under the circumstances" requirement. See *Amendments to the Federal Rules of Civil Procedure* at 50–53 (1993), reprinted in 146 F.R.D. 401, 584–87. The "inquiry reasonable under the circumstances" requirement of § 10.18(b)(2) is identical to that in Fed. R. Civ. P. 11(b). The Federal courts have stated in regard to the "reasonable inquiry" requirement of Fed. R. Civ. P. 11:

In requiring reasonable inquiry before the filing of any pleading in a civil case in federal district court, Rule 11 demands "an objective determination of whether a sanctioned party's conduct was reasonable under the circumstances." In effect it imposes a negligence standard, for negligence is a failure to use reasonable care. The equation between negligence and the failure to conduct a reasonable precomplaint inquiry is . . . that "the amount of investigation required by Rule 11 depends on both the time available to investigate and on the probability that more investigation will turn up important evidence; the Rule does not require steps that are not cost-justified."

*Hays v. Sony Electronics*, 847 F.2d 412, 418, 7 USPQ2d 1043, 1048 (7th. Cir. 1988)(citations omitted)(decided prior to the 1993 amendment to Fed. R. Civ. P. 11, but discussing a "reasonable under the circumstances" standard).

*Comment 105:* One comment opposed the change in § 1.4(d) to import the verification requirement into any papers signed and submitted to the Office, on

the basis that the presence of a verification actually on the paper signed and submitted to the Office would cause the signer to carefully consider what is being signed and submitted to the Office.

*Response:* A separate verification requirement for certain papers results in delays during the examination of an application when such verification is omitted. The Office is convinced that people are inclined to either not make false, misleading or inaccurate statements in documents they sign, or are not deterred from making such statements by the presence of a verification clause in the document. The benefit obtained in the rare instance in which a person otherwise inclined to make a false, misleading or inaccurate statement is persuaded not to do so by a verification clause simply does not outweigh the benefit obtained by the elimination of the delay that results from the requirement for such a verification clause.

*Comment 106:* One comment opposed the change to § 1.4(d) (now § 10.18(b)(2)) on the basis that "reasonable inquiry" requirement therein will expose a practitioner to malpractice liability.

*Response:* Legal malpractice is not an issue of Federal patent (or trademark) law, but of common law sounding in tort. See *Voight v. Kraft*, 342 F. Supp. 821, 822, 174 USPQ 294, 295 (D. Idaho 1972). Section 10.18(b)(2) does not affect the duty (or create a new duty) on the part of a practitioner to his or her client *vis-à-vis* the submission of papers to the Office.

The party's duties under § 10.18 are not to one's own clients; it is to the public in general, other parties before the Office (the examination of whose applications are delayed while the Office is, and whose fees must be applied to the cost of, responding to frivolous papers), and to the Office. *Cf. Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 932 (7th Cir. 1989) (just as tort law creates duties to one's client, Fed. R. Civ. P. 11 creates a duty to one's adversary, other litigants in the courts' queue, and the court itself); *Hays*, 847 F.2d at 418, 7 USPQ2d at 1049 (same).

*Comment 107:* One comment indicated that the requirements in § 1.4(d)(2) (now § 10.18(b)(2)) may be onerous as to persons not registered to practice before the Office. Another comment opposed this change on the basis that it would create new issues during litigation, in that few non-lawyers have enough legal knowledge to accurately verify that the documents they sign are consistent with the law. The comment suggested that § 1.4(d)(2)

simply be amended to include the verification statement from § 1.68.

*Response:* There is no reasonable argument as to why the certification for papers submitted to the Office should be any less than the certification required under Fed. R. Civ. P. 11(b) for papers filed in the Federal courts. The Federal Rules of Civil Procedure do not permit a *pro se* litigant to avoid the requirements of Fed. R. Civ. P. 11(b) ("By presenting \* \* \* an attorney or unrepresented party is certifying \* \* \* ." (emphasis added)). It is, however, appropriate to take account of the special circumstances of *pro se* applicants in determining whether sanctions under § 10.18(c) are appropriate. See advisory committee notes to Fed. R. Civ. P. 11 (1983), reprinted in 97 F.R.D. 165, 198-99 (1983) ("Although the standard is the same for unrepresented parties, who are obligated themselves to sign the [papers], the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations").

The Office expects that *pro se* applicants will often submit arguments that evidence little, if any, appreciation of the applicable law or procedure. The Office is not adopting §§ 1.4(d)(2) and 10.18 (b) and (c) for the purpose of imposing, and does not intend to impose, sanctions on *pro se* applicants in situations in which they simply submit arguments lacking an appreciation of the applicable law or procedure. See *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1582, 17 USPQ2d 1914, 1921 (Fed. Cir. 1991) ("courts are particularly cautious about imposing sanctions on a *pro se* litigant, whose improper conduct may be attributed to ignorance of the law and proper procedures"); see also *Hornback v. U.S.*, 40 USPQ2d 1694, 1697 (Cl. Ct. 1996) (*pro se* without legal training is not held to the same standard as trained counsel).

Where, however, a *pro se* applicant engages in a course of conduct that any reasonable person should have known was improper, and which causes a needless and inordinate expenditure of Office resources, such conduct may result in the imposition of sanctions on the *pro se* applicant. The Federal courts have subjected *pro se* litigants to sanctions for: (1) Taking or persisting in actions that even a non-lawyer should have known were frivolous; (2) taking or persisting in actions that, after engaging in a sufficient course of litigation, the *pro se* litigant should have known were frivolous; or (3) taking or persisting in actions after having been warned by the court that such actions were frivolous.

See *Constant v. U.S.*, 929 F.2d 654, 658, 18 USPQ2d 1298, 1301 (Fed. Cir.), cert. denied, 501 U.S. 1206 (1991); *Finch*, 926 F.2d at 1582-83, 17 USPQ2d at 1921; *U.S. ex rel. Taylor v. Times Herald Record*, 22 USPQ2d 1716, 1718 (S.D.N.Y. 1992), *aff'd*, 990 F.3d 623 (2d Cir. 1993)(table).

*Comment 108:* One comment argued that the change to § 1.4(d) would be particularly difficult to apply in the context of provisional applications.

*Response:* The patent statute and rules of practice do not require any papers other than a disclosure (with or without claims) and a cover sheet for a provisional application (e.g., an applicant need and should not submit legal arguments or other contentions with a provisional application). Thus, it is highly unlikely that the filing of a provisional application will result in a violation of § 10.18(b).

*Comment 109:* One comment opposed the change to § 1.4(d) on the basis that it was not clear whether a practitioner has an obligation in the case of a submission of a statement of facts to inform the party making the statement (or the client) of this certification effect, and the sanctions applicable to noncompliance. Another comment indicated that practitioners will now be placed under the obligation of questioning their clients each time they are given information or instructions.

*Response:* The submission by an applicant of misleading or inaccurate statements of facts during the prosecution of applications for patent has resulted in the patents issuing on such applications being held unenforceable. See, e.g., *Refac International Ltd. v. Lotus Development Corp.*, 81 F.3d 1576, 38 USPQ2d 1665 (Fed. Cir. 1996); *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 25 USPQ2d 1561 (Fed. Cir. 1993); *Rohm and Haas Corp. v. Crystal Chemical Co.*, 722 F.2d 1556, 200 USPQ 289 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984); *Ott v. Goodpasture*, 40 USPQ2d 1831 (D.N. Tex. 1996); *Herman v. William Brooks Shoe Co.*, 39 USPQ2d 1773 (S.D.N.Y. 1996); *Golden Valley Microwave Food Inc. v. Weaver Popcorn Co.*, 837 F. Supp. 1444, 24 USPQ2d 1801 (N.D. Ind. 1992), *aff'd*, 11 F.3d 1072 (Fed. Cir. 1993)(table), cert. denied, 511 U.S. 1128 (1994). Likewise, false statements by a practitioner in a paper submitted to the Office during the prosecution of an application for patent has resulted in the patent issuing on such application also being held unenforceable. See *General Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 30 USPQ2d 1149 (Fed. Cir. 1994)(false statement in

a petition to make an application special constitutes inequitable conduct, and renders the patent issuing on such application unenforceable). In addition, the failure to exercise due care in ascertaining the accuracy of the statements in a certification submitted to the Office has also resulted in a patent being held invalid. See *DH Technology*, 937 F. Supp. at 910; 40 USPQ2d at 1761.

For the above-stated reasons, it is highly advisable for a practitioner to advise a client or third party that any information so provided must be reliable and not misleading, regardless of this amendment to §§ 1.4(d)(2) and 10.18. Nevertheless, §§ 1.4(d)(2) and 10.18 as adopted do not require a practitioner to advise the client (or third party) providing information of this certification effect (or the sanctions applicable to noncompliance), or question the client (or third party) when such information or instructions are provided. When a practitioner is submitting information (e.g., a statement of fact) from the applicant or a third party, or relying in arguments upon information from the applicant or a third party, the Office will consider a practitioner's "inquiry reasonable under the circumstances" duty under § 10.18 met so long as the practitioner has no knowledge of information that is contrary to the information provided by the applicant or third party or would otherwise indicate that the information provided by the applicant or third party was so provided for the purpose of a violation of § 10.18 (e.g., was submitted to cause unnecessary delay).

An applicant has no duty to conduct a prior art search as a prerequisite to filing an application for patent. See *Nordberg, Inc. v. Telsmith, Inc.*, 82 F.3d 394, 397, 38 USPQ2d 1593, 1595-96 (Fed. Cir. 1996); *FMC Corp. v. Hennessy Indus., Inc.*, 836 F.2d 521, 526 n.6, 5 USPQ2d 1272, 1275-76 n.6 (Fed. Cir. 1987); *FMC Corp. v. Manitowoc Co., Inc.*, 835 F.2d 1411, 1415, 5 USPQ2d 1112, 1115 (Fed. Cir. 1987); *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1362, 220 USPQ 763, 772 (Fed. Cir.), cert. denied, 469 U.S. 821, 224 USPQ 520 (1984). The "inquiry reasonable under the circumstances" requirement of § 10.18 does not create any new duty on the part of an applicant for patent to conduct a prior art search. See MPEP 609; cf. *Judin v. United States*, 110 F.3d 780, 42 USPQ2d 1300 (Fed. Cir. 1997) (the failure to obtain and examine the accused infringing device prior to bringing a civil action for infringement violates the 1983 version of Fed. R. Civ. P. 11). The "inquiry reasonable under

the circumstances" requirement of § 10.18, however, will require an inquiry into the underlying facts and circumstances when a practitioner provides conclusive statements to the Office (e.g., a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to § 1.137(b) was unintentional).

#### Section 10.23

Section 10.23 is amended to change the phrase "knowingly signing" to "signing." This amendment to § 10.23 is for consistency with § 10.18, which contains no "knowingly" provision or requirement.

#### Review Under the Paperwork Reduction Act of 1995

This final rule contains information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The principal impact of this Final Rule is: (1) elimination of unnecessary rules of practice; (2) simplification or elimination of certain requirements of the rules of practice; (3) rearrangement of certain rules to improve their context; and (4) clarification of the requirements of the rules of practice.

The title, description and respondent description of each of the information collections are shown below with an estimate of each of the annual reporting burdens. The collections of information in this Final Rule have been reviewed and approved by OMB under the following control numbers: 0651-0016, 0651-0021, 0651-0022, 0651-0027, 0651-0031, 0651-0032, 0651-0033, 0651-0034, 0651-0035, and 0651-0037. Included in each estimate is the time for reviewing instructions, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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

OMB Number: 0651-0016.

Title: Rules for Patent Maintenance Fees.

Form Numbers: PTO/SB/45/46/47/65/66.

Type of Review: Approved through July of 1999.

Affected Public: Individuals or Households, Business or Other For-

Profit, Not-for-Profit Institutions and Federal Government.

Estimated Number of Respondents: 273,800.

Estimated Time Per Response: 0.08 hour.

Estimated Total Annual Burden Hours: 22,640 hours.

Needs and Uses: Maintenance fees are required to maintain a patent, except for design or plant patents, in force under 35 U.S.C. 41(b). Payment of maintenance fees are required at 3½, 7½ and 11½ years after the grant of the patent. A patent number and application number of the patent on which maintenance fees are paid are required in order to ensure proper crediting of such payments.

OMB Number: 0651-0021.

Title: Patent Cooperation Treaty.

Form Numbers: PCT/RO/101, ANNEX/134/144, PTO-1382, PCT/IPEA/401, PCT/IB/328.

Type of Review: Approved through May of 2000.

Affected Public: Individuals or Households, Business or Other For-Profit, Federal Agencies or Employees, Not-for-Profit Institutions, Small Businesses or Organizations.

Estimated Number of Respondents: 102,950.

Estimated Time Per Response: 0.9538 hour.

Estimated Total Annual Burden Hours: 98,195 hours.

Needs and Uses: The information collected is required by the Patent Cooperation Treaty (PCT). The general purpose of the PCT is to simplify the filing of patent applications on the same invention in different countries. It provides for a centralized filing procedure and a standardized application format.

OMB Number: 0651-0022.

Title: Deposit of Biological Materials for Patent Purposes.

Form Numbers: None.

Type of Review: Approved through December of 1997.

Affected Public: Individuals or Households, State or Local Governments, Farms, Business or Other For-Profit, Federal Agencies or Employees, Not-for-Profit Institutions, Small Businesses or Organizations.

Estimated Number of Respondents: 3,325.

Estimated Time Per Response: 1.0 hour.

Estimated Total Annual Burden Hours: 3,325 hours.

Needs and Uses: Information on depositing of biological materials in depositories is required for (1) Office determination of compliance with the

patent statute where the invention sought to be patented relies on biological material subject to deposit requirement, which includes notifying interested members of the public where to obtain samples of deposits, and (2) depositories desiring to be recognized as suitable by the Office.

*OMB Number:* 0651-0027.

*Title:* Changes in Patent and Trademark Assignment Practices.

*Form Numbers:* PTO-1618 and PTO-1619, PTO/SB/15/41.

*Type of Review:* Approved through September of 1998.

*Affected Public:* Individuals or Households and Businesses or Other For-Profit.

*Estimated Number of Respondents:* 170,000.

*Estimated Time Per Response:* 0.57 hour.

*Estimated Total Annual Burden Hours:* 97,000 hours.

*Needs and Uses:* The Office records about 170,000 assignments or documents related to ownership of patent and trademark cases each year. The Office requires a cover sheet to expedite the processing of these documents and to ensure that they are properly recorded.

*OMB Number:* 0651-0031.

*Title:* Patent Processing (Updating).

*Form Numbers:* PTO/SB/08-12/21-26/31/32/42/43/61-64/67-69/91-93/96/97.

*Type of Review:* Approved through October of 1999.

*Affected Public:* Individuals or Households, Business or Other For-Profit Institutions, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 1,690,690.

*Estimated Time Per Response:* 0.361 hours.

*Estimated Total Annual Burden Hours:* 644,844 hours.

*Needs and Uses:* During the processing for an application for a patent, the applicant/agent may be required or desire to submit additional information to the Office concerning the examination of a specific application. The specific information required or which may be submitted includes: Information Disclosure Statements; Terminal Disclaimers; Petitions to Revive; Express Abandonments; Appeal Notices; Small Entity; Petitions for Access; Powers to Inspect; Certificates of Mailing; Certificates under § 3.73(b); Amendments, Petitions and their Transmittal Letters; and Deposit Account Order Forms.

*OMB Number:* 0651-0032.

*Title:* Initial Patent Application.

*Form Number:* PTO/SB/01-07/17-20/101-109.

*Type of Review:* Approved through September of 1998.

*Affected Public:* Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 243,100.

*Estimated Time Per Response:* 7.88 hours.

*Estimated Total Annual Burden Hours:* 1,915,500 hours.

*Needs and Uses:* The purpose of this information collection is to permit the Office to determine whether an application meets the criteria set forth in the patent statute and regulations. The standard Fee Transmittal form, New Utility Patent Application Transmittal form, New Design Patent Application Transmittal form, New Plant Patent Application Transmittal form, Plant Color Coding Sheet, Declaration, and Plant Patent Application Declaration will assist applicants in complying with the requirements of the patent statute and regulations, and will further assist the Office in processing and examination of the application.

*OMB Number:* 0651-0033.

*Title:* Post Allowance and Refiling.

*Form Numbers:* PTO/SB/13/14/44/50-57; PTOL-85b.

*Type of Review:* Approved through June of 1999.

*Affected Public:* Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 135,190.

*Estimated Time Per Response:* 0.325 hour.

*Estimated Total Annual Burden Hours:* 43,893 hours.

*Needs and Uses:* This collection of information is required to administer the patent laws pursuant to title 35, U.S.C., concerning the issuance of patents and related actions including correcting errors in printed patents, refile of patent applications, requesting reexamination of a patent, and requesting a reissue patent to correct an error in a patent. The affected public includes any individual or institution whose application for a patent has been allowed or who takes action as covered by the applicable rules.

*OMB Number:* 0651-0034.

*Title:* Secrecy/License to Export.

*Form Numbers:* None.

*Type of Review:* Approved through January of 1998.

*Affected Public:* Individuals or Households, Business or Other For-

Profit, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 2,156.

*Estimated Time Per Response:* 0.5 hour.

*Estimated Total Annual Burden Hours:* 1,129 hours.

*Needs and Uses:* In the interest of national security, patent laws and regulations place certain limitations on the disclosure of information contained in patents and patent applications and on the filing of applications for patent in foreign countries.

*OMB Number:* 0651-0035.

*Title:* Address-Affecting Provisions.

*Form Numbers:* PTO/SB/82/83.

*Type of Review:* Approved through June of 1999.

*Affected Public:* Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 44,850.

*Estimated Time Per Response:* 0.2 hour.

*Estimated Total Annual Burden Hours:* 8,970 hours.

*Needs and Uses:* Under existing law, a patent applicant or assignee may appoint, revoke or change a representative to act in a representative capacity. Also, an appointed representative may withdraw from acting in a representative capacity. This collection includes the information needed to ensure that Office correspondence reaches the appropriate individual.

*OMB Number:* 0651-0037.

*Title:* Provisional Applications.

*Form Numbers:* PTO/SB/16.

*Type of Review:* Approved through January of 1998.

*Affected Public:* Individuals or Households, Business or Other For-Profit, Not-for-Profit Institutions and Federal Government.

*Estimated Number of Respondents:* 6,000.

*Estimated Time Per Response:* 0.2 hour.

*Estimated Total Annual Burden Hours:* 1,200 hours.

*Needs and Uses:* The information included on the provisional application cover sheet is needed by the Office to identify the submission as a provisional application and not some other kind of submission, to promptly and properly process the provisional application, to prepare the provisional application filing receipt which is sent to the applicant, and to identify those provisional applications which must be reviewed by the Office for foreign filing licenses.

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Office has submitted a copy of this Final Rule to OMB for its review of these information collections. Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to the Office of Information and Regulatory Affairs of OMB, New Executive Office Bldg., 725 17th St. NW, rm. 10235, Washington, DC 20503, Attn: Desk Officer for the Patent and Trademark Office.

**Other Considerations**

This Final Rule is in conformity with the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), Executive Order 12612 (October 26, 1987), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It has been determined that this rulemaking is not significant for the purposes of Executive Order 12866 (September 30, 1993).

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy, Small Business Administration that this Final Rule would not have a significant impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)). The principal impact of this Final Rule is: (1) elimination of unnecessary rules of practice; (2) simplification or elimination of certain requirements of the rules of practice; (3) rearrangement of certain rules to improve their context; and (4) clarification of the requirements of the rules of practice.

The Office has determined that this Final Rule has no Federalism implications affecting the relationship between the National Government and the States as outlined in Executive Order 12612.

**List of Subjects**

*37 CFR Part 1*

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

*37 CFR Part 3*

Administrative practice and procedure, Inventions and patents, Reporting and recordkeeping requirements.

*37 CFR Part 5*

Classified information, Foreign relations, Inventions and patents.

*37 CFR Part 7*

Administrative practice and procedure, Inventions and patents, Reporting and recordkeeping requirements.

*37 CFR Part 10*

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 37 CFR parts 1, 3, 5, 7 and 10 are amended as follows:

**PART 1—RULES OF PRACTICE IN PATENT CASES**

1. The authority citation for 37 CFR part 1 continues to read as follows:

**Authority:** 35 U.S.C. 6, unless otherwise noted.

2. Section 1.4 is amended by revising paragraph (d) and by adding paragraph (g) to read as follows:

**§ 1.4 Nature of correspondence and signature requirements.**

\* \* \* \* \*

(d)(1) Each piece of correspondence, except as provided in paragraphs (e) and (f) of this section, filed in a patent or trademark application, reexamination proceeding, patent or trademark interference proceeding, patent file or trademark registration file, trademark opposition proceeding, trademark cancellation proceeding, or trademark concurrent use proceeding, which requires a person's signature, must either:

- (i) Be an original, that is, have an original signature personally signed in permanent ink by that person; or
- (ii) Be a direct or indirect copy, such as a photocopy or facsimile transmission (§ 1.6(d)), of an original. In the event that a copy of the original is filed, the original should be retained as evidence of authenticity. If a question of authenticity arises, the Patent and Trademark Office may require submission of the original.

(2) The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any paper by a party, whether a practitioner or non-practitioner, constitutes a certification under § 10.18(b) of this chapter. Violations of § 10.18(b)(2) of this chapter by a party, whether a practitioner or non-practitioner, may result in the imposition of sanctions under § 10.18(c) of this chapter. Any practitioner violating § 10.18(b) may also be subject to disciplinary action. See §§ 10.18(d) and 10.23(c)(15).

\* \* \* \* \*

(g) An applicant who has not made of record a registered attorney or agent may be required to state whether assistance was received in the preparation or prosecution of the patent application, for which any compensation or consideration was given or charged, and if so, to disclose the name or names of the person or persons providing such assistance. Assistance includes the preparation for the applicant of the specification and amendments or other papers to be filed in the Patent and Trademark Office, as well as other assistance in such matters, but does not include merely making drawings by draftsmen or stenographic services in typing papers.

3. Section 1.6 is amended by revising paragraphs (d)(3), (d)(6), and (e) and adding paragraph (f) to read as follows:

**§ 1.6 Receipt of correspondence.**

\* \* \* \* \*

(d) \* \* \*  
 (3) Correspondence which cannot receive the benefit of the certificate of mailing or transmission as specified in § 1.8(a)(2)(i) (A) through (D) and (F), § 1.8(a)(2)(ii)(A), and § 1.8(a)(2)(iii)(A), except that a continued prosecution application under § 1.53(d) may be transmitted to the Office by facsimile;

\* \* \* \* \*  
 (6) Correspondence to be filed in a patent application subject to a secrecy order under §§ 5.1 through 5.5 of this chapter and directly related to the secrecy order content of the application;

\* \* \* \* \*  
 (e) *Interruptions in U.S. Postal Service.* If interruptions or emergencies in the United States Postal Service which have been so designated by the Commissioner occur, the Patent and Trademark Office will consider as filed on a particular date in the Office any correspondence which is:

- (1) Promptly filed after the ending of the designated interruption or emergency; and
- (2) Accompanied by a statement indicating that such correspondence would have been filed on that particular date if it were not for the designated interruption or emergency in the United States Postal Service.

(f) *Facsimile transmission of a patent application under § 1.53(d).* In the event that the Office has no evidence of receipt of an application under § 1.53(d) (a continued prosecution application) transmitted to the Office by facsimile transmission, the party who transmitted the application under § 1.53(d) may petition the Commissioner to accord the application under § 1.53(d) a filing date as of the date the application under

§ 1.53(d) is shown to have been transmitted to and received in the Office,

(1) Provided that the party who transmitted such application under § 1.53(d):

(i) Informs the Office of the previous transmission of the application under § 1.53(d) promptly after becoming aware that the Office has no evidence of receipt of the application under § 1.53(d);

(ii) Supplies an additional copy of the previously transmitted application under § 1.53(d); and

(iii) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous transmission of the application under § 1.53(d) and is accompanied by a copy of the sending unit's report confirming transmission of the application under § 1.53(d) or evidence that came into being after the complete transmission and within one business day of the complete transmission of the application under § 1.53(d).

(2) The Office may require additional evidence to determine if the application under § 1.53(d) was transmitted to and received in the Office on the date in question.

4. Section 1.8 is amended by revising paragraphs (a)(2)(i)(A) and (b) to read as follows:

**§ 1.8 Certificate of mailing or transmission.**

- (a) \* \* \*
- (2) \* \* \*
- (i) \* \* \*

(A) The filing of a national patent application specification and drawing or other correspondence for the purpose of obtaining an application filing date, including a request for a continued prosecution application under § 1.53(d);

(b) In the event that correspondence is considered timely filed by being mailed or transmitted in accordance with paragraph (a) of this section, but not received in the Patent and Trademark Office, and the application is held to be abandoned or the proceeding is dismissed, terminated, or decided with prejudice, the correspondence will be considered timely if the party who forwarded such correspondence:

(1) Informs the Office of the previous mailing or transmission of the correspondence promptly after becoming aware that the Office has no evidence of receipt of the correspondence;

(2) Supplies an additional copy of the previously mailed or transmitted correspondence and certificate; and

(3) Includes a statement which attests on a personal knowledge basis or to the satisfaction of the Commissioner to the previous timely mailing or transmission. If the correspondence was sent by facsimile transmission, a copy of the sending unit's report confirming transmission may be used to support this statement.

\* \* \* \* \*

5. Section 1.9 is amended by revising paragraphs (d) and (f) to read as follows:

**§ 1.9 Definitions.**

\* \* \* \* \*

(d) A small business concern as used in this chapter means any business concern meeting the size standards set forth in 13 CFR Part 121 to be eligible for reduced patent fees. Questions related to size standards for a small business concern may be directed to: Small Business Administration, Size Standards Staff, 409 Third Street, SW, Washington, DC 20416.

\* \* \* \* \*

(f) A small entity as used in this chapter means an independent inventor, a small business concern, or a non-profit organization eligible for reduced patent fees.

\* \* \* \* \*

6. Section 1.10 is amended by revising paragraphs (d) and (e) to read as follows:

**§ 1.10 Filing of correspondence by "Express Mail."**

\* \* \* \* \*

(d) Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled

pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

(e) Any person mailing correspondence addressed as set out in § 1.1(a) to the Office with sufficient postage utilizing the "Express Mail Post Office to Addressee" service of the USPS but not received by the Office, may petition the Commissioner to consider such correspondence filed in the Office on the USPS deposit date, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has no evidence of receipt of the correspondence;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail";

(3) The petition includes a copy of the originally deposited paper(s) or fee(s) that constitute the correspondence showing the number of the "Express Mail" mailing label thereon, a copy of any returned postcard receipt, a copy of the "Express Mail" mailing label showing the "date-in," a copy of any other official notation by the USPS relied upon to show the date of deposit, and, if the requested filing date is a date other than the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS, a showing pursuant to paragraph (d)(3) of this section that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day; and

(4) The petition includes a statement which establishes, to the satisfaction of the Commissioner, the original deposit of the correspondence and that the copies of the correspondence, the copy of the "Express Mail" mailing label, the copy of any returned postcard receipt, and any official notation entered by the USPS are true copies of the originally mailed correspondence, original "Express Mail" mailing label, returned postcard receipt, and official notation entered by the USPS.

\* \* \* \* \*

7. Section 1.11 is amended by revising paragraph (b) to read as follows:

**§ 1.11 Files open to the public.**

\* \* \* \* \*

(b) All reissue applications, all applications in which the Office has accepted a request to open the complete

application to inspection by the public, and related papers in the application file, are open to inspection by the public, and copies may be furnished upon paying the fee therefor. The filing of reissue applications, other than continued prosecution applications under § 1.53(d) of reissue applications, will be announced in the *Official Gazette*. The announcement shall include at least the filing date, reissue application and original patent numbers, title, class and subclass, name of the inventor, name of the owner of record, name of the attorney or agent of record, and examining group to which the reissue application is assigned.

\* \* \* \* \*

8. Section 1.14 is amended by revising paragraph (a) and adding a new paragraph (f) to read as follows:

**§ 1.14 Patent applications preserved in confidence.**

(a) Patent applications are generally preserved in confidence pursuant to 35 U.S.C. 122. No information will be given concerning the filing, pendency, or subject matter of any application for patent, and no access will be given to, or copies furnished of, any application or papers relating thereto, except as set forth in this section.

(1) Status information includes information such as whether the application is pending, abandoned, or patented, as well as the application number and filing date (or international filing date or date of entry into the national stage).

(i) Status information concerning an application may be supplied:

(A) When copies of, or access to, the application may be provided pursuant to paragraph (a)(3) of this section;

(B) When the application is identified by application number or serial number and filing date in a published patent document or in a U.S. application open to public inspection; or

(C) When the application is the national stage of an international application in which the United States of America has been indicated as a Designated State.

(ii) Status information concerning an application may also be supplied when the application claims the benefit of the filing date of an application for which status information may be provided pursuant to paragraph (a)(1)(i) of this section.

(2) Copies of an application-as-filed may be provided to any person, upon written request accompanied by the fee set forth in § 1.19(b)(1), without notice to the applicant, if the application is incorporated by reference in a U.S. patent.

(3) Copies of (upon payment of the fee set forth in § 1.19(b)(2)), and access to, an application file wrapper and contents may be provided to any person, upon written request, without notice to the applicant, when the application file is available and:

(i) It has been determined by the Commissioner to be necessary for the proper conduct of business before the Office or warranted by other special circumstances;

(ii) The application is open to the public as provided in § 1.11(b);

(iii) Written authority in that application from the applicant, the assignee of the application, or the attorney or agent of record has been granted; or

(iv) The application is abandoned, but not if the application is in the file jacket of a pending application under § 1.53(d), and is:

(A) Referred to in a U.S. patent;

(B) Referred to in a U.S. application open to public inspection;

(C) An application which claims the benefit of the filing date of a U.S. application open to public inspection; or

(D) An application in which the applicant has filed an authorization to lay open the complete application to the public.

\* \* \* \* \*

(f) Information as to the filing of an application will be published in the *Official Gazette* in accordance with § 1.47(a) and (b).

9. Section 1.16 is amended by revising paragraphs (d) and (l) to read as follows:

**§ 1.16 National application filing fees.**

\* \* \* \* \*

(d) In addition to the basic filing fee in an original application, except provisional applications, if the application contains, or is amended to contain, a multiple dependent claim(s), per application:

By a small entity (§ 1.9(f)).....135.00

By other than a small entity .....270.00

\* \* \* \* \*

(l) Surcharge for filing the basic filing fee or cover sheet (§ 1.51(c)(1)) on a date later than the filing date of the provisional application:

By a small entity (§ 1.9(f)).....25.00

By other than a small entity .....50.00

\* \* \* \* \*

10. Section 1.17 is amended by removing and reserving paragraphs (e) through (g) and revising paragraphs (a) through (d), (h), (i) and (q) to read as follows:

**§ 1.17 Patent application processing fees.**

(a) Extension fees pursuant to § 1.136(a):

(1) For reply within first month:

By a small entity (§ 1.9(f)).....\$55.00

By other than a small entity .....110.00

(2) For reply within second month:

By a small entity (§ 1.9(f)).....200.00

By other than a small entity .....400.00

(3) For reply within third month:

By a small entity (§ 1.9(f)).....475.00

By other than a small entity .....950.00

(4) For reply within fourth month:

By a small entity (§ 1.9(f)).....755.00

By other than a small entity .....1,510.00

(5) For reply within fifth month:

By a small entity (§ 1.9(f)).....1,030.00

By other than a small entity .....2,060.00

(b) For filing a notice of appeal from the examiner to the Board of Patent Appeals and Interferences:

By a small entity (§ 1.9(f)).....155.00

By other than a small entity .....310.00

(c) In addition to the fee for filing a notice of appeal, for filing a brief in support of an appeal:

By a small entity (§ 1.9(f)).....155.00

By other than a small entity .....310.00

(d) For filing a request for an oral hearing before the Board of Patent Appeals and Interferences in an appeal under 35 U.S.C. 134:

By a small entity (§ 1.9(f)).....135.00

By other than a small entity .....270.00

(e) [Reserved]

(f) [Reserved]

(g) [Reserved]

(h) For filing a petition to the Commissioner under a section listed below which refers to this paragraph .....130.00

§ 1.182—for decision on a question not specifically provided for.

§ 1.183—to suspend the rules.

§ 1.295—for review of refusal to publish a statutory invention registration.

§ 1.377—for review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of a patent.

§ 1.378(e)—for reconsideration of decision on petition refusing to accept delayed payment of maintenance fee in an expired patent.

§ 1.644(e)—for petition in an interference.

§ 1.644(f)—for request for reconsideration of a decision on petition in an interference.

§ 1.666(c)—for late filing of interference settlement agreement.

§ 5.12—for expedited handling of a foreign filing license.

§ 5.15—for changing the scope of a license.

§ 5.25—for retroactive license.

(i) For filing a petition to the Commissioner under a section listed below which refers to this paragraph .....130.00

§ 1.12—for access to an assignment record.

§ 1.14—for access to an application.

§ 1.41—to supply the name or names of the inventor or inventors after the filing date without an oath or declaration as prescribed by § 1.63, except in provisional applications.

§ 1.47—for filing by other than all the inventors or a person not the inventor.

§ 1.48—for correction of inventorship, except in provisional applications.

§ 1.53—to accord a filing date, except in provisional applications.

§ 1.55—for entry of late priority papers.

§ 1.59—for expungement and return of information.

§ 1.84—for accepting color drawings or photographs.

§ 1.91—for entry of a model or exhibit.

§ 1.97(d)—to consider an information disclosure statement.

§ 1.102—to make an application special.

§ 1.103—to suspend action in application.

§ 1.177—for divisional reissues to issue separately.

§ 1.312—for amendment after payment of issue fee.

§ 1.313—to withdraw an application from issue.

§ 1.314—to defer issuance of a patent.

§ 1.666(b)—for access to an interference settlement agreement.

§ 3.81—for a patent to issue to assignee, assignment submitted after payment of the issue fee.

\* \* \* \* \*

(q) For filing a petition to the Commissioner under a section listed below which refers to this paragraph.....50.00

§ 1.41—to supply the names or names of the inventor or inventors after the filing date without a cover sheet as prescribed by § 1.51(c)(1) in a provisional application.

§ 1.48—for correction of inventorship in a provisional application.

§ 1.53—to accord a provisional application a filing date or to convert a nonprovisional application filed under § 1.53(b) to a provisional application under § 1.53(c).

\* \* \* \* \*

11. Section 1.21 is amended by revising paragraphs (l) and (n) to read as follows:

**§ 1.21 Miscellaneous fees and charges.**

\* \* \* \* \*

(l) For processing and retaining any application abandoned pursuant to § 1.53(f), unless the required basic filing fee (§ 1.16) has been paid .....130.00

\* \* \* \* \*

(n) For handling an application in which proceedings are terminated pursuant to § 1.53(e) .....130.00

\* \* \* \* \*

12. Section 1.26 is amended by revising paragraph (a) to read as follows:

**§ 1.26 Refunds.**

(a) Any fee paid by actual mistake or in excess of that required will be refunded, but a mere change of purpose after the payment of money, as when a party desires to withdraw an application, an appeal, or a request for oral hearing, will not entitle a party to demand such a return. Amounts of twenty-five dollars or less will not be returned unless specifically requested within a reasonable time, nor will the payer be notified of such amounts; amounts over twenty-five dollars may be returned by check or, if requested, by credit to a deposit account.

\* \* \* \* \*

13. Section 1.27 is revised to read as follows:

**§ 1.27 Statement of status as small entity.**

(a) Any person seeking to establish status as a small entity (§ 1.9(f) of this part) for purposes of paying fees in an application or a patent must file a statement in the application or patent prior to or with the first fee paid as a small entity. Such a statement need only be filed once in an application or patent and remains in effect until changed.

(b) When establishing status as a small entity pursuant to paragraph (a) of this section, any statement filed on behalf of an independent inventor must be signed by the independent inventor except as provided in § 1.42, § 1.43, or § 1.47 of this part and must state that the inventor qualifies as an independent inventor in accordance with § 1.9(c) of this part. Where there are joint inventors in an application, each inventor must file a statement establishing status as an independent inventor in order to qualify as a small entity. Where any rights have been assigned, granted, conveyed, or licensed, or there is an obligation to assign, grant, convey, or license, any rights to a small business concern, a nonprofit organization, or any other individual, a statement must be filed by the individual, the owner of the small business concern, or an official of the small business concern or nonprofit organization empowered to act on behalf of the small business concern or nonprofit organization identifying their status. For purposes of a statement under this paragraph, a license to a Federal agency resulting from a funding agreement with that agency pursuant to 35 U.S.C. 202(c)(4) does not constitute a license as set forth in § 1.9 of this part.

(c)(1) Any statement filed pursuant to paragraph (a) of this section on behalf of a small business concern must:

(i) Be signed by the owner or an official of the small business concern empowered to act on behalf of the concern;

(ii) State that the concern qualifies as a small business concern as defined in § 1.9(d); and

(iii) State that the exclusive rights to the invention have been conveyed to and remain with the small business concern or, if the rights are not exclusive, that all other rights belong to small entities as defined in § 1.9.

(2) Where the rights of the small business concern as a small entity are not exclusive, a statement must also be filed by the other small entities having rights stating their status as such. For purposes of a statement under this paragraph, a license to a Federal agency resulting from a funding agreement with

that agency pursuant to 35 U.S.C. 202(c)(4) does not constitute a license as set forth in § 1.9 of this part.

(d)(1) Any statement filed pursuant to paragraph (a) of this section on behalf of a nonprofit organization must:

(i) Be signed by an official of the nonprofit organization empowered to act on behalf of the organization;

(ii) State that the organization qualifies as a nonprofit organization as defined in § 1.9(e) of this part specifying under which one of § 1.9(e) (1), (2), (3), or (4) of this part the organization qualifies; and

(iii) State that exclusive rights to the invention have been conveyed to and remain with the organization or if the rights are not exclusive that all other rights belong to small entities as defined in § 1.9 of this part.

(2) Where the rights of the nonprofit organization as a small entity are not exclusive, a statement must also be filed by the other small entities having rights stating their status as such. For purposes of a statement under this paragraph, a license to a Federal agency pursuant to 35 U.S.C. 202(c)(4) does not constitute a conveyance of rights as set forth in this paragraph.

14. Section 1.28 is amended by revising paragraphs (a) and (c) to read as follows:

**§ 1.28 Effect on fees of failure to establish status, or change status, as a small entity.**

(a)(1) The failure to establish status as a small entity (§§ 1.9(f) and 1.27 of this part) in any application or patent prior to paying, or at the time of paying, any fee precludes payment of the fee in the amount established for small entities. A refund pursuant to § 1.26 of this part, based on establishment of small entity status, of a portion of fees timely paid in full prior to establishing status as a small entity may only be obtained if a statement under § 1.27 and a request for a refund of the excess amount are filed within two months of the date of the timely payment of the full fee. The two-month time period is not extendable under § 1.136. Status as a small entity is waived for any fee by the failure to establish the status prior to paying, at the time of paying, or within two months of the date of payment of, the fee.

(2) Status as a small entity must be specifically established in each application or patent in which the status is available and desired. Status as a small entity in one application or patent does not affect any other application or patent, including applications or patents which are directly or indirectly dependent upon the application or patent in which the status has been

established. The refiling of an application under § 1.53 as a continuation, division, or continuation-in-part (including a continued prosecution application under § 1.53(d)), or the filing of a reissue application requires a new determination as to continued entitlement to small entity status for the continuing or reissue application. A nonprovisional application claiming benefit under 35 U.S.C. 119(e), 120, 121, or 365(c) of a prior application, or a reissue application may rely on a statement filed in the prior application or in the patent if the nonprovisional application or the reissue application includes a reference to the statement in the prior application or in the patent or includes a copy of the statement in the prior application or in the patent and status as a small entity is still proper and desired. The payment of the small entity basic statutory filing fee will be treated as such a reference for purposes of this section.

(3) Once status as a small entity has been established in an application or patent, the status remains in that application or patent without the filing of a further statement pursuant to § 1.27 of this part unless the Office is notified of a change in status.

\* \* \* \* \*

(c) If status as a small entity is established in good faith, and fees as a small entity are paid in good faith, in any application or patent, and it is later discovered that such status as a small entity was established in error or that through error the Office was not notified of a change in status as required by paragraph (b) of this section, the error will be excused upon payment of the deficiency between the amount paid and the amount due. The deficiency is based on the amount of the fee, for other than a small entity, in effect at the time the deficiency is paid in full.

\* \* \* \* \*

15. Section 1.33 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1.33 Correspondence respecting patent applications, reexamination proceedings, and other proceedings.**

(a) The applicant, the assignee(s) of the entire interest (see §§ 3.71 and 3.73) or an attorney or agent of record (see § 1.34(b)) may specify a correspondence address to which communications about the application are to be directed. All notices, official letters, and other communications in the application will be directed to the correspondence address or, if no such correspondence address is specified, to an attorney or agent of record (see § 1.34(b)), or, if no

attorney or agent is of record, to the applicant, so long as a post office address has been furnished in the application. Double correspondence with an applicant and an attorney or agent, or with more than one attorney or agent, will not be undertaken. If more than one attorney or agent is made of record and a correspondence address has not been specified, correspondence will be held with the one last made of record.

(b) Amendments and other papers filed in the application must be signed by:

(1) An attorney or agent of record appointed in compliance with § 1.34(b);

(2) A registered attorney or agent not of record who acts in a representative capacity under the provisions of § 1.34(a);

(3) The assignee of record of the entire interest, if there is an assignee of record of the entire interest;

(4) An assignee of record of an undivided part interest, and any assignee(s) of the remaining interest and any applicant retaining an interest, if there is an assignee of record of an undivided part interest; or

(5) All of the applicants (§§ 1.42, 1.43 and 1.47) for patent, unless there is an assignee of record of the entire interest and such assignee has taken action in the application in accordance with §§ 3.71 and 3.73.

\* \* \* \* \*

16. Section 1.41 is amended by revising paragraph (a) to read as follows:

**§ 1.41 Applicant for patent.**

(a) A patent is applied for in the name or names of the actual inventor or inventors.

(1) The inventorship of a nonprovisional application is that inventorship set forth in the oath or declaration as prescribed by § 1.63, except as provided for in § 1.53(d)(4) and § 1.63(d). If an oath or declaration as prescribed by § 1.63 is not filed during the pendency of a nonprovisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(b), unless a petition under this paragraph accompanied by the fee set forth in § 1.17(i) is filed supplying or changing the name or names of the inventor or inventors.

(2) The inventorship of a provisional application is that inventorship set forth in the cover sheet as prescribed by § 1.51(c)(1). If a cover sheet as prescribed by § 1.51(c)(1) is not filed during the pendency of a provisional application, the inventorship is that inventorship set forth in the application papers filed pursuant to § 1.53(c), unless

a petition under this paragraph accompanied by the fee set forth in § 1.17(q) is filed supplying or changing the name or names of the inventor or inventors.

(3) In a nonprovisional application filed without an oath or declaration as prescribed by § 1.63 or a provisional application filed without a cover sheet as prescribed by § 1.51(c)(1), the name or names of person or persons believed to be the actual inventor or inventors should be provided for identification purposes when the application papers pursuant to § 1.53(b) or (c) are filed. If no name of a person believed to be an actual inventor is so provided, the application should include an applicant identifier consisting of alphanumeric characters.

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17. Section 1.47 is revised to read as follows:

**§ 1.47 Filing when an inventor refuses to sign or cannot be reached.**

(a) If a joint inventor refuses to join in an application for patent or cannot be found or reached after diligent effort, the application may be made by the other inventor on behalf of himself or herself and the nonsigning inventor. The oath or declaration in such an application must be accompanied by a petition including proof of the pertinent facts, the fee set forth in § 1.17(i) and the last known address of the nonsigning inventor. The Patent and Trademark Office shall, except in a continued prosecution application under § 1.53(d), forward notice of the filing of the application to the nonsigning inventor at said address and publish notice of the filing of the application in the *Official Gazette*. The nonsigning inventor may subsequently join in the application on filing an oath or declaration complying with § 1.63.

(b) Whenever all of the inventors refuse to execute an application for patent, or cannot be found or reached after diligent effort, a person to whom an inventor has assigned or agreed in writing to assign the invention or who otherwise shows sufficient proprietary interest in the matter justifying such action may make application for patent on behalf of and as agent for all the inventors. The oath or declaration in such an application must be accompanied by a petition including proof of the pertinent facts, a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage, the fee set forth in § 1.17(i), and the last known address of all of the inventors. The Office shall, except in a continued prosecution application under § 1.53(d), forward

notice of the filing of the application to all of the inventors at the addresses stated in the application and publish notice of the filing of the application in the *Official Gazette*. An inventor may subsequently join in the application on filing an oath or declaration complying with § 1.63.

18. Section 1.48 is revised to read as follows:

**§ 1.48 Correction of inventorship in a patent application, other than a reissue application.**

(a) If the inventive entity is set forth in error in an executed § 1.63 oath or declaration in an application, other than a reissue application, and such error arose without any deceptive intention on the part of the person named as an inventor in error or on the part of the person who through error was not named as an inventor, the application may be amended to name only the actual inventor or inventors. When the application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Such amendment must be accompanied by:

(1) A petition including a statement from each person being added as an inventor and from each person being deleted as an inventor that the error in inventorship occurred without deceptive intention on his or her part;

(2) An oath or declaration by the actual inventor or inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43 or 1.47;

(3) The fee set forth in § 1.17(i); and

(4) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b)).

(b) If the correct inventors are named in a nonprovisional application, other than a reissue application, and the prosecution of the application results in the amendment or cancellation of claims so that fewer than all of the currently named inventors are the actual inventors of the invention being claimed in the application, an amendment must be filed deleting the name or names of the person or persons who are not inventors of the invention being claimed. When the application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Such amendment must be accompanied by:

(1) A petition including a statement identifying each named inventor who is being deleted and acknowledging that

the inventor's invention is no longer being claimed in the application; and

(2) The fee set forth in § 1.17(i).

(c) If a nonprovisional application, other than a reissue application, discloses unclaimed subject matter by an inventor or inventors not named in the application, the application may be amended to add claims to the subject matter and name the correct inventors for the application. When the application is involved in an interference, the amendment must comply with the requirements of this section and must be accompanied by a motion under § 1.634. Such amendment must be accompanied by:

(1) A petition including a statement from each person being added as an inventor that the amendment is necessitated by amendment of the claims and that the inventorship error occurred without deceptive intention on his or her part;

(2) An oath or declaration by the actual inventor or inventors as required by § 1.63 or as permitted by §§ 1.42, 1.43 or 1.47;

(3) The fee set forth in § 1.17(i); and

(4) If an assignment has been executed by any of the original named inventors, the written consent of the assignee (see § 3.73(b)).

(d) If the name or names of an inventor or inventors were omitted in a provisional application through error without any deceptive intention on the part of the omitted inventor or inventors, the provisional application may be amended to add the name or names of the omitted inventor or inventors. Such amendment must be accompanied by:

(1) A petition including a statement that the inventorship error occurred without deceptive intention on the part of the omitted inventor or inventors; and

(2) The fee set forth in § 1.17(q).

(e) If a person or persons were named as an inventor or inventors in a provisional application through error without any deceptive intention on the part of such person or persons, an amendment may be filed in the provisional application deleting the name or names of the person or persons who were erroneously named. Such amendment must be accompanied by:

(1) A petition including a statement by the person or persons whose name or names are being deleted that the inventorship error occurred without deceptive intention on the part of such person or persons;

(2) The fee set forth in § 1.17(q); and

(3) If an assignment has been executed by any of the original named inventors,

the written consent of the assignee (see § 3.73(b)).

(f)(1) If the correct inventor or inventors are not named on filing a nonprovisional application under § 1.53(b) without an executed oath or declaration under § 1.63, the later submission of an executed oath or declaration under § 1.63 during the pendency of the application will act to correct the earlier identification of inventorship.

(2) If the correct inventor or inventors are not named on filing a provisional application without a cover sheet under § 1.51(c)(1), the later submission of a cover sheet under § 1.51(c)(1) during the pendency of the application will act to correct the earlier identification of inventorship.

(g) The Office may require such other information as may be deemed appropriate under the particular circumstances surrounding the correction of inventorship.

19. Section 1.51 is revised to read as follows:

**§ 1.51 General requisites of an application.**

(a) Applications for patents must be made to the Commissioner of Patents and Trademarks.

(b) A complete application filed under § 1.53(b) comprises:

(1) A specification as prescribed by 35 U.S.C. 112, including a claim or claims, see §§ 1.71 to 1.77;

(2) An oath or declaration, see § 1.63 and § 1.68;

(3) Drawings, when necessary, see §§ 1.81 to 1.85; and

(4) The prescribed filing fee, see § 1.16.

(c) A complete provisional application filed under § 1.53(c) comprises:

(1) A cover sheet identifying:

(i) The application as a provisional application,

(ii) The name or names of the inventor or inventors, (see § 1.41(a)(2)),

(iii) The residence of each named inventor,

(iv) The title of the invention,

(v) The name and registration number of the attorney or agent (if applicable),

(vi) The docket number used by the person filing the application to identify the application (if applicable),

(vii) The correspondence address, and

(viii) The name of the U.S.

Government agency and Government contract number (if the invention was made by an agency of the U.S. Government or under a contract with an agency of the U.S. Government);

(2) A specification as prescribed by the first paragraph of 35 U.S.C. 112, see § 1.71;

(3) Drawings, when necessary, see §§ 1.81 to 1.85; and

(4) The prescribed filing fee, see § 1.16.

(d) Applicants are encouraged to file an information disclosure statement in nonprovisional applications. See § 1.97 and § 1.98. No information disclosure statement may be filed in a provisional application.

20. Section 1.52 is amended by revising paragraphs (a), (c) and (d) to read as follows:

**§ 1.52 Language, paper, writing, margins.**

(a) The application, any amendments or corrections thereto, and the oath or declaration must be in the English language except as provided for in § 1.69 and paragraph (d) of this section, or be accompanied by a translation of the application and a translation of any corrections or amendments into the English language together with a statement that the translation is accurate. All papers which are to become a part of the permanent records of the Patent and Trademark Office must be legibly written either by a typewriter or mechanical printer in permanent dark ink or its equivalent in portrait orientation on flexible, strong, smooth, non-shiny, durable, and white paper. All of the application papers must be presented in a form having sufficient clarity and contrast between the paper and the writing thereon to permit the direct reproduction of readily legible copies in any number by use of photographic, electrostatic, photo-offset, and microfilming processes and electronic reproduction by use of digital imaging and optical character recognition. If the papers are not of the required quality, substitute typewritten or mechanically printed papers of suitable quality will be required. See § 1.125 for filing substitute typewritten or mechanically printed papers constituting a substitute specification when required by the Office.

\* \* \* \* \*

(c) Any interlineation, erasure, cancellation or other alteration of the application papers filed should be made on or before the signing of any accompanying oath or declaration pursuant to § 1.63 referring to those application papers and should be dated and initialed or signed by the applicant on the same sheet of paper. Application papers containing alterations made after the signing of an oath or declaration referring to those application papers must be supported by a supplemental oath or declaration under § 1.67(c). After the signing of the oath or declaration referring to the application papers,

amendments may only be made in the manner provided by § 1.121.

(d) An application may be filed in a language other than English. An English translation of the non-English-language application, a statement that the translation is accurate, and the fee set forth in § 1.17(k) are required to be filed with the application or within such time as may be set by the Office.

21. Section 1.53 is revised to read as follows:

**§ 1.53 Application number, filing date, and completion of application.**

(a) *Application number.* Any papers received in the Patent and Trademark Office which purport to be an application for a patent will be assigned an application number for identification purposes.

(b) *Application filing requirements—Nonprovisional application.* The filing date of an application for patent filed under this section, except for a provisional application under paragraph (c) of this section or a continued prosecution application under paragraph (d) of this section, is the date on which a specification as prescribed by 35 U.S.C. 112 containing a description pursuant to § 1.71 and at least one claim pursuant to § 1.75, and any drawing required by § 1.81(a) are filed in the Patent and Trademark Office. No new matter may be introduced into an application after its filing date. A continuing application, which may be a continuation, divisional, or continuation-in-part application, may be filed under the conditions specified in 35 U.S.C. 120, 121 or 365(c) and § 1.78(a).

(1) A continuation or divisional application that names as inventors the same or fewer than all of the inventors named in the prior application may be filed under this paragraph or paragraph (d) of this section.

(2) A continuation-in-part application (which may disclose and claim subject matter not disclosed in the prior application) or a continuation or divisional application naming an inventor not named in the prior application must be filed under this paragraph.

(c) *Application filing requirements—Provisional application.* The filing date of a provisional application is the date on which a specification as prescribed by the first paragraph of 35 U.S.C. 112, and any drawing required by § 1.81(a) are filed in the Patent and Trademark Office. No amendment, other than to make the provisional application comply with the patent statute and all applicable regulations, may be made to the provisional application after the

filing date of the provisional application.

(1) A provisional application must also include the cover sheet required by § 1.51(c)(1) or a cover letter identifying the application as a provisional application. Otherwise, the application will be treated as an application filed under paragraph (b) of this section.

(2) An application for patent filed under paragraph (b) of this section may be converted to a provisional application and be accorded the original filing date of the application filed under paragraph (b) of this section,

(i) Provided that a petition requesting the conversion, with the fee set forth in § 1.17(q), is filed prior to the earliest of:

(A) Abandonment of the application filed under paragraph (b) of this section;

(B) Payment of the issue fee on the application filed under paragraph (b) of this section;

(C) Expiration of twelve months after the filing date of the application filed under paragraph (b) of this section; or

(D) The filing of a request for a statutory invention registration under § 1.293 in the application filed under paragraph (b) of this section.

(ii) The grant of any such petition will not entitle applicant to a refund of the fees which were properly paid in the application filed under paragraph (b) of this section.

(3) A provisional application is not entitled to the right of priority under 35 U.S.C. 119 or 365(a) or § 1.55, or to the benefit of an earlier filing date under 35 U.S.C. 120, 121 or 365(c) or § 1.78 of any other application. No claim for priority under § 1.78(a)(3) may be made in a design application based on a provisional application. No request under § 1.293 for a statutory invention registration may be filed in a provisional application. The requirements of §§ 1.821 through 1.825 regarding application disclosures containing nucleotide and/or amino acid sequences are not mandatory for provisional applications.

(d) *Application filing requirements—Continued prosecution (nonprovisional) application.* (1) A continuation or divisional application (but not a continuation-in-part) of a prior nonprovisional application may be filed as a continued prosecution application under this paragraph, provided that:

(i) The prior nonprovisional application is either:

(A) Complete as defined by § 1.51(b) and filed on or after June 8, 1995; or

(B) The national stage of an international application in compliance with 35 U.S.C. 371 and filed on or after June 8, 1995; and

(ii) The application under this paragraph is filed before the earliest of:

(A) Payment of the issue fee on the prior application, unless a petition under § 1.313(b)(5) is granted in the prior application;

(B) Abandonment of the prior application; or

(C) Termination of proceedings on the prior application.

(2) The filing date of a continued prosecution application is the date on which a request on a separate paper for an application under this paragraph is filed. An application filed under this paragraph:

(i) Must identify the prior application;

(ii) Discloses and claims only subject matter disclosed in the prior application;

(iii) Names as inventors the same inventors named in the prior application on the date the application under this paragraph was filed, except as provided in paragraph (d)(4) of this section;

(iv) Includes the request for an application under this paragraph, will utilize the file jacket and contents of the prior application, including the specification, drawings and oath or declaration from the prior application, to constitute the new application, and will be assigned the application number of the prior application for identification purposes; and

(v) Is a request to expressly abandon the prior application as of the filing date of the request for an application under this paragraph.

(3) The filing fee for a continued prosecution application filed under this paragraph is:

(i) The basic filing fee as set forth in § 1.16; and

(ii) Any additional § 1.16 fee due based on the number of claims remaining in the application after entry of any amendment accompanying the request for an application under this paragraph and entry of any amendments under § 1.116 unentered in the prior application which applicant has requested to be entered in the continued prosecution application.

(4) An application filed under this paragraph may be filed by fewer than all the inventors named in the prior application, provided that the request for an application under this paragraph when filed is accompanied by a statement requesting deletion of the name or names of the person or persons who are not inventors of the invention being claimed in the new application. No person may be named as an inventor in an application filed under this paragraph who was not named as an inventor in the prior application on the

date the application under this paragraph was filed, except by way of a petition under § 1.48.

(5) Any new change must be made in the form of an amendment to the prior application as it existed prior to the filing of an application under this paragraph. No amendment in an application under this paragraph (a continued prosecution application) may introduce new matter or matter that would have been new matter in the prior application. Any new specification filed with the request for an application under this paragraph will not be considered part of the original application papers, but will be treated as a substitute specification in accordance with § 1.125.

(6) The filing of a continued prosecution application under this paragraph will be construed to include a waiver of confidentiality by the applicant under 35 U.S.C. 122 to the extent that any member of the public, who is entitled under the provisions of § 1.14 to access to, copies of, or information concerning either the prior application or any continuing application filed under the provisions of this paragraph, may be given similar access to, copies of, or similar information concerning the other application or applications in the file jacket.

(7) A request for an application under this paragraph is the specific reference required by 35 U.S.C. 120 to every application assigned the application number identified in such request. No amendment in an application under this paragraph may delete this specific reference to any prior application.

(8) In addition to identifying the application number of the prior application, applicant should furnish in the request for an application under this paragraph the following information relating to the prior application to the best of his or her ability:

- (i) Title of invention;
- (ii) Name of applicant(s); and
- (iii) Correspondence address.

(9) Envelopes containing only requests and fees for filing an application under this paragraph should be marked "Box CPA." Requests for an application under this paragraph filed by facsimile transmission should be clearly marked "Box CPA."

(e) *Failure to meet filing date requirements.* (1) If an application deposited under paragraph (b), (c), or (d) of this section does not meet the requirements of such paragraph to be entitled to a filing date, applicant will be so notified, if a correspondence address has been provided, and given a

time period within which to correct the filing error.

(2) Any request for review of a notification pursuant to paragraph (e)(1) of this section, or a notification that the original application papers lack a portion of the specification or drawing(s), must be by way of a petition pursuant to this paragraph. Any petition under this paragraph must be accompanied by the fee set forth in § 1.17(i) in an application filed under paragraphs (b) or (d) of this section, and the fee set forth in § 1.17(q) in an application filed under paragraph (c) of this section. In the absence of a timely (§ 1.181(f)) petition pursuant to this paragraph, the filing date of an application in which the applicant was notified of a filing error pursuant to paragraph (e)(1) of this section will be the date the filing error is corrected.

(3) If an applicant is notified of a filing error pursuant to paragraph (e)(1) of this section, but fails to correct the filing error within the given time period or otherwise timely (§ 1.181(f)) take action pursuant to this paragraph, proceedings in the application will be considered terminated. Where proceedings in an application are terminated pursuant to this paragraph, the application may be disposed of, and any filing fees, less the handling fee set forth in § 1.21(n), will be refunded.

(f) *Completion of application subsequent to filing—Nonprovisional (including continued prosecution) application.* If an application which has been accorded a filing date pursuant to paragraph (b) of this section, including a continuation, divisional, or continuation-in-part application, does not include the appropriate filing fee or an oath or declaration by the applicant pursuant to § 1.63 or § 1.175, or, if an application which has been accorded a filing date pursuant to paragraph (d) of this section does not include the appropriate filing fee, applicant will be so notified, if a correspondence address has been provided, and given a period of time within which to file the fee, oath or declaration, and the surcharge as set forth in § 1.16(e) in order to prevent abandonment of the application. See § 1.63(d) concerning the submission of a copy of the oath or declaration from the prior application for a continuation or divisional application. If the required filing fee is not timely paid, or if the processing and retention fee set forth in § 1.21(l) is not paid within one year of the date of mailing of the notification required by this paragraph, the application may be disposed of. The notification pursuant to this paragraph may be made simultaneously with any notification pursuant to paragraph (e) of

this section. If no correspondence address is included in the application, applicant has two months from the filing date to file the basic filing fee, the oath or declaration in an application under paragraph (b) of this section, and the surcharge as set forth in § 1.16(e) in order to prevent abandonment of the application; or, if no basic filing fee has been paid, one year from the filing date to pay the processing and retention fee set forth in § 1.21(l) to prevent disposal of the application.

(g) *Completion of application subsequent to filing—Provisional application.* If a provisional application which has been accorded a filing date pursuant to paragraph (c) of this section does not include the appropriate filing fee or the cover sheet required by § 1.51(c)(1), applicant will be so notified, if a correspondence address has been provided, and given a period of time within which to file the fee, cover sheet, and the surcharge as set forth in § 1.16(l) in order to prevent abandonment of the application. If the required filing fee is not timely paid, the application may be disposed of. The notification pursuant to this paragraph may be made simultaneously with any notification pursuant to paragraph (e) of this section. If no correspondence address is included in the application, applicant has two months from the filing date to file the basic filing fee, cover sheet, and the surcharge as set forth in § 1.16(l) in order to prevent abandonment of the application.

(h) *Subsequent treatment of application—Nonprovisional (including continued prosecution) application.* An application for a patent filed under paragraphs (b) or (d) of this section will not be placed on the files for examination until all its required parts, complying with the rules relating thereto, are received, except that certain minor informalities may be waived subject to subsequent correction whenever required.

(i) *Subsequent treatment of application—Provisional application.* A provisional application for a patent filed under paragraph (c) of this section will not be placed on the files for examination and will become abandoned no later than twelve months after its filing date pursuant to 35 U.S.C. 111(b)(1).

(j) *Filing date of international application.* The filing date of an international application designating the United States of America is treated as the filing date in the United States of America under PCT Article 11(3), except as provided in 35 U.S.C. 102(e).

22. Section 1.54 is revised to read as follows:

**§ 1.54 Parts of application to be filed together; filing receipt.**

(a) It is desirable that all parts of the complete application be deposited in the Office together; otherwise, a letter must accompany each part, accurately and clearly connecting it with the other parts of the application. See § 1.53 (f) and (g) with regard to completion of an application.

(b) Applicant will be informed of the application number and filing date by a filing receipt, unless the application is an application filed under § 1.53(d).

23. Section 1.55 is amended by revising paragraph (a) to read as follows:

**§ 1.55 Claim for foreign priority.**

(a) An applicant in a nonprovisional application may claim the benefit of the filing date of one or more prior foreign applications under the conditions specified in 35 U.S.C. 119 (a) through (d) and 172. The claim to priority need be in no special form and may be made by the attorney or agent if the foreign application is referred to in the oath or declaration as required by § 1.63. The claim for priority and the certified copy of the foreign application specified in 35 U.S.C. 119(b) must be filed in the case of an interference (§ 1.630), when necessary to overcome the date of a reference relied upon by the examiner, when specifically required by the examiner, and in all other situations, before the patent is granted. If the claim for priority or the certified copy of the foreign application is filed after the date the issue fee is paid, it must be accompanied by a petition requesting entry and by the fee set forth in § 1.17(i). If the certified copy is not in the English language, a translation need not be filed except in the case of interference; or when necessary to overcome the date of a reference relied upon by the examiner; or when specifically required by the examiner, in which event an English language translation must be filed together with a statement that the translation of the certified copy is accurate.

\* \* \* \* \*

24. Section 1.59 is revised to read as follows:

**§ 1.59 Expungement of information or copy of papers in application file.**

(a) (1) Information in an application will not be expunged and returned, except as provided in paragraph (b) of this section. See § 1.618 for return of unauthorized and improper papers in interferences.

(2) Information forming part of the original disclosure (*i.e.*, written specification including the claims, drawings, and any preliminary

amendment specifically incorporated into an executed oath or declaration under §§ 1.63 and 1.175) will not be expunged from the application file.

(b) Information, other than what is excluded by paragraph (a)(2) of this section, may be requested to be expunged and returned to applicant upon petition under this paragraph and payment of the petition fee set forth in § 1.17(i). Any petition to expunge and return information from an application must establish to the satisfaction of the Commissioner that the return of the information is appropriate.

(c) Upon request by an applicant and payment of the fee specified in § 1.19(b), the Office will furnish copies of an application, unless the application has been disposed of (see § 1.53 (e), (f) and (g)). The Office cannot provide or certify copies of an application that has been disposed of.

**§ 1.60 [Removed and reserved]**

25. Section 1.60 is removed and reserved.

**§ 1.62 [Removed and reserved]**

26. Section 1.62 is removed and reserved.

27. Section 1.63 is amended by revising paragraphs (a) and (d) and adding a paragraph (e) to read as follows:

**§ 1.63 Oath or declaration.**

(a) An oath or declaration filed under § 1.51(b)(2) as a part of an application must:

- (1) Be executed in accordance with either § 1.66 or § 1.68;
- (2) Identify the specification to which it is directed;
- (3) Identify each inventor by: full name, including the family name, and at least one given name without abbreviation together with any other given name or initial, and the residence, post office address and country of citizenship of each inventor; and
- (4) State whether the inventor is a sole or joint inventor of the invention claimed.

\* \* \* \* \*

(d)(1) A newly executed oath or declaration is not required under § 1.51(b)(2) and § 1.53(f) in a continuation or divisional application, provided that:

- (i) The prior nonprovisional application contained an oath or declaration as prescribed by paragraphs (a) through (c) of this section;
- (ii) The continuation or divisional application was filed by all or by fewer than all of the inventors named in the prior application;
- (iii) The specification and drawings filed in the continuation or divisional

application contain no matter that would have been new matter in the prior application; and

(iv) A copy of the executed oath or declaration filed in the prior application, showing the signature or an indication thereon that it was signed, is submitted for the continuation or divisional application.

(2) The copy of the executed oath or declaration submitted under this paragraph for a continuation or divisional application must be accompanied by a statement requesting the deletion of the name or names of the person or persons who are not inventors in the continuation or divisional application.

(3) Where the executed oath or declaration of which a copy is submitted for a continuation or divisional application was originally filed in a prior application accorded status under § 1.47, the copy of the executed oath or declaration for such prior application must be accompanied by:

(i) A copy of the decision granting a petition to accord § 1.47 status to the prior application, unless all inventors or legal representatives have filed an oath or declaration to join in an application accorded status under § 1.47 of which the continuation or divisional application claims a benefit under 35 U.S.C. 120, 121, or 365(c); and

(ii) If one or more inventor(s) or legal representative(s) who refused to join in the prior application or could not be found or reached has subsequently joined in the prior application or another application of which the continuation or divisional application claims a benefit under 35 U.S.C. 120, 121, or 365(c), a copy of the subsequently executed oath(s) or declaration(s) filed by the inventor or legal representative to join in the application.

(4) Where the power of attorney (or authorization of agent) or correspondence address was changed during the prosecution of the prior application, the change in power of attorney (or authorization of agent) or correspondence address must be identified in the continuation or divisional application. Otherwise, the Office may not recognize in the continuation or divisional application the change of power of attorney (or authorization of agent) or correspondence address during the prosecution of the prior application.

(5) A newly executed oath or declaration must be filed in a continuation or divisional application naming an inventor not named in the prior application.

(e) A newly executed oath or declaration must be filed in any continuation-in-part application, which application may name all, more, or fewer than all of the inventors named in the prior application. The oath or declaration in any continuation-in-part application must also state that the person making the oath or declaration acknowledges the duty to disclose to the Office all information known to the person to be material to patentability as defined in § 1.56 which became available between the filing date of the prior application and the national or PCT international filing date of the continuation-in-part application.

28. Section 1.67 is amended by revising paragraph (b) to read as follows:

**§ 1.67 Supplemental oath or declaration.**

\* \* \* \* \*

(b) A supplemental oath or declaration meeting the requirements of § 1.63 must be filed when a claim is presented for matter originally shown or described but not substantially embraced in the statement of invention or claims originally presented or when an oath or declaration submitted in accordance with § 1.53(f) after the filing of the specification and any required drawings specifically and improperly refers to an amendment which includes new matter. No new matter may be introduced into a nonprovisional application after its filing date even if a supplemental oath or declaration is filed. In proper situations, the oath or declaration here required may be made on information and belief by an applicant other than the inventor.

\* \* \* \* \*

29. Section 1.69 is amended by revising paragraph (b) to read as follows:

**§ 1.69 Foreign language oaths and declarations.**

\* \* \* \* \*

(b) Unless the text of any oath or declaration in a language other than English is a form provided or approved by the Patent and Trademark Office, it must be accompanied by an English translation together with a statement that the translation is accurate, except that in the case of an oath or declaration filed under § 1.63, the translation may be filed in the Office no later than two months from the date applicant is notified to file the translation.

30. Section 1.78 is amended by revising paragraph (a) to read as follows:

**§ 1.78 Claiming benefit of earlier filing date and cross-references to other applications.**

(a)(1) A nonprovisional application may claim an invention disclosed in one or more prior filed copending

nonprovisional applications or copending international applications designating the United States of America. In order for a nonprovisional application to claim the benefit of a prior filed copending nonprovisional application or copending international application designating the United States of America, each prior application must name as an inventor at least one inventor named in the later filed nonprovisional application and disclose the named inventor's invention claimed in at least one claim of the later filed nonprovisional application in the manner provided by the first paragraph of 35 U.S.C. 112. In addition, each prior application must be:

(i) An international application entitled to a filing date in accordance with PCT Article 11 and designating the United States of America; or

(ii) Complete as set forth in § 1.51(b); or

(iii) Entitled to a filing date as set forth in § 1.53(b) or § 1.53(d) and include the basic filing fee set forth in § 1.16; or

(iv) Entitled to a filing date as set forth in § 1.53(b) and have paid therein the processing and retention fee set forth in § 1.21(l) within the time period set forth in § 1.53(f).

(2) Except for a continued prosecution application filed under § 1.53(d), any nonprovisional application claiming the benefit of one or more prior filed copending nonprovisional applications or international applications designating the United States of America must contain or be amended to contain in the first sentence of the specification following the title a reference to each such prior application, identifying it by application number (consisting of the series code and serial number) or international application number and international filing date and indicating the relationship of the applications. The request for a continued prosecution application under § 1.53(d) is the specific reference required by 35 U.S.C. 120 to the prior application. The identification of an application by application number under this section is the specific reference required by 35 U.S.C. 120 to every application assigned that application number. Cross-references to other related applications may be made when appropriate (see § 1.14(a)).

(3) A nonprovisional application other than for a design patent may claim an invention disclosed in one or more prior filed copending provisional applications. Since a provisional application can be pending for no more than twelve months, the last day of pendency may occur on a Saturday,

Sunday, or Federal holiday within the District of Columbia which for copendency would require the nonprovisional application to be filed on or prior to the Saturday, Sunday, or Federal holiday. In order for a nonprovisional application to claim the benefit of one or more prior filed copending provisional applications, each prior provisional application must name as an inventor at least one inventor named in the later filed nonprovisional application and disclose the named inventor's invention claimed in at least one claim of the later filed nonprovisional application in the manner provided by the first paragraph of 35 U.S.C. 112. In addition, each prior provisional application must be:

- (i) Complete as set forth in § 1.51(c); or
- (ii) Entitled to a filing date as set forth in § 1.53(c) and include the basic filing fee set forth in § 1.16(k).

(4) Any nonprovisional application claiming the benefit of one or more prior filed copending provisional applications must contain or be amended to contain in the first sentence of the specification following the title a reference to each such prior provisional application, identifying it as a provisional application, and including the provisional application number (consisting of series code and serial number).

\* \* \* \* \*

31. Section 1.84 is amended by revising paragraphs (a)(2)(i), (b), (c) and (g) to read as follows:

**§ 1.84 Standards for drawings.**

- (a) \* \* \*
- (2) \* \* \*
- (i) The fee set forth in § 1.17(i);

\* \* \* \* \*

(b) *Photographs*—(1) *Black and white*. Photographs are not ordinarily permitted in utility patent applications. However, the Office will accept photographs in utility patent applications only after the granting of a petition filed under this paragraph which requests that photographs be accepted. Any such petition must include the following:

- (i) The fee set forth in § 1.17(i); and
- (ii) Three (3) sets of photographs. Photographs must either be developed on double weight photographic paper or be permanently mounted on bristol board. The photographs must be of sufficient quality so that all details in the drawings are reproducible in the printed patent.

(2) *Color*. Color photographs will be accepted in utility patent applications if the conditions for accepting color

drawings have been satisfied. See paragraph (a)(2) of this section.

(c) *Identification of drawings*. Identifying indicia, if provided, should include the application number or the title of the invention, inventor's name, docket number (if any), and the name and telephone number of a person to call if the Office is unable to match the drawings to the proper application. This information should be placed on the back of each sheet of drawings a minimum distance of 1.5 cm. ( $\frac{5}{8}$  inch) down from the top of the page. In addition, a reference to the application number, or, if an application number has not been assigned, the inventor's name, may be included in the left-hand corner, provided that the reference appears within 1.5 cm. ( $\frac{5}{8}$  inch) from the top of the sheet.

\* \* \* \* \*

(g) *Margins*. The sheets must not contain frames around the sight (*i.e.*, the usable surface), but should have scan target points (*i.e.*, cross-hairs) printed on two catercorner margin corners. Each sheet must include a top margin of at least 2.5 cm. (1 inch), a left side margin of at least 2.5 cm. (1 inch), a right side margin of at least 1.5 cm. ( $\frac{5}{8}$  inch), and a bottom margin of at least 1.0 cm. ( $\frac{3}{8}$  inch), thereby leaving a sight no greater than 17.0 cm. by 26.2 cm. on 21.0 cm. by 29.7 cm. (DIN size A4) drawing sheets, and a sight no greater than 17.6 cm. by 24.4 cm. ( $6\frac{1}{16}$  by  $9\frac{5}{8}$  inches) on 21.6 cm. by 27.9 cm. ( $8\frac{1}{2}$  by 11 inch) drawing sheets.

\* \* \* \* \*

32. Section 1.91 is revised to read as follows:

**§ 1.91 Models or exhibits not generally admitted as part of application or patent.**

- (a) A model or exhibit will not be admitted as part of the record of an application unless it:
  - (1) Substantially conforms to the requirements of § 1.52 or § 1.84;
  - (2) Is specifically required by the Office; or
  - (3) Is filed with a petition under this section including:
    - (i) The petition fee as set forth in § 1.17(i); and
    - (ii) An explanation of why entry of the model or exhibit in the file record is necessary to demonstrate patentability.
- (b) Notwithstanding the provisions of paragraph (a) of this section, a model, working model, or other physical exhibit may be required by the Office if deemed necessary for any purpose in examination of the application.

(b) Notwithstanding the provisions of paragraph (a) of this section, a model, working model, or other physical exhibit may be required by the Office if deemed necessary for any purpose in examination of the application.

**§ 1.92 [Removed and reserved]**

33. Section 1.92 is removed and reserved.

34. Section 1.97 is amended by revising paragraphs (c) through (e) to read as follows:

**§ 1.97 Filing of information disclosure statement.**

\* \* \* \* \*

(c) An information disclosure statement shall be considered by the Office if filed by the applicant after the period specified in paragraph (b) of this section, provided that the information disclosure statement is filed before the mailing date of either a final action under § 1.113, or a notice of allowance under § 1.311, whichever occurs first, and is accompanied by either:

- (1) A statement as specified in paragraph (e) of this section; or
- (2) The fee set forth in § 1.17(p).
- (d) An information disclosure statement shall be considered by the Office if filed by the applicant after the period specified in paragraph (c) of this section, provided that the information disclosure statement is filed on or before payment of the issue fee and is accompanied by:

- (1) A statement as specified in paragraph (e) of this section;
- (2) A petition requesting consideration of the information disclosure statement; and
- (3) The petition fee set forth in § 1.17(i).

(e) A statement under this section must state either:

- (1) That each item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application not more than three months prior to the filing of the information disclosure statement; or
- (2) That no item of information contained in the information disclosure statement was cited in a communication from a foreign patent office in a counterpart foreign application, and, to the knowledge of the person signing the statement after making reasonable inquiry, no item of information contained in the information disclosure statement was known to any individual designated in § 1.56(c) more than three months prior to the filing of the information disclosure statement.

\* \* \* \* \*

**§ 1.101 [Removed and reserved]**

35. Section 1.101 is removed and reserved.

36. Section 1.102 is amended by revising paragraph (a) to read as follows:

**§ 1.102 Advancement of examination.**

(a) Applications will not be advanced out of turn for examination or for further action except as provided by this part, or upon order of the Commissioner to expedite the business of the Office, or upon filing of a request under paragraph (b) of this section or upon filing a petition under paragraphs (c) or (d) of this section with a showing which, in the opinion of the Commissioner, will justify so advancing it.

\* \* \* \* \*

37. Section 1.103 is amended by revising paragraph (a) to read as follows:

**§ 1.103 Suspension of action.**

(a) Suspension of action by the Office will be granted for good and sufficient cause and for a reasonable time specified upon petition by the applicant and, if such cause is not the fault of the Office, the payment of the fee set forth in § 1.17(i). Action will not be suspended when a reply by the applicant to an Office action is required.

\* \* \* \* \*

38. Section 1.104 is revised to read as follows:

**§ 1.104 Nature of examination.**

(a) *Examiner's action.* (1) On taking up an application for examination or a patent in a reexamination proceeding, the examiner shall make a thorough study thereof and shall make a thorough investigation of the available prior art relating to the subject matter of the claimed invention. The examination shall be complete with respect both to compliance of the application or patent under reexamination with the applicable statutes and rules and to the patentability of the invention as claimed, as well as with respect to matters of form, unless otherwise indicated.

(2) The applicant, or in the case of a reexamination proceeding, both the patent owner and the requester, will be notified of the examiner's action. The reasons for any adverse action or any objection or requirement will be stated and such information or references will be given as may be useful in aiding the applicant, or in the case of a reexamination proceeding the patent owner, to judge the propriety of continuing the prosecution.

(3) An international-type search will be made in all national applications filed on and after June 1, 1978.

(4) Any national application may also have an international-type search report prepared thereon at the time of the national examination on the merits, upon specific written request therefor and payment of the international-type search report fee set forth in § 1.21(e).

The Patent and Trademark Office does not require that a formal report of an international-type search be prepared in order to obtain a search fee refund in a later filed international application.

(5) Copending applications will be considered by the examiner to be owned by, or subject to an obligation of assignment to, the same person if:

(i) The application files refer to assignments recorded in the Patent and Trademark Office in accordance with part 3 of this chapter which convey the entire rights in the applications to the same person or organization; or

(ii) Copies of unrecorded assignments which convey the entire rights in the applications to the same person or organization are filed in each of the applications; or

(iii) An affidavit or declaration by the common owner is filed which states that there is common ownership and states facts which explain why the affiant or declarant believes there is common ownership, which affidavit or declaration may be signed by an official of the corporation or organization empowered to act on behalf of the corporation or organization when the common owner is a corporation or other organization; or

(iv) Other evidence is submitted which establishes common ownership of the applications.

(b) *Completeness of examiner's action.* The examiner's action will be complete as to all matters, except that in appropriate circumstances, such as misjoinder of invention, fundamental defects in the application, and the like, the action of the examiner may be limited to such matters before further action is made. However, matters of form need not be raised by the examiner until a claim is found allowable.

(c) *Rejection of claims.* (1) If the invention is not considered patentable, or not considered patentable as claimed, the claims, or those considered unpatentable will be rejected.

(2) In rejecting claims for want of novelty or for obviousness, the examiner must cite the best references at his or her command. When a reference is complex or shows or describes inventions other than that claimed by the applicant, the particular part relied on must be designated as nearly as practicable. The pertinence of each reference, if not apparent, must be clearly explained and each rejected claim specified.

(3) In rejecting claims the examiner may rely upon admissions by the applicant, or the patent owner in a reexamination proceeding, as to any matter affecting patentability and, insofar as rejections in applications are

concerned, may also rely upon facts within his or her knowledge pursuant to paragraph (d)(2) of this section.

(4) Subject matter which is developed by another person which qualifies as prior art only under 35 U.S.C. 102(f) or (g) may be used as prior art under 35 U.S.C. 103 against a claimed invention unless the entire rights to the subject matter and the claimed invention were commonly owned by the same person or organization or subject to an obligation of assignment to the same person or organization at the time the claimed invention was made.

(5) The claims in any original application naming an inventor will be rejected as being precluded by a waiver in a published statutory invention registration naming that inventor if the same subject matter is claimed in the application and the statutory invention registration. The claims in any reissue application naming an inventor will be rejected as being precluded by a waiver in a published statutory invention registration naming that inventor if the reissue application seeks to claim subject matter:

(i) Which was not covered by claims issued in the patent prior to the date of publication of the statutory invention registration; and

(ii) Which was the same subject matter waived in the statutory invention registration.

(d) *Citation of references.* (1) If domestic patents are cited by the examiner, their numbers and dates, and the names of the patentees must be stated. If foreign published applications or patents are cited, their nationality or country, numbers and dates, and the names of the patentees must be stated, and such other data must be furnished as may be necessary to enable the applicant, or in the case of a reexamination proceeding, the patent owner, to identify the published applications or patents cited. In citing foreign published applications or patents, in case only a part of the document is involved, the particular pages and sheets containing the parts relied upon must be identified. If printed publications are cited, the author (if any), title, date, pages or plates, and place of publication, or place where a copy can be found, shall be given.

(2) When a rejection in an application is based on facts within the personal knowledge of an employee of the Office, the data shall be as specific as possible, and the reference must be supported, when called for by the applicant, by the affidavit of such employee, and such affidavit shall be subject to contradiction or explanation by the

affidavits of the applicant and other persons.

(e) *Reasons for allowance.* If the examiner believes that the record of the prosecution as a whole does not make clear his or her reasons for allowing a claim or claims, the examiner may set forth such reasoning. The reasons shall be incorporated into an Office action rejecting other claims of the application or patent under reexamination or be the subject of a separate communication to the applicant or patent owner. The applicant or patent owner may file a statement commenting on the reasons for allowance within such time as may be specified by the examiner. Failure to file such a statement does not give rise to any implication that the applicant or patent owner agrees with or acquiesces in the reasoning of the examiner.

**§ 1.105 [Removed and reserved]**

39. Section 1.105 is removed and reserved.

**§ 1.106 [Removed and reserved]**

40. Section 1.106 is removed and reserved.

**§ 1.107 [Removed and reserved]**

41. Section 1.107 is removed and reserved.

**§ 1.108 [Removed and reserved]**

42. Section 1.108 is removed and reserved.

**§ 1.109 [Removed and reserved]**

43. Section 1.109 is removed and reserved.

44. Section 1.111 is amended by revising paragraph (b) to read as follows:

**§ 1.111 Reply by applicant or patent owner.**

\* \* \* \* \*

(b) In order to be entitled to reconsideration or further examination, the applicant or patent owner must reply to the Office action. The reply by the applicant or patent owner must be reduced to a writing which distinctly and specifically points out the supposed errors in the examiner's action and must reply to every ground of objection and rejection in the prior Office action. The reply must present arguments pointing out the specific distinctions believed to render the claims, including any newly presented claims, patentable over any applied references. If the reply is with respect to an application, a request may be made that objections or requirements as to form not necessary to further consideration of the claims be held in abeyance until allowable subject matter is indicated. The applicant's or patent owner's reply must appear throughout to be a *bona fide* attempt to advance the

application or the reexamination proceeding to final action. A general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references does not comply with the requirements of this section.

\* \* \* \* \*

45. Section 1.112 is revised to read as follows:

**§ 1.112 Reconsideration before final action.**

After reply by applicant or patent owner (§ 1.111) to a non-final action, the application or patent under reexamination will be reconsidered and again examined. The applicant or patent owner will be notified if claims are rejected, or objections or requirements made, in the same manner as after the first examination. Applicant or patent owner may reply to such Office action in the same manner provided in § 1.111, with or without amendment, unless such Office action indicates that it is made final (§ 1.113).

46. Section 1.113 is revised to read as follows:

**§ 1.113 Final rejection or action.**

(a) On the second or any subsequent examination or consideration by the examiner the rejection or other action may be made final, whereupon applicant's or patent owner's reply is limited to appeal in the case of rejection of any claim (§ 1.191), or to amendment as specified in § 1.116. Petition may be taken to the Commissioner in the case of objections or requirements not involved in the rejection of any claim (§ 1.181). Reply to a final rejection or action must include cancellation of, or appeal from the rejection of, each rejected claim. If any claim stands allowed, the reply to a final rejection or action must comply with any requirements or objections as to form.

(b) In making such final rejection, the examiner shall repeat or state all grounds of rejection then considered applicable to the claims in the application, clearly stating the reasons in support thereof.

**§ 1.115 [Removed and Reserved]**

47. Section 1.115 is removed and reserved.

48. Section 1.116 is amended by revising its heading and paragraph (a) to read as follows:

**§ 1.116 Amendments after final action or appeal.**

(a) After a final rejection or other final action (§ 1.113), amendments may be

made cancelling claims or complying with any requirement of form expressly set forth in a previous Office action. Amendments presenting rejected claims in better form for consideration on appeal may be admitted. The admission of, or refusal to admit, any amendment after final rejection, and any related proceedings, will not operate to relieve the application or patent under reexamination from its condition as subject to appeal or to save the application from abandonment under § 1.135.

\* \* \* \* \*

**§ 1.117 [Removed and reserved]**

49. Section 1.117 is removed and reserved.

**§ 1.118 [Removed and reserved]**

50. Section 1.118 is removed and reserved.

**§ 1.119 [Removed and reserved]**

51. Section 1.119 is removed and reserved.

52. Section 1.121 is revised to read as follows:

**§ 1.121 Manner of making amendments.**

(a) *Amendments in nonprovisional applications, other than reissue applications:* Amendments in nonprovisional applications, excluding reissue applications, are made by filing a paper, in compliance with § 1.52, directing that specified amendments be made.

(1) *Specification other than the claims.* Except as provided in § 1.125, amendments to add matter to, or delete matter from, the specification, other than to the claims, may only be made as follows:

(i) Instructions for insertions: The precise point in the specification must be indicated where an insertion is to be made, and the matter to be inserted must be set forth.

(ii) Instructions for deletions: The precise point in the specification must be indicated where a deletion is to be made, and the matter to be deleted must be set forth or otherwise indicated.

(iii) Matter deleted by amendment can be reinstated only by a subsequent amendment presenting the previously deleted matter as a new insertion.

(2) *Claims.* Amendments to the claims may only be made as follows:

(i) Instructions for insertions and deletions: A claim may be amended by specifying only the exact matter to be deleted or inserted by an amendment and the precise point where the deletion or insertion is to be made, where the changes are limited to:

(A) Deletions and/or

(B) The addition of no more than five (5) words in any one claim; or

(ii) Claim cancellation or rewriting: A claim may be amended by directions to cancel the claim or by rewriting such claim with underlining below the matter added and brackets around the matter deleted. The rewriting of a claim in this form will be construed as directing the deletion of the previous version of that claim. If a previously rewritten claim is again rewritten, underlining and bracketing will be applied relative to the previous version of the claim, with the parenthetical expression "twice amended," "three times amended," etc., following the original claim number. The original claim number followed by that parenthetical expression must be used for the rewritten claim. No interlineations or deletions of any prior amendment may appear in the currently submitted version of the claim. A claim canceled by amendment (not deleted and rewritten) can be reinstated only by a subsequent amendment presenting the claim as a new claim with a new claim number.

(3) *Drawings.* (i) Amendments to the original application drawings are not permitted. Any change to the application drawings must be by way of a substitute sheet of drawings for each sheet changed submitted in compliance with § 1.84.

(ii) Where a change to the drawings is desired, a sketch in permanent ink showing proposed changes in red, to become part of the record, must be filed for approval by the examiner and should be in a separate paper.

(4) Any amendment to an application that is present in a substitute specification submitted pursuant to § 1.125 must be presented under the provisions of this paragraph either prior to or concurrent with submission of the substitute specification.

(5) The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition, and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(6) No amendment may introduce new matter into the disclosure of an application.

(b) *Amendments in reissue applications:* Amendments in reissue applications are made by filing a paper, in compliance with § 1.52, directing that specified amendments be made.

(1) *Specification other than the claims.* Amendments to the specification, other than to the claims, may only be made as follows:

(i) Amendments must be made by submission of the entire text of a newly

added or rewritten paragraph(s) with markings pursuant to paragraph (b)(1)(iii) of this section, except that an entire paragraph may be deleted by a statement deleting the paragraph without presentation of the text of the paragraph.

(ii) The precise point in the specification must be indicated where the paragraph to be amended is located.

(iii) Underlining below the subject matter added to the patent and brackets around the subject matter deleted from the patent are to be used to mark the amendments being made.

(2) *Claims.* Amendments to the claims may only be made as follows:

(i)(A) The amendment must be made relative to the patent claims in accordance with paragraph (b)(6) of this section and must include the entire text of each claim which is being amended by the current amendment and of each claim being added by the current amendment with markings pursuant to paragraph (b)(2)(i)(C) of this section, except that a patent claim or added claim should be cancelled by a statement cancelling the patent claim or added claim without presentation of the text of the patent claim or added claim.

(B) Patent claims must not be renumbered and the numbering of any claims added to the patent must follow the number of the highest numbered patent claim.

(C) Underlining below the subject matter added to the patent and brackets around the subject matter deleted from the patent are to be used to mark the amendments being made. If a claim is amended pursuant to paragraph (b)(2)(i)(A) of this section, a parenthetical expression "amended," "twice amended," etc., should follow the original claim number.

(ii) Each amendment submission must set forth the status (*i.e.*, pending or cancelled) as of the date of the amendment, of all patent claims and of all added claims.

(iii) Each amendment when originally submitted must be accompanied by an explanation of the support in the disclosure of the patent for the amendment along with any additional comments on page(s) separate from the page(s) containing the amendment.

(3) *Drawings.* (i) Amendments to the original patent drawings are not permitted. Any change to the patent drawings must be by way of a new sheet of drawings with the amended figures identified as "amended" and with added figures identified as "new" for each sheet changed submitted in compliance with § 1.84.

(ii) Where a change to the drawings is desired, a sketch in permanent ink

showing proposed changes in red, to become part of the record, must be filed for approval by the examiner and should be in a separate paper.

(4) The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition, and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(5) No reissue patent shall be granted enlarging the scope of the claims of the original patent unless applied for within two years from the grant of the original patent, pursuant to 35 U.S.C. 251. No amendment to the patent may introduce new matter or be made in an expired patent.

(6) All amendments must be made relative to the patent specification, including the claims, and drawings, which is in effect as of the date of filing of the reissue application.

(c) *Amendments in reexamination proceedings:* Any proposed amendment to the description and claims in patents involved in reexamination proceedings must be made in accordance with § 1.530(d).

**§ 1.122 [Removed and reserved]**

53. Section 1.122 is removed and reserved.

**§ 1.123 [Removed and reserved]**

54. Section 1.123 is removed and reserved.

**§ 1.124 [Removed and reserved]**

55. Section 1.124 is removed and reserved.

56. Section 1.125 is revised to read as follows:

**§ 1.125 Substitute specification.**

(a) If the number or nature of the amendments or the legibility of the application papers renders it difficult to consider the application, or to arrange the papers for printing or copying, the Office may require the entire specification, including the claims, or any part thereof, be rewritten.

(b) A substitute specification, excluding the claims, may be filed at any point up to payment of the issue fee if it is accompanied by:

(1) A statement that the substitute specification includes no new matter; and

(2) A marked-up copy of the substitute specification showing the matter being added to and the matter being deleted from the specification of record.

(c) A substitute specification submitted under this section must be submitted in clean form without markings as to amended material.

(d) A substitute specification under this section is not permitted in a reissue application or in a reexamination proceeding.

57. Section 1.126 is revised to read as follows:

**§ 1.126 Numbering of claims.**

The original numbering of the claims must be preserved throughout the prosecution. When claims are canceled the remaining claims must not be renumbered. When claims are added, they must be numbered by the applicant consecutively beginning with the number next following the highest numbered claim previously presented (whether entered or not). When the application is ready for allowance, the examiner, if necessary, will renumber the claims consecutively in the order in which they appear or in such order as may have been requested by applicant.

58. Section 1.133 is amended by revising paragraph (b) to read as follows:

**§ 1.133 Interviews.**

\* \* \* \* \*

(b) In every instance where reconsideration is requested in view of an interview with an examiner, a complete written statement of the reasons presented at the interview as warranting favorable action must be filed by the applicant. An interview does not remove the necessity for reply to Office actions as specified in §§ 1.111 and 1.135.

**Subpart B—[Amended]**

59. The undesignated center heading in Subpart B—National Processing Provisions, following § 1.133 is revised to read as follows:

**Time for Reply by Applicant; Abandonment of Application**

60. Section 1.134 is revised to read as follows:

**§ 1.134 Time period for reply to an Office action.**

An Office action will notify the applicant of any non-statutory or shortened statutory time period set for reply to an Office action. Unless the applicant is notified in writing that a reply is required in less than six months, a maximum period of six months is allowed.

61. Section 1.135 is revised to read as follows:

**§ 1.135 Abandonment for failure to reply within time period.**

(a) If an applicant of a patent application fails to reply within the time period provided under § 1.134 and § 1.136, the application will become

abandoned unless an Office action indicates otherwise.

(b) Prosecution of an application to save it from abandonment pursuant to paragraph (a) of this section must include such complete and proper reply as the condition of the application may require. The admission of, or refusal to admit, any amendment after final rejection or any amendment not responsive to the last action, or any related proceedings, will not operate to save the application from abandonment.

(c) When reply by the applicant is a *bona fide* attempt to advance the application to final action, and is substantially a complete reply to the non-final Office action, but consideration of some matter or compliance with some requirement has been inadvertently omitted, applicant may be given a new time period for reply under § 1.134 to supply the omission.

62. Section 1.136 is revised to read as follows:

**§ 1.136 Extensions of time**

(a)(1) If an applicant is required to reply within a nonstatutory or shortened statutory time period, applicant may extend the time period for reply up to the earlier of the expiration of any maximum period set by statute or five months after the time period set for reply, if a petition for an extension of time and the fee set in § 1.17(a) are filed, unless:

(i) Applicant is notified otherwise in an Office action;

(ii) The reply is a reply brief submitted pursuant to § 1.193(b);

(iii) The reply is a request for an oral hearing submitted pursuant to § 1.194(b);

(iv) The reply is to a decision by the Board of Patent Appeals and Interferences pursuant to § 1.196, § 1.197 or § 1.304; or

(v) The application is involved in an interference declared pursuant to § 1.611.

(2) The date on which the petition and the fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The expiration of the time period is determined by the amount of the fee paid. A reply must be filed prior to the expiration of the period of extension to avoid abandonment of the application (§ 1.135), but in no situation may an applicant reply later than the maximum time period set by statute, or be granted an extension of time under paragraph

(b) of this section when the provisions of this paragraph are available. See § 1.136(b) for extensions of time relating

to proceedings pursuant to §§ 1.193(b), 1.194, 1.196 or 1.197; § 1.304 for extension of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.550(c) for extension of time in reexamination proceedings; and § 1.645 for extension of time in interference proceedings.

(3) A written request may be submitted in an application that is an authorization to treat any concurrent or future reply, requiring a petition for an extension of time under this paragraph for its timely submission, as incorporating a petition for extension of time for the appropriate length of time. An authorization to charge all required fees, fees under § 1.17, or all required extension of time fees will be treated as a constructive petition for an extension of time in any concurrent or future reply requiring a petition for an extension of time under this paragraph for its timely submission. Submission of the fee set forth in § 1.17(a) will also be treated as a constructive petition for an extension of time in any concurrent reply requiring a petition for an extension of time under this paragraph for its timely submission.

(b) When a reply cannot be filed within the time period set for such reply and the provisions of paragraph (a) of this section are not available, the period for reply will be extended only for sufficient cause and for a reasonable time specified. Any request for an extension of time under this paragraph must be filed on or before the day on which such reply is due, but the mere filing of such a request will not effect any extension under this paragraph. In no situation can any extension carry the date on which reply is due beyond the maximum time period set by statute. See § 1.304 for extension of time to appeal to the U.S. Court of Appeals for the Federal Circuit or to commence a civil action; § 1.645 for extension of time in interference proceedings; and § 1.550(c) for extension of time in reexamination proceedings.

63. Section 1.137 is revised to read as follows:

**§ 1.137 Revival of abandoned application or lapsed patent.**

(a) *Unavoidable.* Where the delay in reply was unavoidable, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to this paragraph. A grantable petition pursuant to this paragraph must be accompanied by:

(1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing

application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;

(2) The petition fee as set forth in § 1.17(l);

(3) A showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and

(4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (c) of this section.

(b) *Unintentional*. Where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to this paragraph. A grantable petition pursuant to this paragraph must be accompanied by:

(1) The required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof;

(2) The petition fee as set forth in § 1.17(m);

(3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (c) of this section.

(c) In a design application, a utility application filed before June 8, 1995, or a plant application filed before June 8, 1995, any petition to revive pursuant to this section must be accompanied by a terminal disclaimer and fee as set forth in § 1.321 dedicating to the public a terminal part of the term of any patent granted thereon equivalent to the period of abandonment of the application. Any terminal disclaimer pursuant to this paragraph must also apply to any patent granted on any continuing application that contains a specific reference under 35 U.S.C. 120, 121, or 365(c) to the application for which revival is sought. The provisions of this paragraph do not apply to lapsed patents.

(d) Any request for reconsideration or review of a decision refusing to revive

an abandoned application or lapsed patent upon petition filed pursuant to this section, to be considered timely, must be filed within two months of the decision refusing to revive or within such time as set in the decision. Unless a decision indicates otherwise, this time period may be extended under the provisions of § 1.136.

(e) A provisional application, abandoned for failure to timely respond to an Office requirement, may be revived pursuant to this section so as to be pending for a period of no longer than twelve months from its filing date. Under no circumstances will a provisional application be regarded as pending after twelve months from its filing date.

**§ 1.139 [Removed and reserved]**

64. Section 1.139 is removed and reserved.

65. Section 1.142 is amended by revising paragraph (a) to read as follows:

**§ 1.142 Requirement for restriction.**

(a) If two or more independent and distinct inventions are claimed in a single application, the examiner in an Office action will require the applicant in the reply to that action to elect an invention to which the claims will be restricted, this official action being called a requirement for restriction (also known as a requirement for division). Such requirement will normally be made before any action on the merits; however, it may be made at any time before final action.

\* \* \* \* \*

66. Section 1.144 is revised to read as follows:

**§ 1.144 Petition from requirement for restriction.**

After a final requirement for restriction, the applicant, in addition to making any reply due on the remainder of the action, may petition the Commissioner to review the requirement. Petition may be deferred until after final action on or allowance of claims to the invention elected, but must be filed not later than appeal. A petition will not be considered if reconsideration of the requirement was not requested (see § 1.181).

67. Section 1.146 is revised to read as follows:

**§ 1.146 Election of species.**

In the first action on an application containing a generic claim to a generic invention (genus) and claims to more than one patentably distinct species embraced thereby, the examiner may require the applicant in the reply to that action to elect a species of his or her

invention to which his or her claim will be restricted if no claim to the genus is found to be allowable. However, if such application contains claims directed to more than a reasonable number of species, the examiner may require restriction of the claims to not more than a reasonable number of species before taking further action in the application.

68. Section 1.152 is revised to read as follows:

**§ 1.152 Design drawings.**

(a) The design must be represented by a drawing that complies with the requirements of § 1.84, and must contain a sufficient number of views to constitute a complete disclosure of the appearance of the design.

(1) Appropriate and adequate surface shading should be used to show the character or contour of the surfaces represented. Solid black surface shading is not permitted except when used to represent the color black as well as color contrast. Broken lines may be used to show visible environmental structure, but may not be used to show hidden planes and surfaces which cannot be seen through opaque materials. Alternate positions of a design component, illustrated by full and broken lines in the same view are not permitted in a design drawing.

(2) Color photographs and color drawings are not permitted in design applications in the absence of a grantable petition pursuant to § 1.84(a)(2). Photographs and ink drawings are not permitted to be combined as formal drawings in one application. Photographs submitted in lieu of ink drawings in design patent applications must comply with § 1.84(b) and must not disclose environmental structure but must be limited to the design for the article claimed.

(b) Any detail shown in the ink or color drawings or photographs (formal or informal) deposited with the original application papers constitutes an integral part of the disclosed and claimed design, except as otherwise provided in this paragraph. This detail may include, but is not limited to, color or contrast, graphic or written indicia, including identifying indicia of a proprietary nature, surface ornamentation on an article, or any combination thereof.

(1) When any detail shown in informal drawings or photographs does not constitute an integral part of the disclosed and claimed design, a specific disclaimer must appear in the original application papers either in the specification or directly on the drawings or photographs. This specific disclaimer

in the original application papers will provide antecedent basis for the omission of the disclaimed detail(s) in later-filed drawings or photographs.

(2) When informal color drawings or photographs are deposited with the original application papers without a disclaimer pursuant to paragraph (b)(1) of this section, formal color drawings or photographs, or a black and white drawing lined to represent color, will be required.

69. Section 1.154 is amended by revising its heading and paragraph (a)(3) as to read follows:

**§ 1.154 Arrangement of application elements.**

(a) \* \* \*

(3) Preamble, stating name of the applicant, title of the design, and a brief description of the nature and intended use of the article in which the design is embodied.

\* \* \* \* \*

70. Section 1.155 is revised to read as follows:

**§ 1.155 Issue of design patents.**

If, on examination, it appears that the applicant is entitled to a design patent under the law, a notice of allowance will be sent to the applicant, or applicant's attorney or agent, calling for the payment of the issue fee (§ 1.18(b)). If this issue fee is not paid within three months of the date of the notice of allowance, the application shall be regarded as abandoned.

71. Section 1.163 is amended by revising its heading and paragraph (b) to read as follows:

**§ 1.163 Specification and arrangement of application elements.**

\* \* \* \* \*

(b) Two copies of the specification (including the claim) must be submitted, but only one signed oath or declaration is required.

\* \* \* \* \*

72. Section 1.167 is revised to read as follows:

**§ 1.167 Examination.**

Applications may be submitted by the Patent and Trademark Office to the Department of Agriculture for study and report.

73. Section 1.171 is revised to read as follows:

**§ 1.171 Application for reissue.**

An application for reissue must contain the same parts required for an application for an original patent, complying with all the rules relating thereto except as otherwise provided, and in addition, must comply with the

requirements of the rules relating to reissue applications.

74. Section 1.172 is amended by revising paragraph (a) to read as follows:

**§ 1.172 Applicants, assignees.**

(a) A reissue oath must be signed and sworn to or declaration made by the inventor or inventors except as otherwise provided (see §§ 1.42, 1.43, 1.47), and must be accompanied by the written consent of all assignees, if any, owning an undivided interest in the patent, but a reissue oath may be made and sworn to or declaration made by the assignee of the entire interest if the application does not seek to enlarge the scope of the claims of the original patent. All assignees consenting to the reissue must establish their ownership interest in the patent by filing in the reissue application a submission in accordance with the provisions of § 3.73(b) of this chapter.

\* \* \* \* \*

75. Section 1.175 is revised to read as follows:

**§ 1.175 Reissue oath or declaration.**

(a) The reissue oath or declaration in addition to complying with the requirements of § 1.63, must also state that:

(1) The applicant believes the original patent to be wholly or partly inoperative or invalid by reason of a defective specification or drawing, or by reason of the patentee claiming more or less than the patentee had the right to claim in the patent, stating at least one error being relied upon as the basis for reissue; and

(2) All errors being corrected in the reissue application up to the time of filing of the oath or declaration under this paragraph arose without any deceptive intention on the part of the applicant.

(b)(1) For any error corrected, which is not covered by the oath or declaration submitted under paragraph (a) of this section, applicant must submit a supplemental oath or declaration stating that every such error arose without any deceptive intention on the part of the applicant. Any supplemental oath or declaration required by this paragraph must be submitted before allowance and may be submitted:

(i) With any amendment prior to allowance; or

(ii) In order to overcome a rejection under 35 U.S.C. 251 made by the examiner where it is indicated that the submission of a supplemental oath or declaration as required by this paragraph will overcome the rejection.

(2) For any error sought to be corrected after allowance, a

supplemental oath or declaration must accompany the requested correction stating that the error(s) to be corrected arose without any deceptive intention on the part of the applicant.

(c) Having once stated an error upon which the reissue is based, as set forth in paragraph (a)(1), unless all errors previously stated in the oath or declaration are no longer being corrected, a subsequent oath or declaration under paragraph (b) of this section need not specifically identify any other error or errors being corrected.

(d) The oath or declaration required by paragraph (a) of this section may be submitted under the provisions of § 1.53(f).

76. Section 1.182 is revised to read as follows:

**§ 1.182 Questions not specifically provided for.**

All situations not specifically provided for in the regulations of this part will be decided in accordance with the merits of each situation by or under the authority of the Commissioner, subject to such other requirements as may be imposed, and such decision will be communicated to the interested parties in writing. Any petition seeking a decision under this section must be accompanied by the petition fee set forth in § 1.17(h).

77. Section 1.184 is removed and reserved.

**§ 1.184 [Removed and reserved]**

78. Section 1.191 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1.191 Appeal to Board of Patent Appeals and Interferences.**

(a) Every applicant for a patent or for reissue of a patent, and every owner of a patent under reexamination, any of whose claims has been twice or finally (§ 1.113) rejected, may appeal from the decision of the examiner to the Board of Patent Appeals and Interferences by filing a notice of appeal and the fee set forth in § 1.17(b) within the time period provided under §§ 1.134 and 1.136 for reply.

(b) The signature requirement of § 1.33 does not apply to a notice of appeal filed under this section.

\* \* \* \* \*

79. Section 1.192 is amended by revising paragraph (a) to read as follows:

**§ 1.192 Appellant's brief.**

(a) Appellant must, within two months from the date of the notice of appeal under § 1.191 or within the time allowed for reply to the action from which the appeal was taken, if such

time is later, file a brief in triplicate. The brief must be accompanied by the fee set forth in § 1.17(c) and must set forth the authorities and arguments on which appellant will rely to maintain the appeal. Any arguments or authorities not included in the brief will be refused consideration by the Board of Patent Appeals and Interferences, unless good cause is shown.

\* \* \* \* \*

80. Section 1.193 is revised to read as follows:

**§ 1.193 Examiner's answer and reply brief.**

(a) (1) The primary examiner may, within such time as may be directed by the Commissioner, furnish a written statement in answer to appellant's brief including such explanation of the invention claimed and of the references and grounds of rejection as may be necessary, supplying a copy to appellant. If the primary examiner finds that the appeal is not regular in form or does not relate to an appealable action, the primary examiner shall so state.

(2) An examiner's answer must not include a new ground of rejection, but if an amendment under § 1.116 proposes to add or amend one or more claims and appellant was advised that the amendment under § 1.116 would be entered for purposes of appeal and which individual rejection(s) set forth in the action from which the appeal was taken would be used to reject the added or amended claim(s), then the appeal brief must address the rejection(s) of the claim(s) added or amended by the amendment under § 1.116 as appellant was so advised and the examiner's answer may include the rejection(s) of the claim(s) added or amended by the amendment under § 1.116 as appellant was so advised. The filing of an amendment under § 1.116 which is entered for purposes of appeal represents appellant's consent that when so advised any appeal proceed on those claim(s) added or amended by the amendment under § 1.116 subject to any rejection set forth in the action from which the appeal was taken.

(b) (1) Appellant may file a reply brief to an examiner's answer within two months from the date of such examiner's answer. See § 1.136(b) for extensions of time for filing a reply brief in a patent application and § 1.550(c) for extensions of time for filing a reply brief in a reexamination proceeding. The primary examiner must either acknowledge receipt and entry of the reply brief or withdraw the final rejection and reopen prosecution to respond to the reply brief. A supplemental examiner's answer is not permitted, unless the application has

been remanded by the Board of Patent Appeals and Interferences for such purpose.

(2) Where prosecution is reopened by the primary examiner after an appeal or reply brief has been filed, appellant must exercise one of the following two options to avoid abandonment of the application:

(i) File a reply under § 1.111, if the Office action is not final, or a reply under § 1.113, if the Office action is final; or

(ii) Request reinstatement of the appeal. If reinstatement of the appeal is requested, such request must be accompanied by a supplemental appeal brief, but no new amendments, affidavits (§§ 1.130, 1.131 or 1.132) or other evidence are permitted.

81. Section 1.194 is revised to read as follows:

**§ 1.194 Oral hearing.**

(a) An oral hearing should be requested only in those circumstances in which appellant considers such a hearing necessary or desirable for a proper presentation of the appeal. An appeal decided without an oral hearing will receive the same consideration by the Board of Patent Appeals and Interferences as appeals decided after oral hearing.

(b) If appellant desires an oral hearing, appellant must file, in a separate paper, a written request for such hearing accompanied by the fee set forth in § 1.17(d) within two months from the date of the examiner's answer. If appellant requests an oral hearing and submits therewith the fee set forth in § 1.17(d), an oral argument may be presented by, or on behalf of, the primary examiner if considered desirable by either the primary examiner or the Board. See § 1.136(b) for extensions of time for requesting an oral hearing in a patent application and § 1.550(c) for extensions of time for requesting an oral hearing in a reexamination proceeding.

(c) If no request and fee for oral hearing have been timely filed by appellant, the appeal will be assigned for consideration and decision. If appellant has requested an oral hearing and has submitted the fee set forth in § 1.17(d), a day of hearing will be set, and due notice thereof given to appellant and to the primary examiner. A hearing will be held as stated in the notice, and oral argument will be limited to twenty minutes for appellant and fifteen minutes for the primary examiner unless otherwise ordered before the hearing begins. If the Board decides that a hearing is not necessary, the Board will so notify appellant.

82. Section 1.196 is amended by revising paragraphs (b) and (d) to read as follows:

**§ 1.196 Decision by the Board of Patent Appeals and Interferences.**

\* \* \* \* \*

(b) Should the Board of Patent Appeals and Interferences have knowledge of any grounds not involved in the appeal for rejecting any pending claim, it may include in the decision a statement to that effect with its reasons for so holding, which statement constitutes a new ground of rejection of the claim. A new ground of rejection shall not be considered final for purposes of judicial review. When the Board of Patent Appeals and Interferences makes a new ground of rejection, the appellant, within two months from the date of the decision, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (§ 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. The new ground of rejection is binding upon the examiner unless an amendment or showing of facts not previously of record be made which, in the opinion of the examiner, overcomes the new ground of rejection stated in the decision. Should the examiner reject the claims, appellant may again appeal pursuant to §§ 1.191 through 1.195 to the Board of Patent Appeals and Interferences.

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. The request for rehearing must address the new ground of rejection and state with particularity the points believed to have been misapprehended or overlooked in rendering the decision and also state all other grounds upon which rehearing is sought. Where request for such rehearing is made, the Board of Patent Appeals and Interferences shall rehear the new ground of rejection and, if necessary, render a new decision which shall include all grounds of rejection upon which a patent is refused. The decision on rehearing is deemed to incorporate the earlier decision for purposes of appeal, except for those portions specifically withdrawn on rehearing, and is final for the purpose of judicial review, except when noted otherwise in the decision.

\* \* \* \* \*

(d) The Board of Patent Appeals and Interferences may require appellant to address any matter that is deemed appropriate for a reasoned decision on the pending appeal. Appellant will be given a non-extendable time period within which to respond to such a requirement.

\* \* \* \* \*

83. Section 1.197 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1.197 Action following decision.**

(a) After decision by the Board of Patent Appeals and Interferences, the application will be returned to the examiner, subject to appellant's right of appeal or other review, for such further action by appellant or by the examiner, as the condition of the application may require, to carry into effect the decision.

(b) Appellant may file a single request for rehearing within two months from the date of the original decision, unless the original decision is so modified by the decision on rehearing as to become, in effect, a new decision, and the Board of Patent Appeals and Interferences so states. The request for rehearing must state with particularity the points believed to have been misapprehended or overlooked in rendering the decision and also state all other grounds upon which rehearing is sought. See § 1.136(b) for extensions of time for seeking rehearing in a patent application and § 1.550(c) for extensions of time for seeking rehearing in a reexamination proceeding.

\* \* \* \* \*

84. Section 1.291 is amended by revising paragraph (c) to read as follows:

**§ 1.291 Protests by the public against pending applications.**

\* \* \* \* \*

(c) A member of the public filing a protest in an application under paragraph (a) of this section will not receive any communications from the Office relating to the protest, other than the return of a self-addressed postcard which the member of the public may include with the protest in order to receive an acknowledgment by the Office that the protest has been received. In the absence of a request by the Office, an applicant has no duty to, and need not, reply to a protest. The limited involvement of the member of the public filing a protest pursuant to paragraph (a) of this section ends with the filing of the protest, and no further submission on behalf of the protestor will be considered, except for additional prior art, or unless such submission raises new issues which could not have been earlier presented.

85. Section 1.293 is amended by revising paragraph (c) to read as follows:

**§ 1.293 Statutory invention registration.**

\* \* \* \* \*

(c) A waiver filed with a request for a statutory invention registration will be effective, upon publication of the statutory invention registration, to waive the inventor's right to receive a patent on the invention claimed in the statutory invention registration, in any application for an original patent which is pending on, or filed after, the date of publication of the statutory invention registration. A waiver filed with a request for a statutory invention registration will not affect the rights of any other inventor even if the subject matter of the statutory invention registration and an application of another inventor are commonly owned. A waiver filed with a request for a statutory invention registration will not affect any rights in a patent to the inventor which issued prior to the date of publication of the statutory invention registration unless a reissue application is filed seeking to enlarge the scope of the claims of the patent. See also § 1.104(c)(5).

86. Section 1.294 is amended by revising paragraph (b) to read as follows:

**§ 1.294 Examination of request for publication of a statutory invention registration and patent application to which the request is directed.**

\* \* \* \* \*

(b) Applicant will be notified of the results of the examination set forth in paragraph (a) of this section. If the requirements of § 1.293 and this section are not met by the request filed, the notification to applicant will set a period of time within which to comply with the requirements in order to avoid abandonment of the application. If the application does not meet the requirements of 35 U.S.C. 112, the notification to applicant will include a rejection under the appropriate provisions of 35 U.S.C. 112. The periods for reply established pursuant to this section are subject to the extension of time provisions of § 1.136. After reply by the applicant, the application will again be considered for publication of a statutory invention registration. If the requirements of § 1.293 and this section are not timely met, the refusal to publish will be made final. If the requirements of 35 U.S.C. 112 are not met, the rejection pursuant to 35 U.S.C. 112 will be made final.

\* \* \* \* \*

87. Section 1.304 is amended by revising paragraph (a)(1) to read as follows:

**§ 1.304 Time for appeal or civil action.**

(a)(1) The time for filing the notice of appeal to the U.S. Court of Appeals for the Federal Circuit (§ 1.302) or for commencing a civil action (§ 1.303) is two months from the date of the decision of the Board of Patent Appeals and Interferences. If a request for rehearing or reconsideration of the decision is filed within the time period provided under § 1.197(b) or § 1.658(b), the time for filing an appeal or commencing a civil action shall expire two months after action on the request. In interferences, the time for filing a cross-appeal or cross-action expires:

(i) 14 days after service of the notice of appeal or the summons and complaint; or

(ii) Two months after the date of decision of the Board of Patent Appeals and Interferences, whichever is later.

\* \* \* \* \*

88. Section 1.312 is amended by revising paragraph (b) to read as follows:

**§ 1.312 Amendments after allowance.**

\* \* \* \* \*

(b) Any amendment pursuant to paragraph (a) of this section filed after the date the issue fee is paid must be accompanied by a petition including the fee set forth in § 1.17(i) and a showing of good and sufficient reasons why the amendment is necessary and was not earlier presented. For reissue applications, see § 1.175(b), which requires a supplemental oath or declaration to accompany the amendment.

89. Section 1.316 is revised to read as follows:

**§ 1.316 Application abandoned for failure to pay issue fee.**

If the issue fee is not paid within three months from the date of the notice of allowance, the application will be regarded as abandoned. Such an abandoned application will not be considered as pending before the Patent and Trademark Office.

90. Section 1.317 is revised to read as follows:

**§ 1.317 Lapsed patents; delayed payment of balance of issue fee.**

If the issue fee paid is the amount specified in the notice of allowance, but a higher amount is required at the time the issue fee is paid, any remaining balance of the issue fee is to be paid within three months from the date of notice thereof and, if not paid, the patent will lapse at the termination of the three-month period.

**§ 1.318 [Removed and reserved]**

91. Section 1.318 is removed and reserved.

92. Section 1.324 is revised to read as follows:

**§ 1.324 Correction of inventorship in patent.**

(a) Whenever through error a person is named in an issued patent as the inventor, or through error an inventor is not named in an issued patent and such error arose without any deceptive intention on his or her part, the Commissioner may, on petition, or on order of a court before which such matter is called in question, issue a certificate naming only the actual inventor or inventors. A petition to correct inventorship of a patent involved in an interference must comply with the requirements of this section and must be accompanied by a motion under § 1.634.

(b) Any petition pursuant to paragraph (a) of this section must be accompanied by:

(1) A statement from each person who is being added as an inventor and from each person who is being deleted as an inventor that the inventorship error occurred without any deceptive intention on his or her part;

(2) A statement from the current named inventors who have not submitted a statement under paragraph (b)(1) of this section either agreeing to the change of inventorship or stating that they have no disagreement in regard to the requested change;

(3) A statement from all assignees of the parties submitting a statement under paragraphs (b)(1) and (b)(2) of this section agreeing to the change of inventorship in the patent, which statement must comply with the requirements of § 3.73(b) of this chapter; and

(4) The fee set forth in § 1.20(b).

**§ 1.352 [Removed and reserved]**

93. Section 1.352 is removed and reserved.

94. Section 1.366 is amended by revising paragraphs (b) through (d) to read as follows:

**§ 1.366 Submission of maintenance fees.**

(b) A maintenance fee and any necessary surcharge submitted for a patent must be submitted in the amount due on the date the maintenance fee and any necessary surcharge are paid. A maintenance fee or surcharge may be paid in the manner set forth in § 1.23 or by an authorization to charge a deposit account established pursuant to § 1.25. Payment of a maintenance fee and any necessary surcharge or the authorization to charge a deposit account must be submitted within the periods set forth in

§ 1.362 (d), (e), or (f). Any payment or authorization of maintenance fees and surcharges filed at any other time will not be accepted and will not serve as a payment of the maintenance fee except insofar as a delayed payment of the maintenance fee is accepted by the Commissioner in an expired patent pursuant to a petition filed under § 1.378. Any authorization to charge a deposit account must authorize the immediate charging of the maintenance fee and any necessary surcharge to the deposit account. Payment of less than the required amount, payment in a manner other than that set forth § 1.23, or in the filing of an authorization to charge a deposit account having insufficient funds will not constitute payment of a maintenance fee or surcharge on a patent. The procedures set forth in § 1.8 or § 1.10 may be utilized in paying maintenance fees and any necessary surcharges.

(c) In submitting maintenance fees and any necessary surcharges, identification of the patents for which maintenance fees are being paid must include the following:

(1) The patent number; and

(2) The application number of the United States application for the patent on which the maintenance fee is being paid.

(d) Payment of maintenance fees and any surcharges should identify the fee being paid for each patent as to whether it is the 3½-, 7½-, or 11½-year fee, whether small entity status is being changed or claimed, the amount of the maintenance fee and any surcharge being paid, and any assigned customer number. If the maintenance fee and any necessary surcharge is being paid on a reissue patent, the payment must identify the reissue patent by reissue patent number and reissue application number as required by paragraph (c) of this section and should also include the original patent number.

95. Section 1.377 is amended by revising paragraph (c) to read as follows:

**§ 1.377 Review of decision refusing to accept and record payment of a maintenance fee filed prior to expiration of patent.**

(c) Any petition filed under this section must comply with the requirements of § 1.181(b) and must be signed by an attorney or agent registered to practice before the Patent and Trademark Office, or by the patentee, the assignee, or other party in interest.

96. Section 1.378 is amended by revising paragraph (d) to read as follows:

**§ 1.378 Acceptance of delayed payment of maintenance fee in expired patent to reinstate patent.**

(d) Any petition under this section must be signed by an attorney or agent registered to practice before the Patent and Trademark Office, or by the patentee, the assignee, or other party in interest.

97. Section 1.425 is revised to read as follows:

**§ 1.425 Filing by other than inventor.**

Where an international application which designates the United States of America is filed and where one or more inventors refuse to sign the Request for the international application or cannot be found or reached after diligent effort, the Request need not be signed by such inventor if it is signed by another applicant. Such international application must be accompanied by a statement explaining to the satisfaction of the Commissioner the lack of the signature concerned.

98. Section 1.484 is amended by revising paragraphs (d) through (f) to read as follows:

**§ 1.484 Conduct of international preliminary examination.**

(d) The International Preliminary Examining Authority will establish a written opinion if any defect exists or if the claimed invention lacks novelty, inventive step or industrial applicability and will set a non-extendable time limit in the written opinion for the applicant to reply.

(e) If no written opinion under paragraph (d) of this section is necessary, or after any written opinion and the reply thereto or the expiration of the time limit for reply to such written opinion, an international preliminary examination report will be established by the International Preliminary Examining Authority. One copy will be submitted to the International Bureau and one copy will be submitted to the applicant.

(f) An applicant will be permitted a personal or telephone interview with the examiner, which must be conducted during the non-extendable time limit for reply by the applicant to a written opinion. Additional interviews may be conducted where the examiner determines that such additional interviews may be helpful to advancing the international preliminary examination procedure. A summary of any such personal or telephone interview must be filed by the applicant as a part of the reply to the written

opinion or, if applicant files no reply, be made of record in the file by the examiner.

99. Section 1.485 is amended by revising paragraph (a) to read as follows:

**§ 1.485 Amendments by applicant during international preliminary examination.**

(a) The applicant may make amendments at the time of filing of the Demand and within the time limit set by the International Preliminary Examining Authority for reply to any notification under § 1.484(b) or to any written opinion. Any such amendments must:

- (1) Be made by submitting a replacement sheet for every sheet of the application which differs from the sheet it replaces unless an entire sheet is cancelled; and
- (2) Include a description of how the replacement sheet differs from the replaced sheet.

\* \* \* \* \*

100. Section 1.488 is amended by revising paragraph (b)(3) to read as follows:

**§ 1.488 Determination of unity of invention before the International Preliminary Examining Authority.**

\* \* \* \* \*

(b) \* \* \*

(3) If applicant fails to restrict the claims or pay additional fees within the time limit set for reply, the International Preliminary Examining Authority will issue a written opinion and/or establish an international preliminary examination report on the main invention and shall indicate the relevant facts in the said report. In case of any doubt as to which invention is the main invention, the invention first mentioned in the claims and previously searched by an International Searching Authority shall be considered the main invention.

\* \* \* \* \*

101. Section 1.492 is amended by adding a new paragraph (g) to read as follows:

**§ 1.492 National stage fees.**

\* \* \* \* \*

(g) If the additional fees required by paragraphs (b), (c), and (d) of this section are not paid on presentation of the claims for which the additional fees are due, they must be paid or the claims cancelled by amendment, prior to the expiration of the time period set for reply by the Office in any notice of fee deficiency.

102. Section 1.494 is amended by revising paragraph (c) to read as follows:

**§ 1.494 Entering the national stage in the United States of America as a Designated Office.**

\* \* \* \* \*

(c) If applicant complies with paragraph (b) of this section before expiration of 20 months from the priority date but omits:

(1) A translation of the international application, as filed, into the English language, if it was originally filed in another language (35 U.S.C. 371(c)(2)); and/or

(2) The oath or declaration of the inventor (35 U.S.C. 371(c)(4); see § 1.497), applicant will be so notified and given a period of time within which to file the translation and/or oath or declaration in order to prevent abandonment of the application. The payment of the processing fee set forth in § 1.492(f) is required for acceptance of an English translation later than the expiration of 20 months after the priority date. The payment of the surcharge set forth in § 1.492(e) is required for acceptance of the oath or declaration of the inventor later than the expiration of 20 months after the priority date. A copy of the notification mailed to applicant should accompany any reply thereto submitted to the Office.

\* \* \* \* \*

103. Section 1.495 is amended by revising paragraph (c) to read as follows:

**§ 1.495 Entering the national stage in the United States of America as an Elected Office.**

\* \* \* \* \*

(c) If applicant complies with paragraph (b) of this section before expiration of 30 months from the priority date but omits:

(1) A translation of the international application, as filed, into the English language, if it was originally filed in another language (35 U.S.C. 371(c)(2)); and/or

(2) The oath or declaration of the inventor (35 U.S.C. 371(c)(4); see § 1.497), applicant will be so notified and given a period of time within which to file the translation and/or oath or declaration in order to prevent abandonment of the application. The payment of the processing fee set forth in § 1.492(f) is required for acceptance of an English translation later than the expiration of 30 months after the priority date. The payment of the surcharge set forth in § 1.492(e) is required for acceptance of the oath or declaration of the inventor later than the expiration of 30 months after the priority date. A copy of the notification mailed to applicant should accompany any reply thereto submitted to the Office.

\* \* \* \* \*

104. Section 1.510 is amended by revising paragraph (e) to read as follows:

**§ 1.510 Request for reexamination.**

\* \* \* \* \*

(e) A request filed by the patent owner may include a proposed amendment in accordance with § 1.530(d).

\* \* \* \* \*

105. Section 1.530 is amended by removing paragraph (e) and revising the section heading and paragraph (d) to read as follows:

**§ 1.530 Statement; amendment by patent owner.**

\* \* \* \* \*

(d) *Amendments in reexamination proceedings.* Amendments in reexamination proceedings are made by filing a paper, in compliance with paragraph (d)(5) of this section, directing that specified amendments be made.

(1) *Specification other than the claims.* Amendments to the specification, other than to the claims, may only be made as follows:

(i) Amendments must be made by submission of the entire text of a newly added or rewritten paragraph(s) with markings pursuant to paragraph (d)(1)(iii) of this section, except that an entire paragraph may be deleted by a statement deleting the paragraph without presentation of the text of the paragraph.

(ii) The precise point in the specification must be indicated where the paragraph to be amended is located.

(iii) Underlining below the subject matter added to the patent and brackets around the subject matter deleted from the patent are to be used to mark the amendments being made.

(2) *Claims.* Amendments to the claims may only be made as follows:

(i)(A) The amendment must be made relative to the patent claims in accordance with paragraph (d)(8) of this section and must include the entire text of each claim which is being proposed to be amended by the current amendment and each proposed new claim being added by the current amendment with markings pursuant to paragraph (d)(2)(i)(C) of this section, except that a patent claim or previously proposed new claim should be cancelled by a statement cancelling the patent claim or proposed new claim without presentation of the text of the patent claim or proposed new claim.

(B) Patent claims must not be renumbered and the numbering of any new claims proposed to be added to the patent must follow the number of the highest numbered patent claim.

(C) Underlining below the subject matter added to the patent and brackets around the subject matter deleted from the patent are to be used to mark the

amendments being made. If a claim is amended pursuant to paragraph (d)(2)(i)(A) of this section, a parenthetical expression "amended," "twice amended," etc., should follow the original claim number.

(ii) Each amendment submission must set forth the status (*i.e.*, pending or cancelled) as of the date of the amendment, of all patent claims and of all new claims currently or previously proposed.

(iii) Each amendment, when submitted for the first time, must be accompanied by an explanation of the support in the disclosure of the patent for the amendment along with any additional comments on page(s) separate from the page(s) containing the amendment.

(3) No amendment may enlarge the scope of the claims of the patent or introduce new matter. No amendment may be proposed for entry in an expired patent. Moreover, no amendment will be incorporated into the patent by certificate issued after the expiration of the patent.

(4) Although the Office actions will treat proposed amendments as though they have been entered, the proposed amendments will not be effective until the reexamination certificate is issued.

(5) The form of amendments other than to the patent drawings must be in accordance with the following requirements. All amendments must be in the English language and must be legibly written either by a typewriter or mechanical printer in at least 11 point type in permanent dark ink or its equivalent in portrait orientation on flexible, strong, smooth, non-shiny, durable, white paper. All amendments must be presented in a form having sufficient clarity and contrast between the paper and the writing thereon to permit the direct reproduction of readily legible copies in any number by use of photographic, electrostatic, photo-offset, and microfilming processes and electronic reproduction by use of digital imaging or optical character recognition. If the amendments are not of the required quality, substitute typewritten or mechanically printed papers of suitable quality will be required. The papers, including the drawings, must have each page plainly written on only one side of a sheet of paper. The sheets of paper must be the same size and either 21.0 cm. by 29.7 cm. (DIN size A4) or 21.6 cm. by 27.9 cm. (8½ by 11 inches). Each sheet must include a top margin of at least 2.0 cm. (¾ inch), a left side margin of at least 2.5 cm. (1 inch), a right side margin of at least 2.0 cm. (¾ inch), and a bottom margin of at least 2.0 cm. (¾ inch), and no holes should

be made in the sheets as submitted. The lines must be double spaced, or one and one-half spaced. The pages must be numbered consecutively, starting with 1, the numbers being centrally located, preferably below the text, or above the text.

(6) *Drawings.* (i) The original patent drawing sheets may not be altered. Any proposed change to the patent drawings must be by way of a new sheet of drawings with the amended figures identified as "amended" and with added figures identified as "new" for each sheet change submitted in compliance with § 1.84.

(ii) Where a change to the drawings is desired, a sketch in permanent ink showing proposed changes in red, to become part of the record, must be filed for approval by the examiner and should be in a separate paper.

(7) The disclosure must be amended, when required by the Office, to correct inaccuracies of description and definition and to secure substantial correspondence between the claims, the remainder of the specification, and the drawings.

(8) All amendments to the patent must be made relative to the patent specification, including the claims, and drawings, which is in effect as of the date of filing of the request for reexamination.

106. Section 1.550 is amended by revising paragraphs (a), (b) and (e) to read as follows:

**§ 1.550 Conduct of reexamination proceedings.**

(a) All reexamination proceedings, including any appeals to the Board of Patent Appeals and Interferences, will be conducted with special dispatch within the Office. After issuance of the reexamination order and expiration of the time for submitting any responses thereto, the examination will be conducted in accordance with §§ 1.104, 1.110 through 1.113 and 1.116, and will result in the issuance of a reexamination certificate under § 1.570.

(b) The patent owner will be given at least thirty days to respond to any Office action. Such response may include further statements in response to any rejections or proposed amendments or new claims to place the patent in a condition where all claims, if amended as proposed, would be patentable.

(e) The reexamination requester will be sent copies of Office actions issued during the reexamination proceeding. After filing of a request for reexamination by a third party requester, any document filed by either the patent owner or the third party

requester must be served on the other party in the reexamination proceeding in the manner provided by § 1.248. The document must reflect service or the document may be refused consideration by the Office.

(1) The active participation of the reexamination requester ends with the reply pursuant to § 1.535, and no further submissions on behalf of the reexamination requester will be acknowledged or considered. Further, no submissions on behalf of any third parties will be acknowledged or considered unless such submissions are:

(i) In accordance with § 1.510; or  
 (ii) Entered in the patent file prior to the date of the order to reexamine pursuant to § 1.525.

(2) Submissions by third parties, filed after the date of the order to reexamine pursuant to § 1.525, must meet the requirements of and will be treated in accordance with § 1.501(a).

107. Section 1.770 is revised to read as follows:

**§ 1.770 Express withdrawal of application for extension of patent term.**

An application for extension of patent term may be expressly withdrawn before a determination is made pursuant to § 1.750 by filing in the Office, in duplicate, a written declaration of withdrawal signed by the owner of record of the patent or its agent. An application may not be expressly withdrawn after the date permitted for reply to the final determination on the application. An express withdrawal pursuant to this section is effective when acknowledged in writing by the Office. The filing of an express withdrawal pursuant to this section and its acceptance by the Office does not entitle applicant to a refund of the filing fee (§ 1.20(j)) or any portion thereof.

108. Section 1.785 is amended by revising paragraph (d) to read as follows:

**§ 1.785 Multiple applications for extension of term of the same patent or of different patents for the same regulatory review period for a product.**

\* \* \* \* \*

(d) An application for extension shall be considered complete and formal regardless of whether it contains the identification of the holder of the regulatory approval granted with respect to the regulatory review period. When an application contains such information, or is amended to contain such information, it will be considered in determining whether an application is eligible for an extension under this section. A request may be made of any applicant to supply such information

within a non-extendable period of not less than one month whenever multiple applications for extension of more than one patent are received and rely upon the same regulatory review period. Failure to provide such information within the period for reply set shall be regarded as conclusively establishing that the applicant is not the holder of the regulatory approval.

109. Section 1.804 is amended by revising paragraph (b) to read as follows:

**§ 1.804 Time of making an original deposit.**

(b) When the original deposit is made after the effective filing date of an application for patent, the applicant must promptly submit a statement from a person in a position to corroborate the fact, stating that the biological material which is deposited is a biological material specifically identified in the application as filed.

110. Section 1.805 is amended by revising paragraph (c) to read as follows:

**§ 1.805 Replacement or supplement of deposit.**

(c) A request for a certificate of correction under this section shall not be granted unless the request is made promptly after the replacement or supplemental deposit has been made and the request:

- (1) Includes a statement of the reason for making the replacement or supplemental deposit;
- (2) Includes a statement from a person in a position to corroborate the fact, and stating that the replacement or supplemental deposit is of a biological material which is identical to that originally deposited;
- (3) Includes a showing that the patent owner acted diligently—
  - (i) In the case of a replacement deposit, in making the deposit after receiving notice that samples could no longer be furnished from an earlier deposit; or
  - (ii) In the case of a supplemental deposit, in making the deposit after receiving notice that the earlier deposit had become contaminated or had lost its capability to function as described in the specification;
- (4) Includes a statement that the term of the replacement or supplemental deposit expires no earlier than the term of the deposit being replaced or supplemented; and
- (5) Otherwise establishes compliance with these regulations.

**PART 3—ASSIGNMENT, RECORDING AND RIGHTS OF ASSIGNEE**

111. The authority citation for 37 CFR part 3 continues to read as follows:

**Authority:** 15 U.S.C. 1123; 35 U.S.C. 6.

112. Section 3.11 is revised to read as follows:

**§ 3.11 Documents which will be recorded.**

(a) Assignments of applications, patents, and registrations, accompanied by completed cover sheets as specified in §§ 3.28 and 3.31, will be recorded in the Office. Other documents, accompanied by completed cover sheets as specified in §§ 3.28 and 3.31, affecting title to applications, patents, or registrations, will be recorded as provided in this part or at the discretion of the Commissioner.

(b) Executive Order 9424 of February 18, 1944 (9 FR 1959, 3 CFR 1943–1948 Comp., p. 303) requires the several departments and other executive agencies of the Government, including Government-owned or Government-controlled corporations, to forward promptly to the Commissioner of Patents and Trademarks for recording all licenses, assignments, or other interests of the Government in or under patents or patent applications. Assignments and other documents affecting title to patents or patent applications and documents not affecting title to patents or patent applications required by Executive Order 9424 to be filed will be recorded as provided in this part.

113. Section 3.21 is revised to read as follows:

**§ 3.21 Identification of patents and patent applications.**

An assignment relating to a patent must identify the patent by the patent number. An assignment relating to a national patent application must identify the national patent application by the application number (consisting of the series code and the serial number, e.g., 07/123,456). An assignment relating to an international patent application which designates the United States of America must identify the international application by the international application number (e.g., PCT/US90/01234). If an assignment of a patent application filed under § 1.53(b) is executed concurrently with, or subsequent to, the execution of the patent application, but before the patent application is filed, it must identify the patent application by its date of execution, name of each inventor, and title of the invention so that there can be no mistake as to the patent application intended. If an assignment

of a provisional application under § 1.53(c) is executed before the provisional application is filed, it must identify the provisional application by name of each inventor and title of the invention so that there can be no mistake as to the provisional application intended.

114. Section 3.26 is revised to read as follows:

**§ 3.26 English language requirement.**

The Office will accept and record non-English language documents only if accompanied by an English translation signed by the individual making the translation.

115. Section 3.27 is revised to read as follows:

**§ 3.27 Mailing address for submitting documents to be recorded.**

(a) Except as provided in paragraph (b) of this section, documents and cover sheets to be recorded should be addressed to the Commissioner of Patents and Trademarks, Box Assignment, Washington, D.C. 20231, unless they are filed together with new applications or with a petition under § 3.81(b).

(b) A document required by Executive Order 9424 to be filed which does not affect title and is so identified in the cover sheet (see § 3.31(c)(2)) must be addressed and mailed to the Commissioner of Patents and Trademarks, Box Government Interest, Washington, D.C. 20231.

116. Section 3.31 is amended by adding paragraph (c) to read as follows:

**§ 3.31 Cover sheet content.**

(c) Each patent cover sheet required by § 3.28 seeking to record a governmental interest as provided by § 3.11(b) must:

- (1) Indicate that the document is to be recorded on the Governmental Register, and, if applicable, that the document is to be recorded on the Secret Register (see § 3.58); and
- (2) Indicate, if applicable, that the document to be recorded is not a document affecting title (see § 3.41(b)).

117. Section 3.41 is revised to read as follows:

**§ 3.41 Recording fees.**

(a) All requests to record documents must be accompanied by the appropriate fee. Except as provided in paragraph (b) of this section, a fee is required for each application, patent and registration against which the document is recorded as identified in the cover sheet. The recording fee is set in § 1.21(h) of this chapter for patents

and in § 2.6(q) of this chapter for trademarks.

(b) No fee is required for each patent application and patent against which a document required by Executive Order 9424 is to be filed if:

(1) The document does not affect title and is so identified in the cover sheet (see § 3.31(c)(2)); and

(2) The document and cover sheet are mailed to the Office in compliance with § 3.27(b).

118. Section 3.51 is revised to read as follows:

**§ 3.51 Recording date.**

The date of recording of a document is the date the document meeting the requirements for recording set forth in this part is filed in the Office. A document which does not comply with the identification requirements of § 3.21 will not be recorded. Documents not meeting the other requirements for recording, for example, a document submitted without a completed cover sheet or without the required fee, will be returned for correction to the sender where a correspondence address is available. The returned papers, stamped with the original date of receipt by the Office, will be accompanied by a letter which will indicate that if the returned papers are corrected and resubmitted to the Office within the time specified in the letter, the Office will consider the original date of filing of the papers as the date of recording of the document. The procedure set forth in § 1.8 or § 1.10 of this chapter may be used for resubmissions of returned papers to have the benefit of the date of deposit in the United States Postal Service. If the returned papers are not corrected and resubmitted within the specified period, the date of filing of the corrected papers will be considered to be the date of recording of the document. The specified period to resubmit the returned papers will not be extended.

119. Section 3.58 is added to read as follows:

**§ 3.58 Governmental registers.**

(a) The Office will maintain a Departmental Register to record governmental interests required to be recorded by Executive Order 9424. This Departmental Register will not be open to public inspection but will be available for examination and inspection by duly authorized representatives of the Government. Governmental interests recorded on the Departmental Register will be available for public inspection as provided in § 1.12.

(b) The Office will maintain a Secret Register to record governmental

interests required to be recorded by Executive Order 9424. Any instrument to be recorded will be placed on this Secret Register at the request of the department or agency submitting the same. No information will be given concerning any instrument in such record or register, and no examination or inspection thereof or of the index thereto will be permitted, except on the written authority of the head of the department or agency which submitted the instrument and requested secrecy, and the approval of such authority by the Commissioner of Patents and Trademarks. No instrument or record other than the one specified may be examined, and the examination must take place in the presence of a designated official of the Patent and Trademark Office. When the department or agency which submitted an instrument no longer requires secrecy with respect to that instrument, it must be recorded anew in the Departmental Register.

**§ 3.61 [Amended]**

120. The undesignated center heading in Part 3—Assignment, Recording and Rights of Assignee, following § 3.61 is revised to read as follows:

**Action Taken by Assignee**

121. Section 3.73 is amended by revising its heading and paragraph (b) to read as follows:

**§ 3.73 Establishing right of assignee to take action.**

\* \* \* \* \*

(b) When an assignee seeks to take action in a matter before the Office with respect to a patent application, trademark application, patent, registration, or reexamination proceeding, the assignee must establish its ownership of the property to the satisfaction of the Commissioner. Ownership is established by submitting to the Office, in the Office file related to the matter in which action is sought to be taken, documentary evidence of a chain of title from the original owner to the assignee (e.g., copy of an executed assignment submitted for recording) or by specifying (e.g., reel and frame number) where such evidence is recorded in the Office. The submission establishing ownership must be signed by a party authorized to act on behalf of the assignee. Documents submitted to establish ownership may be required to be recorded as a condition to permitting the assignee to take action in a matter pending before the Office.

**PART 5—SECURITY OF CERTAIN INVENTIONS AND LICENSES TO EXPORT AND FILE APPLICATIONS IN FOREIGN COUNTRIES**

122. The authority citation for 37 CFR Part 5 continues to read as follows:

**Authority:** 35 U.S.C. 6, 41, 181–188, as amended by the Patent Law Foreign Filing Amendments Act of 1988, Pub. L. 100–418, 102 Stat. 1567; the Arms Export Control Act, as amended, 22 U.S.C. 2751 *et seq.*; the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*; and the Nuclear Non-Proliferation Act of 1978, 22 U.S.C. 3201 *et seq.*; and the delegations in the regulations under these Acts to the Commissioner (15 CFR 370.10(j), 22 CFR 125.04, and 10 CFR 810.7).

123. Section 5.1 is revised to read as follows:

**§ 5.1 Correspondence.**

All correspondence in connection with this part, including petitions, must be addressed to “Assistant Commissioner for Patents (Attention Licensing and Review), Washington, DC 20231.”

124. Section 5.2 is amended by removing paragraphs (c) and (d) and revising paragraph (b) to read as follows:

**§ 5.2 Secrecy order.**

\* \* \* \* \*

(b) Any request for compensation as provided in 35 U.S.C. 183 must not be made to the Patent and Trademark Office, but directly to the department or agency which caused the secrecy order to be issued.

125. Section 5.3 is amended by revising paragraph (c) to read as follows:

**§ 5.3 Prosecution of application under secrecy orders; withholding patent.**

\* \* \* \* \*

(c) When the national application is found to be in condition for allowance except for the secrecy order the applicant and the agency which caused the secrecy order to be issued will be notified. This notice (which is not a notice of allowance under § 1.311 of this chapter) does not require reply by the applicant and places the national application in a condition of suspension until the secrecy order is removed. When the secrecy order is removed the Patent and Trademark Office will issue a notice of allowance under § 1.311 of this chapter, or take such other action as may then be warranted.

\* \* \* \* \*

126. Section 5.4 is amended by revising paragraphs (a) and (d) to read as follows:

**§ 5.4 Petition for rescission of secrecy order.**

(a) A petition for rescission or removal of a secrecy order may be filed by, or on behalf of, any principal affected thereby. Such petition may be in letter form, and it must be in duplicate.

\* \* \* \* \*

(d) Appeal to the Secretary of Commerce, as provided by 35 U.S.C. 181, from a secrecy order cannot be taken until after a petition for rescission of the secrecy order has been made and denied. Appeal must be taken within sixty days from the date of the denial, and the party appealing, as well as the department or agency which caused the order to be issued, will be notified of the time and place of hearing.

127. Section 5.5 is amended by revising paragraphs (b) and (e) to read as follows:

**§ 5.5 Permit to disclose or modification of secrecy order.**

\* \* \* \* \*

(b) Petitions for a permit or modification must fully recite the reason or purpose for the proposed disclosure. Where any proposed disclosee is known to be cleared by a defense agency to receive classified information, adequate explanation of such clearance should be made in the petition including the name of the agency or department granting the clearance and the date and degree thereof. The petition must be filed in duplicate.

\* \* \* \* \*

(e) Organizations requiring consent for disclosure of applications under secrecy order to persons or organizations in connection with repeated routine operation may petition for such consent in the form of a general permit. To be successful such petitions must ordinarily recite the security clearance status of the disclosees as sufficient for the highest classification of material that may be involved.

**§ 5.6 [Removed and reserved]**

128. Section 5.6 is removed and reserved.

**§ 5.7 [Removed and reserved]**

129. Section 5.7 is removed and reserved.

**§ 5.8 [Removed and reserved]**

130. Section 5.8 is removed and reserved.

131. Section 5.11 is amended by revising paragraphs (b), (c) and (e)(3) to read as follows:

**§ 5.11 License for filing in a foreign country an application on an invention made in the United States or for transmitting international application.**

\* \* \* \* \*

(b) The license from the Commissioner of Patents and Trademarks referred to in paragraph (a) would also authorize the export of technical data abroad for purposes relating to the preparation, filing or possible filing and prosecution of a foreign patent application without separately complying with the regulations contained in 22 CFR parts 121 through 130 (International Traffic in Arms Regulations of the Department of State), 15 CFR part 779 (Regulations of the Office of Export Administration, International Trade Administration, Department of Commerce) and 10 CFR part 810 (Foreign Atomic Energy Programs of the Department of Energy).

(c) Where technical data in the form of a patent application, or in any form, is being exported for purposes related to the preparation, filing or possible filing and prosecution of a foreign patent application, without the license from the Commissioner of Patents and Trademarks referred to in paragraphs (a) or (b) of this section, or on an invention not made in the United States, the export regulations contained in 22 CFR parts 120 through 130 (International Traffic in Arms Regulations of the Department of State), 15 CFR parts 768–799 (Export Administration Regulations of the Department of Commerce) and 10 CFR part 810 (Assistance to Foreign Atomic Energy Activities Regulations of the Department of Energy) must be complied with unless a license is not required because a United States application was on file at the time of export for at least six months without a secrecy order under § 5.2 being placed thereon. The term “exported” means export as it is defined in 22 CFR part 120, 15 CFR part 779 and activities covered by 10 CFR part 810.

\* \* \* \* \*

(e) \* \* \*  
(3) For subsequent modifications, amendments and supplements containing additional subject matter to, or divisions of, a foreign patent application if:

(i) A license is not, or was not, required under paragraph (e)(2) of this section for the foreign patent application;

(ii) The corresponding United States application was not required to be made available for inspection under 35 U.S.C. 181; and

(iii) Such modifications, amendments, and supplements do not, or did not, change the general nature of the

invention in a manner which would require any corresponding United States application to be or have been available for inspection under 35 U.S.C. 181.

\* \* \* \* \*

132. Section 5.12 is amended by revising paragraph (b) to read as follows:

**§ 5.12 Petition for license.**

\* \* \* \* \*

(b) Petitions for license should be presented in letter form, and must include the petitioner's address and full instructions for delivery of the requested license when it is to be delivered to other than the petitioner. If expedited handling of the petition under this paragraph is sought, the petition must also include the fee set forth in § 1.17(h).

133. Section 5.13 is revised to read as follows:

**§ 5.13 Petition for license; no corresponding application.**

If no corresponding national or international application has been filed in the United States, the petition for license under § 5.12(b) must also be accompanied by a legible copy of the material upon which a license is desired. This copy will be retained as a measure of the license granted.

134. Section 5.14 is amended by revising paragraph (a) to read as follows:

**§ 5.14 Petition for license; corresponding U.S. application.**

(a) When there is a corresponding United States application on file, a petition for license under § 5.12(b) must also identify this application by application number, filing date, inventor, and title, but a copy of the material upon which the license is desired is not required. The subject matter licensed will be measured by the disclosure of the United States application.

\* \* \* \* \*

135. Section 5.15 is amended by revising paragraphs (a), (b), (c) and (e) to read as follows:

**§ 5.15 Scope of license.**

(a) Applications or other materials reviewed pursuant to §§ 5.12 through 5.14, which were not required to be made available for inspection by defense agencies under 35 U.S.C. 181, will be eligible for a license of the scope provided in this paragraph. This license permits subsequent modifications, amendments, and supplements containing additional subject matter to, or divisions of, a foreign patent application, if such changes to the application do not alter the general nature of the invention in a manner

which would require the United States application to have been made available for inspection under 35 U.S.C. 181. Grant of this license authorizing the export and filing of an application in a foreign country or the transmitting of an international application to any foreign patent agency or international patent agency when the subject matter of the foreign or international application corresponds to that of the domestic application. This license includes authority:

(1) To export and file all duplicate and formal application papers in foreign countries or with international agencies;

(2) To make amendments, modifications, and supplements, including divisions, changes or supporting matter consisting of the illustration, exemplification, comparison, or explanation of subject matter disclosed in the application; and

(3) To take any action in the prosecution of the foreign or international application provided that the adding of subject matter or taking of any action under paragraphs (a)(1) or (2) of this section does not change the general nature of the invention disclosed in the application in a manner which would require such application to have been made available for inspection under 35 U.S.C. 181 by including technical data pertaining to:

(i) Defense services or articles designated in the United States Munitions List applicable at the time of foreign filing, the unlicensed exportation of which is prohibited pursuant to the Arms Export Control Act, as amended, and 22 CFR parts 121 through 130; or

(ii) Restricted Data, sensitive nuclear technology or technology useful in the production or utilization of special nuclear material or atomic energy, dissemination of which is subject to restrictions of the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978, as implemented by the regulations for Unclassified Activities in Foreign Atomic Energy Programs, 10 CFR part 810, in effect at the time of foreign filing.

(b) Applications or other materials which were required to be made available for inspection under 35 U.S.C. 181 will be eligible for a license of the scope provided in this paragraph. Grant of this license authorizes the export and filing of an application in a foreign country or the transmitting of an international application to any foreign patent agency or international patent agency. Further, this license includes

authority to export and file all duplicate and formal papers in foreign countries or with foreign and international patent agencies and to make amendments, modifications, and supplements to, file divisions of, and take any action in the prosecution of the foreign or international application, provided subject matter additional to that covered by the license is not involved.

(c) A license granted under § 5.12(b) pursuant to § 5.13 or § 5.14 shall have the scope indicated in paragraph (a) of this section, if it is so specified in the license. A petition, accompanied by the required fee (§ 1.17(h)), may also be filed to change a license having the scope indicated in paragraph (b) of this section to a license having the scope indicated in paragraph (a) of this section. No such petition will be granted if the copy of the material filed pursuant to § 5.13 or any corresponding United States application was required to be made available for inspection under 35 U.S.C. 181. The change in the scope of a license will be effective as of the date of the grant of the petition.

(e) Any paper filed abroad or transmitted to an international patent agency following the filing of a foreign or international application which changes the general nature of the subject matter disclosed at the time of filing in a manner which would require such application to have been made available for inspection under 35 U.S.C. 181 or which involves the disclosure of subject matter listed in paragraphs (a)(3)(i) or (ii) of this section must be separately licensed in the same manner as a foreign or international application. Further, if no license has been granted under § 5.12(a) on filing the corresponding United States application, any paper filed abroad or with an international patent agency which involves the disclosure of additional subject matter must be licensed in the same manner as a foreign or international application.

**§ 5.16 [Removed and reserved]**

136. Section 5.16 is removed and reserved.

**§ 5.17 [Removed and reserved]**

137. Section 5.17 is removed and reserved.

138. Section 5.18 is revised to read as follows:

**§ 5.18 Arms, ammunition, and implements of war.**

(a) The exportation of technical data relating to arms, ammunition, and implements of war generally is subject to the International Traffic in Arms

Regulations of the Department of State (22 CFR parts 120 through 130); the articles designated as arms, ammunitions, and implements of war are enumerated in the U.S. Munitions List (22 CFR part 121). However, if a patent applicant complies with regulations issued by the Commissioner of Patents and Trademarks under 35 U.S.C. 184, no separate approval from the Department of State is required unless the applicant seeks to export technical data exceeding that used to support a patent application in a foreign country. This exemption from Department of State regulations is applicable regardless of whether a license from the Commissioner is required by the provisions of §§ 5.11 and 5.12 (22 CFR part 125).

(b) When a patent application containing subject matter on the Munitions List (22 CFR part 121) is subject to a secrecy order under § 5.2 and a petition is made under § 5.5 for a modification of the secrecy order to permit filing abroad, a separate request to the Department of State for authority to export classified information is not required (22 CFR part 125).

139. Section 5.19 is revised to read as follows:

**§ 5.19 Export of technical data.**

(a) Under regulations (15 CFR 770.10(j)) established by the Department of Commerce, a license is not required in any case to file a patent application or part thereof in a foreign country if the foreign filing is in accordance with the regulations (§§ 5.11 through 5.25) of the Patent and Trademark Office.

(b) An export license is not required for data contained in a patent application prepared wholly from foreign-origin technical data where such application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office (15 CFR 779A.3(e)).

140. Section 5.20 is revised to read as follows:

**§ 5.20 Export of technical data relating to sensitive nuclear technology.**

Under regulations (10 CFR 810.7) established by the United States Department of Energy, an application filed in accordance with the regulations (§§ 5.11 through 5.25) of the Patent and Trademark Office and eligible for foreign filing under 35 U.S.C. 184, is considered to be information available to the public in published form and a generally authorized activity for the purposes of the Department of Energy regulations.

**§ 5.25 [Amended]**

141. Section 5.25 is amended by removing paragraph (c).

**§ 5.31 [Removed and reserved]**

142. Section 5.31 is removed and reserved.

**§ 5.32 [Removed and reserved]**

143. Section 5.32 is removed and reserved.

**§ 5.33 [Removed and reserved]**

144. Section 5.33 is removed and reserved.

**PART 7—REGISTER OF GOVERNMENT INTERESTS IN PATENTS [REMOVED AND RESERVED]**

145. Part 7 is removed and reserved.

**PART 10—REPRESENTATION OF OTHERS BEFORE THE PATENT AND TRADEMARK OFFICE**

146. The authority citation for 37 CFR part 10 continues to read as follows:

**Authority:** 5 U.S.C. 500, 15 U.S.C. 1123; 35 U.S.C. 6, 31, 32, 41.

147. Section 10.18 is revised to read as follows:

**§ 10.18 Signature and certificate for correspondence filed in the Patent and Trademark Office.**

(a) For all documents filed in the Office in patent, trademark, and other non-patent matters, except for correspondence that is required to be signed by the applicant or party, each piece of correspondence filed by a practitioner in the Patent and Trademark Office must bear a signature, personally signed by such practitioner, in compliance with § 1.4(d)(1) of this chapter.

(b) By presenting to the Office (whether by signing, filing, submitting, or later advocating) any paper, the party

presenting such paper, whether a practitioner or non-practitioner, is certifying that—

(1) All statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Patent and Trademark Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and that violations of this paragraph may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom; and

(2) To the best of the party's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that—

(i) The paper is not being presented for any improper purpose, such as to harass someone or to cause unnecessary delay or needless increase in the cost of prosecution before the Office;

(ii) The claims and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(iv) The denials of factual contentions are warranted on the evidence, or if

specifically so identified, are reasonably based on a lack of information or belief.

(c) Violations of paragraph (b)(1) of this section by a practitioner or non-practitioner may jeopardize the validity of the application or document, or the validity or enforceability of any patent, trademark registration, or certificate resulting therefrom. Violations of any of paragraphs (b)(2) (i) through (iv) of this section are, after notice and reasonable opportunity to respond, subject to such sanctions as deemed appropriate by the Commissioner, or the Commissioner's designee, which may include, but are not limited to, any combination of—

(1) Holding certain facts to have been established;

(2) Returning papers;

(3) Precluding a party from filing a paper, or presenting or contesting an issue;

(4) Imposing a monetary sanction;

(5) Requiring a terminal disclaimer for the period of the delay; or

(6) Terminating the proceedings in the Patent and Trademark Office.

(d) Any practitioner violating the provisions of this section may also be subject to disciplinary action. See § 10.23(c)(15).

148. Section 10.23 is amended by revising paragraph (c)(15) to read as follows:

**§ 10.23 Misconduct.**

\* \* \* \* \*

(c) \* \* \*

(15) Signing a paper filed in the Office in violation of the provisions of § 10.18 or making a scandalous or indecent statement in a paper filed in the Office.

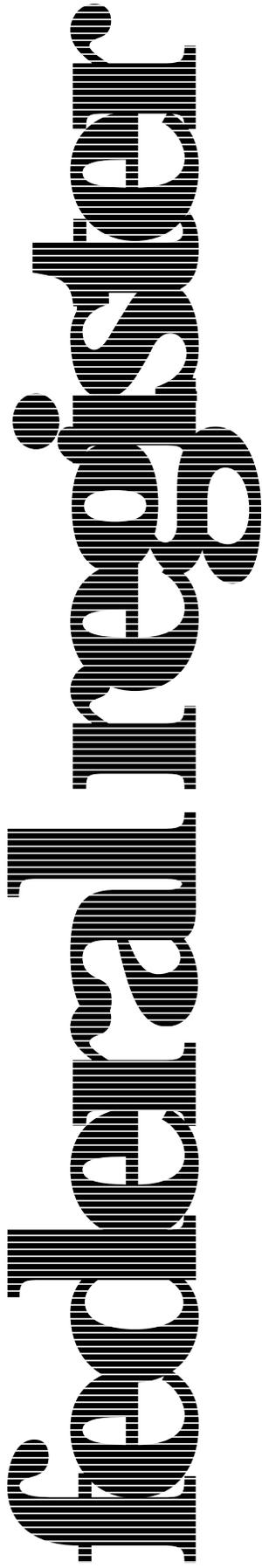
\* \* \* \* \*

Dated: September 26, 1997.

**Bruce A. Lehman,**

*Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.*  
[FR Doc. 97-26339 Filed 10-9-97; 8:45 am]

BILLING CODE 3510-16-P



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Friday  
October 10, 1997

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**Part IV**

**Department of  
Education**

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**Visiting Scholars Fellowship Program at  
the U.S. Department of Education, Office  
of Educational Research and  
Improvement (OERI); Combined Notice  
Inviting Applications for New Awards for  
Fiscal Year (FY) 1998; Notice**

**DEPARTMENT OF EDUCATION**

[CFDA No.: 84.305V, 84.306V, 84.307V, 84.308V, and 84.309V]

**Visiting Scholars Fellowship Program at the U.S. Department of Education, Office of Educational Research and Improvement (OERI); Combined Notice Inviting Applications for New Awards for Fiscal Year (FY) 1998**

*Purpose of Program:* The OERI Visiting Scholars Fellowship Program allows individuals engaged in educational research to work at one of the following OERI national research institutes in Washington, DC for up to 18 months:

1. National Institute on Student Achievement, Curriculum, and Assessment (CFDA No. 84.305V).
2. National Institute on the Education of At-Risk Students (CFDA No. 84.306V).

3. National Institute on Early Childhood Development and Education (CFDA No. 84.307V)

4. National Institute on Educational Governance, Finance, Policy-Making, and Management (CFDA No. 84.308V).

5. National Institute on Postsecondary Education, Libraries and Lifelong Learning (CFDA No. 84.309V).

*Administration of Program:* This fellowship competition will be administered by the National Research Council (the Council). The Council was organized by the National Academy of Sciences in 1916 to associate the broad community of science and technology with the Academy's purposes of furthering knowledge and advising the Federal Government. Functioning in accordance with general policies determined by the Academy, the Council has become the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in providing services to the government, the public,

and the scientific and engineering communities. The Council is administered jointly by both Academies and the Institute of Medicine.

*Fiscal and Programmatic Information:* Except for the individual descriptions of the National Research Institutes, the fiscal and programmatic information in this notice applies separately for each of the competitions under the five institutes.

*Eligible Applicants:* Scholars, researchers, policymakers, education practitioners, librarians, or statisticians who are engaged in the use, collection, and dissemination of information about education and educational research.

*Deadline for Transmittal of Applications:* January 5, 1998.

**Note:** Decisions on awards will be made by the Council by April 1998, and fellows will be able to commence their appointments as early as June 1998 or as late as January 1999.

*Applications Available:* October 14, 1997.

FISCAL INFORMATION

CFDA No. and name of institute	Available funds	Estimated range of awards	Estimated average size of awards	Estimated number of awards
84.305V, National Institute on Student Achievement, Curriculum, and Assessment .....	\$200,000	\$50,000-\$100,000	\$75,000	1-2
84.306V, National Institute on the Education of At-Risk Students .....	200,000	50,000-100,000	75,000	1-2
84.307V, National Institute on Early Childhood Development and Education .....	200,000	50,000-100,000	75,000	1-2
84.308V, National Institute on Educational Governance, Finance, Policy-Making, and Management .....	200,000	50,000-100,000	75,000	1-2
84.309V, National Institute on Postsecondary Education, Libraries and Lifelong Learning .....	200,000	50,000-100,000	75,000	1-2

**Note:** Neither the U.S. Department of Education, nor the Council, is bound by the estimates in this notice.

*Fellowship Period:* From 9 to 18 months.

*Applicable Regulations:* General procedures governing the application process and the evaluation and selection of fellows can be found in the 1998 Program Announcement for the OERI Visiting Scholars Fellowship Program. This Program Announcement, prepared by the Council, is available on the web site <http://fellowships.nas.edu>, and is also available from the address and telephone number listed at the end of this notice. More specific procedures governing the panel review process will be available from the Council after all applications have been received.

The regulations in 34 CFR Part 700 and in the Education Department General Administrative Regulations (EDGAR) govern the grant relationship between OERI and the Council and apply to the Council's administration of Federal funds under the grant.

**SUPPLEMENTARY INFORMATION:** OERI is authorized to make fellowship awards to visiting scholars under section 931(c)(1)(E) of the Educational Research, Development, Dissemination, and Improvement Act of 1994, 20 U.S.C. 6001 *et seq.* This statute states, in relevant part, that the fellowships "shall be awarded competitively following the publication of a notice in the **Federal Register** inviting the submission of applications." OERI made a grant to the National Research Council to carry out this activity pursuant to the regulations in 34 CFR Part 700 and the Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 75. OERI is publishing this application notice on behalf of the Council.

The Council will fund applications for fellowships under the following OERI national research institutes:

*National Institute on Student Achievement, Curriculum, and Assessment (CFDA No. 84.305V).* The

purpose of the National Institute on Student Achievement, Curriculum, and Assessment is to support research, development, and evaluation activities to provide research-based leadership for improving student achievement in the core content areas. The institute supports work to identify, develop, and evaluate innovative and exemplary methods to improve student knowledge at all levels in the core academic subjects. The institute also supports basic and applied research in the areas of cognition, learning, and performance, including research on the educational contexts that promote excellence in teaching and learning, and research and development in the area of assessment.

*National Institute on the Education of At-Risk Students (CFDA No. 84.306V).* The purpose of the National Institute for the Education of At-Risk Students is to expand research-based knowledge and strategies that will promote excellence and equity in the education of children

and youth placed at risk of educational failure because of limited-English proficiency, poverty, race or ethnicity, or geographic location. The institute will carry out a program of research and development to identify and assist others to replicate and adapt programs and models which promote greater achievement and educational success by at-risk students, including innovative methods of instruction, student assessment, professional development, and curricula.

*National Institute on Early Childhood Development and Education (CFDA No. 84.307V).* The purpose of the National Institute on Early Childhood Development and Education is to carry out a comprehensive program of research and development to provide research-based leadership to the United States as it seeks to improve early childhood development and education. The priority is to improve learning and development in early childhood so that all children can enter kindergarten prepared to learn and succeed in elementary and secondary schools. The institute is interested in developmentally appropriate assessment of preschool children and programs, early literacy, early math and science learning, how the arts relate to early learning, development of the early childhood workforce, translating brain development research into policy and practice, how communities and schools support early learning, supporting diverse populations, and supporting adolescent parents and their children.

*National Institute on Educational Governance, Finance, Policy-Making, and Management (CFDA No. 84.308V).* The purpose of the National Institute on Educational Governance, Finance, Policy-Making, and Management is to develop and disseminate research-based information that helps guide the design and implementation of governance arrangements, finance systems, policy approaches, and management strategies that will support high levels of learning by all students. By law, the institute supports work which promises to improve education equity and excellence at the State, local, tribal, school building and classroom levels of elementary and secondary education in the United States.

*National Institute on Postsecondary Education, Libraries and Lifelong Learning (CFDA No. 84.309V).* The purpose of the National Institute on Postsecondary Education, Libraries and Lifelong Learning is to support research and development activities designed to meet the following goals: improve successful participation and degree completion by students in

postsecondary education; affordability, quality, and positive learning outcomes of postsecondary education; adult learning and literacy; and connections/transitions between education and work. Of central concern is the investigation of how adults learn—in formal educational institutions and work settings as well as in informal settings such as libraries, museums, and communities. Our vision is that all adults will be provided with opportunities for affordable, high quality education tailored to their individual, citizenship, and workplace needs.

#### **Invitational Priorities**

The Council is particularly interested in applications that meet one or both of the following two invitational priorities. However, an application that addresses one or both of these invitational priorities does not receive competitive or absolute preference over other applications.

##### *Invitational Priority 1—Research Priorities Plan—Making Connections*

The subjects under this invitational priority are taken from the OERI's Research Priorities Plan published on June 6, 1996 in the **Federal Register** (61 FR 28858), which defines national priorities for education research and development under section 912(f) of OERI's authorizing statute. An applicant that responds to this invitational priority is encouraged to address one or more of the following subjects:

Improving curriculum, instruction, assessment, and student learning at all levels of education to promote high academic achievement, problem-solving abilities, creativity, and the motivation for further learning.

Ensuring effective teaching by expanding the supply of potential teachers, improving teacher preparation, and promoting career-long professional development at all levels of education.

Strengthening schools, particularly middle and high schools, as institutions capable of engaging young people as active and responsible learners.

Supporting schools to effectively prepare diverse populations to meet high standards for knowledge, skills, and productivity, and to participate fully in American economic, cultural, social, and civic life.

Promoting learning in informal and formal settings, and building the connections that cause out-of-school experiences to contribute to in-school achievement.

Improving learning and development in early childhood so that all children can enter kindergarten prepared to learn

and succeed in elementary and secondary schools.

Understanding the changing requirements for adult competence in civic, work, and social contexts, and how these requirements affect learning and the futures of individuals and the nation.

**Note:** The Department's Research Priorities Plan is available on-line at [www.ed.gov](http://www.ed.gov). Copies may also be requested by calling OERI at (202) 219-2000.

##### *Invitational Priority 2—Traditionally Underrepresented Groups and Institutions*

Based on section 931(c)(5) of OERI's authorizing statute, the Council also invites applications from groups of researchers or institutions that have been historically underutilized in Federal educational research activities. Such groups and institutions include: Women, African-Americans, Hispanics, American Indians, and Alaskan Natives or other ethnic minorities; promising young or new researchers in the field, such as postdoctoral students and recently appointed assistant or associate professors, Historically Black Colleges and Universities, Tribally Controlled Colleges, and other institutions of higher education with large numbers of minority students; institutions of higher education located in rural areas; and institutions and researchers located in States and regions of the United States which have historically received the least Federal support for educational research and development. Applicants are invited to propose projects that are designed to increase the participation in the activities of the institutes of the above groups and institutions.

*Selection Criteria:* According to the Council's 1998 Program Announcement for the OERI Visiting Scholars Fellowship Program, qualifications of applicants will be evaluated by panels of distinguished scholars selected by the Council. The evaluation of applications will be based on achievement, experience, and training as evidenced by the application materials submitted, and by the importance of the proposed work to the field of education and the goals of the OERI. Panelists will carefully consider the application, proposed project plan, letters of recommendation, and other supporting documentation. The quality of the proposed project and the appropriateness of the proposed study at the OERI will also be carefully reviewed. The final selection of fellows, based on the panelists' recommendations, will be made by the National Research Council. The Council will set forth the specific procedures

governing the panel review process in a 1988 "Guide for Panelists" after the number and composition of the applications have been determined.

*For Applications and Information*

Contact: Delores Banks, The Fellowship Program, National Research Council, 2101 Constitution Avenue, Washington, D.C. 20418, (202) 334-2872. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 A.M. and 8 P.M., Eastern time, Monday through Friday.

Individuals with disabilities may obtain this document and the applications in an alternate format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

**Note:** The official application notice for a discretionary grant competition is the notice published in the **Federal Register**.

**Electronic Access to This Document**

Anyone may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

<http://ocfo.ed.gov/fedreg.htm>

<http://www.ed.gov/news.html>

To use the pdf you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1-888-293-6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219-1511 or, toll free, 1-800-222-4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

**Note:** The official version of a document is the document published in the **Federal Register**.

**Program Authority:** 20 U.S.C. 6001 *et seq.* (OERI) and 36 U.S.C. 253 (National Academy of Sciences, National Research Council).

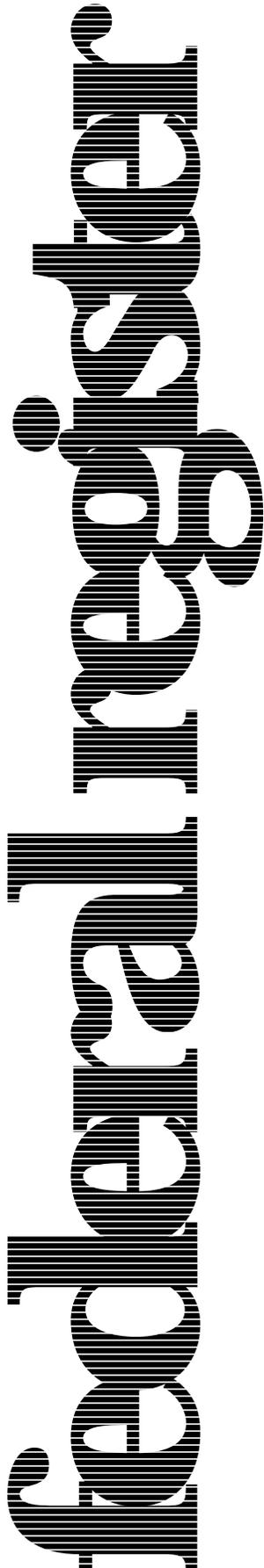
Dated: October 6, 1997.

**Ricky Takai,**

*Acting Assistant Secretary, Office of Educational Research and Improvement.*

[FR Doc. 97-26936 Filed 10-9-97; 8:45 am]

BILLING CODE 4000-01-U



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Friday  
October 10, 1997

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**Part V**

**Environmental  
Protection Agency**

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**40 CFR Part 131**

**Withdrawal From Federal Regulations of  
Nineteen Acute Aquatic Life Water  
Quality Criteria Applicable to Alaska;  
Final Rule**

**ENVIRONMENTAL PROTECTION  
AGENCY****40 CFR Part 131**

[FRL-5903-7]

**Withdrawal From Federal Regulations  
of Nineteen Acute Aquatic Life Water  
Quality Criteria Applicable to Alaska****AGENCY:** Environmental Protection  
Agency.**ACTION:** Final rule.

**SUMMARY:** In 1992, EPA promulgated federal regulations establishing water quality criteria for toxic pollutants for several states, including Alaska (40 CFR 131.36). Among the criteria promulgated for Alaska were acute aquatic life criteria for 24 pollutants. Recently, Alaska has clarified that certain criteria they have previously adopted are no less stringent than the acute aquatic life water quality criteria in the federal regulations. Based on the state's clarification, EPA is amending the federal regulations to withdraw acute aquatic life criteria for 19 pollutants applicable to waters of Alaska. EPA is withdrawing these criteria without a notice and comment rulemaking because the State's acute aquatic life criteria are no less stringent than the federal criteria. Federal aquatic life criteria for 5 pollutants continue to apply to Alaska as well as federal human health criteria for carcinogens.

**DATES:** This amendment is effective October 10, 1997.**ADDRESSES:** The administrative record for consideration of Alaska's acute aquatic life criteria is available for public inspection at EPA Region 10, Office of Water, 1200 Sixth Avenue, Seattle, Washington, 98101, during normal business hours of 8 a.m. to 4:30 p.m.**FOR FURTHER INFORMATION CONTACT:** Fred Leutner at EPA Headquarters, Office of Water, 401 M Street, SW, Washington, D.C., 20460 (202-260-1542) or Sally Brough in EPA's Region 10 at 206-553-1295.**SUPPLEMENTARY INFORMATION:**

- A. Potentially Affected Entities
- B. Background
- C. Basis for Partial Withdrawal of Criteria
- D. Related Issues
  - 1. Metals Expressed as Total Recoverable
  - 2. Specified Criteria
- E. Executive Order 12866
- F. Unfunded Mandates Reform Act
- G. Regulatory Flexibility Act
- H. Paperwork Reduction Act
- I. Submission to Congress and the General Accounting Office

**A. Potentially Affected Entities**

Citizens concerned with water quality in Alaska may be interested in this rulemaking. Entities discharging toxic pollutants to waters of the United States in Alaska could be affected by this rulemaking since acute aquatic life criteria are used in determining national pollutant discharge elimination system (NPDES) permit limits. Categories and entities which may ultimately be affected include:

Category	Examples of potentially affected entities
Industry ....	Industries discharging pollutants to surface waters in Alaska.
Municipalities.	Publicly-owned treatment works discharging pollutants to surface waters in Alaska.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. This table lists the types of entities that EPA is now aware could potentially be affected by this action. Other types of entities not listed in the table could also potentially be affected by this action. To determine whether your facility is affected by this action, you should carefully examine the applicability criteria in § 131.36 of Title 40 of the Code of Federal Regulations (CFR). If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in **FOR FURTHER INFORMATION CONTACT** section.

**B. Background**

In 1992, EPA promulgated a final rule known as the National Toxics Rule or NTR. The NTR established numeric water quality criteria for 12 States and 2 Territories (hereafter "States") that had failed to comply fully with section 303(c)(2)(B) of the Clean Water Act ("CWA") (57 FR 60848). The criteria, codified at 40 CFR 131.36, became applicable water quality standards in those 14 jurisdictions for all purposes and programs under the CWA effective February 5, 1993.

When a State adopts criteria that meet the requirements of the CWA, EPA's policy is to withdraw the federal criteria. If the State's criteria are no less stringent than the federal regulations, EPA has determined that additional comment on the criteria is unnecessary and constitutes good cause for issuing a final rule without notice and comment. For the same reason, EPA has determined that good cause exists to waive the requirement for a 30-day period before the amendment becomes effective and therefore, the amendment

will be immediately effective. EPA has determined that both of these circumstances apply in this case.

**C. Basis for Partial Withdrawal of  
Criteria**

Water quality criteria applicable in Alaska were included in the NTR due to ambiguity about whether the State had adopted by reference acute aquatic life criteria cited in EPA's Quality Criteria for Water July 1976, 45 FR 79318 (Nov. 28, 1980), 49 FR 5831 (Feb. 15, 1984), and 50 FR 30784 (July 29, 1985). EPA included Alaska in the NTR for acute aquatic life criteria based on statements in two state documents (the State's Water Quality Standards Workbook published in July 1991 and an August 30, 1991 letter from the Alaska Department of Environmental Conservation (ADEC) to EPA Region 10), indicating that Alaska had adopted only chronic criteria. In a December 19, 1996 letter, ADEC clarified for EPA that Alaska had adopted both acute and chronic aquatic life criteria for toxic pollutants by reference in 1987. ADEC indicated that the statements in the two 1991 non-regulatory documents indicating the state had adopted only chronic aquatic life criteria were misstatements. Alaska explained that the adoption by reference of EPA criteria, in Note 5 to Alaska's water quality standards table at 18 AAC 70.020(b), implicitly includes both acute and chronic aquatic life criteria. EPA Region 10 had approved the 1987 changes to the Alaska water quality standards, including the adoption of toxic criteria by reference found in Note 5, by letter dated April 6, 1987. Today's action is based on Alaska's explanation of what aquatic life water quality criteria are included in its water quality standards.

**D. Related Issues***1. Metals Expressed as Total Recoverable*

The December 19, 1996 letter from ADEC to EPA also clarified that Alaska's metals criteria are to be measured as total recoverable metal. This approach is available to states implementing their own criteria. The NTR as amended (60 FR 22229, May 4, 1995) expresses aquatic life metals criteria for metals as dissolved metal with the exception of Fresh Water acute and chronic criteria for selenium.

As noted above, Alaska adopted metals criteria by referencing EPA's criteria at 45 FR 79318 (Nov. 28, 1980) and 50 FR 30784 (July 29, 1985). In the 1980 FR notice, EPA established water quality criteria for metals as measured

with the total recoverable method. In the 1985 FR notice, EPA published water quality criteria for metals as measured with the acid soluble method, but acknowledged that a final approved acid soluble method was unavailable and recommended the continued use of the total recoverable method. This statement apparently caused confusion over what sample preparation method Alaska should use to implement EPA's 1985 metals criteria it had adopted by reference.

The December 19, 1996 ADEC letter acknowledges that Alaska's aquatic life criteria for metals are indeed expressed as total recoverable criteria. ADEC has indicated it will consistently apply aquatic life criteria for metals as total recoverable to water quality actions and

decisions in Alaska, including NPDES permits, section 303(d) lists, and TMDL development.

2. Specified Criteria

Alaska has identified in the table below, the acute aquatic life criteria that were adopted by reference that are no less stringent than the Federal criteria in the NTR. A comparison of the criteria found in the NTR and in the EPA documents which Alaska adopted by reference raised questions regarding the stringency comparison for lead, lindane/gamma BHC, endosulfan, and heptachlor. In the case of lead, the freshwater (FW) hardness equation in the NTR is different from the hardness equation adopted by Alaska. The NTR lists FW and saltwater (SW) acute aquatic life criteria for gamma BHC

while Alaska adopted criteria for lindane. Alaska adopted FW and SW aquatic life criteria for endosulfan by citing EPA's 1980 Federal Register notice. However, the NTR acknowledges the separate toxicity of the alpha and beta isomers of endosulfan. Similarly, Alaska adopted FW and SW criteria for heptachlor while the NTR contains separate criteria for heptachlor and heptachlor epoxide (a breakdown product of heptachlor). The following table shows the acute aquatic life criteria, adopted by Alaska, for which EPA is withdrawing Alaska from the NTR. Footnotes 1 and 2 explain EPA Region 10's determinations for lead and lindane. Footnotes 3 and 4 explain how Alaska interprets their criteria for endosulfan and heptachlor.

ALASKA ACUTE AQUATIC LIFE CRITERIA (IN µg/l), ADOPTED IN NOTE 5 OF THE ALASKA WATER QUALITY STANDARDS 18 AAC 70.020(b) [December, 1996]

Compound	Fresh water acute (µg/l)	Salt water acute (µg/l)
1. Arsenic (TR) .....	360 .....	69
2. Cadmium (TR) .....	* $e^{(1.128[\ln(H)]-3.828)}$ .....	43
3. Chromium III (TR) .....	* $e^{(0.819[\ln(H)]+3.688)}$ .....	.....
4. Chromium VI (TR) .....	16 .....	1100
5. Copper (TR) .....	* $e^{(0.9422[\ln(H)]-1.464)}$ .....	2.9
6. Lead (TR) <sup>1</sup> .....	* $e^{(1.266[\ln(H)]-1.416)}$ .....	140
7. Mercury (TR) .....	2.4 .....	2.1
8. Silver (TR) .....	* $e^{(1.72[\ln(H)]-6.52)}$ .....	2.3
9. Cyanide .....	22 .....	1.0
10. Aldrin .....	3.0 .....	1.3
11. Lindane/Gamma-BHC <sup>2</sup> .....	2.0 .....	0.16
12. Chlordane .....	2.4 .....	0.09
13. DDT, 4,4'- .....	1.1 .....	0.13
14. Dieldrin .....	2.5 .....	0.71
15. Endosulfan <sup>3</sup> .....	0.22 .....	0.034
16. Endrin .....	0.18 .....	0.037
17. Heptachlor <sup>4</sup> .....	0.52 .....	0.053
18. Toxaphene .....	.....	0.070

TR Total Recoverable method for measuring metal concentrations.

\*Hardness dependent metals—numeric criteria are calculated using the equations in the above table where H = ambient hardness. For example, the numeric criteria using 100 mg/l of hardness are: cadmium = 3.9 µg/l, chromium III = 1700 µg/l, copper = 18 µg/l, lead = 83 µg/l, and silver = 4.1 µg/l.

<sup>1</sup>Alaska adopted the 1985 federal criteria document for lead which contains a hardness based equation to calculate the numeric criterion using ambient hardness. The NTR hardness equation for FW acute aquatic life for lead is different than the 1985 equation. However, the calculated numeric values for any specific ambient hardness, using the two different equations, are within a few µg/l of each other. Since the calculated values from the two equations are so close, EPA has determined by letter written on Sept. 18, 1996, to the ADEC that the 1985 equation is functionally equivalent to the NTR equation for purposes of NTR removal.

<sup>2</sup>Alaska adopted acute aquatic life criteria for hexachlorocyclohexane (Lindane and a mixture of BHC isomers) from the 1980 FEDERAL REGISTER (45 FR 79335). The NTR only includes gamma BHC. Lindane and gamma-BHC have the same Chemical Abstract Service (CAS) numbers and are the same compounds. Therefore, Alaska's Lindane criteria apply to gamma BHC. EPA has determined that Alaska can be removed from the NTR for gamma BHC (EPA letter dated September 18, 1996).

<sup>3</sup>Alaska adopted the endosulfan criteria by reference from the 1980 FR (45 FR 79334). The NTR has criteria for the two endosulfan isomers, alpha and beta endosulfan. Alaska interprets its endosulfan criteria in this table to apply to the summation of both alpha and beta isomers of endosulfan.

<sup>4</sup>Alaska adopted heptachlor criteria from the 1980 FR (45 FR 79335). The NTR includes criteria for heptachlor and heptachlor epoxide (a breakdown product of heptachlor). Alaska interprets its heptachlor criteria in this table to apply as a summation of both heptachlor and heptachlor epoxide.

Alaska has not requested removal from the NTR for the following acute aquatic life criteria: freshwater (FW) and saltwater (SW) nickel, FW and SW selenium, FW and SW zinc, FW and SW pentachlorophenol, and FW toxaphene.

The acute aquatic life criteria adopted by reference by Alaska for these five pollutants are less stringent than the Federal criteria. The NTR criteria for these five pollutants continue to apply in Alaska.

E. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether a regulatory action is "significant" and therefore subject to

Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

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

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

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

The withdrawal of certain federal acute aquatic life criteria applicable to Alaska imposes no additional regulatory requirements. Therefore, it has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is not subject to OMB review.

#### F. Unfunded Mandates Reform Act

Today's action will not result in the annual expenditure of \$100 million or more for State, local, and tribal governments, in the aggregate, or to the private sector, and is not a Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4), nor does it uniquely affect small governments in any way. As such, the requirements of sections 202, 203, and 205 of Title II of the UMRA do not apply to this action.

#### G. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 USC 601 et seq.), whenever a federal agency promulgates a final rule after being required to publish a general notice of proposed rulemaking under section 553 of the Administrative Procedures Act (APA), the agency generally must prepare a final regulatory flexibility analysis describing the economic impact of the regulatory action on small entities. EPA has not prepared a final regulatory flexibility analysis for this action because the Agency was not required to publish a general notice of proposed rulemaking for this rule.

As explained above, section 553 of the APA provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary and contrary to the public interest, an agency may first issue a rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making today's rule final without notice and opportunity for comment for the reasons spelled out above. In these circumstances, the RFA does not require preparation of a final regulatory flexibility analysis. Today's final rule establishes no requirements applicable to small entities.

#### H. Paperwork Reduction Act

This final rule does not impose any requirement subject to the Paperwork Reduction Act.

#### I. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as amended by the Small Business Regulatory Enforcement Fairness Act of

1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 131

Environmental protection, Water pollution control, Water quality standards.

Dated: October 6, 1997.

**Carol M. Browner,**  
*Administrator.*

For the reasons set out in the preamble title 40, chapter I, part 131 of the Code of Federal Regulations is amended as follows:

#### PART 131—WATER QUALITY STANDARDS

1. The authority citation for part 131 continues to read as follows:

**Authority:** 33 U.S.C. 1251 et seq.

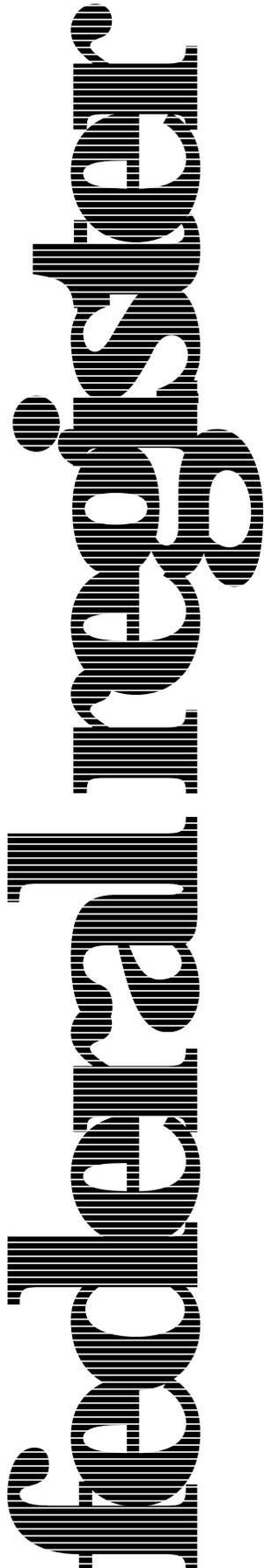
#### § 131.36 [Amended]

2. Section 131.36(d)(12)(ii) is amended in use classifications, (1)(A)i, (1)(A)iii, (1)(B)i, (1)(B)ii, and (1)(C) under the listing of applicable criteria, by replacing "all" with "#9, 10, 13, 53, and 126" for Column B1.

3. Section 131.36(d)(12)(ii) is amended in use classifications, (2)(A)i, (2)(B)i, (2)(B)ii, (2)(C), and (2)(D) under the listing of applicable criteria, by replacing "all" with "# 9, 10, 13, and 53" for column C1.

[FR Doc. 97-27019 Filed 10-9-97; 8:45 am]

BILLING CODE 6560-50-P



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Friday  
October 10, 1997

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## Part VI

# The President

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**Presidential Determination No. 97-33—  
U.S. Contributions to the International  
Fund for Ireland With Fiscal Year 1996  
and 1997 Funds**

**Presidential Determination No. 97-37—FY  
1998 Refugee Admissions Numbers and  
Authorizations of In-Country Refugee  
Status**

**Presidential Determination No. 97-38—  
Counternarcotics Assistance to Colombia,  
Venezuela, Peru, and Countries of the  
Eastern Caribbean**



## Title 3—

Presidential Determination No. 97-33 of September 22, 1997

## The President

**Presidential Determination To Permit U.S. Contributions to the International Fund for Ireland With Fiscal Year 1996 and 1997 Funds****Memorandum for the Secretary of State**

Pursuant to section 5(c) of the Anglo-Irish Agreement Support Act of 1986 (Public Law 99-415), I hereby certify that I am satisfied that: (1) the Board of the International Fund for Ireland as established pursuant to the Anglo-Irish Agreement of November 15, 1985, is, as a whole, broadly representative of the interests of the communities in Ireland and Northern Ireland; and (2) disbursements from the International Fund for Ireland (a) will be distributed in accordance with the principle of equality of opportunity and non-discrimination in employment, without regard to religious affiliation, and (b) will address the needs of both communities in Northern Ireland.

You are authorized and directed to transmit this determination, together with the attached statement setting forth a detailed explanation of the basis for this certification, to the Congress.

This determination shall be effective immediately and shall be published in the **Federal Register**.



THE WHITE HOUSE,  
*Washington, September 22, 1997.*

## Presidential Documents

### Presidential Determination No. 97-37 of September 30, 1997

#### **Presidential Determination on FY 1998 Refugee Admissions Numbers and Authorizations of In-Country Refugee Status Pursuant to Sections 207 and 101(a)(42), Respectively, of the Immigration and Nationality Act, and Determination Pursuant to Section 2(b)(2) of the Migration and Refugee Assistance Act, as Amended**

#### **Memorandum for the Secretary of State**

In accordance with section 207 of the Immigration and Nationality Act ("the Act") (8 U.S.C. 1157), as amended, and after appropriate consultation with the Congress, I hereby make the following determinations and authorize the following actions:

The admission of up to 83,000 refugees to the United States during FY 1998 is justified by humanitarian concerns or is otherwise in the national interest; provided, however, that this number shall be understood as including persons admitted to the United States during FY 1998 with Federal refugee resettlement assistance under the Amerasian immigrant admissions program, as provided below.

The 83,000 admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with the following regional allocations; provided, however, that the number allocated to the East Asia region shall include persons admitted to the United States during FY 1998 with Federal refugee resettlement assistance under section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1988, as contained in section 101(e) of Public Law 100-202 (Amerasian immigrants and their family members); provided further that the number allocated to the former Soviet Union shall include persons admitted who were nationals of the former Soviet Union, or in the case of persons having no nationality, who were habitual residents of the former Soviet Union, prior to September 2, 1991:

Africa .....	7,000
East Asia .....	14,000
Europe .....	51,000
Latin America/Caribbean .....	4,000
Near East/South Asia .....	4,000
Unallocated .....	3,000

Within the Europe ceiling are 5,000 unfunded reserve numbers allocated to the former Soviet Union for use as needed provided that resources within existing appropriations are available to fund the cost of their admission. The 3,000 unfunded unallocated numbers shall be allocated as needed if resources within existing appropriations are available to fund the cost of their admission. Unused admissions numbers allocated to a particular region within the 75,000 federally funded ceiling may be transferred to one or more other regions if there is an overriding need for greater numbers for the region or regions to which the numbers are being transferred. You are hereby authorized and directed to consult with the Judiciary Committees of the Congress prior to any such use of the unallocated numbers or reallocation of numbers from one region to another.

Pursuant to section 2(b)(2) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. 2601(b)(2), I hereby determine that assistance

to or on behalf of persons applying for admission to the United States as part of the overseas refugee admissions program will contribute to the foreign policy interests of the United States and designate such persons for this purpose.

An additional 10,000 refugee admissions numbers shall be made available during FY 1998 for the adjustment to permanent resident status under section 209(b) of the Immigration and Nationality Act (8 U.S.C. 1159(b)) of aliens who have been granted asylum in the United States under section 208 of the Act (8 U.S.C. 1158), as this is justified by humanitarian concerns or is otherwise in the national interest.

In accordance with section 101(a)(42)(B) of the Act (8 U.S.C. 1101(a)(42)) and after appropriate consultation with the Congress, I also specify that, for FY 1998, the following persons may, if otherwise qualified, be considered refugees for the purpose of admission to the United States within their countries of nationality or habitual residence:

- a. Persons in Vietnam
- b. Persons in Cuba
- c. Persons in the former Soviet Union

You are authorized and directed to report this determination to the Congress immediately and to publish it in the **Federal Register**.



THE WHITE HOUSE,  
*Washington, September 30, 1997.*

## Presidential Documents

**Presidential Determination No. 97-38 of September 30, 1997**

### **Drawdown Under Section 506(a)(2) of the Foreign Assistance Act To Provide Counternarcotics Assistance to Colombia, Venezuela, Peru, and the Countries of the Eastern Caribbean**

#### **Memorandum for the Secretary of State, the Secretary of Defense [and] the Secretary of Transportation**

Pursuant to the authority vested in me by section 506(a)(2) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2318(a)(2) ("the Act"), I hereby determine that it is in the national interest of the United States to draw down articles and services from the inventory and resources of the Department of Defense, military education and training from the Department of Defense, and articles and services from the inventory and resources of the Department of Transportation for the purpose of providing international narcotics assistance to Colombia, Venezuela, Peru, and the countries of the Eastern Caribbean Regional Security System (RSS), including: Antigua and Barbuda, Barbados, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines.

Therefore, I direct the drawdown of up to \$20 million of articles and services from the inventory and resources of the Departments of Defense and Transportation, and military education and training from the Department of Defense, for the Governments of Colombia, Venezuela, Peru, and the countries of the RSS, for the purposes and under the authorities of chapter 8 of part I of the Act.

The Secretary of State is authorized and directed to report this determination to the Congress immediately and to arrange for its publication in the **Federal Register**.



THE WHITE HOUSE,  
*Washington, September 30, 1997.*

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## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202-523-6641. This list is also available online at <http://www.nara.gov/nara/fedreg/fedreg.html>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-2470). The text will also be made available on the Internet from GPO Access at [http://www.access.gpo.gov/su\\_docs/](http://www.access.gpo.gov/su_docs/). Some laws may not yet be available.

### H.R. 2266/P.L. 105-56

Department of Defense Appropriations Act, 1998 (Oct. 8, 1997; 111 Stat. 1203)

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